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Zürich, May 11, 2022

RSA / MBI / MBI

Reference-No. HG 20 117

Replik on the issue of copyright protection

In terms of

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against

PANArt Hangbau AG **Defendant 1**
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Rohner Felix **Defendant 2**
c/o PANArt Hangbau AG Engehaldenstrasse 131, 3012 Bern

Schärer Sabine **Defendant 3**
c/o PANArt Hangbau AG Engehaldenstrasse 131, 3012 Bern

all represented by Dr. Michael Ritscher and/or Dr. Stefan Schröter, lawyers, Meyerlustenberger Lachenal Froriep AG, Schiffbaustrasse 2, P.O. Box 1765, 8031 Zürich

regarding

Copyright

we file in the name of and on behalf of the plaintiffs the

Replica on the issue of copyright protection

and uphold in full the corresponding legal claims in the Statements of Claim dated October 27, 2020, December 4, 2020, and December 31, 2020.

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1. What the question of copyright protection is about in the present case

- 1 The central question in the copyright protection of product designs such as the "Hang" is, in all legal systems relevant to the present case, whether the creators made sufficiently creative design decisions in developing the design or whether they were merely technically active. In the former case, copyright protection exists, in the latter it must be denied. The starting point for this assessment is the concrete task. In the creation of the "Hang", the task was to make a playable instrument with a better sound out of the prototype 1, which was created by chance, as was expressly acknowledged by the defendants.
- 2 In the present reply, the plaintiffs will show in detail how the defendants approached this task and that in doing so they did not make any creative design decisions and certainly not those which would be sufficient to establish copyright protection. The four features (lens shape consisting of two spherical segments, central dome, opposing opening and circularly arranged sound fields), which the defendants would like to regard as establishing copyright, were to a large extent already part of the starting point. All these features and the nature of their concrete design find their justification in considerations of playing, sound, and voice. They are solely the result of technical craftsmanship, even if the result is pleasing. The defendants are aware of this, as they have repeatedly described the technical development process as such in pre-trial times. Only during the legal disputes with the plaintiffs did they switch over to trying eloquently to place their work in this respect in the vicinity of artistic creation.
- 3 In their response, the defendants repeatedly refer to the Brompton ruling of the European Court of Justice (**ECJ**). However, this judgment does not help them. Ultimately, the Brompton ruling says nothing other than that works of applied art can be protected by copyright if they meet the general requirements for a copyrighted work. This is nothing new. The ruling does not say that the protection threshold of copyright would be lowered, nor that the Brompton bicycle would be protected by copyright. Consequently, the Belgian court of reference then denied copyright protection with respect to the Brompton bicycle by applying the criteria of the ECJ judgment.
- 4 For the design of the "Hang", protection under design law could at most come into question. Thus, the defendants have also applied for an (unexamined) international design for the "Integral Hang". According to the case law of the Federal Supreme Court, the "Hang" clearly does not meet the higher requirements of copyright protection compared to design law. This finding is also valid for the territories of Germany and the Netherlands. On the one hand, for both states,

based on Art. 2 (7) of the Revised Berne Convention, copyright protection of works of applied art must be rejected if the corresponding design is not protected by copyright in its country of origin (here: Switzerland). On the other hand, the decisions on the "Hang" issued in these countries in the context of interim legal protection are in no way prejudicial. They were not only issued in a mere summary proceeding, but above all because of incomplete and partly misrepresented facts. In particular, the process of creation of the "Hang" was not known to the adjudicating courts. The plaintiffs will show this in detail in this reply.

2. Formal

2.1. Compliance with deadline

5 The time limit extended by order of February 3, 2022, is met with the filing under today's date.

2.2. Subject

6 In compliance with the order of January 24, 2022, the present reply is limited to the question of copyright protection, i.e. to the question of whether the various versions of "Hang" meet the requirements to be protected by copyright under Swiss, German and Dutch law. The plaintiffs will therefore in particular not comment on the question of infringement, the declaratory interest regarding non-infringement, forfeiture or a waiver of possible copyrights and expressly reserve the right to make corresponding submissions.

2.3. Designation of pleadings and Supplements / cross-references

7 Where reference is made below to earlier pleadings, they are referred to as follows:

- **Action I:** Statement of claim dated October 27, 2020 (Business No. HG 20 117)
- **Action II:** Statement of claim dated December 4, 2020 (formerly Business No. HG 20 133)

- **Action III:** Statement of claim dated December 31, 2020 or (amended) statement of claim dated January 12, 2021 (formerly Business No. 21 2)
- **Response:** Response dated May 11, 2021
- **Plaintiff Statment IV:** Statement of the plaintiffs dated November 16, 2021 concerning the minutes of the instruction hearing and the visual inspection
- **Defendant's Statement IV:** Defendant's Statement of November 16, 2021 on the Record of the Instruction Hearing and on the Visual Inspection

8 In the present pleading, the numbering of the Supplements as per claim I (and submission of January 15, 2021) is continued. The Supplements to claims I to III are not identical. Where reference is made below to an "Supplement", this refers in each case to an Supplement to Claim I or to the present Response, while Supplements to Claim II and to Claim III are referred to as "K-II Supplement" and "K-III Supplement", respectively.

9 Insofar as cross-references are found in the present application, these also include the factual allegations contained in the respective place as well as the evidence and offers of proof listed there, without this being expressly mentioned in each case.

2.4. Updating the rubric

10 Plaintiff 3 (previously: World of Handpans GmbH i.Gr.) has meanwhile been entered in the Commercial Register (below, para. 45). The court is requested to add this to the heading.

2.5. Structure of the replica

11 Within the framework of the formal part of the present reply, the plaintiffs will comment below in particular on the interest in a declaratory judgment (chap. 2.8). In the factual part, the plaintiffs will first make some preliminary remarks (Chapter 3.1), stating in particular that the defendants are ultimately concerned with protecting an idea under copyright law (Chapter 3.1.1) and that they elevate the "Hang" from an instrument to a work of art (chapter 3.1.2). In the

context of the preliminary remarks, the plaintiffs will also demonstrate that the "Hang" is not the result of a creative work, but of a technical-craft activity without any creative design decisions (chapter 3.1.3). Following these preliminary remarks, following the structure of the statement of claim, the plaintiffs will first be referred to the parties (chapter 3.2) and the terminology (Chapter 3.3). Then they will comment on the history of the defendant as an instrument maker (chapters 3.4 and 3.6), on the visual characteristics of the "Hang" (chapter 3.5) and on its technical function and functionality (Chapter 3.7). In the legal part, the plaintiffs will finally explain that the individual prototypes and variants of the "Hang" are neither protected under Swiss nor under German or Dutch copyright law (Chapter 4).

2.6. On the definiteness of the legal claims (Response, para. 23)

12 The defendants claim that claim 1 is vague, especially since it is not clear "*whose copyright is to be established as non-existent*" (Response, para. 23). This objection is unjustified. The claim seeks a declaration that no copyright exists in the various prototypes and variants of the "Hang". It is not necessary to specify in the legal claim that Defendant 1, Defendant 2, Defendant 3, Reto Weber or anyone else has no copyright in the "Hang". What is decisive is that it is bindingly established in the relationship between the parties that the various prototypes and variants of the "Hang" are not protected by copyright.

2.7. On the burden of proof (Response, para. 24)

13 On the issue of the burden of proof, the plaintiffs will comment during the legal arguments (below, para. 261, 292 and 322). It is incumbent on the defendants.

2.8. On the interest in a declaratory judgment (Response, paras. 28 to 63)

2.8.1. Preliminary remarks

14 The defendants raise various objections regarding the declaratory interest. Before the declaratory interest of the individual plaintiffs is discussed (below, para. 34 ff.), five basic and overarching preliminary remarks suggest themselves. The plaintiffs will set out below:

- that all plaintiffs already have an interest in a declaratory judgment because the defendants on their website urgently threaten suppliers of *Handpans* and thus also the plaintiffs here with lawsuits in the EU and Switzerland (below, para. 15 ff.);
- that due to the warnings issued by the defendants, not only the companies directly warned, but also the shareholders involved, and their managing directors have an interest in a declaratory judgment (below, para. 19);
- that the declaratory interest in factual terms is not limited to the first generation of the "Hang", but rather also extends to the prototypes and the variants of the "Hang", because the defendants have also asserted copyrights to these variants (below, para. 20 ff.);
- that the interest in a declaratory judgment extends territorially at least to those countries in which the respective plaintiffs distribute *Handpans*, so that the plaintiffs have a sufficient interest in the requested declaratory judgment under Swiss (all plaintiffs), German (all plaintiffs) and Dutch (plaintiffs 1 to 9) law (below, para. 29 ff.); and
- that the plaintiffs have an interest in asserting their claims in a jointly financed lawsuit (below, para. 32 f.).

2.8.1.1. The interest in a declaratory judgment exists for all plaintiffs already due to the threats on the defendant's website

15 On their website at <www.panart.ch>, on October 31, 2020, Defendants posted "Copyright: Questions and Answers," which has since been revised or amended several times. In it, they announce that they have "*decided to take legal action against distributors of Handpans that are copies of the Hang® and refuse to cease distribution.*" Furthermore, they refer to injunctions already obtained in Germany and emphasize once again that they would "*if necessary, also take legal action against other suppliers of Handpans that are mere copies of the Hang®*". The question of whether the (alleged) copyright protection also applies outside Germany is answered in the affirmative by the defendants in their contribution, and they again threaten *Handpan providers* with legal action: "*PANArt is therefore convinced that the Hang® is also protected by copyright outside Germany, namely also in Switzerland, and will, if necessary, also take legal action against other providers of Handpans that are mere copies of the Hang®*". Furthermore, regarding the territories in which they claim copyrights,

the defendants make clear that they would concentrate the "*fight against the commercialization of counterfeits of their work on Europe for the time being*" (see also Claim II, para. 19 and 168; Claim III, para. 17 and 168).

K-II Supplement 86: Retrieved December 3, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

K-III Supplement 89: Retrieved December 30, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

16 In other words, the defendants **threaten all suppliers who continue to sell *Handpans* in the EU or in Switzerland with legal action**. The defendants have already emphasized these threats not only with their cease-and-desist letters against the plaintiffs, but also, and above all, with various action proceedings in Germany and the Netherlands, to which they expressly refer on their website.

K-II Supplement 86: Retrieved December 3, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

K-III Supplement 89: Retrieved December 30, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

17 The plaintiffs are *handpan manufacturers* and suppliers who are unwilling to stop selling *handpans* as demanded by the defendants. This, in view of the threats on the defendant website, means that they **must all expect to come into the defendants' firing line**. The threats raised by Defendants interfere with Plaintiffs' continued distribution of *Handpans* and create an unacceptable level of uncertainty for them. Therefore, the plaintiffs already have a **declaratory interest at least regarding their respective (European) countries of distribution** due to the threats expressed on the defendant's website. If the defendants state that individual plaintiffs are not or not personally (e.g., Statement of Claim, paras. 40 et seq., 45, 47 et seq., 52 et seq., 55 et seq, 63) or not with reference to individual legal systems (e.g., Response, paras. 39, 46, 51, 54 or 62), they lack the necessary **overall consideration of the defendant's threatening scenario** and fail to recognize that a direct warning is not a prerequisite for an interest in a declaratory judgment (VOLKEN, in: Weinmann et al. (eds.), Schweizer IP-Handbuch, 2nd ed. 2021, § 29, para. 1.18). Rather, no high requirements are set for the declaratory interest in actions for continuance under intellectual property law, and it is already sufficient to prove a potential conflict

situation (instead of many MARBACH et al., Immaterialgüter- und Wettbewerbsrecht, 4th ed. 2017, para. 1024).

18 In the future, the plaintiffs will also manufacture and sell *handpans* other than those listed in the complaint. Therefore, their interest in legal protection is also not limited to a finding of non-infringement by the instruments listed in the complaint. Rather, they also have an interest in a finding that the various prototypes and variants of the "Hang" on which the defendants base their alleged claims are not protected by copyright. Only in this way can a dispute regarding further *Handpans* be prevented and the plaintiffs obtain certainty that they may continue to manufacture or distribute further models of their *Handpans* in the future.

2.8.1.2. The shareholders and managing directors of a company against which a warning has been issued also have an interest in a declaratory judgment

19 In their response, the defendants (rightly) acknowledge that a warning letter constitutes a sufficient interest in a declaratory judgment (see Response, para. 37; HUBACHER, in: Weinmann et al. (eds.), Schweizer IP-Handbuch, 2nd ed. 2021, § 52, para. 2.1; VOLKEN, loc. cit., § 29, para. 1.18). However, insofar as the plaintiffs are **shareholders or managing directors of companies that have been warned**, the defendants claim in each case that they have not been warned personally or separately or that they do not have a separate legal interest in protection (Response, paras. 41 f., 45, 47 ff., 52 f., 58 and 61). This **differentiation** is **artificial and (exaggeratedly) formalistic**: in the past, the defendants have also applied for precautionary measures against shareholders (Claim I, para. 217; below, para. 41). They have also already warned shareholders and managing directors personally and demanded that they issue a cease-and-desist declaration (for example, below, para. 38 and 51). Thus, the defendants have provided the factual evidence that they will assert cease-and-desist claims not only against the company *selling Handpans*, but also against its shareholders and managing directors personally. This is not denied by the defendants in their response. This means that the shareholders of the companies against which a warning has been issued must also expect to be taken to court by the defendants at any time. For this reason, they also have an interest in a declaratory judgment.

2.8.1.3. The declaratory interest extends to the prototypes and variants of the "hang" (to Response, paras. 32 to 34)

20 The defendants then claim that none of the plaintiffs has an interest worthy of protection in a declaration that no copyright exists in the **prototypes** referred to in claims 1.i.a)-e). The defendants had "*never asserted such rights against third parties, let alone against the plaintiffs*" (statement of defense, para. 32). On the one hand, the procedural motivation of this objection is obvious: The defendants are also aware that these prototypes cannot enjoy copyright protection already due to their genesis (cf. also below, paras. 84 ff.). On the other hand, however, the defendants' assertions are **simply false**:

21 In the warning letters of **February 2020** sent out at the beginning of the wave of warnings launched by the defendants (see Claim I, para. 161 et seq.; Claim II, para. 166 et seq.; Claim III, para. 164 et seq.), the defendants stated in each case: "*Our client [Defendant 1] is the owner of the worldwide copyrights to the Hang sound sculpture, which was designed by Sabrina Schärer and Felix Rohner in 1999*". This is followed by an illustration of prototype 1 (see also Claim II, paras. 300 f. and 338; Claim III, para. 167):



K-II Supplement 83: Letter from RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to Thomann GmbH dated February 21, 2020.

K-II Supplement 85: Letter from RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Hage Musikverlag GmbH & Co. KG dated February 11, 2020

22 Furthermore, the defendants claimed (emphasis added; see also Claim II, paras. 302 and 338):

*"The form of this sound sculpture was then continuously developed further and **both the original form and the further developments are protected by copyright in Germany as intellectual creations of the authors as works of applied art within the meaning of Section 2 (1) No. 4 UrhG.**"*

Contrary to the allegations in the response, the defendants have thus indeed asserted rights to prototype 1 and its further developments, i.e. prototypes 2 to 5 in particular.

K-II Supplement 83: Letter from RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to Thomann GmbH dated February 21, 2020.

K-II Supplement 85: Letter from RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Hage Musikverlag GmbH & Co. KG dated February 11, 2020

23 In their response, the defendants further state that they have not claimed copyrights in any of the **variants of the "Hang", i.e. in the "Low Hang"**, the second generation of the "Hang", the "integral Hang" or the "free integral Hang" (in each case claim 1.ii.b-e)) (Response, para. 33). This is not true either: as just shown, the defendants explicitly claimed copyrights to the "*further developments*", which also include the variants of the "Hang" just mentioned. In addition, the defendants claimed in the warning letters that "*various variants*" were protected "*beyond that*", i.e. in addition to the copyright, by means of a design. This also clearly shows that the warning letters were also based on alleged copyrights to the variants of the "Hang".

K-II Supplement 83: Letter from RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to Thomann GmbH dated February 21, 2020.

K-II Supplement 85: Letter from RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Hage Musikverlag GmbH & Co. KG dated February 11, 2020

24 In **May 2020**, the defendants then proceeded to claim in their warning letters that they were entitled to copyrights to the "*sound sculptures designed by Sabina Schärer and Felix Rohner since the 1990s and referred to by them as 'Hang', of which there are now **several types and different versions***" (emphasis added). They then blended in a first generation "Hang" (see Claim I, para. 75),

which they now suddenly - unlike in the earlier warning letters (above, para. 21 f.) - as an "original form". In addition, they depicted an "integral hang" as an example of continuous further development (on the "integral hang" see Claim I, para. 84; Claim II, para. 89; Claim III, para. 87). Further, the defendants claimed that "*both the original form and the further developments of the Hang sound sculpture are [...] protected by copyright.*" Here, too, the defendants consequently asserted copyrights to the various variants of the "Hang."

Supplement 81: Warning letter to World of Handpans GmbH i.Gr. dated May 15, 2020

25 In their warning letters of **September and December 2020**, the defendants then refrained from depicting the "Integral Hang". However, they continued to claim that the first generation of the "Hang" was the "*original form*" which had been "*designed*" in 2000. In the meantime, this had been further developed in "*various embodiments*". They then claimed copyrights to the "Hang *sculpture*", but without specifying whether they meant the first generation of the "Hang" and without limiting their alleged copyright claims to the "*original form*". Here, too, the defendants thus asserted copyrights to all variants of the "Hang".

Supplement 82: Warning letter to Kammen Marten Marten Mercks GbR dated September 8, 2020

Supplement 83: Warning letter to Ayasa Instruments B.V. and Ralf van den Bor dated September 21, 2020.

K-III Supplement 83: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Raven-Spirit Weltmusik-laden dated December 15, 2020.

K-III Supplement 84: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Djilli instruments, Jérémie Poux, dated December 15, 2020.

K-III Supplement 85: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Soma Sounds Sculptures, Daniel Bernasconi, dated December 15, 2020.

K-III Supplement 86: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Handpanwelt, Kay Rauber, dated December 15, 2020.

K-III Supplement 87: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Klangstudio Rudenzhof dated December 15, 2020.

K-III Supplement 88: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Handpan-Shop c/o Musik Melody dated December 15, 2020

26 In the warning letters sent since **May 2020** (just now, para. 24 f.), Defendants then claimed that the "Hang" - without clarification as to a specific variant - is characterized by **four design features**, namely (i) basic lenticular shape consisting of two spherical segments; (ii) central dome (on the top); (iii) opposite resonance hole (on the bottom); and (iv) sound fields arranged in a circle on the top spherical segment. To individual plaintiffs and on their website, defendants depict this in a **sketch** as shown below (Claim I, para. 198; Claim II, paras. 167 and 306; Claim III, para. 166) . The mentioned features as well as the sketch cover all variants of the "Hang" and at least prototypes 4 and 5.



Supplement 89: Email from RA Ritscher to RA Dissmann dated October 19, 2020.

K-II Supplement 84: Letter RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to RA Dr. Rainer Heimler dated November 6, 2020.

K-II Supplement 86: Retrieved December 3, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

K-III Supplement 89: Retrieved December 30, 2020, from <www.panart.ch/de/artikel/urheberrecht-fragen-und-antworten>.

27 Thus, the Defendants express that they see their allegedly copyrighted work in the basic idea of an instrument reproduced in this sketch and all individual pieces resulting from it. In summary, it is thus clear that Defendants have already asserted copyrights in all prototypes and in all variants of the "Hang," thereby creating unacceptable uncertainty as to the copyright protection of the prototypes and variants. Therefore, there is an interest in a declaratory judgment also with regard to all prototypes and variants.

28 A differentiation according to individual "Hang" models seems artificial: If the court were to rule only on the copyright protection of the "Hang" of the first generation, the danger would continue to exist that the defendants, notwithstanding this, would assert copyrights to the prototypes and further variants and based on this, take action against the plaintiffs, as they have already announced (cf. also BGer, sic! 2010, p. 91 ff., E. 2 - *Gotthard*, according to which a declaratory interest also exists regarding all other trademarks of the invalidation defendant with the corresponding component, even if it has not invoked these).

2.8.1.4. The interest in a declaratory judgment exists regarding all the legal systems at issue (to the statement of defense, paras. 35 to 38)

29 The defendants further argue that they "*issued warnings territorially specific to individual plaintiffs to the extent that the plaintiffs, to the defendants' knowledge, were operating in the respective territories.*" The plaintiffs have no interest in a declaratory judgment insofar as they "*have not been warned*" for individual jurisdictions (Statement of Defense, para. 37). Two remarks suggest themselves in this regard:

30 On the one hand, the defendants thus concede that the interest in a declaratory judgment extends to all countries in which the respective plaintiffs are active. It would indeed be artificial to deny a company operating in Germany and Switzerland, which was "only" warned for Germany, an interest in a declaratory judgment for Switzerland. This is even more relevant since the defendants also claim copyrights on their website, in particular for the EU and Switzerland, and hold out the prospect of legal action here (above, para. 15 ff.).

31 Second, it is not true that warnings were issued in a "*territorially specific*" manner. Rather, in the warning letters, the defendants each invoked their "*world-wide rights of use under copyright law*" (cf. below, para. 36, 40, 49, 53, 57 and 70). Apart from that, the warning letters and the cease-and-desist declarations attached to them are unclear with regard to the territorial scope, but in any case, not limited to individual countries. The plaintiffs therefore had to expect legal action at least in those countries in which they distribute *Handpans* (see also BGE 129 III 295, E. 2.4, according to which in patent law legal action is to be expected in all countries in which the warning patent holder claims patents). The defendants can no longer clarify their (probably deliberately) vague formulations today for tactical reasons. The defendants do not argue that they will not proceed against the plaintiffs in the respective jurisdictions for which, according to the defendants, there is no interest in a declaratory judgment. On

the contrary: The announcements of the defendants on their website can rather only be understood by *handpan suppliers* like the plaintiffs as threatening them with lawsuits in all European countries of distribution (above, para. 15 ff.).

2.8.1.5. The plaintiffs have an interest in asserting their claims jointly

32 In contrast to register rights (in particular trademarks, patents and designs), it is not possible in copyright law to destroy the legal status of a disputed property right by means of an action with *erga omnes effect*. The judgment denying the copyright protection of the hang creates legal certainty, but only in the relationship between the parties involved in the proceedings due to the legal effect only *inter partes*. For the definitive elimination of the legal uncertainty created by the defendants, it is therefore necessary that the plaintiffs here each appear as a party themselves.

33 Unlike the defendants, who can apparently afford to issue warning letters to *handpan providers* throughout Europe and to litigate before various courts in Germany and abroad, many of the plaintiffs are small, sometimes even one-man businesses that do not have the necessary financial resources to defend themselves individually against the threat set up by the defendants (already submission of January 15, 2021, para. 6). They have an eminent interest in being able to participate in the present action as simple joint litigants because, on the one hand, this will enable them to obtain a judgment that also provides them with legal certainty and, on the other hand, the present action is being financed via crowdfunding (submission of January 15, 2021, para. 7).

2.8.2. The individual plaintiffs have an interest in a declaratory judgment (in response to the statement of defense, paras. 39 to 63)

34 In their response, the defendants deny that all plaintiffs have an interest in a declaratory judgment, at least regarding some of the requested findings. We will therefore show below that all plaintiffs have an interest in a declaratory judgment about all of the findings they are seeking:

2.8.2.1. Plaintiff 1 - Ayasa Instruments B.V. (re Response, para. 39)

35 The defendants deny a declaratory interest of plaintiff 1, on the one hand, under Swiss law, since it was warned only with reference to EU law, and, on the other hand, with regard to the prototypes and variants of the "Hang" (statement of defense, para. 39). Wrongly:

36 Plaintiff 1 indisputably distributes its *Handpans* in the Netherlands, Switzerland and Germany, among other countries (Claim I, paras. 23 and 171). Based on the threats on the defendant's website, it already has an interest in declaratory relief with regard to all European countries of distribution and thus also Switzerland (above, para. 15 ff.). Contrary to the defendants, the plaintiff was also not warned exclusively under EU law: In their warning letter of September 21, 2020, the defendants rather claimed to be "owner of the **worldwide** copyrights on the Hang® sculpture" (emphasis added). The offer of a "**worldwide shipping of a broad range of 'handpans'**" by Plaintiff 1 was copyright infringing (emphasis added; Claim I, para. 195). In an e-mail of October 19, 2020, the defendants then answered the question as to the countries for which they claimed a copyright in the "Hang" to the effect that they would in any case claim copyrights for the whole of Europe - and thus also for Switzerland (Claim I, para. 199). Under these circumstances, it is not comprehensible why the declaratory interest of plaintiff 1 should be limited to determinations under German and Dutch law and not also extend to those under Swiss law, where plaintiff 1 also distributes its *Handpans* (above, para. 29 ff.). Rather, there is an interest in a declaratory judgment also with regard to the requested findings under Swiss law. Regarding the declaratory interest concerning the prototypes and variants of the "Hang", reference can be made to what has been said above (above, para. 20 ff.). Thus, the plaintiff has an interest in declaratory relief with regard to all findings requested by it (see already Claim I, paras. 15 ff., 187 ff. and 283 ff.).

Supplement 83: Warning letter to Ayasa Instruments B.V. and Ralf van den Bor dated September 21, 2020.

Supplement 89: Email from RA Ritscher to RA Dissmann dated October 19, 2020.

2.8.2.2. Plaintiff 2 - Ralf van den Bor (re Response, paras. 40 to 42)

37 The defendants claim in the letter of warning to plaintiff 1, plaintiff 2 was only addressed in his function as plaintiff 1's representative. He was not warned personally, so that he has no interest in a declaratory judgment, at least not about Switzerland (Response, paras. 41 f.). This is not true:

38 Plaintiff 2 is the founder and managing director of the plaintiff 1 against whom a warning has been issued (claim I, para. 24). As such, he would also have the right to sue in infringement proceedings. For this reason alone, he has a sufficient interest in a declaratory judgment of his own (above, paras. 15 ff. and 19). In any case, he was **personally addressed in the warning letter** (claim I, para. 195), and this was (also) sent to his private e-mail address

<ralf_bor@hotmail.com>. For this reason he has his own interest in a declaratory judgment. His interest in a declaratory judgment also extends to Switzerland. In this regard, reference can be made to the comments on plaintiff 1 (above, para. 36). Overall, therefore, Plaintiff 2 also has an interest in a declaratory judgment, namely in respect of all the findings sought (see already Claim I, paras. 15 f., 187 ff. and 283 ff.).

Supplement 83: Warning letter to Ayasa Instruments B.V. and Ralf van den Bor dated September 21, 2020.

2.8.2.3. Plaintiff 3 - World of Handpans GmbH (on response, para. 43 f.)

39 The defendants argue without further justification that the plaintiff 3 has no interest in a declaratory judgment (response, para. 43 f.). They are wrong:

40 The web store of plaintiff 4 (below, para. 46 f.) at <www.handpan.store>, where indisputably *Handpans* were offered for sale in particular in Germany, Switzerland and the Netherlands, was originally to be transferred to plaintiff 3 (claim I, para. 200). The defendants issued a warning to plaintiff 3 in a letter dated May 15, 2020. In doing so, they claimed that Defendant 3 was the "owner of the worldwide copyright usage rights" to the "Hang" sound sculptures, "of which there are now several types and different embodiments." The cease-and-desist declaration attached to the warning letter was not restricted to a specific area.

Supplement 81: Warning letter to World of Handpans GmbH i.Gr. dated May 15, 2020

41 After plaintiff 3 did not submit to the defendants' unfounded claims, the defendants approached the Hamburg Regional Court on June 8, 2020 with an application for a preliminary injunction. In the application, the defendants failed to state the corporate form of plaintiff 3 and referred to the defendant there as "*World of Handpans*." However, it is clear from the grounds that the application was directed against plaintiff 3 ("*The defendant is a limited liability company [...] which is in the process of being established*").

Supplement 92: Application for a preliminary injunction against World of Handpans i.Gr. dated June 8, 2020., p. 1 and 10

42 During the proceedings, however, the defendants became aware that the webshop referred to was not (yet) operated by plaintiff 3, but (still) by plaintiff 4.

They therefore applied for an extension of the proceedings and subsequently also directed the application for an injunction against plaintiff 4. Insofar as the application was also directed against plaintiff 4, it was rejected by the Hamburg Regional Court for lack of urgency - the defendants had allowed too much time to elapse before the subsequent extension. The ban was subsequently issued against "*World of Handpans*" (Supplement 93 = Defendant's Supplement 2).

Defendant's

Supplement 2: Judgment of the Hamburg Regional Court, Case No. 310 O 160/20, of August 20, 2020, pp. 1 and 35 f. (E. II./2)

43 Although it was clear that this "*World of Handpans*" was the plaintiff 3, the defendants subsequently took the view that it was the company of the sole proprietorship of the plaintiff 4 and filed an application for an order against the latter. Subsequently, the rubric of the judgment of the Hamburg Regional Court was corrected by order dated April 29, 2021, and it was clarified that the defendant 1 there (i.e., "*World of Handpans*") was the plaintiff 3 here. The defendants filed an appeal against the rubric correction order (see Response, para. 69). The appeal proceedings are still pending.

Supplement 100: Rubric correction order of the Hamburg Regional Court of April 29, 2021, Ref. 310 O 160/20

44 It is therefore beyond question that the plaintiff 3 has an interest in a declaratory judgment (cf. already claim I, paras. 15 f., 200 ff. and 283 ff.). This arises on the one hand from the warning and the injunction proceedings initiated, and on the other hand also from the threats on the defendant's website (above, paras. 15 ff.). The interest in a declaratory judgment exists with regard to all countries of distribution and thus in particular with regard to Switzerland, Germany and the Netherlands (above, para. 29 ff.). With regard to the declaratory interest concerning the prototypes and variants of the "Hang", reference can be made to what has been said above (above, para. 20).

45 Plaintiff 3 has now been entered in the Commercial Register. The court is requested to adjust the heading accordingly.

Supplement 101: Extract from the Commercial Register of World of Handpans GmbH dated April 12, 2022

2.8.2.4. Plaintiff 4 - Emmanuel Eitle (re Response, para. 45)

46 As far as Plaintiff 4 is concerned, the Defendants also deny an interest in a declaratory judgment without giving reasons (Statement of Defense, para. 44).
Wrongly:

47 As just mentioned, the defendants took the plaintiff 4 to task with an application for a temporary injunction and an application for an order (above, para. 42). In doing so, they unambiguously expressed their intention to enforce copyright claims against plaintiff 4 as well. His interest in a declaratory judgment also results from the fact that he is the managing director of plaintiff 3 (above, paras. 15 ff. and 19). For the rest, reference can be made to what has been said above about plaintiff 3 (above, paras. 39 ff.). Thus, Plaintiff 4 also has an interest in a declaratory judgment in all the findings it seeks (see already Claim I, paras. 15 f., 200 ff. and 235 ff.).

Supplement 101: Extract from the Commercial Register of World of Handpans GmbH dated April 12, 2022

2.8.2.5. Plaintiff 5 - Kammen Marten Mercks GbR (re Response, para. 46)

48 The defendants deny a declaratory interest of the plaintiff 5 under Swiss (and probably also Dutch) law, because it was only "*warned about its activity in Germany with reference to German law*", and with regard to the prototypes (and probably also variants of the "Hang") (statement of defense, para. 46). This cotestation fails:

49 The web store of the plaintiff 5 under <www.yataoshop.com> was indisputably directed at customers in Switzerland, Germany and the Netherlands (claim I, para. 220). Already due to the threats on the defendant's website, plaintiff 5 has an interest in declaratory relief with regard to all countries of distribution and thus also Switzerland and the Netherlands (above, para. 15 ff.). Contrary to the defendants, the warning letter of September 8, 2020 to plaintiff 5 was also not limited to Germany: Rather, the defendants claimed therein to be the "*owner of the **worldwide** copyright usage rights to the [...] sound sculpture designated as 'Hang'*" (emphasis added). One looks in vain for a restriction according to which the warning should refer "only" to Germany. The draft cease-and-desist declaration attached to the warning letter was also not limited to actions in Germany. Obviously, the defendants were interested in stopping the activities of plaintiff 5 as a whole and worldwide, and thus in particular also in Switzerland and the Netherlands. In addition, the defendants referred in the

warning letter to their website, on which they hold out the prospect of enforcing their alleged copyrights in the EU and Switzerland in particular. An interest in a declaratory judgment thus also exists regarding Switzerland and the Netherlands (see also above, para. 29 ff.). With regard to the declaratory interest concerning the prototypes and variants of the "Hang", reference can be made to what has been said above (above, para. 20). As a result, Plaintiff 5 also has a declaratory interest in all the findings it seeks (see already Claim I, paras. 15 ff., 277 ff. and 283 ff.).

Supplement 82: Warning letter to Kammen Marten Marten Mercks GbR dated September 8, 2020

2.8.2.6. Plaintiff 6 to 9 - Stephan Kammen, Malte Marten, Sebastian Marten and Alexander Mercks (re. response, paras. 47 to 50)

50 According to the defendants, plaintiffs 6 to 9 should not have a separate declaratory interest, at least not for Dutch and Swiss law (Response, paras. 47 to 50). This is also incorrect:

51 Plaintiffs 6 to 9 are the four shareholders of Plaintiff 5 who are also managing directors (Sec. 709 DE-BGB). For this reason alone, they have a sufficient interest in a declaratory judgment of their own (supra, para. 19). In addition, according to the cease-and-desist declaration attached to the warning letter to plaintiff 5, plaintiffs 6 to 9 were to personally undertake to cease and desist:

"Kammen Marten Mercks GbR [...] and Stephan Kammen, Malte Marten, Sebastian Marten and Alexander Mercks, each personally [...]"

Plaintiffs 6 to 9 were consequently warned personally and therefore also have an interest in a declaratory judgment. Incidentally, this also exists with regard to findings under Dutch and Swiss law and with regard to the prototypes and variants of the "Hang". In this regard, reference can be made to what has been said with regard to plaintiff 5 (above, para. 49). Overall, therefore, Plaintiffs 6 to 9 also have an interest in a declaratory judgment in respect of all the findings requested by them (see already Claim I, paras. 15 f., 277 ff. and 283 ff.).

Supplement 82: Warning letter to Kammen Marten Marten Mercks GbR dated September 8, 2020

2.8.2.7. Plaintiff 10 - Thomann GmbH (re Response, para. 51)

52 According to the Defendants, Plaintiff 10 is said to lack a declaratory interest in part, namely with regard to findings under Swiss law, because Plaintiff 10 was merely "*warned about its activities in Germany with reference to German law*", and with regard to the prototypes and variants of the "Hang" (Statement of Defense, para. 51). This is not the case:

53 Plaintiff 10 operates the largest online store for musical instruments in Europe under the domain <www.thomann.de>, where in particular customers from Switzerland and Germany can purchase *handpans* (Claim II, para. 178). Based on the threats on the defendant's website, it already has an interest in declaratory relief with regard to its European sales countries and thus also with regard to Switzerland (above, para. 15 ff.). Furthermore, the defendants conceal that in their warning letter to plaintiff 10 dated February 21, 2020, they invoked their "***worldwide copyright usage rights to the Hang sound sculpture***" (emphasis added; Claim II, para. 300). The cease-and-desist declaration attached to the warning letter was also not limited to acts in Germany. In their letter of November 6, 2020, the defendants then demanded the submission of a "*cease-and-desist declaration with regard to the further distribution of all products*", i.e. without restriction to Germany (claim II, para. 306). Obviously, the defendants were interested in preventing the distribution of *Handpans* by plaintiff 10 as a whole - and not only in Germany, but also in Switzerland. Thus, plaintiff 10 also has an interest in declaratory relief with regard to Switzerland (see also above, para. 29). With regard to the declaratory interest concerning the prototypes and variants of the "Hang", reference can be made to what has been said above (above, para. 20 ff.). The warning letter of February 21, 2020 expressly contains an illustration of prototype 1, and the defendants claimed therein that both this "*original form*" and the further developments are protected by copyright (Claim II, para. 301 f.). Overall, Plaintiff 10 thus also has a declaratory interest in all of the requested findings (see already Claim II, paras. 15, 19 et seq., 300 et seq. and 377 et seq.).

K-II Supplement 83: Letter from RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to Thomann GmbH dated February 21, 2020.

K-II Supplement 84: Letter from RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to RA Dr. Rainer Heimler dated November 6, 2020.

2.8.2.8. Plaintiff 11 - Hans Thomann (re Response, paras. 52 and 53)

54 The defendants claim that plaintiff 11 was not warned separately. It therefore has no interest in a declaratory judgment of its own (Response, paras. 52-53).

55 Contrary to the defendants, plaintiff 11 does indeed have its own interest in a declaratory judgment (see already claim II, paras. 18 et seq., 300 et seq. and 377 et seq.): He is indisputably the managing director of plaintiff 10 and as such responsible, among other things, for the distribution of the *handpans* in dispute (claim II, paras. 29 and 180). In any infringement proceedings, he would therefore also have the right to bring an action. He therefore also has his own declaratory interest (above, paras. 15 ff. and 19; see also Action II, para. 308). With regard to the territorial and factual scope of this declaratory interest, reference can be made to the comments on Plaintiff 10 (above, para. 53 f.).

2.8.2.9. Plaintiff 12 - Hage Musikverlag GmbH & Co. KG (re. Response, para. 54)

56 The defendants deny that the plaintiff 12 has an interest in a declaratory judgment with regard to findings under Swiss law, since it was only "*warned about its activities in Germany with reference to German law*", and with regard to the prototypes and variants of the "Hang" (Response, para. 54). This is also not correct:

57 Plaintiff 12 is, together with Plaintiff 14 (below, para. 60 et seq.) responsible for the operational business of the Hage Group, a long-established music publisher which, among other things, distributes *Handpans* in Switzerland and Germany (Claim II, para. 309 et seq.). Plaintiff 12 is responsible for distribution to dealers (B2B sector; Claim II, para. 311). In view of the threats on the defendant's website, Plaintiff 12 already has an interest in the findings it seeks under Swiss law due to its activities (supra, para. 15 ff.). It is also not true that the plaintiff 12 was only warned with regard to Germany: In their warning letter of February 11, 2020, the defendants expressly asserted that they hold the "**worldwide copyright usage rights to the Hang sound sculpture**" (emphasis added; Claim II, para. 338). The draft cease-and-desist declaration attached to the warning letter is also not limited to Germany. Here, too, the defendants obviously aimed at putting a stop to the distribution of *Handpans* by plaintiff 10 as a whole and thus in particular also in Switzerland. Consequently, plaintiff 10 also has an interest in a declaratory judgment with regard to Swiss law (see also above, para. 29 ff.). With regard to the declaratory interest concerning the prototypes and variants of the "Hang", reference can be made to what has been said above (above, para. 20). As already in the case of plaintiff 10 (above, para. 53), the

warning letter also contained an illustration of prototype 1. The defendants claimed copyrights to this "*original form*" as well as to its further developments (Claim II, para. 338). Thus, the plaintiff 12 also has a declaratory interest in all the findings it seeks (cf. already claim II, paras. 15, 19 ff., 338 ff. and 377 ff.).

- K-II Supplement 85:** Letter from RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Hage Musikverlag GmbH & Co. KG dated February 11, 2020
- K-II Supplement 91:** Letter RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to RA Dr. Rainer Heimler dated March 10, 2020.

2.8.2.10. Plaintiff 13 - Hage Verwaltungs GmbH (re Response, para. 55)

58 The defendants then claim that plaintiff 13 does not have a separate declaratory interest, at least not for Dutch and Swiss law (Response, para. 55). This is also incorrect:

59 Like plaintiff 12, plaintiff 13 belongs to the Hage Group and its purpose is namely the development, manufacture and distribution of musical instruments. Defendants have been aware of Plaintiff 13's involvement in the distribution of *Handpans* at least since the filing of this action. It is not understandable - and has not been plausibly demonstrated by the Defendants - why the Defendants should assert claims solely and exclusively against the directly warned Plaintiff 12 and why only the latter should have an interest in a declaratory judgment. On the contrary: The defendants expressly hold out the prospect of such claims against dealers and manufacturers of *Handpans* on their website (above, para. 15 ff.). This also includes plaintiff 13, so that it already has its own declaratory interest for this reason. However, the declaratory interest of plaintiff 13 also arises from the fact that it is the personally liable partner (general partner) of plaintiff 12 and as such is personally liable for any infringements of the rights of plaintiff 12 (claim II, paras. 31, 309 and 385). As a shareholder of plaintiff 12, it must urgently fear that the defendants will take action against it for alleged copyright infringements (above, paras. 15 et seq. and 19). The declaratory interest of plaintiff 13 also extends to Switzerland, for which reference can be made to what has been said about plaintiff 12 (above, para. 56 f.). Overall, therefore, Plaintiff 13 also has a declaratory interest in all the findings it seeks (see already Claim II, paras. 18 ff., 338 ff. and 377 ff.).

2.8.2.11. Plaintiff 14 - Cascha GmbH (on response, para. 56 f.)

60 The defendants deny a declaratory interest of plaintiff 14. That the defendants would also bring plaintiff 14 to justice is pure speculation. The "*often dubious business organization of plagiarism providers*" exemplified in view of "*Plaintiffs 3 and 4*" (probably meant: Hage Group, i.e. *Plaintiffs 12 to 14*) also vividly shows that the decision as to whom the authors wish to assert their claims against can be the sole responsibility of the rights holders (Response, para. 56 f.). The defendants are also wrong here:

61 Like plaintiffs 12 and 13, plaintiff 14 belongs to the Hage Group. It sells the same *Handpans* as plaintiff 12, but not in the B2B, but in the B2C sector, i.e. to end customers, and in particular in Switzerland and Germany (claim II, para. 311 f.). These very *Handpans* were warned by the defendants against the plaintiff 12 as infringing copyrights (above, para. 57). The fact that the defendants were not aware of the distribution structure of the Hage Group at the time of the warning notice or that they obviously did not sufficiently clarify it does not detract from the declaratory interest of plaintiff 14 (see also above, paras. 59). There is no reason to assume that the defendants would not want to assert their asserted rights against plaintiff 14 of all people. On the contrary, in particular due to the announcements on the defendant's website, it is to be urgently feared that the defendants, now that they know about the activities of plaintiff 14, will also take action against it (above, para. 15 ff.). The Defendants do not claim that they would not consider taking legal action against Plaintiff 14. Consequently, Plaintiff 14 also has a declaratory interest in all the findings it seeks (see already Claim II, paras. 16, 19 ff., 338 ff. and 377 ff.). In particular, its interest in a declaratory judgment also extends to Switzerland (cf. what has been said above with regard to Plaintiff 10, paras. 56 f.).

62 Furthermore, it is unclear what is supposed to be "*dubious*" about the organization of the Hage Group. Plaintiff 12 is responsible for the B2B area, Plaintiff 14 for the B2C area. There is nothing unusual about this, let alone "*dubious*". Even more so, it is not clear to what extent these are "*plagiarism providers*" who "*try to hide behind supposedly responsible companies*", as the defendants presumptuously but ultimately unsubstantiatedly state (statement of defense, para. 57).

2.8.2.12. Plaintiff 15 - Helmut Hage (re. Response, para. 58 f.)

63 The defendants further claim that plaintiff 15 lacks an interest in a declaratory judgment. He was neither directly addressed in the warning letter to plaintiff 15 nor was he warned separately (statement of defense, paras. 58-59).

64 As managing director, plaintiff 15 is responsible for the operational business of plaintiffs 12 and 14 (claim II, para. 39). As such, he has his own interest in a declaratory judgment, as he must assume that the defendants will also take legal action against him for alleged copyright infringement as a potential passive party (claim II, para. 340; above, paras. 15 ff. and 19). Thus, Plaintiff 15 also has a sufficient declaratory interest in all the findings it seeks (see already Claim II, paras. 18 et seq., 338 et seq. and 377 et seq.).

2.8.2.13. Plaintiff 16 - Terré GmbH (re Response, para. 60)

65 As far as Plaintiff 16 is concerned, the Defendants deny a declaratory interest, especially since Plaintiff 16 had never been warned by the Defendants (Statement of Defense, para. 60). Contrary to the Defendants, Plaintiff 16 also has an interest in a declaratory judgment:

66 Plaintiff 16 manufactures *Handpans* and offers them in Switzerland and Germany, among other countries (Claim II, para. 341). In view of the threats on the defendant's website, the plaintiff 16 already has a sufficient interest in the requested findings under Swiss and German law (above, para. 15 ff.). In addition, the *Handpans* manufactured by plaintiff 16 are distributed, among others, by plaintiff 12 (Claim II, para. 341 et seq.). In the warning letter of February 11, 2020 sent to Plaintiff 12, respectively in the supplementary letter of March 10, 2020, the *handpans of the* trademark "Terré", i.e. those of Plaintiff 16, were explicitly described as infringing the copyright (Claim II, paras. 304 and 373). Defendants have m.a.w. warned a customer of Plaintiff 16 for distributing *handpans* manufactured and supplied by Plaintiff 16. The assumption that plaintiff 16 should have no own declaratory interest in a warning of its customer, only because the defendants did not warn plaintiff 16 directly, but one of its customers, is absurd (see also for example SHK PatG-Schweizer, Art. 28 N 6; SHK MSchG-Staub, Art. 52 N 32). The plaintiff 16 does not have to stand idly by and watch its customers being warned about the distribution of the *hand pans* manufactured and supplied by it. Such warnings can lead to the warned company ceasing to purchase *Handpans* from the plaintiff 16. Furthermore, it leads to a loss of reputation for the manufacturer if such warnings of its customers by third parties remain unaddressed. Furthermore, the manufacturer must expect to be prosecuted sooner or later. All of this massively restricts the manufacturer's economic freedom of movement. It is therefore obvious that if a warning is issued to a customer against a product as infringing copyright, the manufacturer and supplier of this product also has its own interest in a declaratory judgment. Thus, the plaintiff 16 also has a declaratory interest in all findings requested by it (cf. already claim II, paras. 17, 19 et seq., 341 et seq. and 373).

- K-II Supplement 85:** Letter from RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Hage Musikverlag GmbH & Co. KG dated February 11, 2020
- K-II Supplement 91:** Letter RA Dr. Michael Ritscher, Meyerlustenberger Lachenal, to RA Dr. Rainer Heimler dated March 10, 2020.

2.8.2.14. Plaintiff 17 - Günter Riederer (re Response, para. 61)

67 The Defendants argue that because he was not warned, Plaintiff 17 has no declaratory interest of his own (Response, para. 61). Also here the defendants are wrong:

68 As the managing director of the plaintiff 16, the plaintiff 17 is responsible for its business policy and is potentially entitled to passivity in infringement proceedings. He has to expect that the defendants will take action against him personally (above, para. 15 ff. and 19). Consequently, he also has a declaratory interest in all the findings he seeks (see already Claim II, paras. 18 ff., 341 ff. and 373).

2.8.2.15. Plaintiff 18 to 21 and 23 to 25 - Thomas Würmli, Sabine Würmli, Jérémie Poux, Daniel Bernasconi, Kay Ferdinand Rauber, Josef Maier and Markus Brönnimann (on response, para. 62)

69 Furthermore, the defendants acknowledge that plaintiffs 18 to 21 and 23 to 25 have a declaratory interest with regard to the requested findings under Swiss law. However, their interest in a declaratory judgment should not extend to the requested findings under German law. They claim that they are Swiss suppliers who offer their *Handpans* on the Swiss market, which is why they were warned by the defendants under Swiss law (statement of defense, para. 62). This is not true either:

70 Plaintiffs 18 to 21 and 23 to 25 all sell their *Handpans* not only in Switzerland, but also in Germany in particular (Claim III, paras. 19, 180, 302, 339, 363, 415 and 721). Already due to the threats on the defendant's website, they therefore have a sufficient interest also in the requested findings under German law (above, para. 15 ff.). It should be added that the defendants expressly asserted in the respective warning letters that they hold the "**worldwide copyright usage rights**" to the "Hang" (emphasis added; Claim III, paras. 295, 334, 356, 410, 716 and 754). The draft cease-and-desist letters attached to the warning letters also did not limit the acts to be ceased to those in Switzerland (Claim III, paras.

297, 335, 357, 411, 717 and 755). Furthermore, the warning letters also mentioned in each case the online presence of plaintiffs 18 to 21 and 23 to 25, on which *handpans* are offered to buyers, in particular also to those in Germany. Finally, the defendants referred in each of the warnings to their own website, on which they announced that they would in any case take action against the distribution of *Handpans* throughout Europe and thus also in Germany. The defendants were obviously interested in using the warning letters to prevent further distribution not only in Switzerland, but also in Germany in particular. The legal uncertainty created by the warning letters is therefore not limited to Switzerland, but rather extends to Germany (see also above, para. 29 ff.). The mentioned plaintiffs therefore also have an interest in a declaratory judgment with regard to the requested findings under German law (cf. already claim III, paras. 15, 17 ff., 178 ff., 295 ff., 301 f., 334 ff., 339 ff., 355 ff., 362 ff., 409 ff., 414 ff., 715 ff., 720 f., 753 ff. and 761 ff.).

- K-III Supplement 83:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Raven-Spirit Weltmusikladen dated December 15, 2020.
- K-III Supplement 84:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Djillihi instruments, Jérémie Poux, dated December 15, 2020
- K-III Supplement 85:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Soma Sounds Sculptures, Daniel Bernasconi, dated December 15, 2020
- K-III Supplement 86:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Handpanwelt, Kay Rauber, dated December 15, 2020
- K-III Supplement 87:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Klangstudio Rudenzhof dated December 15, 2020
- K-III Supplement 88:** Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Handpan-Shop c/o Musik Melody dated December 15, 2020

2.8.2.16. Plaintiff 22 - Handpanwelt.ch GmbH (re Response, para. 63)

- 71 Finally, the defendants deny that the plaintiff 22 has an interest in a declaratory judgment because it was not warned (Response, para. 63). The defendants are also wrong here:

72 Plaintiff 22 sells *hand pans* via its online store at <www.handpanwelt.ch/store> to customers in Switzerland and Germany, among other countries (Claim III, para. 363). For this reason alone, in view of the threats on the defendant's website, it has its own interest in the requested findings under German and Swiss law (above, para. 15 ff.). The defendants addressed their letter of warning to the sole shareholder and managing director of the plaintiff 22. In this letter, they have warned the *handpans* offered on the mentioned online store as infringing copyright. It must have escaped the attention of the Defendants when they sent the warning letter on December 15, 2020, that Plaintiff 23 operates its business through Plaintiff 22, especially since the commercial register entry of Plaintiff 22 was only published in the SOGC on that date. The Defendants acknowledge a declaratory interest of the Plaintiff 23. It has neither been shown nor is it evident why the Defendants should only and solely proceed against the Plaintiff 23, but not against its company, the Plaintiff 22, which distributes the *Handpans* via the online store mentioned in the warning letter. Thus, plaintiff 22 also has its own declaratory interest (see already claim III, para. 16). Incidentally, this also extends to the requested declaratory findings under German law and to the prototypes, whereby reference can be made to the above (above, para. 70, 20 ff. and 29 ff.).

K-III Supplement 86: Letter RA Dr. Michael Ritscher / RA Dr. Stefan Schröter, Meyerlustenberger Lachenal, to Handpanwelt, Kay Rauber, dated December 15, 2020

3. Facts of the case (on response, paras. 64 to 206)

3.1. Preliminary remarks

73 The position of the defendant that the "Hang" is a copyrighted work is based on various incorrect basic assumptions. Before the statements in the response are dealt with in detail, four overarching preliminary remarks are therefore imperative:

- The defendants do not claim protection on a concrete design, but rather on an **idea for a (new) musical instrument** (below, para. 74 ff.).
- The "Hang" is a musical instrument, which the defendants are now **stylizing into a work of art for** transparent reasons (below, para. 79 ff.).

- Contrary to the defendants, the shape of the "Hang" is not the result of a creative work in the sense of various creative decisions of defendants 2 and 3, but a **purely handicraft-technical further development of a randomly and spontaneously created prototype** (below, para. 84 ff.).
- The defendants cannot derive **anything in their favor from the foreign decisions** they cite: Insofar as foreign courts have judged the copyright protection of "Hang", they did so on different, incorrect factual bases (below, para. 120 ff.).

3.1.1. Defendants claim protection for an idea (and not for a work)

74 The inconsistent warnings of the defendants clearly show that not even the defendants themselves know on which (concrete) work they would like to claim copyright protection. At one time, for example, they invoke prototype 1 (supra, para. 21), another time to the "Hang" of the first generation (supra, para. 24) and again another time to the "Integral Hang" (above, para. 24). Often, they even remain so vague that they claim copyright protection on a (and thus apparently on any!) shape characterized by four features - lens shape, central dome on the top, opposite resonance opening on the bottom, and sound fields arranged in a circle on the top - as presented by the defendants in the abstract as follows (supra, para. 26; Response, para. 4):



75 This shows that the defendants ultimately **want to claim copyright in an idea for a new type of musical instrument - and not in the concrete design** of this idea. They are not interested in protecting a concrete work, but rather in monopolizing a new type of instrument for themselves.

76 The defendants fundamentally fail to recognize that copyright does not grant protection to ideas, no matter how original they may be or how substantial an intellectual achievement they may be based on. For example, the developer of a novel musical notation system cannot exclude others from also using this notation, even if notes can be represented differently (BGE 70 II 57 - *Habla*), or the developer of a novel bicycle with a folding mechanism cannot prevent others from also marketing foldable bicycles with this mechanism (below, para.

298). Similarly, the developer of a new type of instrument cannot prohibit others from manufacturing and marketing instruments of the same type.

77 But this is exactly what the defendants want when they try to describe their alleged work verbally by means of four features and with the help of a hand-drawn sketch reminiscent of a patent specification. With these four features, the defendants ultimately describe nothing more than what constitutes instruments of the novel instrument type. However, there can be no copyright protection for this idea. Similarly, the developer of the recorder cannot claim copyright in this instrument genre and exclude third parties from selling recorders, even if he claims that his work is characterized by a stick shape, a tapered mouthpiece at one end, an opposite opening and finger holes arranged on a straight line. The fact that there are flutes with an angled head joint or that the finger holes can also be arranged slightly offset does not change the fact that these features describe an instrument of the recorder genre.

78 If the idea of the "hang" as such were to be protected by copyright, this would mean that an entire instrument genre would presumably be monopolized by the defendants or their legal successors until the 22nd century. Switching to other forms is not an alternative since it is then a different instrument. The design of the violin or the cello, for example, has not changed over the centuries. Instrument makers always fall back on the same forms, because these are largely technically determined. Walter Waidosch, who is himself a violin maker and specializes in historical instruments, can attest to this.

Witness: Walter Waidosch, Woldemarstrasse 47, 32756 Detmold, Germany

3.1.2. The "Hang" is an instrument that Defendants now elevate to a work of art

79 Against the background just described, namely that the defendants cannot claim copyright protection for an idea for a novel musical instrument, their efforts in the statement of defense must be seen as presenting the "Hang" **not as a musical instrument but as a work of art** or (sound) sculpture and themselves not as instrument makers but as plastic artists. For example, the defendants describe the "Hang" as a "*novel work [...] with which one can also produce sounds*" (Response, para. 2) or "**not as a musical instrument in the proper sense**" (Response, para. 124). Or they state that the "Hang" "**also enables the production of sounds**" and can "**thus also serve as an instrument in the broader sense**" (Response, para. 131).

80 This is not only easy to see through, but also clearly contradicts the statements of the defendants from earlier, unsuspecting times, when they were not yet concerned with excluding third parties from the manufacture and distribution of *Handpans*. Purely by way of example, the following are some quotes from the defendant that speak for themselves (emphasis added in each case; see also, for example, below, para. 89, first indent, and 93):

- From the defendant's website at <www.hang.ch> in 2005:

*"> H A N G < A **new musical instrument**, built by master hands, of high quality and beauty."*

Supplement 102:Wayback Machine excerpt to web page <www.hang.ch> dated August 25, 2005.

- From the defendant's 2005 company description:

*"Collaboration with physicists, metallurgists, engineers and many other specialists has resulted in **new musical instruments** such as the PANG family or the latest prank: the HANG. "*

Supplement 103:Wayback Machine excerpt to web page <www.hang.ch/firma/index> dated August 26, 2005.

- From the 2006 "hang rest" memo:

*"In March 2006, we will introduce the new **hang instruments** on the Internet and in our Bauhaus, and we will reopen the doors for visits. "*

Supplement 104:Wayback Machine excerpt to website <www.hang.ch> dated February 9, 2006.

- From the product description from 2005:

*"HANG means hand in the language of the Bern region, and hands are also used to play the **newest acoustic instrument of the millennium**. "*

Supplement 86: Wayback Machine excerpt to web page
<www.hang.ch/produkt/index.html> dated February 12,
2005.

- From a memo on the suspension of sales of the "Hang":

*"We would like to reiterate that PANArt no longer manufactures the traditional **hang instruments**. They are no longer available. Neither with us directly nor with instrument dealers.*

*If you still receive offers for **instruments** under the name Hang or Hang Drum, these are not **instruments** from PANArt. "*

Supplement 105:Wayback Machine excerpt to website
<www.panart.ch/de/news/das-hang-ist-nicht-mehr-erhaelich> dated September 21, 2015.

- From a 2007 scientific publication by the defendant:

*"The HANG is a new **musical instrument**. "*

Supplement 39: Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, p. 8 (and p. 1)

- From the resale right agreement, which buyers of the "hang" have to sign:

*"Immediate information of PANArt Hangbau AG before any kind of disposal of the **musical instrument**".*

*"the owners of a **hang instrument** grant PANArt Hangbau AG a right of first refusal in the event of sale against payment
."*

*"The **instruments** are shipped with a protective shell, packed in a specially made cardboard box. Within 7 days after receipt, the **instrument** can be returned to PANArt Hangbau AG. "*

Supplement 106: Resale Right Agreement for "Hang" Buyers
Supplement 40: Brochure "Hang", 2008, p. 22 f.

81 In contrast, the defendants in recent times increasingly and in many places refer to the "Hang" as "*sound sculpture*" or "sculpture" for short (see already Claim I, para. 162; Claim II, para. 169; Claim III, para. 169). This terminology must not obscure the fact that the defendants - at least outside the proceedings - do not mean a sculpture in the conventional sense, i.e. a shaped three-dimensional object. Rather, they refer the sculptural to the **sound that is imparted to the instrument** by the instrument makers, tuners or "**sound sculptors**" (emphasis added; Response, para. 88). Indicative of this is, for example, a scientific contribution by the defendants in which, after describing the tuning process, they conclude: "*The sound sculpture is now built.*"

Supplement 39: Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, S. 5

82 And so the defendants did not receive their awards in the past in the form of design awards or the like (for the creative design of a form), but of music awards (for the sound they created; infra, para. 171) or of craft prizes (for the technical development of the "pang" instruments; below, para. 167 ff.).

83 The "Hang" in its form is thus a pure musical instrument, and not a work of art. This is evidenced not least by the process of its creation:

3.1.3. The "Hang" is not the result of a creative work, but of a technical-craftsman development of a spontaneously and accidentally created prototype

84 The defendants make various sweeping and unsubstantiated claims that creative decisions were made in the development of the "hang" (e.g., Response, para. 11 or 119). Which decisions these are supposed to have been, however, remains completely in the dark.

85 The plaintiffs will discuss the development of the "hang" or its history in more detail below - and in comparison, with the statement of claim (see already claim I, para. 45 ff.; claim II, para. 50 ff.; claim III, para. 48 ff.). This will show that there were no such "creative decisions". If there were decisions, they were exclusively technical or functional in nature. The defendants have repeatedly and consistently expressed this in this way at earlier (unsuspicious) times:

3.1.3.1. Prototype 1 was created spontaneously and by chance due to the desire for a stable hand and sitting playable instrument with different tones

86 The starting shot for the development was described in detail in the complaint (Claim I, para. 58 f.; Claim II, para. 63 f.; Claim III, para. 61 f.). Reto Weber and defendants 2 and 3 placed two *Steel Pan shells*, which happened to be lying around in the defendants' workshop, on top of each other and fixed them. This is how prototype 1 was created in 1999 (legal claim no. 1.i.a; claim I, para. 60; claim II, para. 65; claim III, para. 63):



87 According to the defendants, the fact that Prototype 1 came into being "*spontaneously*" during the "*joint, whimsical work with Reto Weber*" (Claim III, para. 167) is supposed to represent a "*presumptuous trivialization*" of the "*creation process*" (Response, para. 84). However, the defendants themselves have not described Prototype 1 in any other way - but rather also as a spontaneous product of chance - outside the present proceedings:

88 Thus, the defendants presented prototype 1 for a long time on their website, in the media and to third parties as a **spontaneous chance find** (emphasis added in each case; see also below, para. 98, second indent):

– From a post published on the lamented website:

"This spherical sculpture was made in November 1999 from two raw molds 60 cm in diameter. The percussionist Reto Weber, picking up his freshly tuned steel drum, brought a gatham at the request of the PANArt tuners. The sight of the rich soundscapes triggered the percussionist's desire to add tones to his Gatham. The tuners

*were able to fulfill this dream and assembled two spherical segments. One shell had previously been tuned with eight sound fields by Sabina Schärer. However, this **accidental first was an uncomfortable thing, simply unplayable.** "*

Supplement 107: Excerpt from <www.panart.ch/de/artikel/hang-ein-neues-musikinstrument-eine-marke-viele-miss-verstaendnisse> dated March 21, 2022

– From an article in the Bund in 2001:

*"Almost **by accident**, Rohner and Schärer have recently newly developed the 'hang,' which is both a melody and rhythm instrument played with the hands. "*

Supplement 108: High-tech sheet metal instead of Trinidad clichés, Der Bund of April 18, 2001, p. 6, fourth line

– From an article in a music magazine from 2008:

*"In 2000, Reto Weber, a musician friend, entered the Panart workshop with an Indian gatam. Gatams are made of clay and played with the fingers. The distinctive sound of the gatam is created by air compression at the upper round opening. If you close it with the flat of your hand, you will hear a muffled sound. This contrasts with the bright timbre produced by beating the sides. Reto Weber asked the panbuilders if it would be possible to develop an instrument that would combine the melodic variety of a steel drum with the handiness of a Gatam. **Spontaneously Felix Rohner and Sabina Schärer put two half shells of a steel drum on top of each other.** This was the birth of the 'Urhäng', which, however, seemed oversized with a radius of 60 cm. In the time that followed, various sizes were tested. "*

Supplement 109: Hang - melodic percussion instrument from the 21st century, ntama Journal of African Music and Popular Culture, dated September 7, 2008.

89 Likewise, the defendants confirmed that the development of prototype 1 was **limited to retrieving two pre-existing shells with a handle under the workbench and then fixing them**. Whether these were "Amphorenpang" bowls, as the defendants now claim (Response, para. 110 f.) or *Steel Pan bowls* (such as Claim I, para. 60), as they stated earlier (cf. just now, para. 88, third quotation, and below, para. 93, first and second quotation), is irrelevant (emphasis added in each case):

- From a brochure published in 2008:

*"His [Reto Weber's] experiments with sound bodies lying around, which he played with his bare hands instead of mallets, gave us the impulse to **reach under the workbench and bring two PANG metal bowls to light. One of them was tuned with seven tones. When brought together, they formed a whole, the sounding sphere! A new acoustic musical instrument was born.**"*

Supplement 40: Brochure "Hang", 2008, S. 6

- From the description of the company history on the defendant website:

*"Thereupon Sabina Schärer brings out a ping half-shell (without mantle) that she has tuned [the "ping" is a steel pan made of "pang" sheet metal, cf. below, para. 151], Felix Rohner contributes an untuned ping shell without mantle, **both shells are screwed together: the Urhang is in front of them.**"*

Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 6

- From the description of the product history on the former defendant website:

*"It was the Swiss musician Reto Weber who, on a November day in 1999, revealed the dream of an instrument: a vessel made 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. "

- From a 2007 public letter from the defendant:

Supplement 86: Wayback Machine excerpt to web page <www.hang.ch/produkt/index.html> dated February 12, 2005.

*"At the suggestion of a ghatam player, we fashioned a sphere from **steelpan half-shells lying around**, which contained a couple of hammered-in concave tone fields."*

Supplement 59: PANArt, letter from Hangbauhaus, end of March 2007., S. 1

90 Contrary to the Defendants, the Plaintiff's account of the development of Prototype 1 is thus not a trivialization (Response, para. 84) - Rather, its development was simply trivial. **Prototype 1** was not the result or outflow of creative decisions by Defendants 2 and 3. Rather, it arose spontaneously and by chance. **Random products**, no matter how unusual or aesthetically pleasing, cannot be **copyrighted works**. Thus, the defendants also claim that "*the actual creation process*" only began after prototype 1 (statement of defense, para. 111). However, it is wrong to speak of a process of creation. Rather, it was solely a matter of the further development of the prototype in terms of play and sound technology, as will be shown below (paras. 92 ff.).

91 Most of the features for which the defendants claim protection today or which are said to characterize the design of the "Hang" were already present in the accidentally created prototype 1: Prototype 1 was even more spherical, but already had (at least in the approach) a **lens shape**. On the upper side, there were circularly arranged tone fields with a central concave indentation. On the underside, prototype 1 had a **resonance opening**. A **central sound field** was also present **on the top**, but still with an indentation instead of a dome:



Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 5 f.

3.1.3.2. The task was then to make the prototype playable and improve the sound

92 For the instrument makers, the **task** - following the purpose of use - was to **make the prototype 1 playable and to improve the sound**. The main problem was that the bulky prototype with its 60 cm diameter was **too large** for playing on the lap. In addition, the **sound was not yet fully developed**, in particular it still lacked an (appealing) Helmholtz resonance.

93 Defendants themselves described this task consistently over the years as follows (emphasis added in each case):

– The defendant 2 in a documentary about the history of the "hang":

*"From two shells of Steel Pans from our technology that were lying around, we made a sphere, fixed it here. And he [Reto Weber] was thrilled. That's what had happened. The sphere was there. The sounds were there. The hand was on the sheet metal. A new dimension. And now the journey began. **The first question is, 'Can you even play this?'** It's too big. 'It's too fat,' the musicians said. 'You have to make it smaller. It's brilliant. The instrument is genius, but: it's too big.' **And then came this question of the bass.** [Defendant 2 hits the opening on the bottom] Doesn't work well. Too much*

air. So we made that [Defendant 2 points to the sphere] smaller. To this size [Defendant 2 shows a hug]."



Supplement 38: PANArt Hang History and Story of Felix Rohner and Sabina Schärer (video, from <www.youtube.com/watch?v=R_4Qf5r7Ulg>), from min. 26:54

– Defendant 2 in an interview with an Italian music magazine:

"Felix Rohner: [...] Un percussionista è venuto da noi per accordare la sua Steel Pan e ci ha detto: 'lo suono il Gatham e il mio sogno è di avere uno strumento con le note come le Steel Pan ma con la possibilità di suonarlo con le ma.' Da quell'idea abbiamo messo insieme due emisferi delle Steel Pan. Le note c'erano e le mani potevano toccare il metallo, il problema erano le dimensioni. Il primo Hang era troppo grande, quindi difficile da trasportare e difficile da suonare appoggiato sulle ginocchia: il lavoro successivo allora è stato quello di ridurre le dimensioni e migliorare il suono. "

In German:

"Felix Rohner: [...] *A percussionist came to us to tune his steel pan and said, 'I play the Gatham, and my dream is to have an instrument with tones like the steel pan, but with the possibility to play it with my hands.'* From that idea, we put together two hemispheres of steel pans. The notes were there and you could touch the metal with your hands, **the problem was the size.** The first hang was too big, so it was hard to carry and play on your knees, **so the next task was to reduce the size and improve the sound.** "

Supplement 110: Wayback Machine excerpt to website <www.mescalina.it/musica/interviste-/interviste.php?id=198> dated February 13, 2008.

– Defendants 1 and 2 in a 2007 scientific article:

*"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. PANArt had the know-how: the technology of deep drawing, the gas nitride steel, the dome geometry of the notes, the octave-fifth tuning. **The prototype had to be reduced in diameter from 60 cm to 50 cm to make it possible to be played on the lap. The challenge was to bring the Helmholtz resonator, the central gong-like sound, and the tone circle, into a unified musical conception.** Fewer notes could be tuned in, which meant that we would have to leave the chromatic scale behind and explore the large world of tonal systems. After one year the HANG was ready to be presented at the Frankfurt Music Fair. "*

Supplement 39: Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, S. 2

94 The further development of Prototype 1 or the "Urhang" was driven by this task. The changes made in the course of **further development** are all based on **technical and technical considerations** and are **not an expression of creative design decisions**. It was by no means a matter of "*transforming the created sound object into a visually appealing and harmonious form*" or of "*condensing a convex-concave plasticity into an organic and dynamic form that should radiate a natural harmony*", as the defendants would have us believe today (statement of defense, para. 111). On closer inspection, the further changes appear rather as a logical consequence of the technical and functional tasks.

3.1.3.3. The changes to the prototypes are all due to the technical and functional tasks and motivated

(a) **Prototype 2**

95 Subsequently, Defendants 2 and 3 developed Prototype 2 (Claim 1.i.b.; already Claim I, para. 66; Claim II, para. 71; Claim III, para. 69; Response, para. 114):



Supplement 30:

Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 6 f.

- 96 Prototype 2 had the following characteristics:
- Reduction in height and diameter (*new*);
 - central resonance opening on the top (*new*);
 - tone fields arranged in a circle on the upper side, with an indentation in the center (*as in prototype 1*).
- 97 Prototype 2 was thus less high and had a smaller diameter, and was thus **more "lenticular"** than Prototype 1. However, this change was obvious in view of the task of making Prototype 1 playable. Prototype 1 was simply "*too big*" or "*too fat*" to be played on the lap (above, para. 93, first indent; cf. already Claim I, para. 67; Claim II, para. 72; Claim III, para. 70). The intended "degreasing" of the form inevitably resulted in a strong reduction of the height, which in turn inevitably led to a strengthening of the lenticular overall impression. Accordingly, the aim was not to create "*a visually appealing and harmonious shape*" (Response, para. 111). Rather, the changes were necessitated by the technical playing task. The defendants themselves confirmed this several times in the past (emphasis added in each case; see also above, para. 93, second and third quotation):
- From a 2007 technical paper by the defendant:

*"The prototype **had to be reduced in diameter** from 60 cm to 50 cm to **make it possible to be played on the lap.**"*
- Supplement 39:** Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, S. 2
- From the company history on the lamented website:

*"Prototype 2 - sound sculpture, prototype 1 reduced to the size **of a hug**, about 50 cm in diameter."*
- Supplement 30:** Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 7
- 98 The fact that the **resonance opening** moved from the lower to the upper side was done in an attempt to imitate the ghatam and thus improve the sound or

obtain a bassy pulse, i.e., for technical sound reasons. However, this attempt failed (see already Claim I, para. 68; Claim II, para. 73; Claim III, para. 71). The defendants commented on this in the past as follows (emphasis added in each case):

- From the gallery on the lamented website:

*"Prototype 2 - [...] **attempt to replicate the ghatam, small neck pointing upwards**".*

*"Prototype 2 - [...] **Attempt to get a bassy pulse by means of a resonance hole failed.**"*

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 7

- From a post published on Defendants' website (where Defendants here mean *Prototype 2* by "*first playable prototype*" and *Prototype 1* by "*accidental first playable prototype*"):

*"The **first playable prototype**, fashioned from the **accidental first by** tuners Sabina Schärer and Felix Rohner, [...] was discarded, however, **because playing with the cavity resonance was wholly unsatisfactory**. The dream of a pulsating bass burst. The understanding of the function of the Helmholtz resonator was just still closed to the tuners."*

Supplement 107: Excerpt from <www.panart.ch/de/artikel/hang-ein-neues-musikinstrument-eine-marke-viele-miss-verstaendnisse> dated March 21, 2022, S. 3

(b) **Prototype 3**

- 99 Due to the failed attempt to achieve a bass tone by means of a resonance hole on the upper side, the defendants subsequently developed prototype 3 (legal claim no. 1.i.c; already claim I, para. 66; claim II, para. 71; claim III, para. 71; response, para. 115):



Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 7 f.

- 100 Prototype 3 had the following characteristics:
- Lens shape (*as for prototype 2*);
 - central resonance opening on the top (*as on prototype 2*), partly with a plug (*new*);
 - tone patches arranged in a circle on the upper surface, with a concave indentation in the center (*as in prototypes 1 and 2*).
- 101 With these changes, the defendants were not concerned with creating an "*organic and dynamic form*" or the like, as they now want to make popular (Response, para. 111). Rather, it was a sound-related attempt to make a membrane inside the instrument vibrate with the help of the plug-in order to find the sought-after bass pulse. This attempt also failed (see already Claim I, paras. 68 f.; Claim II, paras. 73 f.; Claim III, paras. 71 f.). In addition, the central hole on the top led to instability, so that a resonance opening on the top, where the recorded sound fields are also located, seemed unsuitable to the defendants (already Claim I, para. 68; Claim II, para. 73; Claim III, para. 71). This is also confirmed by the statements of the defendant outside the present proceedings (emphasis added in each case):

- From the gallery on the lamented website to the "*play page*" of prototype 3 without the plug (i.e. the same as prototype 2):

*"Hang percussion instrument, resonance hole leads to **instability**, to chaos. Cavity resonance too weak. "*

and to the top with plug:

*"In **search of the bass**, the cavity resonance. **Attempt to make a membrane inside vibrate by means of a plug**. The bass frequencies produced are weak. Experiment failed. "*

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 8

- In connection with prototype 3 from the description of the development of the "Hang" on the defendant website:

"At first, we tried to embed the deep sound of the air vibration in the cavity of the vessel in the new instrument and amplify it. However, after the support of renowned acousticians did not help either, we soon gave up these attempts. "

Supplement 41: Excerpt from website <www.panart.ch/de/geschichte/vom-hang-zum-gubal> dated October 1, 2020, S. 1

(c) **Prototype 4**

102 After the tests with the resonance hole on the upper side had failed with prototypes 2 and 3 (just now, para. 95 ff.), the defendants moved the resonance hole back to the underside, where it had already been located in prototype 1. They subsequently developed Prototype 4 (Claim 1.i.4; already Claim I, para. 69; Claim II, para. 74; Claim III, para. 72; Response, para. 116):



Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 8 f.

- 103 Prototype 4 had the following characteristics:
- Lens shape (*as for prototypes 2 and 3*);
 - Dome (*new*) in the central sound field on the top (*as in prototype 1*);
 - tone fields arranged in a circle on the upper side, with an indentation in the center (*as in prototypes 1 to 3*);
 - central resonance opening on the underside (*as on prototype 1*).
- 104 The change on the top, the **dome**, is due to Defendants' findings in the course of research on sound. After a study trip to Munich, which sparked Defendants' interest in gongs and, in particular, their hump (central dome), Defendants conducted intensive research on the sound characteristics of domes, rebuilt gongs and cymbals, and fitted other instruments with domes (discussed in detail below, para. 157 ff.). In the course of their experiments on geometries for singing bowls, they found that the sound of a tone becomes warmer when a dome is driven into the center of a singing bowl, as reported in the "Research and Technology" section of the NZZ of August 30, 2000 (emphasis added):

*"Building on these investigations, the instrument makers from Bern experimented with new geometries for the singing bowls. They discovered that the **sound of a***

tone becomes warmer when a dome is driven into the center of the relatively flat bowls. This stiffens the bowls in their center. This stiffening makes it easier to tune the bowls by deliberate hammer blows so that the fundamental and the overtones are in a harmonious relationship to each other. And the flow of energy also changes as a result of the new geometry. If you excite a tone by striking the dome, the energy flows first into the fundamental and from there into the overtones. This results in a warm sound. With the steelpan, on the other hand, some of the energy flows directly into the overtones, giving the instrument its characteristic shrill sound. "

- Supplement 111:** Arbeiten am Wohlklang, Schlaginstrumentenbau unter wissenschaftlichen Vorzeichen, NZZ of August 30, 2000, p. 73
- Supplement 32:** Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 7

105 In acoustics, harmonics are the components of an instrumentally produced tone that resonate in addition to the fundamental. However, such a tone produced by an instrument, for example, is not a single tone in the acoustic sense, but rather a sound or mixture of tones that is composed of several partials. The fundamental is the lowest partial and often determines the perceived pitch, while the higher partials, the overtones, produce the timbre.

- Supplement 112:** Wikipedia excerpt for "Klangfarbe" from March 23, 2022
- Supplement 113:** Wikipedia excerpt for "Overtone" dated March 23, 2022
- Expert opinion:** On the criteria constituting sound, pitch and timbre

106 The dome is thus not a reduction of the "*optical aspect[s] of the spherical stopper*" of prototype 2 (according to response, para. 116), but the result of the study of other "dome" instruments and sound technology findings. The dome had a completely different function than the plug: It was intended to make a membrane inside the instrument vibrate to generate bass frequencies (supra, para. 101).

107 The **resonance opening** centrally located on the top of prototypes 2 and 3 gave way to the central dome for the reasons already explained (above, para. 101). Again, for sound-related reasons - namely to enable a Helmholtz resonance (or in the words of the defendants: to lead vibrations to the outside) - the defendants decided to retain the resonance opening, however. Instead of being located on the top surface, where it had caused instability (supra, para. 101), the resonance opening was again placed centrally on the underside, as in Prototype 1 (emphasis added):

*"However, in order to **guide the vibrations inside the vessel to the outside**, the opening was retained and given its place on the lower half shell of the instrument. The **weak, deep bass sound that could be excited at the opening** we called Gu. The Hang[®] was given its Gu side. "*

Supplement 41: Excerpt from website <www.panart.ch/de/geschichte/vom-hang-zum-gubal> dated October 1, 2020, S. 2

108 Overall, the defendants' activities thus continued to consist of finding technical answers to technical problems and then incorporating these technical answers into the constantly evolving prototypes. The defendants themselves describe this as follows (emphasis added):

*"In January and February, more hang prototypes are created, quite a few **technical and acoustic problems of the prototypes are studied and find a solution.** "*

Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 7

(d) **Prototype 5**

109 Further technical findings then led to Prototype 5 (already Claim I, para. 71; Response, para. 117 f.):



110 Prototype 5 has the following elements:

- Lens shape (*as for prototypes 2 to 4*), with weld-riveted edge (*new*);
- Dome in the central sound field on the top (*as in prototype 4*);
- circular tone patches attached to the top, with a concave indentation in the center (*as in prototypes 1 to 4*);
- center resonance hole on the bottom (*as on prototypes 1 and 4*) with the neck facing inward (*new*).

111 The defendants claim that they "*accentuated*" the "*circumferential 'flange' between the upper and lower shells*" in Prototype 5 (Response, para. 117). In fact, however, at that time they investigated alternative **technical** possibilities to join the two half shells, with a **weld seam** as can be seen above. However, this attempt failed. A weld-riveted joint was too hard, and the instrument broke apart when it fell onto the edge:

"Ding" side with hand-driven central tone field of pressed raw form, weld-riveted. Failed: weld-riveted is too hard a joint, when dropped on edge the instrument breaks apart. "

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 9

112 Subsequently, the defendants returned to elastically joining the two half-shells:

"The hemispheres are elastically joined together. "

Supplement 114: Wayback Machine excerpt to web page <www.hang.ch/produkt/spielen> dated August 30, 2005., S. 1

113 The "*refined*" "*design of the opening*" (Response, para. 118) was **sound-related**. The resonance opening in prototype 4 did not yet have an inward-facing neck, and the Helmholtz resonance or bass was still "*weak*" (supra, para. 107). The defendants therefore sought help from specialists in the field of acoustic tuning of cars, who recommended this shape (already Claim I, para. 73; Claim II, para. 78; Claim III, para. 76):

*"Gu side - The resonance hole is called GU by tuners. Driven by hand, **shaped according to the recommendation of car tuners** (Gebr. Gabathuler, Affoltern, Zurich)".*

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 10

(e) **"Hang" first generation**

114 After a year of tinkering and technical/craft development together with physicists, engineers, metallurgists, car tuners and musicians (see Claim I, para. 72 ff.; Claim II, para. 77 ff.; Claim III, para. 75 ff.), the first generation of the "Hang" was created (Claim 1.ii.a; already Claim I, para. 75; Claim II, para. 80; Claim III, para. 78; Response, para. 120):





- 115 The first generation "hang" has the following characteristics:
- Lens shape (*as for prototypes 2 to 5*), without weld seam (*as for prototypes 1 to 4*);
 - Dome in the central sound field on the top (*as in prototypes 4 and 5*);
 - tone patches arranged in a circle on the upper shell, in the center of which is a concave indentation (*as in prototypes 1 to 5*);
 - central resonance hole on the underside (*as in prototypes 1, 4 and 5*).

116 In contrast to the earlier prototypes, the first-generation "Hang" differs only in that the surface has been given a shimmering sheen and the dome has been polished to a high gloss (Response, para. 121). The defendants rightly assume that these "*optical refinements*" are irrelevant in terms of copyright (see Response, para. 127). From the sketch of the "hang" on which the defendants base their alleged copyright (above, para. 26 and 74), it is also clear that the defendants do not attach any importance to the surface design for the question of copyright protection.

(f) **Conclusion**

117 The first generation "Hang" is the **result of a technical-crafts manly further development of** a spontaneously and accidentally created prototype and not of a "*creative process lasting for years*", as the defendants claim (Response, para. 119). In each case, the defendants did not *make "creative decisions"* (Response, para. 119), but **improved the prototypes purely in terms of craftsmanship**

based on newly gained knowledge of playing and sound technology. As shown, the reduction of the size of the prototype to a lens shape, for example, was based on technical playing considerations and not on design considerations, since this allowed the instrument to be played on the lap - in contrast to the "too fat" "accidental first instrument" (above, para. 97). The central dome was added because of the work on the gong dome (above, Rz. 104 ff.). The resonance opening already present in the spontaneous and accidental prototype was retained to allow for a Helmholtz resonator (above, Rz. 107), and the specific shape of the aperture followed sound engineering considerations and recommendations of car tuners (above, Rz. 113). Finally, the circular sound fields on the top were already present on the "accidental first". As a result, the defendants are trying to **protect technical innovation by way of copyright**, which copyright with its comparatively very long term of protection does not serve and is not intended to serve.

118 The fact that the result of the tinkering with the sound body and the technical-craftsmanly further development of the prototype is supposed to be "**visually [...] appealing**" (statement of defense, para. 122) is **irrelevant in terms of copyright** (see, for example, TISSOT et al., *Propriété intellectuelle*, 2019, para. 30; EGLOFF, in: Barrelet/Egloff (eds.), *Das neue Urheberrecht*, 4th ed. 2020, Art. 2 N 17). It is equally wrong that already at the "sight" of the "hang" it is convincing that its design was not determined by technical considerations, but that the defendants 2 and 3 "*primarily pursued the creation of an appealing design*" (statement of defense, para. 270). The **external appearance of an object does not in itself allow any conclusion as to whether its design is based on technical-craftsmanship or creative design decisions**. An object may appear pretty or visually appealing to the respective viewer, but it does not follow from this that it is based on design decisions. The fact that the "Hang" is "*haptically appealing*", as the defendants further emphasize (statement of defense, para. 122), is likewise irrelevant to the concerns of copyright and, moreover, is precisely an outgrowth of (gaming) technical development.

119 Also, contrary to the Defendants, the "*creation process*" was not "*years long*" (Statement of Claim, para. 119) or "*several years long*" (Statement of Claim, para. 79). Rather, the first generation "Hang" was presented to the public already about 17 months after Reto Weber's visit to the defendants' workshop in October 1999, namely in March 2001 (Claim I, para. 75; Response, para. 123). The defendants claim to have Supplemented prototype 5 at the Munich International Trade Fair as early as March 2000, i.e. just five months after the spontaneous, "*accidental first product*" (Response, para. 120), to which we will return (below, para. 168).

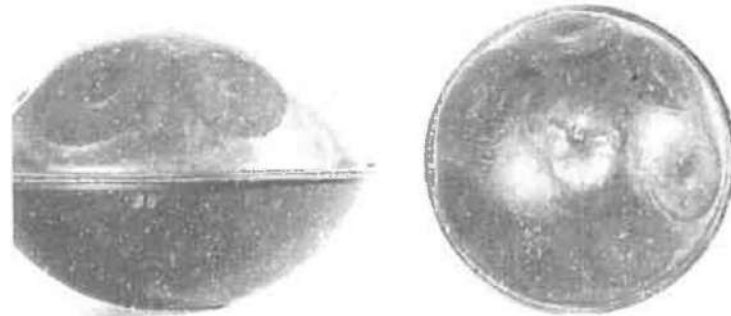
3.1.4. The foreign decisions on the "hang" do not support the defendant's position

120 The defendants refer at various points in their response to the decisions of German and Dutch courts which have ordered interim bans against providers of *Handpans*. In doing so, they want the court to believe that there is no reason to decide differently than the "specialized chambers" in a "carefully reasoned judgment" (Response, para. 9). The fact that the plaintiff want a Swiss court to establish that the German courts were "wrong" is "astonishing" (Response, para. 262; see also Response, para. 317).

121 However, the German and Dutch courts reached their decision on a completely different basis. In particular, the defendants did not present the above-described history of the "Hang" to the ruling courts. On the contrary, in their affidavits they stated - contrary to the facts! - they stated in their affidavits that Prototype 1 was the result of "countless attempts to combine an appealing shape with positive sound characteristics". Specifically, they stated in the proceedings before the Hamburg Regional Court:

*"In 1999, we were inspired by the Indian instrument ghatam to further develop the shape of steelpans, creating an instrument made of pang that could be played by hand as a hollow body. **This idea led to the first design of our Hang Sculpture after countless attempts to combine an appealing shape with positive sound characteristics.***

***This original form was characterized by** an only slightly compressed circular shape, which is composed of two spherical segments. On the upper segment there are 7 sound fields arranged in a circle and one sound field is in the center (Ding), while the other segment has an opening at the lower pole (Gu; not visible in the illustration below):*



Supplement 115: Affidavit of Felix Rohner dated June 8, 2020, S. 1

Supplement 116: Affidavit of Sabina Schärer dated June 8, 2020, S. 1

122 The defendants thus pretended to the German courts that Prototype 1 had been the result of a long creative process. In fact, however, as the defendants had repeatedly stated in other, unsuspecting places, it was a spontaneously created, "*accidental first creation*" (above, para. 86 ff.).

123 The LG Hamburg subsequently based its decision essentially on these untruths about the genesis. It found, for example, that the defendants 2 and 3 had also taken preliminary aesthetic decisions in a very important way in the development of the "Hang" and the "Integral Hang" in terms of design and that the selection decisions among several design options, each of which may have been technically conditioned, were therefore essentially determined by aesthetic considerations. According to what has been said, this is precisely not the case.

Defendant's

Supplement 2: Judgment of the Hamburg Regional Court, Case No. 310 O 160/20, of August 20, 2020, p. 46

124 The affidavits also contained further untruths. For example, the defendants claimed that they had presented the "*first prototypes of our Hang sound sculpture*" at the special Supplementation Exempla in March 2000 and that they had been awarded the Bavarian State Prize for innovative craftsmanship "*for this*". This is not true either. Rather, they were awarded for their "Pang" instruments (see also below, para. 167 ff.).

Supplement 115: Affidavit of Felix Rohner dated June 8, 2020, S. 5

Supplement 116: Affidavit of Sabina Schärer dated June 8, 2020, S. 3

125 The same picture emerges in the Dutch proceedings. The defendants described the genesis of the "Hang" there as follows:

"13. Vervolgens hebben Schärer en Rohner het idee geconcipieerd voor een driedimensionaal en interactief sculpturaal object dat toeschouwers uitnodigt om het object met de hand te beroeren en op die wijze klanken ten gehore te brengen. Een leidende gedachte was daarbij dat het object - net als de traditionele steel pans - verschillende klanken kon produceren door de inherente spanning en eigenschappen van het plaatstaal waaruit het object zou worden vervaardigd.

14. De initiële inspiratie voor deze ontwikkeling was de zogenaamde Ghatam, een Indiaas percussie-instrument dat bestaat uit een uit gebakken klei vervaardigde pot dat is voorzien van een opening en dat rondom met de handen bespeeld kan worden. [The following is an illustration of a ghatam.]

15. Schärer en Rohner hebben zich ten doel gesteld om met het door hen ontwikkelde PANG materiaal een sculpturaal object te ontwikkelen dat een gebruiker in staat zou stellen om - net als de Ghatam - door beroering met de handen op intuïtieve wijze klanken voort te brengen en waarbij de toepassing van de principes van de steel pan de gebruiker in staat zou stellen om een rijk scala aan complexe klanken te produceren.

16. De wens om een dergelijke interactief klankobject te ontwerpen was aanleiding tot een intensief en langdurig scheppingsproces en ontwikkelingstraject waarbij Schärer en Rohner experimenteerden met materialen, technieken en vormen om tot een resultaat te komen dat de aantrekkelijke, tot interactie uitnodigende, vorm had die hen voor ogen stond, en die in staat was door handaanraking de door hen gewenste klanken te produceren.

hebben Schärer en Rohner verschillende ontwerpschetsen en prototypes gemaakt. De leidende gedachte was daarbij de traditionele vormgeving van de steel pan - die één concaaf vlak met toonvelden omvat dat is opgehangen in een cilindrisch frame - te doorbreken. [The three illustrations below follow].

18. in het jaar 2000 hebben Schärer en Rohner uiteindelijk de driedimensionale vorm van het object gecreëerd dat zij de naam HANG - in het Berner dialect het woord voor 'hand' - hebben gegeven. [...]. "

In English:

"13 Schärer and Rohner then developed the idea of a three-dimensional and interactive sculptural object that invites the viewer to touch it with their hands to create sounds. A guiding principle was that the object - like traditional steel pans - could produce different sounds through inherent tension and the properties of the sheet metal from which it is made.

14. the first inspiration for this development was the so-called ghatam, an Indian percussion instrument consisting of a pot of baked tone that has an opening and can be played with the hands all around. [An illustration of a ghatam follows.]

15 Schärer and Rohner set out to develop a sculptural object from the 'Pang' material that, like the Ghatam, would allow the user to intuitively create sounds by touching them with their hands, and where the application of the principles of the Steel Pan would allow the user to create a rich palette of complex sounds.

*16. the desire to design such an interactive sound object led to an **intensive and lengthy design and development process** in which Schärer and Rohner experimented with materials, techniques, and forms to arrive at a result that had the attractive, inviting interaction*

they had in mind and was capable of producing the desired sounds by touching them with the hand.

*17. During **this development process**, Schärer and Rohner made **several design sketches and prototypes**. The guiding idea was to break with the traditional design of the Steel Pan - which consists of a concave surface with tone panels suspended in a cylindrical frame.*



18. in 2000, Schärer and Rohner finally created the three-dimensional form of the object, which they named "HANG" - the word for "hand" in the Bernese dialect. [...]"

Supplement 117: Seizure request dated May 11, 2022.

126 Here, too, the defendants thus falsely described the process of creation as an intensive and lengthy creative process. In particular, it is brazened for Defendants to stoop to describing the "pang" bells attached to a truncated cone (first figure at para. 17; see also infra, para. 157) or turned raw forms for *Steel Pans* (second figure under para. 17) as part of the development process of the "Hang" - after "they" had already had the "idea" for it. These are simply other instruments from a time before Reto Weber had visited the defendants in their workshop and had brought the idea of a metal ghatam with different tones.

127 It is not necessary at this point to go into further detail as to what these proven falsehoods, in particular in the affidavits of Defendants 2 and 3 submitted to the German courts, mean in terms of the credibility of their party assertions and statements in the present proceedings. On the other hand, it is important to note that the foreign decisions are based on a different, and in essential points incorrect, factual basis. For this reason alone, they are not decisive for the present proceedings.

3.2. Regarding the parties (Response, paras. 64 to 77)

128 The defendants repeatedly attempt to portray the plaintiffs as "*dubious businessmen*" (Response, para. 64) who would sell "*industrially manufactured mass-produced goods (which are not even remotely comparable in sound to the originals) at high prices*" (Response, para. 65). None of the plaintiffs would have "*an in-depth understanding of brass sound instruments*" (Response, para. 67). This is unnecessary polemic. The allegations of the defendants are disputed, unsubstantiated and completely unsubstantiated. The questioning of the parties will show that there is no truth in these allegations.

129 The defendants, on the other hand, find plenty of fine words for themselves (Response, para. 74 ff.). The defendants overlook the fact that it is the individuality of the work and not the individuality of the author that is decisive. Due to the lack of relevance to the decision, it is therefore unnecessary to go into this further (on the music price received [Response, para. 76], below, para. 171).

3.3. On the terminology (Response, paras. 78 to 84)

130 Defendants take issue with the term *handpan* or the designation of the "hang" as a *handpan*. As a reminder, with the emergence of various manufacturers from 2006 onwards that produced instruments of the new type, the

Defendants were increasingly disturbed by the fact that terms such as "hang" or "hang drum" were used for these instruments. This led the defendants to apply for registration of the trademark "Hang" in 2008 and subsequently to apply for international protection, so that this term was no longer available as a material designation. Subsequently, the term "*handpan*" prevailed as the material designation for the new type of instrument (Claim I, para. 146 f.; Claim II, para. 151 f.; Claim III, para. 149 f.; see also Response, para. 78).

131 Contrary to the defendants (statement of defense, para. 80), today there is indeed a type of instrument that is commonly referred to as *handpan*. *The Defendants* themselves have also used the term *handpan* in the past to designate the corresponding instrument genre or family. For example:

*"Their instruments all have their own name and are assigned to the **Handpan family**. "*

Supplement 118: Wayback Machine excerpt to web page
<www.panart.ch/de/artikel/panarts-offerte-an-blechklangplastiker> dated February 5, 2020., S. 1

or:

*"We do not have any objections towards **Handpan Makers** producing **handpans** with nitrided material as long as the used material does not infringe our patent.*

*Once more, we have not and will never try to prevent **Handpan Makers** from producing **handpans** and using nitridding outside from our patented parameters. "*

Supplement 119: Email from Defendant to Pantheon Steel LLC dated October 23, 2017.

or:

*"So far, quite a number of companies and **handpan** builders have made use of the opportunity of getting their material analyzed, with the result, that their employed material and/or production method does not infringe the PANArt patents. As a matter of fact, they are*

free to produce and sell their products with our best wishes. "

Supplement 120: Email from Defendant 1 to Ezahn Bueraheng dated March 15, 2014.

132 It is therefore not true that "*handpan*" would stand for plagiarism, as the defendants claim (Response, para. 213). The defendants themselves have used this term for this type of instruments as shown.

133 The "hang" in its different variants also belongs to this instrument genre. This is not altered by the fact that the "hang" in its variants is supposed to be instruments of particularly high craftsmanship or the first instruments of this genre - a Stradivarius is just as much a violin as the first violin was a violin, regardless of its name.

3.4. On the history of the defendant as an instrument maker (response, paras. 85 to 124)

134 The defendants are offended by the plaintiffs' description of the creation process of the "Hang", finding it "*false, sweeping and disrespectful*" (Response, para. 84). They then describe the history of the creation of the "Hang" as they would like to see it. Further, under the title "*The 'Hang' and its creation process*", they then describe the principle of sound production in the *steelpan* (Response, para. 85 ff.) and then "*experiments in form*" which the defendants have carried out since 1987 (Response, para. 94 ff.). All this is done to present the history of the development of the "Hang" as a long path marked by creative decisions.

135 In fact, however, the Defendants do not describe the process of creation of the "Hang" here, but rather their history as instrument and steel *pan builders*, their research on sheet metal, and which instruments they have developed over the years. These statements are already not relevant to the decision because the history of the defendants, their research on sheet metal and the other instruments developed by them are irrelevant for the assessment of the copyright protection of the "Hang". However, they are informative in that they underscore the defendant's years of **technical** research work and thus also that the "Hang" is a result of technical craftsmanship and not of creative design decisions. This has already been explained in the context of the introductory

preliminary remarks, to which reference can be made at this point (above, para. 84 ff.).

3.4.1. On the sound generation of *Steel Pans* (Response, paras. 85 to 93)

- 136 Defendants first describe the principle of sound production in the *Steel Pan*. This fits into the history of the Defendants as instrument manufacturers: Defendant 1 originated as a *steel pan manufactory* and was founded in 1993, after Defendant 2 had already been active in the field of manufacturing *steel pans* since 1985 (Claim I, para. 53 et seq.; Claim II, para. 58 et seq.; Claim III, para. 56 et seq.).
- 137 According to the Defendants, both the *Steel Pan* and the "Hang" have the same principle of sound production (Response, para. 86). This is at least incomplete, because the "Hang", unlike the *Steel Pan* (but the same as the Ghatam), has a Helmholtz resonator, which gives the instrument a bass tone. The sound production of the "Hang" will be discussed in the context of technical necessity and conditionality (below, paras. 176 ff.).
- 138 The defendants then claim that both the *Steel Pan* and the Hang have a "plexus" and a "plexus holder". These are not commonly used terms; the "plexus holder" on the *Steel Pan*, for example, is usually referred to as a *skirt*. However, the term "plexus", which can (also) designate a structure in the form of a network (see, for example, the definition in Merriam-Webster), is applicable insofar as both the *Steel Pan* and the "Hang" have a shell in which various tone fields are incorporated, which can be said to form a "network" (see also Response, para. 86). The "plexus holder", a term which, as far as can be seen, is only used by the defendants, does not mean anything else than that this shell is clamped in some way into another structure, precisely the "plexus holder", to avoid natural vibrations of the "plexus".
- 139 Consequently, "plexus" and "plexus holder" do not denote anything more than that an object has a surface with different tone fields, which in turn is clamped in another structure. In the case of *Steel Pan*, these are the expelled barrel lid and the barrel body (Response, para. 87). However, various objects can serve as "plexus" and "plexus holder", which is also proven by the examples of the defendant (Response, para. 90 f.). However, it is incorrect that the sound should be independent of the concrete design of "plexus" and "plexus holder" (Response, para. 89; Defendant's Statement IV, para. 24). This will be discussed further in the context of the comments on technical conditionality and necessity (below, para. 203 ff.).

140 The fact that a certain principle of sound generation makes different instruments possible does not imply anything against the functionality of individual elements of these instruments. For example, all aerophonic instruments, including the recorder and the accordion, produce sound by exciting the air to vibrate. However, this does not mean that the finger holes of the recorder or the keys of the accordion are not technically conditioned or necessary.

141 In their comments on the "*principle of sound generation in steel pans*", the defendants also comment on the expert opinions they obtained (Response, para. 92 f.). It will be necessary to return to these and their deficiencies (below, para. 184 ff.). The assertions made by the defendants in this section in this respect are deemed to be disputed.

3.4.2. **Defendants are developing a new manufacturing process and a new "pang" material for *Steel Pans* (re. Response, paras. 94 to 96)**

142 *Steel pans* were originally made from barrels by driving out the barrel lid/bottom to create a trough. tone fields were worked into this trough (Claim I, para. 45 ff.; Claim II, para. 50 ff.; Claim III, para. 48 ff.). This is vividly demonstrated, for example, by defendant 2 in a YouTube video that was created during a tour of his then *steel band* in Hungary.

Supplement 121: Panbau - Hungary 1989 (video; from
<www.youtube.com/watch?v=1TTEWYEWp8>)

143 This manufacturing process of *steel pans* was very time-consuming and also meant that the material was not consistently the same thickness. The varying thickness of the sheet metal in turn affected the driving of the different tone fields into the sheet metal as well as their sound. It also became apparent that the material available in Switzerland and Europe was increasingly unsuitable for making *steel pans*. The available sheet metal contained increasingly less carbon, which led to unstable instruments that quickly went out of tune.

Supplement 122: Rohner/Schärer, A New Material Leads to Another Sound, 2000., p. 157 f.

144 The defendants therefore worked with physicists and engineers to research a **new manufacturing process** for *Steel Pans*. They found technical solutions to the problems described:

145 The increasingly low carbon content resulted in a less hard steel. Manufacturers of *steel pans* therefore had to drive the barrel lids out deeper and deeper to create the desired conditions for tuning work. The defendants therefore experimented with other materials such as copper, brass, or stainless steel, with which, however, they did not achieve satisfactory results. They therefore looked for ways to harden the steel. By chance, they learned that nitrogen could be suitable for hardening hot sheet metal. The defendants therefore tested various nitriding processes together with several factories specializing in hardening sheet metal and finally decided on gas nitriding. The **nitrided material** produced in this way was given the onomatopoeic name "**Pang**" by the defendants (see also Response, para. 94). Because the material produced in this way was harder on the outside than on the inside, the defendants also referred to it as "sandwich" hardening (Claim I, para. 56; Claim II, para. 61; Claim III, para. 59).

Supplement 122: Rohner/Schärer, A New Material Leads to Another Sound, 2000., p. 157 ff.

Supplement 123: Schärer/Rohner, Hardening Steel by Nitriding, 2000

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, p. 21 f.

146 In addition, the defendants researched mechanical alternatives to the manual expulsion of the barrel lid/bottom. After several attempts with other technical solutions, the defendants decided around 1995 in favor of the much more cost-effective and efficient **deep drawing** of the sheet metal (see also Response, para. 96). The defendants worked together with Hirsig Blech AG, a Swiss company specializing in deep drawing sheet metal. This company had the necessary material to produce the half-shell blanks of the defendants. To do this, they drew sheet metal blanks over a solid convex hemisphere made of tool steel, causing the sheet metal blanks to take on its shape. The mechanical deep drawing of the *steelpan blanks* had two major advantages for the defendants: firstly, it enabled significantly more cost-effective production. Secondly, the blank shapes had the same thickness everywhere because of the deep-drawing process.

Supplement 125: Rohner/Schärer/Schober, The Technology of a New Rawform, 2000, p. 189 ff.

Supplement 122: Rohner/Schärer, A New Material Leads to Another Sound, 2000, S. 160

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 23

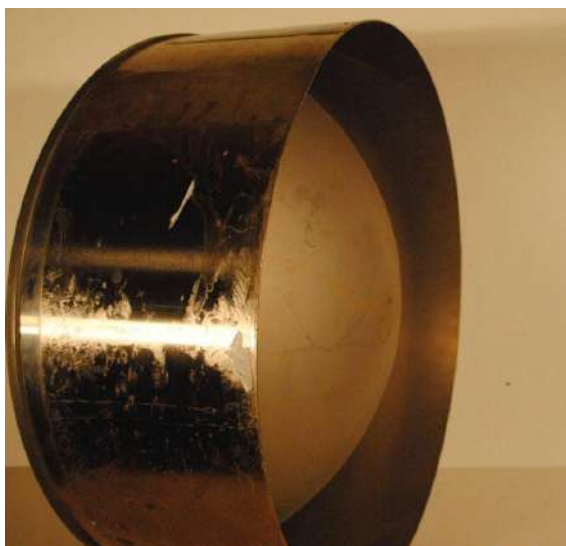
Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 12

147 Deep drawing only became an alternative to manual sheet metal expulsion because of the findings on nitride steel. The sheet used for deep drawing had to be soft; a sheet that was too hard was in danger of breaking during the deep drawing process. The defendants switched to deep drawing (softer) sheet first and then hardening it by means of nitriding.

Supplement 125: Rohner/Schärer/Schober, *The Technology of a New Rawform*, 2000, p. 189 ff.

Supplement 123: Schärer/Rohner, *Hardening Steel by Nitriding*, 2000, S. 3

148 In 1998, the defendants applied for a patent for this new manufacturing process. This protected a process for the manufacture of a sheet metal musical instrument, the steps of which consisted of deep drawing a steel sheet into a curved sheet metal membrane, subsequent hardening, and joining of the curved membrane with a cylindrical shell. This results in the blank shape for *Steel Pans* shown in paragraph 96 of the answer and below, consisting of a deep-drawn, nitride half shell and a cylindrical sheet metal ring.



Supplement 34: Swiss patent CH 693 319

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 2

3.4.3. Regarding the defendant's "Pang" instruments (response, paras. 97 to 107)

149 Subsequently, the defendants set out to study the properties of the "Pang" sheet and the new, purposefully hardened raw form with uniform thickness. The new material had a beneficial effect on the sound. Thus, the first "Pang" instruments were created. At the same time, the defendants studied the vibration modes of the sound fields by means of electromagnetic analysis and developed approaches of a systematic tuning process. The approach of the defendants was scientific, as they themselves write: "*trial and error*" or "*our search for answers was empirical: try and listen*".

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, pp. 8 f., 23 f.

150 The "**chempan**" mentioned by the defendants (Response, para. 98) - "*a cross between a djembe and a steelpan*" (Supplement 124, p. 7) - was the first hand-played instrument made of "pang" sheet metal. It was built between August and November 1995 by defendants 2 and 3 together with and according to the idea of the musician and percussion teacher Martin Hägler (Supplement 32, S. 7; Supplement 107, p. 5 f.). The "Tschempan" could be played by hand like the Djembe.

Supplement 124: Book "10 years of Panart, accountability, results, resonance", 2003, S. 7

Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 7

Supplement 107: Excerpt from <www.panart.ch/de/artikel/hang-ein-neues-musikinstrument-eine-marke-viele-miss-verstaendnisse> dated March 21, 2022, p. 5 f.

151 Then, in May 1996, the instruments "**Ping**", "**Peng**" and "**Pong**" mentioned by the defendants were created (Statement of Claim, para. 100). These were *steel pans* made of "pang" material in soprano, alto and tenor or baritone register. Because of the difference in sound, the defendants decided not to call these instruments *Steel Pans*. The tone fields were arranged in a circular pattern.

Supplement 126: Excerpt from website <www.lex.hangblog.org/de/pang-instrumente.htm> dated March 28, 2022, S. 1

Supplement 124: Book "10 years of Panart, accountability, results, resonance", 2003, S. 24

Supplement 127: Rohner/Schärer, The Pang Instruments, 2000., p. 199 f. (under "5. Ping, Peng, Pong")

152 Already before, in 1995, the defendants had developed the "**Black Baby**". This was also made of hardened metal. At that time, the Defendants experimented with a closed sound box - a sound box in which the bottom was not open but closed, unlike the conventional *steel pan*. Thus, the resonance body of the "Black Baby" consisted of a cylinder and an adjoining convex hemisphere. The illustration in paragraph 99 of the response (below left, rotated) is misleading in that only the sound box is visible, but not the shell with the sound fields (below right). This gives the false impression that the convex hemisphere is the playing side. Contrary to the defendants, the motivation of the defendants was also not to "*find an aesthetically pleasing solution*" (Response, para. 99). Rather, they sought to use the closed resonator to "*control the natural vibrations of the shell [i.e., the cylinder], increase its resonance, and thus lose less energy.*" (Supplement 30, S. 2).

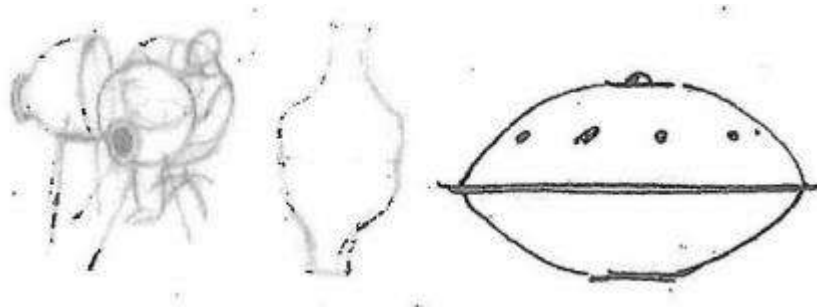


Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 3

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 2

153 In its judgment, the LG Hamburg assumed, based on the defendants' submission, that this "Black Baby" had been the basis for the "Hang", that the defendants had erected the downward-facing shell of a *Steel Pan* upwards in a dome-

like manner, then made sketches for the further development of the "Hang" (including the one shown below), and that they had thus arrived at the first draft of the "Hang", Prototype 1. This is not true in view of the actual history of the development of the "Hang" (cf. in detail above, para. 84 ff.). In this point, too, the judgment of the Hamburg Regional Court is based on incorrect factual foundations.



Defendant's

Supplement 2:

Judgment of the Hamburg Regional Court, Case No. 310 O 160/20, of August 20, 2020, p. 10 f.

154

The investigation of the "cavity resonance" led the defendants to the "pang" instrument described as "amphora pang" in the statement of defense. Again, the defendants were not interested in making the sounding body "aesthetically pleasing" (Response, para. 101). Rather, it was an "object for the study of cavity resonance." The defendants were interested in technical research on the sound object, which could not be more clearly emphasized by their conclusion on the "amphora pang" experiment: "failed experiment: damping too great, jacket swallows too much vibration energy" (Supplement 30, p. 3 f.)



Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 3 f.

155 In the years 1996 to 1999, the defendants also developed the "**Tubal**", which is modeled on the marimba (Response, para. 102 f.). The motivation of the defendants was to explore what happens when a sound field is isolated from a complex system such as a *steel pan*. The tubal is an instrument composed of various sound bodies. The individual cylindrical sound bodies each had a sound field with a **dome** (cf. Supplement 30, S. 12). The resonators were closed at the bottom with a base made of Styrofoam, which had a round hole in the middle (cf. Supplement 30, S. 12). By moving the polystyrene base, the Helmholtz resonance of the resonator could be tuned to the respective tone.



Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, S. 5

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 12

Supplement 126: Excerpt from website <www.lex.hangblog.org/de/pang-instrumente.htm> dated March 28, 2022, S. 2

Supplement 127: Rohner/Schärer, The Pang Instruments, 2000., p. 199 (under "3. Tubal")

156 Exploration of the dome was preceded by exploration of an **accidental umbilicus**. According to Defendants, the umbilicus "appeared" in June 1998 (Supplement 124, S. 11). Defendants had noticed that when the tone panels were driven into the hardened "pang" material, an elliptical navel appeared in the center of a tone panel that was under intense pressure (Supplement 122, S.

160). At first, the defendants still tried to flatten this umbilicus (Supplement 122, p. 160), until they noticed that, unlike the previously shrill *Steel Pans*, the tone fields with an umbilicus had a warmer, more stable sound (Supplement 124, S. 24; Supplement 128, S. 10; Supplement 39, S. 4).

- Supplement 124:** Book "10 years of Panart, accountability, results, resonance", 2003
- Supplement 122:** Rohner/Schärer, A New Material Leads to Another Sound, 2000
- Supplement 33:** Book "hang. Sheet metal sound sculpture", 2013, p. 25 f.
- Supplement 128:** Rohner/Schärer, Abstracts and Posters, 2000, S. 10
- Supplement 39:** Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, S. 4

157 The navel led the defendants to study the gong and gamelan instruments (Supplement 127, S. 197). Among other things, Defendants studied the influence of the hump in the hump gong, that is, a gong that has a distinct bulge in the middle. Thus, in February 1999, they made a study trip to Munich and visited the music collection of the City Museum there. There, Dr. Varsanyi, an ethnologist specializing in Indonesia, introduced the defendants to the history and construction art of the gamelan, an Indonesian musical ensemble consisting of gongs, metallophones and, in some cases, drums, string instruments, flutes, etc. He showed the defendants a video of tuning work on the gong Ageng (see figure below), the largest gong in the gamelan. The **hump** (dome) of the gong "*aroused*" the defendants' "*interest*" or was "*up for discussion*" (on the whole Supplement 124, S. 12; Supplement 32, S. 6). Shortly thereafter, Defendants were supplied with the first "Tubal" chimes with a central **dome** (Supplement 124, S. 12).



- Supplement 32:** Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> as of October 8, 2020.
- Supplement 124:** Book "10 years of Panart, accountability, results, resonance", 2003
- Supplement 127:** Rohner/Schärer, The Pang Instruments, 2000

158 The defendants themselves describe the path over the navel to the dome as follows:

*"To form the tones[,] we had to compress the sheet metal with a wedge. This created a navel. In the beginning, we still tried to flatten this umbilicus back into a plate, until we realized that it brought us something new that was advantageous. The sound was more stable and the fundamental stronger. Everything was pushing to give the tone a new geometry, the strong plate had to be specifically reshaped. The navel led to the study of the gong and gamelan instruments: What is the influence of the hump in the humped gong? How are the gamelan tuned? **Can we also hit domes into our shape and then still tune harmonically?** And other instruments, how are they harmonically tuned? Why does the tabla [North Indian drum] have a mass in the middle of the head? What shape must a bell have? **Our search for answers was empirical: trial and error and listening. We made gongs from our sheet metal that we called pung, cymbals that we called orge, and pang bells. Ping, Peng, and Pong** [i.e., steel pans made of "pang" material, above, Rz. 151] **were given domes.**"*

- Supplement 124:** Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 24

159 Further experiments with the "Pang" sheet resulted in "new" "Pang" instruments. "New" because they were made of a novel material and therefore had a novel timbre and dynamic, but not because they were new instruments. Thus, as of September 1999, the defendants built a **gong with a dome** designated as "**Pung**" (Statement of Claim, para. 104; Statement of Claim I, para. 98; Statement of Claim II, para. 103; Statement of Claim III, para. 101), a cymbal with a

dome designated as "**Orage**" and bells designated as "**Pang**" bells and partially fitted with domes (see the illustration below, para. 160).

Supplement 127: Rohner/Schärer, The Pang Instruments, 2000, p. 197 f.

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 13

Supplement 32: Excerpt from website <www.panart.ch/de/geschichte/die-geschichte-der-panart> dated October 8, 2020, S. 6

Supplement 30: Excerpt from website <www.panart.ch/de/geschichte/galerie> dated October 7, 2020, p. 3 ff.

160 The following illustration shows the "Pang" instruments developed by the defendants, except "Tschimpan": 1 = "Ping" (*Steel Pan*); 2 = "Pong" (*Steel Pan*); 3 = "Orage" (Cymbals); 4 = "Pung" (Gong); 5 = "Pang" Bells, 6 = Double "Peng" (*Steel Pan*); 7 = "Peng" (*Steel Pan*); 8 = "Tubal") .



Supplement 107: Excerpt from <www.panart.ch/de/artikel/hang-ein-neues-musikinstrument-eine-marke-viele-miss-verstaendnisse> dated March 21, 2022, S. 1

161 The defendants also mounted various "plexus holders" on the "pang" bells (above, no. 5). This resulted, for example, in the instruments illustrated in para.

106 of the statement of claim and below, which are reminiscent of the "amphora pang" (above, para. 154):



Supplement 129: 45 years on the road with the hammer - Felix Rohner, tuner, tells (video; from www.youtube.com/watch?v=keKQt8RGgY8&t=5ss), min. 17:20 to 18:05

162 Contrary to what the defendants would have us believe in their response, the "Pang" instruments are therefore not the result of an aesthetic design process, but rather arose as a consequence of technical research into the novel "Pang" sheet metal.

3.4.4. On the development of the "hang" (Response, paras. 108 to 119)

163 Then, in October 1999, the first prototype of the "Hang" was created spontaneously and by chance. Just as the "Pang" instrument came into being as a result of technical research on the brass and its sound, the further development of Prototype 1, which came into being spontaneously and by chance, to the first generation of the "Hang" is also characterized by technical development. In this regard, reference can be made to what has already been said (above, para. 84 ff.; cf. also Claim I, para. 58 ff.; Claim II, para. 63 ff.; Claim III, para. 61 ff.). As shown, it is not true that the defendants, following Prototype 1, concentrated on *"transforming the created sound object into an appealing and harmonious form"* or *"condensing a convex-concave plasticity into an organic and dynamic form"* (Statement of Claim, para. 111). Rather, the "Hang" was the result of a purely technical-craftsmanly further development of a randomly and spontaneously created prototype.

164 In this context, the defendants also state that Reto Weber presented himself as the inventor and developer of the "Hang", which had *to be "corrected by the respective media"* afterwards (Response, para. 112). This is disputed. The defendants refer here, on the face of it, to an interview with Reto Weber in the Schweizer Musikzeitung (SMZ) of September 2014, in which Reto Weber stated, among other things:

"As a percussionist, I am one of the melodists, so I always look for the melody first and then the rhythm, so the idea had arisen to have an instrument with more notes than the ghatam. With this wish I then went to Felix Rohner in Bern, who was known as a steel pan maker. He immediately took up the idea and built the Hang. "

and:

"The ghatam just made me want to work with more notes. "

Supplement 130: Flash of inspiration or work of patience?, in: SMZ 9/2014, p. 9 ff., S. 11

165 This did not have to be *"corrected by SMZ"*. Rather, the defendants had a counterstatement published in which they talked down Reto Weber's contribution. The percussionist, who was unknown to them, had wanted to have his *steel pan* tuned by them, but he had not brought any idea with him. With this, the defendants contradict their own statements elsewhere (above, para. 88 ff.). Particularly illuminating are the following statements of defendant 2 on his understanding of a sound sculpture:

"[...] Sound sculptures, as we call them, belong to a genus of a special kind. They are instruments with a strong effect on the cortex, hence the ability of hang sound to relax people, to take away pain, to relieve them of heavy thoughts or even traumas. They are more than musical instruments. They act in the moment; they are built for the moment. "

It is also clear from this that the defendants understand the object of the "sculpture" to be the sound (and its effect), but not the design of the instrument (cf. on this already above, para. 81).

Supplement 131: Hang - an invention, in: SMZ 7/8/2015, p. 20

3.4.5. Regarding the awards of the defendant (Response, paras. 76 and 120 to 124)

166 The defendants then state that they and the "Hang" have been awarded various prizes (Response, paras. 76 and 120 f.), namely at the "Exempla" in 2000 with the Bavarian State Prize for Special Technical Achievement in Crafts (see below, paras. 167 ff.) and with the Bern Music Prize (below, para. 171 f.). The following clarifications are required in this regard:

167 The defendants Supplemented the "Pang" instrument set (above, para. 149 ff.) at the special Supplementation "Exempla" of the International Craft Fair Munich about rhythm, which took place from March 16 to 22, 2000. In their response, the defendants also claim that they "*Supplemented*" the prototype 5 of the "Hang" at this trade fair - which took place nota bene just five months after Reto Weber's visit to the defendants' workshop (Response, para. 120).

168 That the defendants Supplemented a prototype of the "Hang", or even prototype 5, on the occasion of the special Supplementation is denied (contrary to Claim I, para. 63; Claim II, para. 68; Claim III, para. 66). The photos copied in by the defendants (Statement of Claim, para. 120) only show a "pung" (gong, on the left picture at the back left), "pang" bells (half shells stacked on top of each other) and a "ping", "pong" or "peng" (*steel pan*, each at the front, on stands). The Defendants also contradict their own statements elsewhere: for example, in a brochure from 2008 or in the books published on the occasion of the 10th and 20th anniversary of Defendant 1, the Defendants wrote that they had presented the "Hang" in **spring 2011 at the Frankfurt Music Fair** (Supplement 33, S. 6; Supplement 40, S. 6; Supplement 124, p. 14; so incidentally also above, para. 93, third quote). Furthermore, the defendants state on their website that they had shaped the resonance opening of prototype 5 after a recommendation by Auto-Tuner on the occasion of a meeting in February 2001 (Supplement 32, S. 7; Supplement 30, p. 12) - Prototype 5 will therefore hardly have been Supplemented in Munich a good year earlier.

Supplement 33: Book "hang. Sheet metal sound sculpture", 2013

Supplement 40: Brochure "hang", 2008

- Supplement 124:** Book "10 years of Panart, accountability, results, resonance", 2003
- Supplement 32:** Excerpt from <www.panart.ch/de/geschichte/die-geschichte-der-panart> website as of October 8, 2020.
- Supplement 30:** Website <www.panart.ch/de/geschichte/galerie> excerpt dated October 7, 2020.

169 Next, it is important to note that the defendants were awarded the Bavarian State Prize 2000 for special **technical achievement** in the craft trades at the special "Exempla" show (Response, para. 120). The Bavarian State Prize is awarded to up to 30 Supplementers at the Munich International Crafts Fair in each case upon application. This Bavarian State Prize is awarded in two different categories: (1) design crafts - award criteria: Design and quality of execution - and (2) technical craftsmanship - award criteria: technical solution, quality of execution, degree of innovation, application benefit, sustainability. Thus, it was precisely **not the design of their instruments that was awarded, but the technical performance of the defendant**. In the area of technology, on the last trade fair, for example, barrier-free shower trays, a universal automatic welding head or a system that enables spectacle wearers to work with virtual reality glasses were awarded.

- Supplement 124:** Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 14
- Supplement 132:** Excerpt from website <www.hwk-muenchen.de/artikel/bayerischer-staatspreis> dated March 23, 2022
- Supplement 133:** Excerpt from website <www.ihm.de/messe/politische-kommunikation/bundes-und-staatspreise/bayerische-staatspreise-2019> dated May 4, 2022, p. 3 ff.

170 In contrast, the defendants claimed to the German courts that they had been awarded for the "Hang" on the special show "Exempla" (above, para. 124). According to what has been said, this is not true. They were awarded for the "Pang", and not for the design of this either.

171 In 2020, the defendants - along with the musicians Stephan Eicher, Xavier Dayer and Manuel Pasquellini's Akku Quintet - also received the **Music Prize of the Canton of Bern** (Response, para. 76 and para. 121). Again, the award was not for the design or creation of the "Hang", but rather for the defendant's contribution to sound and music. The music prize is awarded every year as a token of appreciation and recognition for the work of outstanding **music creators** (see

also Defendant's Supplement 8). The prize is awarded to professional musicians from all artistic and organizational areas of musical life, as well as all musical styles, who have had a decisive influence on the Bernese music scene. Among the better-known award winners are Endo Anaconda (Stiller Has, 2015), Züri West (2012), Polo Hofer (2008) and the music editorial team of DRS 2 (1991).

Supplement 134: Cultural Promotion of the Canton of Berne, Information Sheet Music, p. 4 (right column)

Supplement 135: List of the winners of the music prizes of the Canton of Berne since 1988

172 The defendants were thus recognized for a technical innovation (Bavarian State Prize for Special Technical Achievement in Crafts) and for a contribution to music (Bern Music Prize). Whether the defendants have made a significant (sound) technical contribution can be left open. In the present case, the only question is whether the external design of the "Hang" is protected by copyright. Contrary to the defendants (statement of defense, para. 242), the technical and musical price do not speak for a copyright protection of the design of the "Hang".

3.5. Regarding the visual characteristics of the "hang" (Response, paras. 125 to 128)

173 The defendants claim that the first generation "Hang" and its later variants have the following visual characteristics that shape the overall impression (Response, para. 127):

- **Lenticular basic shape:** Prototype 1, which was created spontaneously and by chance, also had a lenticular shape, albeit somewhat more bulbous (above, paras. 86 ff. and esp. 91). For technical reasons, i.e. to make the "*too fat*" and "*too big*" prototype playable at all (above, para. 92 ff.), the height and diameter of the prototype were subsequently reduced (above, para. 97).
- **Dome in the central sound field on the upper side:** This was added based on sound technical findings of the defendant; it was not a design decision (above, para. 104 ff.). These findings went back to the defendant's research on the navels occurring with the "pang" plate and the domes of the (hunchback) gong, cymbal, and other instruments (above, para. 156 ff.).

Apart from that, the terminology used by the Defendants in the Response in connection with the dome is imprecise. Sometimes the defendants refer to the dome as a "ding" (e.g., Response, para. 116 or 127), sometimes they speak (more correctly) of the "ding-dome" (e.g., Response, para. 187). The "ding" correctly refers to the entire tone field positioned centrally on the upper side, including the dome and the flattened area surrounding the dome.

- **Opening (resonance hole) on the underside:** Such an opening was already present on the "*accidental first*" (above, paras. 86 ff. and esp. 91). The resonance hole was retained for tonal reasons, namely, to enable Helmholtz resonance (above, para. 107).
- **Circularly arranged tone fields on the upper surface:** Prototype 1, which was created spontaneously and by chance, already had circularly arranged tone fields on the upper surface (above, paras. 86 ff. and esp. 91). This was not changed.

174 The further development of the spontaneously and accidentally created prototype 1 to the "Hang" of the first generation and in particular the four features listed above were not based on creative decisions of the defendant, but rather on their technical knowledge and thus craftsmanship (above, para. 84 et seq.). For this reason alone, the prototypes as well as the various versions of the "Hang" do not qualify as works, even if they may be musically and tonally high-quality instruments. In any case, however, the elements listed above all fulfill a purely functional or technical purpose and are not accessible to copyright protection for this reason either (see below, paras. 176 ff.).

3.6. About the defendant's other instruments (Response, paras. 129 and 130)

175 Before the defendants discuss the functionality of the individual features of the "Hang", they explain in their response which other instruments they have developed since the "Hang" (Response, para. 129). These are different instruments in each case, so that it is unnecessary to go into further detail. However, it is interesting to note the defendants' assertion that each sound object is unique in sound (Response, para. 130). With this, they place themselves in an insoluble contradiction to their repeated assertion that the shape of a sound object is immaterial for its sound.

3.7. On the technical function or functionality of the individual visual features (Response, paras. 131 to 206)

176 As already stated in the complaint, the four characteristics of "hang" listed above are all functional (Claim I, para. 100 et seq.; Claim II, para. 105 et seq.; Claim III, para. 102 et seq.). In their response, the defendants claim by way of introduction that the plaintiffs misjudge that a functionality, i.e. a possible purpose of a work, is not a ground for exclusion from protection (Response, para. 13). This is not true: a purpose of use is of course not a ground for exclusion from protection; objects of use can be protected by copyright. However, copyright protection cannot exist on purely functional design features of utility objects. However, this is exactly what the defendants want to claim in the present case.

3.7.1. Preliminary remarks (on response, paras. 131 to 150)

177 Before the plaintiffs explain that all design features of the "Hang" are functionally conditioned, so that copyright protection is out of the question for this reason as well (below, para. 198 ff.), the plaintiffs will first explain below in the context of three preliminary remarks:

- that the intended use of the "hang" is as a brass sound instrument that can be played by hand on the lap and has various tones and (like the ghatam) a Helmholtz resonator (below, para. 178 ff.); and
- that the functionality of individual design features must be measured against the intended use of the object in question, which the defendants seem to misjudge (below, para. 181 ff.);
- that it is irrelevant that other instruments are supposed to be sonically comparable to the "Hang", especially since these are other instruments with a different purpose of use (below, para. 187 ff.).

3.7.1.1. The utility purpose of the "Hang": a brass instrument that can be played by hand on the lap and has different tones and a Helmholtz resonance

178 In their statements on the technical conditionality, the defendants once again present the "Hang" as an object that can only secondarily serve as an instrument (Response, para. 132). The "Hang" was prompted by the task of producing an instrument that can be played by hand on the lap and has various tones as well as a Helmholtz resonance. This is the intended use of the "Hang". The

defendants then also understood the "Hang" as an instrument (and themselves as instrument makers; above, para. 79 ff.). That the defendants today elevate the "Hang" to a "sculpture" (cf. also above, para. 81) or a "social sculpture" does not change this.

179 It is also irrelevant that the "Hang", if it is considered solely "*under the aspect of sound production*" - i.e. as an instrument - irrespective of its "*sculptural appearance*", is supposed to be an "*attempt*" to "*pick up the player in his innermost being and lead him holistically to a spontaneous musical expression that knows no right or wrong playing*" (Response, para. 133). Or that the defendants "*wanted to create a sound object for everyone with the 'Hang', independent of certain specifications, through a musical reduction*" (Response, para. 136). These are **mere ideas and motifs that were** only added *ex post* anyway.

180 It is also wrong when the defendants, in an effort not to present the "Hang" as an instrument, state that it is "*not a suitable instrument for music in the narrower sense, let alone for manifestations of a musician per se*", that "*no two sounds are alike*" or that the "Hang" "*is not mastered by its players*" (Response, para. 134 et seq.). Thus, they diametrically contradict their own earlier representation. For example, they stated to the Berner Zeitung: "*And with the compact, handy 'Hang', on the one hand, an instrument has been created that produces **stable sounds** and can **also be used in bands and orchestras.***" (Supplement 35). Furthermore, in the early years, the defendants distributed the "Hang" in 45 different scales (Supplement 136, Supplement 137 and Supplement 138). Finally, there are quite a few musicians who play professional "Hang" and "master" it (Supplement 139). Thus, it is established that the "Hang" is very well suited as an instrument and is also used as such - which is what it was intended for by the defendants (see also above, para. 79 f.).

- Supplement 35:** The new sound for crops and cows, Berner Zeitung, March 12, 2001, p. 23
- Supplement 136:** Flyer from the year 2003
- Supplement 137:** Wayback Machine excerpt to web page <www.hang.ch/sound/index.html> dated August 6, 2004.
- Supplement 138:** Wayback Machine excerpt to web page <www.hang.ch/tonleiter.html> dated July 2, 2004.
- Supplement 139:** Compilation of various "hang" musicians

3.7.1.2. The functionality of the individual features of the "Hang" is not to be measured by a specific sound, but by the purpose of use

181 The "Hang" is an instrument and thus an object of utility. The extent to which features of a utilitarian object are functional and thus not artistic is measured by its intended use.

182 The defendants base their assessment of whether the individual features of the "hang" are technically conditioned or necessary on an incorrect standard. They measure the individual features in terms of producing a sound comparable to a "hang" (e.g., Response, para. 140). However, the task that the defendants faced was to produce an instrument that could be played with the hands on the lap, with different tones and a resonating body. Therefore, the question is not whether the individual design features of the "Hang" are necessary to produce a certain sound, but rather whether they are functional and thus not artistic to the purpose of use.

183 Ultimately, the defendants base their alleged work on a certain sound and not on a certain design. The defendants themselves prove that this cannot be correct by completely disregarding the sound in the question of the scope of protection. The sound of the "Hang" depends on the material and the concrete design of the tone fields. However, the defendants do not claim any copyright on this (see Response, para. 127). There is a good reason for this: on the one hand, the design of the sound fields is technically conditioned to the sound, on which the defendants have published extensively. On the other hand, however, the scope of protection claimed by the defendants would be different and would not allow the defendants to proceed against *Handpans* in general, as they do today.

Supplement 140: Rohner/Schärer, *The Dome Geometry*, 2000
Supplement 141: Rohner/Schärer, *A Systematic Tuning Process*, 2000
Supplement 142: Rossing/Hansen, *Science of the Steelpan: What is Known and What is Not*, 2000, p. 24 ff.

184 Like the defendants, the party expert opinions obtained by them are based on an incorrect question. They discuss the extent to which the external design of the "Hang" is necessary for a sound comparable to the "Hang." Specifically, Anthony Achong (Defendant's Supplement 12) addresses "*whether two different percussion instruments (idiophone class of bowl category), even if they have different geometric shapes, could have similar sound characteristics,*" and Michael Steppat (Defendant's Supplement 13) comments on "*whether two sounding*

bodies can have approximately the same sound characteristics despite having different geometric structures." In contrast, both party experts do not address the relevant question of the extent to which the design features of the "Hang" are functionally justified regarding the intended use.

- 185 The conclusions, which the party experts want to draw, also fall short. Thus, Anthony Achong states that the *"external shape of the Hang [is] not decisive for the sound it produces"*, so *"he concludes that the individual shape of the Hang with two joined bowls and the circularly arranged tone fields as well as a tone field in the middle on top was chosen by the designers primarily for aesthetic reasons."* This is not true: *first*, the shape of the "Hang" very much influences the sound it produces (esp. below, para. 203 ff.). *Secondly*, the design was not chosen for *"aesthetic reasons"* but resulted from a technical-craftsmanship further development of a randomly and spontaneously created prototype (supra, para. 84 ff.). *Thirdly*, even if a comparable sound could be produced with other instruments, this would not lead to the conclusion that the features of the "Hang" instrument relevant in the present case are not functional to the intended use and were chosen, for example, for technical playing reasons. If this argumentation were to be followed, it would also have to be concluded, for example, from the fact that the time can be conveyed "comparably" in different ways (digital clock, sundial, etc.) that the clock hand of an analog clock is not functional but was chosen for *"aesthetic reasons"*. And *fourth*, the reverse conclusion that if a design feature is not technically necessary, it was chosen for *"aesthetic reasons"* is also prohibited. Just because a design feature is not technically necessary does not mean that it was chosen for *"aesthetic reasons"* or is based on creative decisions, as the history of the development of the "Hang" impressively demonstrates.
- 186 Michael Steppat would like to conclude that two geometrically different tone fields could produce the same kind of sound and that the same applies to the overall shape of the "Hang", *"whose concrete design is predominantly design-related"*. Consequently, here, too, it is not examined to what extent the design features of the "Hang" are functionally conditioned with regard to the intended use. Instead, it is claimed that the sound of the "Hang" could also be produced with a differently designed instrument, from which it is concluded that the design features of the "Hang" are *"design-related"*. Thus, the same deficiencies are present as in the Achong expert opinion.

3.7.1.3. That other instruments should be sonically comparable with the "Hang" is irrelevant

187 It has already been explained that it is not decisive whether a sound comparable to that of the "Hang" could also be produced with instruments that do not Supplement the design features of the "Hang" (above, para. 181 ff.). In their response, the defendants present various alleged alternatives as to how an object could be designed that produces a sound comparable to that of the "Hang" (Response, para. 140 ff.). However, these are different instruments in each case (see below, para. 190 ff.).

188 Similarly, it could be argued that a cello and a violin are "*comparable in sound*". Therefore, the sting of the cello or the chinrest of the violin are not functional or technically conditioned, because "*comparable tones*" could also be produced with another instrument without sting or chinrest. A trumpet would be an alternative to a trombone, a bass to a guitar or a gong to a cymbal. All this is obviously not the case.

189 Apart from that, the defendants do not explain when two instruments are supposed to be tonally comparable. Without justification, they affirm this for individual instruments and deny it for others. The fact that the distinction drawn by the defendants is arbitrary and lacks any basis is proven by their statements in their comments on the inspection. There they state that the "Ayasa instrument" cannot be compared with the "Hang" in terms of sound "*because*" it is "*made of softer sheet metal and not of pang*" (Defendant's Statement IV, para. 19). The "Pang" material should therefore be decisive. But why then an instrument made of PVC or wood (see below, para. 191 and 193 f.) should be comparable to the "Hang" in terms of sound, is not clear.

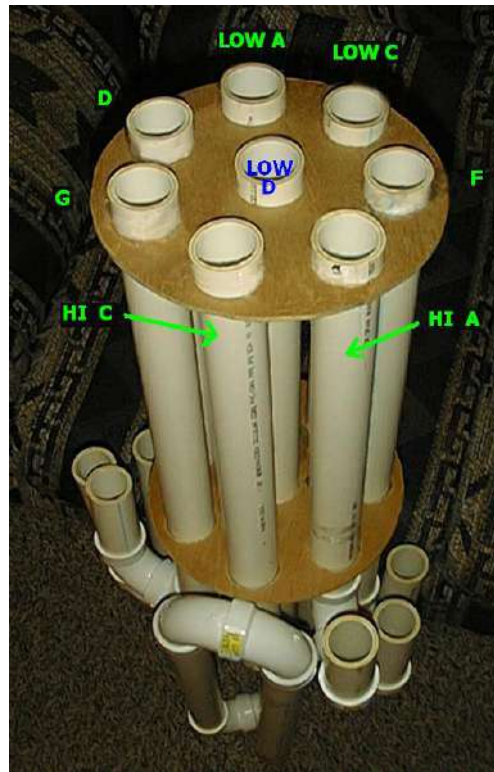
190 As the first alternative, which is said to be "*sonically comparable to the 'Hang'*", the defendants list the "**Tubal**" (Response, para. 141 f.; supra, para. 155). The "tubal" is an instrument composed of single notes. It is not played sitting down, but standing up, with mallets and not by hand. It is a different instrument that does not have the same use as the "hang". Furthermore, it is disputed that the "Tubal" sounds comparable to the "Hang".



Supplement 126: Excerpt from website
<www.lex.hangblog.org/de/pang-instrumente.htm>
dated March 28, 2022, S. 2

Expert opinion: On the differences between "Tubal" and "Hang".

191 The next instrument that "*sounds like the 'hang'*" is said to be a "**PVC Pipe Instrument**" built by Dennis Havlena (Response, para. 144). However, he himself states: "*this is not a hang drum*" (Defendant's Supplement 21). The instrument is not made of sheet metal, but PVC, is played standing with two paddles (or flip-flops) and not sitting by hand, etc. It is simply a completely different instrument. By the way, it does not sound anything like a "hang", as can be seen from Dennis Havlena's video in Supplement 143 results.



- Def. Supp. 21:** Website excerpt <www.dennishavlena.com/PVC-hang>
- Supplement 143:** DIY PVC Pipe Instrument -- plays like a hang drum (video, from <www.youtube.com/watch?v=k5dD4KkJcAw>)
- Expert opinion:** On the differences between "PVC Pipe Instrument" and "Hang"

192

The tongue drum (response, para. 145) is also a different instrument that differs noticeably from the *handpan*. The instrument is mainly played with mallets by striking the steel tongues. *Steel tongue drums* are significantly heavier and smaller than *handpans*. They are quieter, but they resonate longer (so-called *sustain*), which leads to too much blending of sounds, especially when played in

a faster, more percussive manner. The sound is not comparable to that of a *handpan*. This is also a different instrument.



Supplement 11: Wikipedia excerpt on "Handpan" dated October 20, 2020, S. 3

Supplement 144: Website <www.handpan-portal.de/steel-tongue-drums> excerpted from April 8, 2022

Expert opinion: On the differences between reed drum and "hang"

193 The "**Hamgam**" (Response, para. 146) is also a different percussion instrument. It is made of wood, not of sheet metal. The "hamgam" is tuned via a magnetic system. In terms of sound, the "hamgam" has nothing in common with the "hang".

Defendant Supplement

23: Website Excerpt <www.majiddrums.com/hamgam>

Supplement 145: HAMGAM - Majid Drums Percussion Revolution (Video; from <www.youtube.com/watch?v=1nYujxvAW9U>)

Expert opinion: On the differences between "hamgam" and "hang".

194 The "**Sundrum**" (Response, para. 147) is a wooden tongue drum and thus also a different instrument (cf. on the *Steel Tongue Drum* above, para. 192). The sound of the "Sundrum" is not comparable to that of the "Hang".

Supplement 146: Sundrum Teaser (video; from
<www.youtube.com/watch?v=tyNj8Y_mGFc&t=81s>)

Expert opinion: On the differences between reed drum and "hang"

195 **Digital instruments cannot** be equated with analog instruments. The sound is produced differently. Just because, for example, a keyboard does not have hammers and strings, this does not mean that hammers and strings are not functional in a (classical) piano. Which sound is produced when playing the digital instrument "Oval", which the defendants depict in paragraph 148 of the response, is entirely up to the player - it could also sound like a triangle, opera singing or dogs barking (Supplement 147, min. 1:05: "*you can load up any sound you want into it*"). This is common with digital instruments. Moreover, it is clear from the supplement submitted by the defendants that the shape of the "Oval" follows the "*ergonomics of a HandPan*". This shows that the lens shape is particularly advantageous from a playing point of view (see also below, para. 199).

Supplement 147: Oval The First Digital HandPan (video; from
<www.youtube.com/watch?v=Ft6lXtaK8aU>)

Defendant's

Supplement 25: Web Page Excerpt <www.kickstarter.com>, p. 17.

196 The "**Kaisos Steel Drum**" (Response, para. 149) is also a different instrument. It is often played standing up with mallets. It is disputed that it sounds similar to a "hang". The defendants themselves described this instrument as acoustic "*non-sense*".



Supplement 26:

Kaisos Steel Drums

Supplement 107:

Excerpt from <www.panart.ch/de/artikel/hang-ein-neues-musikinstrument-eine-marke-viele-miss-verstaendnisse> dated March 21, 2022, S. 7

Expert opinion:

On the differences between "Kaisos Steel Drum" and "Hang".

197 What the defendants finally want to derive in their favor from René Ramp's "Renedoklang" (Response, para. 150) is not apparent. It is not an instrument. The 90-centimeter-high sounding body can apparently be excited with a mallet. However, to all appearances, it cannot be played by hand while seated, does not have different tones, and does not have a Helmholtz resonator. Finally, it is disputed that the "Renedoklang" should be comparable in sound to the "Hang".

3.7.2. On the lens shape (Response, paras. 151 to 168)

198 In assessing the functionality of the lens shape, the defendants disregard the intended use of the "Hang". It may be true that for idiophones, the only fundamental requirement for sound production is the presence of vibrating elements (Response, para. 151). Idiophones are self-sounders, which include, in addition to the *handpan*, for example, triangle, xylophone, bells, gongs, cymbals, cymbals or castanets. The purpose of the "Hang" is not to provide any idiophone, but a brass instrument with different tones and Helmholtz resonance that can

be played by hand on the lap. According to this intended use, the functionality of the lens shape is also to be assessed (above, para. 181 ff.).

Supplement 148: Wikipedia excerpt for "Idiophone" dated April 5, 2022

3.7.2.1. Regarding the effects of lens shape on playability or ergonomics

199 As already explained in the statement of claim, the lens shape is, *firstly*, particularly **advantageous from a playing point of view regarding** the intended use. It is a particularly comfortable shape for playing the instrument on the lap while striking the tone fields on the upper side with the hand (Claim I, para. 104; Claim II, para. 109; Claim III, para. 107). Defendants themselves state, "*At 53 cm in diameter, 24 cm in height, and 3.7 kg in weight, the HANG has **ideal dimensions for playing with the hands as well as for the acoustic requirements.***" (Emphasis added; Supplement 149). That a round shape or spherical shape would not provide support and would be more uncomfortable to play (Claim I, para. 104; Claim II, para. 109; Claim III, para. 107) is rightly not disputed by the Defendants. If the sounding body were shaped as a car roof, watering can or water bucket, as mentioned by the defendants (Response, para. 154), it would not be possible to play it in accordance with its intended use. The same applies to the "Amphorenpang" (Response, para. 160) or the instruments depicted in para. 162 of the Response, including the "Black Baby" (on this already above, para. 152).

Supplement 149: Wayback Machine excerpt to web page <www.hang.ch/produkt/details.html> dated March 21, 2005.

Expert opinion: On the effects of lens shape on playability or ergonomics.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel

Witness: Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

200 It is disputed that an elliptical, paraboloid or ovaloid shape would be better suited for playing with the hands than a lens shape (Response, para. 163). The examples of shapes cited by the defendants are therefore not even close to being equivalent to a lens shape in terms of playing technique. For example, the "*alternative sound sculpture*" on p. 1 of Defendant's Supplement 30 cannot be played on the lap or does not offer the same support. In the case of the figure

examples "knee", "gene" or "pouf" on p. 2 and 3 of the aforementioned supplement, the resonance hole cannot be closed with the legs (below, para. 239), so that these designs are already not equivalent for this reason. Also the "Hang Gen" on p. 4 f. of the supplement cannot be placed equally well on the lap. This also applies to the instrument with a flat "plexus holder" according to paragraph 167 of the response. Furthermore, all these instruments are different instruments than the "Hang".

Expert opinion:	On the effects of lens shape on playability or ergonomics.
Party survey:	Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands
Party survey:	Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness:	Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

201 To the extent that the defendants also claim that the "Hang" "does *not necessarily* have to be *played on the lap*" (Response, para. 167), they fail to recognize that the purpose of use of the "Hang" is precisely to play it on the lap (see transcript of the instruction hearing, pag. 506: "*The purpose of the Hang is that one sits down and plays on it.*"). Contrary to the defendant, this cannot simply be ignored. A piano could also be played standing or kneeling, yet it is intended to be played sitting down. The arrangement of the keyboard at the height at which the hands are located when sitting does not become less functional as a result of alternative playing possibilities.

202 The defendant's assertion that they had chosen two spherical segmental shells "*solely for aesthetic reasons*" is also incorrect (Response, para. 161). This is clearly not true. Originally, two "*half shells lying around*" (above, para. 89) were joined together without this being done for aesthetic reasons. Subsequently, this "*too fat*" "*accidental first piece*" was reduced to a **playable size and shape** (above, marg. no. 92 f.), which resulted in the lens shape.

3.7.2.2. On the effects of the lens shape on the sound

203 **Secondly**, the shape of the lens influences the **sound** (contrary to Response, para. 153). For their part, the plaintiffs have obtained an expert opinion from Prof. Jim Woodhouse, on the technical sound issues. Prof. Woodhouse is Professor Emeritus of the Department of Engineering at the University of Cambridge. His research interests include vibrations in complex structures, including musical instruments. Prof. Woodhouse has published extensively on acoustic

and physical concerns of musical instruments and is the editor of an online book (available at <www.euphonics.org>) dealing with scientific aspects of musical instruments. The fact that Prof. Woodhouse is an authority in his field is also evidenced by the fact that the defendants mention him in their statement on the minutes of the instruction hearing (IV statement, para. 7).

Supplement 150: Expert opinion of Prof. Jim Woodhouse dated May 10, 2022.

Supplement 151: Curriculum Vitae of Prof. Jim Woodhouse

204 The expert opinion confirms that the lens shape is technically necessary:

205 Every object has *vibration* resonances or *modes* when it is struck. As a rule, this affects the entire structure. In the case of the *steel pan* or the *handpan*, the **vibration modes are on the one hand limited to individual areas (confinement) in order** to form the tone fields¹ (as is also the case, for example, with the singing saw). On the other hand, each tone field comprises not only a single oscillation mode with its resonance frequency. Rather, **several overtones are** created when the sound field is struck. In the case of the *steel pan* and the *handpan*, three, sometimes four, modes are tuned into a tone field to achieve a pattern of resonant frequencies that are (at least approximately) part of a harmonic series. An overtone series contains tones with frequencies that are integer multiples of the fundamental frequency; such tones blend together harmonically. This combination of limited modes in harmonic relationships essentially gives each pitch field its musical sound.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 2

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

206 According to what has been said, in the case of the "hang" or the *handpan* (and the *steel pan*), the vibrational energy is restricted or limited to certain areas, the tone fields (so-called *confinement*). The **physical process of this limitation**

¹ The expert opinion refers to the *dimple* as the indentation (also *dip*) or *dome*. The area around the *dimple* is referred to as the *tone field*. The term *note* refers to *tone field* and *dimple* together. These terms are scientifically correct. Nevertheless, in the present reply, the terminology according to the statement of defense and the statements of claim is continued and, in particular, the entire *note* and not only the area surrounding the *dimple* is referred to as the *tone field*.

is due to the **curvature of the instrument body** in which the tone fields are incorporated. The tone fields themselves have a very slight curvature; at a cursory glance they look flat. The only slightly curved tone field is surrounded by metal that is (more) curved everywhere - these are the areas between the individual tone fields, the so-called *internote region* of the shell. The change in curvature along the edges of the tone field leads to a so-called total internal reflection of the vibration. That is, when the vibration generated by the beat reaches the edge of the tone field, it is "reflected back". Thus, the majority of the vibration cannot leave the sound field, which leads to the mentioned limitation (*confinement*).

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 2

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

207 In the case of a flat surface or an object with flat surfaces (such as a pyramid or a cube; cf. Minutes of the Instruction Hearing, pag. 501; Defendant's Statement IV, para. 24; Plaintiff's Statement IV, para. 26 f.), however, the physical process of limitation mentioned does not work. The required change in curvature could purely theoretically also be achieved by a spherical or ellipsoidal surface or by other curved shapes. However, in order to tune the overtones precisely and reproducibly, it is almost essential that the curvature of the material surrounding the tone fields, i.e. the *internote region*, be the same in all directions, i.e. that the body into which the tone fields are incorporated be a **spherical segment**. Otherwise, the *tuner* would have to determine anew for each tone field how to tune the overtones, depending on the positioning and orientation of the tone field on the instrument. The shape of a spherical segment is best known from the *steelpan* as the **ideal "neutral canvas"** on which to work the tone fields.

Supplement 150: Expert opinion of Prof. Jim Woodhouse dated May 10, 2022, p. 2 f.

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

208 In the defendant's expert opinions, it is claimed that the sound of a sound field depends on the geometry of the same, from which it is concluded that the

shape of the instrument is therefore not decisive for the sound and that any shape can be used. However, this fails to recognize that without the surrounding rigid shell, i.e. the curved *internote region*, there would be no limitation of the vibrations. Consequently, the assertion and the conclusions drawn from it do not apply.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

209 A scientifically equivalent description of this limiting phenomenon is that the sound field has a low **dynamic stiffness** (*dynamic stiffness*) compared to the high dynamic stiffness of the shell or *internote region* (cf. also Minutes of the Instruction Hearing, pag. 497). This so-called mechanical impedance change enables mode limiting. In engineering, it is known that curved sheets (so-called shells) have a high stiffness compared to the inherent stiffness of the same material in flat or less curved form.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

210 The dynamic stiffness of the spherical shell is also important because vibrations escaping the sound fields can excite resonances in the shell itself, creating "*junk tones*". Because the shell has a very high dynamic stiffness due to its high and uniform curvature, these resonances of the shell itself are held at a much higher frequency, so that their excitation is unlikely, and they do **not disturb** the musical sound. This is true for both the top shell, which contains the tone fields, and the bottom shell. If the lower shell were not curved or were less curved, it could produce the "noise" just mentioned.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

211 Another reason to use similar spherical segments for the top and bottom (thus forming a lens shape) is the static-mechanical (structural) stiffening effect of the stiff bottom spherical segment. The combination of two spherical segments with opposite curvature makes the circular junction of the instrument very stiff. This **stabilizes the structure of the playing surface and the entire instrument** when it is played, worked on or transported.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the lens shape on the sound

212 According to what has been said, the **lens shape of the "Hang", consisting of two spherical segments, is technically necessary**. The uniform curvature found in the spherical segment-shaped upper surface physically enables a **limitation of the tone fields** and serves as an ideal "**neutral canvas**" to incorporate the tone fields into it (above, para. 206 ff.). The fact that the upper and lower surfaces are formed by spherical segmental shells also allows to **prevent interfering noises** (above, marg. nos. 210) and also **stabilizes the structure of the playing surface and of the entire instrument (above, marg. nos. 211)**.

3.7.2.3. Concerning the claims of the defendant patent

213 Finally, in connection with the lens shape, the defendant's comment on the **patent claims** which refer to a lens-shaped musical instrument (claim I, para. 108; claim II, para. 113; claim III, para. 111). The defendants object that from the fact that the patent claim mentioned in the application refers to a certain shape, it cannot be concluded that this shape is technically conditioned or necessary. If the lens shape were technically conditioned or necessary, it would rather be obvious to a person skilled in the art, and he would readily arrive at the same shape (Response, para. 168). Neither is the case:

214 In the dependent patent claim listed in the application (claim I, para. 108; claim II, para. 113; claim III, para. 111), the defendants added as the only additional

claim feature that the claimed musical instrument is "*lenticular*" ("*metal sound musical instrument according to any of claims 9 to 12, wherein the musical instrument is lenticular*"). Defendants certainly did not add a non-technical feature as the only additional claim feature in this claim, as such a non-technical feature does not allow for differentiation from the prior art.

215 Also, contrary to the defendants, it is not true that technically conditioned or necessary designs are obvious and thus not patentable. The Brompton bicycle may serve as an example (below, para. 298 ff.).

3.7.3. Regarding the circular arrangement of the sound fields on the upper side (Response, paras. 169 to 186)

216 The sound fields, the defendants first comment in their response on the **specific design of the sound fields** and claim that they could, for example, be curved, flat, round, oval or perforated and would then produce different sounds (Response, para. 170 et seq.). Thus, it is possible for two identical-looking sound fields to sound different and for two different-looking sound fields to produce comparable sounds (Response, para. 175). In doing so, the defendants misjudge two things:

217 *On the one hand*, the defendants do not claim any copyright protection for the concrete design of the individual sound fields of the "Hang" or, according to the defendants, their design is not relevant for the overall impression of the "Hang" (Response, para. 127). It is therefore unnecessary to go into the concrete design of the sound fields. Apart from that, the tone patches depicted in the response (Response, para. 174) are not tone patches of a "Hang", but those of a *Steel Pan* (cf. Supplement 124, S. 11).

Supplement 124: Book "10 Years of Panart, Accountability, Results, Resonance," 2003, S. 11

218 *On the other hand*, it is not a question in the present case of whether two instruments or tone fields sound similar, but rather of the design of an instrument. The defendant's statements therefore also miss the point.

3.7.3.1. On the effects of the circular arrangement of the tone fields on the playability or ergonomics

219 The circular arrangement of the tone fields is **firstly** - as already explained in the statement of claim - due to the purpose of **playability**, i.e., for technical

reasons. The regular, circular arrangement significantly facilitates playing on the lap, sometimes because the tone fields can be reached with the hands in approximately the same way (Claim I, para. 124; Claim II, para. 126; Claim III, para. 127).

220 The defendants deny this (Response, para. 178). However, it is not comprehensible in what way a staggered arrangement in two circular shapes or a cross-and-transverse arrangement (Response, para. 179) would be even remotely as simple and easy to play as a circular arrangement. The defendants prove this themselves when they state that the tone fields of the "Hang" were initially arranged in an ascending or descending circular shape (Response, para. 177). This is simply the most advantageous and simplest arrangement from a technical point of view. Similarly, the bars of a xylophone could be arranged in a cross shape rather than in a row, the individual finger holes of a flute would not necessarily have to be arranged in a row but could also be located at the same height in a different place, or the keys of a keyboard could be arranged in a wave shape instead of flat or could have different widths. However, all this is dispensed with for reasons of playing technique and ergonomics.

Expert opinion:	On the effects of the circular arrangement of the tone fields on the playability or ergonomics.
Party survey:	Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands
Party survey:	Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness:	Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

221 The defendants are then mistaken when they state that "*practicability*" or a practicable design cannot be equated with technical conditionality or necessity (Response, para. 181). If the design is based on technical considerations and is therefore particularly "*practicable*", then it is (play-)technically or ergonomically conditioned. In addition, if a design - as the defendants concede here - was chosen solely based on practicality considerations, it is precisely not an expression of creative decisions, so that intellectual creation is also lacking for this reason.

222 It is also wrong when the defendants state that a circular arrangement of the sound fields was not widespread in *steel pans* (Response, para. 183). Thus, it was no coincidence that the sound fields were already arranged in a circular shape in the first, spontaneously and accidentally created prototype of the "Hang": The defendants used a *steel pan shell* for this (above, para. 86 ff.).

Supplement 150:Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

223 Similarly, it is not true that the defendants "*deliberately reduced*" the number of tone fields in the "plexus" of the "Hang" in order to create an "*aesthetic balance between convex and concave plasticity*" by embedding them in the "plexus" (Response, para. 184). The "Hang" of the first generation was distributed with seven to nine tone fields. The "*accidental prototype*" already had seven tone fields arranged in a circle (supra, para. 91). The *ex post* assertion of a "*deliberate reduction*" is solely motivated by process tactics.

224 The defendants then comment on the **number of possible sound fields** (Response, para. 185). Since the number of sound fields is irrelevant to the question of the copyrightability of the "Hang" in the view of the defendants (see Response, para. 127), it is in principle unnecessary to go into this further. However, the defendants' statements in this regard also show that they are simply trying to monopolize the purpose of use for themselves, which is not acceptable. It may be true that "*the radius of the human arms* [makes it] possible *without further ado to play a wide variety of sound bodies*" (Response, para. 185). However, this is not what is at issue in the present case, but rather an instrument that can be played while sitting on the lap. Likewise, the defendant's statements that the "plexus", i.e. the shell in which the sound fields are incorporated, could be made larger or that the sound fields could be made smaller (Response, para. 185), miss the point: with a larger "plexus", the instrument would no longer be manageable (cf. Prototype 1 and above, para. 97). Also, the tone fields cannot be made arbitrarily small, since they must be playable by hand (and not with mallets). Furthermore, the size of the tone field affects the frequencies that can be tuned; tone fields cannot be made arbitrarily smaller (cf. for example expert opinion Steppat, Bekl.-Beilage 13, p. 2: "*The length and width, the thickness of the material and the radius of curvature have an influence on the pitch*"). Therefore, the reference to a soprano *steel pan* in standard size, which could comprise up to 32 notes (statement of defense, para. 185), is also irrelevant. This is a different instrument, which is neither played sitting nor with the hand, but standing with mallets, and which also sounds different.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness: Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

225 It is also incorrect for the defendants to claim that the "hang" does not know any **orientation**, **that** there is no top or bottom, and that it can also be played vertically or with the "ding" facing downwards (Response, para. 186). The defendants may present it this way today. In the past, however, they very well assumed a top ("Ding" side) and a bottom ("Gu" side). For example, in the 2009 patent specification, they stated, "*the **upper** half shell of the Hang® is also referred to as the Ding side, and the **lower** half shell is referred to as the Gu side.*" Also, in the warning letters and in the response, the defendants respectively refer to the upper sphere segment and the upper and lower sides of the "Hang." Incidentally, the "Hang" does not play equally well when oriented vertically. In addition, when vertically oriented, some of the sound fields are not playable because they are covered by the legs. If the "Ding" dome and thus the half-shell with the tone fields is oriented downward, on the one hand the tone fields cannot be played and on the other hand the resonance hole, which is now at the top, cannot be closed with the thighs if necessary (for this also see below, marg. 239).

Supplement 30:	Excerpt from website < www.panart.ch/de/geschichte/galerie > dated October 7, 2020, S. 7
Supplement 55:	European patent EP 2 443 625 B1, para [0004]
Party survey:	Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands
Party survey:	Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness:	Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

3.7.3.2. On the effects of the circular arrangement of the tone fields on the sound

226 Furthermore, the circular arrangement of the sound fields is necessary from a sound engineering point of view. The expert opinion states this as follows:

227 As already mentioned, tone fields are limited (*confinement*). However, this confinement is never perfect: a small portion of the vibration escapes from the tone field. Even if the *tuner achieves* an ideal mechanical impedance change (above, Rz. 219) at and along the boundary of the tone field, there is a so-called evanescent field that exists outside the tone field boundary (and gradually decreases with increasing distance). Other sound fields must be kept away from this evanescent vibration, otherwise they will be excited by these vibrations and produce unwanted sound. This is referred to in technical jargon as *cross-talk*.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the circular arrangement of the tone fields on the sound

228 The best way to minimize *crosstalk* is to separate the tone fields by the largest possible *internote regions*, i.e., to place them as far apart as possible. This explains the even distribution of the tone fields on the shell around a central tone field (on this below, para. 230 ff.). This is not an aesthetic choice, but a mechanical necessity to ensure good vibration isolation and thus minimal *crosstalk* between tone fields.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the circular arrangement of the tone fields on the sound

229 Another way to reduce *crosstalk* is to ensure that tone patches that are adjacent to each other do not have similar frequencies. For this reason, the ascending tones of the scale are usually placed alternately on one and the other side of the shell (see the illustration in Action I, para. 124; Action II, para. 130; Action III, para. 125). However, one tone field is physically closest to all other tone fields: The central tone field. The best choice for this tone field is therefore the tone field with the lowest frequency, the largest area and the fundamental. This is because this is the farthest away in frequency from all the other notes. Placing the largest tone field in the center is a way to minimize *crosstalk* from oscillations.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the circular arrangement of the tone fields on the sound

3.7.4. Regarding the central dome on the upper side (Response, paras. 187 to 193)

3.7.4.1. On the effects of the central dome on playability or ergonomics

230 As already explained in the statement of claim, the central dome on the top is **firstly** due to considerations of **playability**. The central arrangement ensures that the frequently played fundamental note can be easily reached and played with the fingers of each hand (Statement of Claim I, paras. 109 f.; Statement of Claim II, paras. 114 f.; Statement of Claim III, paras. 112 f.). This is rightly not disputed by the defendants (Response, para. 188 f.). Furthermore, an off-center placement of this tone field would make it significantly more difficult or even impossible to play the shoulder notes.

Expert opinion: On the effects of the central tone field with dome on playability or ergonomics.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel

Witness: Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

231 The fact that the central tone field does not have a (concave) indentation like the other tone fields, but a (convex) dome, is also not a creative decision, but rather a technical or ergonomic one. The hand and fingers have a different line of movement and alignment when playing at the top of the instrument, so that a dome is easier and better to play there than an indentation (see also below, para. 234).

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Expert opinion: On the effects of the central tone field with dome on playability or ergonomics.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel

Witness: Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

232 In this context, the defendants further complain that a central arrangement of the dome is not decisive for the sound properties and that the centrally positioned sound field can also be located on the side of the upper sphere segment,

for example, like the other sound fields (Response, para. 189). This is not true (above, para. 229). However, even if this were the case, this would not change the fact that the central positioning of the dome on the upper side is due to technical playing considerations - equally, the notes of a piano could be arranged in any order, but this does not change the fact that they are arranged in ascending order due to technical playing considerations and that the frequently played notes are located on the center of the keyboard (Claim I, para. 110; Claim II, para. 115; Claim III, para. 113).

3.7.4.2. On the effects of the central dome on the sound

233 **Secondly**, the dome in the central sound field on the upper side is **(sound) technically necessary**. The expert opinion explains this as follows:

234 As already explained, oscillation modes are *confined* in the tone fields (*confinement*; esp. above, para. 205). Nevertheless, the thus confined modes can assume a large number of different configurations (and thus produce e.g. harsh or unmusical sounds). Therefore, the modes are tuned to the desired harmonic frequencies (above, Rz. 205) by shaping the main curvature of the tone field - which is slightly convex -, its contour, and the details of the curvature at the center and periphery of the tone field accordingly. The center of the tone field, which is far from the stiffened edges, is the most difficult part of the tone field to control and the most unstable. Therefore, the instrument maker stiffens this area to stabilize the overtones of the tone by giving it a strong curvature. This is the mechanical function of the *dimple* in the center of the tone field (on *dimples*, already Complaint I, paras. 35 and 39; Complaint II, paras. 40 and 44; Complaint III, paras. 38 and 42). For this purpose, it is of secondary importance whether the *dimple* is concave (i.e., an indentation or depression) or convex (i.e., a dome). The fact that the *dimple* in the central tone field is convex, i.e. that there is a (convex) dome and not a (concave) indentation, is due to ergonomic reasons, since the hand and the fingers have a different line of movement and orientation at the apex of the instrument.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 3

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the central sound field with dome on the sound

235 Another function of the *dimple* (both in dome and indentation form) is that it raises the frequencies of the higher vibration modes. These higher vibrational modes produce tones that are excited when the pitch is struck, but especially when its edge is struck. By changing the size of the *dimple*, the instrument maker can "tune" these frequencies and give a certain character to the sound of the tone field and the instrument as a whole. In a sound field without a *dimple* or with a very small *dimple*, the higher vibration modes tend to produce lower frequencies. Low frequencies are generally louder and last longer, which is why they are more present than higher frequencies. For a smooth, clear sound, it is important that these frequencies are not strongly present and, ideally, are even harmonically tuned. While a tone field with a *dimple* has a soft sound like the "Hang" or other *handpans*, the *steel pan* without a *dimple* in the tone fields has a very bright, shrill sound.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel

Expert opinion: On the effects of the dimple on the sound

236 In connection with the central dome, the defendants also claim (Response, para. 187) that this has nothing to do with the gong or cymbal, either visually or in terms of sound (Claim I, para. 111; Claim II, para. 116; Claim III, para. 114), but that in the case of the "Hang" it is "*aesthetically embedded in the overall form*". This is not true with regard to the history of the origin of the "Hang": After the earlier instruments of the defendant and also the prototype 1 - which was screwed together from shells of other instruments lying around - did not yet have a dome, a visit in February 1999 in Munich aroused the interest of the defendant in the gong and especially in its dome (above, para. 157). Thereupon, the defendants rebuilt gongs ("Pung") and cymbals ("Orage") and provided "Tubal" sound bodies with domes (supra, para. 158 f.). The dome as well as its central positioning was thus adopted from the gong in particular. However, not only visually, but also sonically, a comparison between the gong and the "Ding" dome is not absurd, contrary to the defendants. On the contrary: the defendants themselves describe the sound of the dome: "*A gong-like sound, which sounded like 'ding!*"

Supplement 41: Excerpt from website <www.panart.ch/de/geschichte/vom-hang-zum-gubal> dated October 1, 2020, S. 2

237 The defendants further deny (Response, para. 190) that the dome shape contributes to increased stability by increasing the stiffness in the material (Claim I, para. 112; Claim II, para. 117; Claim III, para. 115). Defendants object that the dome instead "serves to stiffen" (Response, para. 190). This is not true (above, para. 234). But even if it were true, the dome would still be technically conditional.

238 Finally, the defendants state analogously that the dome does not fulfill a technical function, which is also evident from the fact that some of the plaintiff's instruments do not have a dome (Response, para. 193). In doing so, they fail to recognize that the mere fact that a feature can be omitted does not mean that this feature is not functional. Just because there are a number of bicycles without a folding mechanism, for example, does not mean that such a folding mechanism is not, by implication, technically necessary.

3.7.5. Regarding the resonance hole (Response, paras. 194 to 201)

3.7.5.1. On the effects of the resonance hole on the playability or ergonomics

239 The fact that the resonance hole on the underside also fulfills a technical function has also already been explained in the application. **Firstly, the central positioning of the resonance hole on the underside is due to playability.** In particular, it is not covered or closed there by the percussionist's body and legs, and the musician can influence the tone of the resonance hole and thus the harmonies by opening and closing his legs (Claim I, para. 117; Claim II, para. 122; Claim III, para. 120). This is a popular and widespread playing technique, to which the defendants also expressly referred in the past:

"If the hang player takes the instrument on his or her lap, a bass note is sounded when the instrument body is stimulated with the carpus. By varying the angle of the leg, the bass can be changed in pitch [...]"

or:

"Open and close the womb as you stimulate the DING: you notice how the GU and the DING come together."

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Supplement 40: Brochure "Hang", 2008, S. 20

Supplement 56: hang guidance, 2010, S. 8

Expert opinion: On the effects of the central tone field with dome on playability or ergonomics.

Party survey: Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Party survey: Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel

Witness: Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

240 Against this background, it is very surprising when the defendants now claim that the resonance opening of the "Hang" could also be attached to the upper segment of the ball or to the side (Response, para. 196; cf. also Defendant's Statement IV, para. 12). This is disputed, especially since the playing method just mentioned would not be possible - at least not if the hang is played sitting on the lap, as intended. Contrary to the defendants, therefore, the instruments with a resonance hole on the upper side (Response, para. 198; Defendant's Opinion IV, para. 13) or the "Pac-Pan" with a resonance hole on the side (Response, para. 199; Defendant's Opinion IV, para. 21), which is in any case a different instrument, are also no evidence that the central positioning of the resonance hole on the underside is not intended to be purely functional. All these instruments do not allow the aforementioned playing technique.

241 What the defendants want to deduce from the reference to the "Gudu Hang" (Response, para. 197) is not clear. This is a different instrument in which the resonance opening is also located centrally on the underside. The air volume in the sound box can also be stimulated via a further hole on the underside (Response, margin note 197). This does not change the fact that the central positioning of the resonance hole is based purely on functional considerations.

Supplement 152: Excerpt from website
<www.lex.hangblog.org/de/gudu-hang.htm> dated April 12, 2022

Supplement 40: Brochure "Hang", 2008, p. 12 f.

3.7.5.2. On the effects of the resonance hole on the sound

242 **Second**, a resonance hole is technically necessary in a Helmholtz resonator (Claim I, para. 115; Claim II, para. 120; Claim III, para. 118). A Helmholtz resonator requires an air volume enclosed by a vessel and a resonance hole that is small in relation to the vessel (Claim I, para. 38; Claim II, para. 120; Claim III, para. 41). Helmholtz resonators are widely used in musical instruments and can

be found, for example, in the djembe, the guitar, the violin or the ghatam (Claim I, para. 58; Claim II, para. 63; Claim III, para. 61).

243 In the "Hang", the volume of air in the body together with the resonance opening known as the "Gu" forms a Helmholtz resonator. If the sounding body is excited by a blow, this impulse is transferred to the air inside it and causes the Helmholtz resonator to vibrate. This is perceptible as a breathy bass tone.

Supplement 22: Website <www.lex.hangblog.org/de/helmholtz-resonanz.htm> excerpt dated October 12, 2020.

244 In this context, the expert opinion of Prof. Woodhouse confirms that no Helmholtz resonance would occur without a resonance hole. The frequency of the Helmholtz resonator is determined by the air volume, the size of the aperture and the design of the aperture.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the central resonance opening on the sound

245 In this regard, the defendants claim that the Helmholtz effect is not necessary for the sound of the "Hang" and could also be achieved in a different way, for example by correspondingly low-tuned tone fields (Response, paras. 194 and 195). The defendants fail to recognize that the issue is not whether a sound comparable to that of the "Hang" could also be produced in a different way, but whether the individual features for which the defendants claim copyright protection are technically conditioned or necessary regarding the specific sound production in the "Hang". The "Hang" uses a Helmholtz resonator for sound generation, for which a resonance opening is required. The resonance opening is therefore technically necessary. In the past, the defendants explicitly justified the presence and maintenance of the resonance opening with the fact that it enables a Helmholtz resonator (above, para. 107). Similarly, the overblowing hole is not less technically necessary in wind instruments, only because the same result - an increased tone - could also be produced by amplified blowing.

246 In this context, the defendants also state that, as an alternative to completely dispensing with a resonance opening, it could also be designed differently, for example by dispensing with a neck - in the case of the "Hang", the resonance opening has an inwardly curved neck - or by curving the neck outwards instead (Response, para. 194; cf. also Defendant's Statement IV, para. 11). In doing so, the defendants overlook the fact that they themselves do not even consider the **design of the resonance opening** to be relevant for the substantiation of the alleged copyright protection (see Response, para. 127).

247 In addition, the specific design with an inwardly arched neck is also technically conditioned and by no means a "*creative reinterpretation*", as the defendants claim (Response, para. 194). The resonance opening of prototype 4 did not yet have a neck, and the sound was insufficient in the view of the defendants. Therefore, they turned to car tuners and designed the resonance opening with an inwardly directed neck according to their recommendation (supra, para. 113; Claim I, para. 73; Claim II, para. 78; Claim III, para. 76). Inward-facing necks are also known from other instruments with soundboxes, e.g. as tornavoz on guitars. Furthermore, an outwardly curved neck would not allow the resonance opening to be reduced or enlarged as needed with the thighs when playing (above, para. 239).

Supplement 153: Excerpt from website <www.wurth-guitars.com/torres-modelle/torres-nachbau-fe17-tarrega> dated April 27, 2022

3.7.5.3. On the effects of the central resonance hole on voice work

248 **Thirdly**, as already stated in the complaint, the central opening is necessary in order to finally **tune the** tone fields after the two *halves of the handpan* have been joined together. Furthermore, it must also be possible to access the tone fields from the inside during retuning (Claim I, para. 119 ff.; Claim II, para. 124 ff.; Claim III, para. 122 ff.). The defendants are unable to counter this with anything of substance. For example, the defendants first object that most suppliers of *handpans* do not engage in *fine-tuning*, but sell industrially produced copies (Response, par. 200). This is pure polemic, is disputed and is unsubstantiated. But even if this were the case, it would not change the fact that an opening is required for tuning - even if guitars are sold untuned, this does not change the fact that the pegs on the guitar head are required for tuning. Furthermore, the issue at hand is the copyright protection of the "Hang" and not of other *handpans*, and the "Hang" is undisputedly tuned (below, para. 251).

Expert opinion:	On the effects of the opening on the underside on the voice work
Party survey:	Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands
Party survey:	Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness:	Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

249 The fact that the *fine-tuning* can also be carried out before the upper and lower shells are bonded (Response, para. 200) is also not correct. For correct tuning, it is essential that the two shells are already joined. The defendants themselves wrote in the past "*It must be possible to work on the instrument from the inside*" (Supplement 30, p. 12; Claim I, para. 121; Claim II, para. 126; Claim III, para. 124) or "*The size was given through the hand, that we can go in, because we have to tune it, fine-tune it. [...] For me [defendant 3] it's no problem. In a way it's Felix [Defendant 2] hand size. We wanted it the smallest possible to be. Because when the hole [...] is too big, then you lose.*" (Supplement 154min. 02:00 to 02:11). For the same reasons, it is also not possible to separate the two half shells for retuning and then reassemble them (Defendant's Statement IV, para. 14). To the extent that the defendants also claim that an "*arbitrarily shaped (closable) opening would also be suitable for tuning*" (Response, marg. no. 200), they again overlook the fact that they are not claiming copyright protection for a specific design of the resonance opening (see above, marg. no. 14). 246).

Supplement 30:	Excerpt from website < www.panart.ch/de/geschichte/galerie > dated October 7, 2020, S. 12
Supplement 154:	Recording by Felix Rohner and Sabina Schärer, min. 02:00 to min. 02:22
Expert opinion:	On the effects of the opening on the underside on the voice work
Party survey:	Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands
Party survey:	Daniel Bernasconi, Sägholzstrasse 35, 9038 Rehetobel
Witness:	Christian Müller, c/o Terré GmbH, Hans-Sachs-Strasse 44, 08525 Plauen, Germany

250 The expert opinion also confirms this: Although the main tuning work is done before the two ball segments are joined, the tuning is influenced by the joining process, so that the instruments must be retuned afterwards. In addition, as the expert opinion also confirms, all instruments have to be returned after a

longer period of time. The fact that the resonance hole is positioned centrally facilitates the tuning work enormously and is therefore also ergonomic in this respect. It would be extremely difficult to reach all the tone fields if the resonance hole were not positioned centrally.

Supplement 150: Expert Report of Prof. Jim Woodhouse, May 10, 2022., S. 4

Supplement 39: Rohner/Schärer, History, Development and Tuning of the Hang, ISMA 2007, S. 6

Witness: Jim Woodhouse, c/o Cambridge University Engineering Department, Trumpington Street, Cambridge CB2 1PZ, United Kingdom.

Expert opinion: On the effects of the opening on the underside on the voice work

251 The fact that the "Hang" does not need to be retuned, as the defendants further claim, is not true (Response, para. 201; cf. also Defendant's Statement IV, para. 12). The defendants themselves offer a re-tuning service at and, for example, re-tune the instruments of the musician Manu Delago annually.

Supplement 155: Wayback Machine excerpt to website <www.hangblog.org/hangreparatur> dated November 19, 2010.

Supplement 156: Excerpt from website <www.panart.ch/de/reparatur/reparaturen> dated April 12, 2022

Supplement 157: Excerpt from website <www.paniverse.org/interview-with-manu-delago-2021-09> dated May 11, 2022, S. 6

3.7.6. Regarding the brass ring (Response, para. 202)

252 According to the defendants, the brass ring present in individual variants of the "Hang" does not characterize its overall effect (Response, para. 127). It is therefore unnecessary to go into this further. As already explained in the complaint, the brass ring serves on the one hand to protect the instrument (Supplement 40, p. 14: "*The brass ring protected the instrument.*"), and on the other hand, it improved the feel of the instrument and protected the player from the partial sharp edges of the two shells (Claim I, para. 126; Claim II, para. 131; Claim III, para. 129). The defendants object that the protection of the instrument as well as an edge protection could be better ensured by other devices, e.g. by an inconspicuous rubber ring (Statement of Claim, para. 202). In doing so, the defendants fail to recognize that they also oppose such alleged alternatives.

3.7.7. Interim result (on response, paras. 203 to 206)

253 According to what has been said, the individual design features that are to characterize the overall impression of the "Hang" are all necessary in terms of playing, sound and voice. It is not true and misses the point that sounds like those of the "Hang" can be produced with completely differently designed sound objects and that such sounds can also be produced with sound objects that do not Supplement the characteristics of the "Hang" (Response, para. 203). The work claimed by the defendants does not consist in a certain sound, but in a certain design. For the sounds produced by the "Hang", the individual design features are very much necessary and thus (sound-)technically necessary. Furthermore, the individual design features follow playability considerations and are thus also (play-)technically necessary. Finally, the opening on the underside is also necessary for tuning work and thus also (tuning) technically necessary.

254 The German judgments cited by the defendants (Response, para. 204 et seq.) are based on an incomplete and incorrect factual basis. Furthermore, they based their assessment of the functionality of the individual design features on an incorrect standard (see already Claim I, para. 327 f.; Claim II, para. 425 f.; Claim III, para. 803 f.).

4. Legal

4.1. Non-existence of copyright under Swiss law

255 Art. 2 para. 1 URG protects as a copyright work **intellectual creations of literature and art** that have an **individual character**. According to Art. 2 para. 2 lit. f URG, works of applied art may also be protected. These are works that are produced commercially or industrially and serve a practical application, i.e., objects of utility that have an additional form or color component with an individual character that is not determined by the purpose of use (SIWR II/1-von BÜREN/MEER, para. 320; EGLOFF, loc. cit, Art. 2 N 26; MARBACH et al., loc. cit., para. 272; OGer LU, sic! 2003, p. 731 ff., E. 6.1 - *garlic press*).

256 The concept of **intellectual creation** presupposes, on the one hand, that something that does not yet exist must be created (HILTY, Urheberrecht, 2nd ed. 2020, para. 153). On the other hand, the term "intellectual" expresses that the work must be based on human will, must be an expression of a thought (HILTY, loc. cit., para. 151). Excluded from protection are therefore, in, random

products of nature or technology, no matter how unusual or aesthetically pleasing they may be (EGLOFF, LOC. CIT., Art. 2 N 8), or designs that are based on picking up or putting together what has already been found (SIWR II/1-von BÜREN/MEER, para. 167).

- 257 To have **individual character**, the intellectual creation must **stand out from** the actual or natural preconditions **within the scope of the intended purpose** (BGE 143 III 373, E. 2.1 - *Max-Bill-Barhocker*). The decisive factor is the **statistical uniqueness of the work design**. The decisive factor is whether several persons, confronted with the **same task**, would arrive at the **same or essentially the same result** (cf. BGE 134 III 166, E. 2.3.1; VON BÜREN/WALTER, Urteilsanmerkung zu BGE 130 III 168, in: ZBJV 2005, p. 791 ff, p. 795; on the task STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, in: GRUR Int. 2001, p. 1 ff, p. 5). Uniqueness in the sense of copyright law is (only) given if an identical or essentially identical result has **never existed** before, nor is it to be **expected** that such a result **would ever be created in the future** (THOUVENIN, Irrtum: Je kleiner der Gestaltungsspielraum, desto eher sind die Schutzvoraussetzungen erfüllt, in: Berger/Macchiacchini (eds.), Populäre Irrtümer im Urheberrecht, 2008, pp. 61 ff, p. 70; SIWR II/1-von BÜREN/MEER, para. 181; KUMMER, Das urheberlich schützbares Werk, 1968, p. 30; cf. also Botschaft URG, BBl 1989 III 521: "*other existing or possible creations*"; BGer, sic! 2001, p. 729 ff., E. 3.c.bb - *Vaca lechera*). Consequently, it is not the problem definition but its individual solution within the framework of this problem definition that enjoys copyright protection. The task is rather the starting point for the assessment of the creative activity (THOUVENIN, loc. cit., p. 66 f.).
- 258 Individuality is to be distinguished from routine work or **purely manual activity** (see also Message URG, BBl 1989 III 521). It results from the variety of free, creative and personal choices made by the author and surprising and unusual combinations, so that it seems impossible that a third party confronted with the same task would create an (essentially) identical work (BGE 136 III 225, E. 4.2 - *Guide Orange*; BGE 134 III 166, E. 2.3.1 - *Arzneimittel-Kompendium*). In the case of craftsmanship, on the other hand, the design is based on rational selection criteria which are influenced, for example, by technical circumstances. It is to be expected that their selection will be repeated, which is why individuality is lacking (cf. STRAUB, loc. cit., p. 6 with further references). Higher requirements are to be placed on individuality in the case of works of applied art. In **case of doubt**, a purely handcrafted performance is to be assumed (BGer, sic! 2011, p. 504 ff., E. 2.4 - *Le Corbusier III*; BGE 113 II 190, E. II.1.a - *Le Corbusier*; BGE 105 II 299, E. 3.a - *Monsieur Pierre*; BGE 68 II 53, E. 4 - *Buffet*; SHK URG-Cherpillod, Art. 2 N 56).

259 Copyright protection is excluded if a design is **reduced to the non-interchangeable components characteristic of** the respective object of use (HILTY, Urheberrecht, 2nd ed. 2020, para. 192). The same applies if the form is **so conditioned by the purpose of use** or the design is so limited by previously known forms that there is practically no room for individual features (BGE 113 II 190, E. 1.2.a - *Le Corbusier*; SIWR II/1-von BÜREN/MEER, para. 326). In these cases, there is no room for creative and personal creative decisions from the outset.

260 Copyright protection was denied for lack of individuality, for example, for a **running wheel** (HGer AG, sic! 2006, p. 187 ff.), the **LC 1 chair** by Le Corbusier (BGE 113 II 190, E. II.1.a; confirmed in BGer, sic! 2011, p. 504 ff., E. 2), a **sofa with a cross seam** (OGer ZH, sic! 2002, pp. 342 ff, E. 4), the **cutlery set "Schwaben"** by Bruckmann (BGE 75 III 355, E. 2.c), a **miniature bicycle** for cyclists (OGer BL, sic! 2000, p. 285 ff.), **harlequin dolls** (BGE 110 IV 102, E. 3), **heads for Punch and Judy figures** (BGE 106 II 71, E. 3), a **garlic press** by Bodum (ultimately left open; sic! 2003, pp. 731 ff, E. 6), various **wrist watches** (BGE 105 II 297, E. 3.b. - *Monsieur Pierre*; CdJ, sic! 1999, p. 247 f., E. 2.b. - *Siena I*), a **dining room buffet** (BGE 68 II 53, E. 5) or a **jewelry rotating ring with ball bearing** (OGer ZH, sic! 2006, p. 329 ff., E. 3.2.3 - *Girello*). Illustrations of most of the utility articles assessed in these decisions can be found in the Supplement 158 can be taken from the

Supplement 158: Compilation of Swiss decisions on copyright with illustrations

261 The requirements for protection, in particular intellectual creation and individuality, are **circumstances that give rise to rights**. The burden of proof for the relevant facts is therefore on the party claiming copyright protection. This also applies to a negative declaratory action; the reversed distribution of party roles does not change the distribution of the burden of proof (EGLOFF/HEINZMANN, in: Barrelet/Egloff (eds.), *Das neue Urheberrecht*, 4th ed. 2020, Art. 61 N 10; KUKO ZPO-OBERHAMMER/WEBER, Art. 88 N 29).

262 As already stated in the statement of claim, the **"Hang" does not meet the requirements for protection under Swiss copyright law** (Claim I, para. 293 et seq.; Claim II, para. 393 et seq.; Claim III, para. 770 et seq.). The starting point for the development of the "Hang" was Prototype 1, which was created spontaneously and by chance by taking out and fixing two pre-existing *Steel Pan half-shells* found under the workbench (above, paras. 86 ff.). It is self-evident that this process is not a creative design under copyright law, characterized by creative decisions (Claim I, para. 297 f.; Claim II, para. 397 f.; Claim III, para. 774 f.). The defendants then also rightly do not (any longer) claim that this prototype 1

should be protected by copyright (above, para. 90). That was the starting point. The **task** now was to make a playable instrument with a better sound out of the prototype 1 (above, para. 92 ff.). In fulfilling this task, the defendants did not make any relevant creative decisions:

- 263 Apart from the central dome, prototype 1 already had all those features which, according to the defendants, should now characterize the overall impression of their "work" (above, para. 91 and 173 f.; Claim I, para. 297; Claim II, para. 397; Claim III, para. 774). Based on the just described task the further development of the prototype towards the "Hang" of the first generation consisted exclusively of **technical-craft activities**. As shown, **every single change to the prototypes followed manufacturing, playing or sound-technical considerations** and was precisely not based on creative design decisions (above, paras. 95 ff.; Claim I, para. 299; Claim II, para. 399; Claim III, para. 776). However, this is precisely what would be required for the "Hang" to qualify as a work in the sense of copyright in the first place.
- 264 Contrary to the defendants' assertions, it is simply not true that the appealing design played a decisive role for defendants 2 and 3 in the design of the "Hang" (Response, para. 252). There is no "*revolutionary new creation in comparison to the then previously known set of forms*" (Statement of Claim, para. 240), and it was also not the intention of Defendants 2 and 3 to *condense a "convex-concave plasticity"* into an "*organic and dynamic form that should radiate a natural harmony*" (Statement of Claim, para. 252), as they want to portray this *ex post* glorified today. Contrary to the defendants, it is also not "*obvious*" that defendants 2 and 3 *made a "multitude of creative design decisions"* in the "*creation process*" (Response, para. 253). On the contrary, the creation process described in detail above impressively proves that the development of the "Hang" was a purely technical-craft activity (above, para. 84 ff.). What all this is supposed to have to do with the "*golden section*" (Response, para. 252) is not clear; in particular, the proportions of the "Hang" do not correspond to the golden section. All these are empty **phrases without substance**.
- 265 The **intended use dictated the four characteristics of the 'Hang' which, according to the defendants, should shape its overall impression** (see also Claim I, para. 300; Claim II, para. 400; Claim III, para. 777). The defendants object that for the design of an instrument that "*produces sounds similar to the 'Hang', there is a practically unlimited variety of possible shapes*" (Response, paras. 245 and 251). According to what has been said, this is not true. The defendants already assume a **wrong purpose of use and a wrong task**. The purpose of use is not to produce "*comparable*" or "*similar*" sounds with the "Hang", but to

produce a brass instrument based on prototype 1, which can be played with the hands while sitting on the lap and which has various tone fields as well as a Helmholtz resonance (above, paras. 178 ff.). Likewise, the purpose of use of a bicycle is not the same as that of a scooter, even if both serve to bring persons from A to B by self-propulsion (cf. also Kl.-Stellungnahme IV, para. 25).

- 266 Within the correctly understood purpose of use or the correctly understood task, the defendants did **not make any creative design decisions** when developing the "Hang", but were **merely technically active**. In particular, the choice of a technically advantageous solution - e.g. the use of two spherical segments to achieve the highest possible dynamic and static rigidity (above, para. 203 ff.), and their subsequent "compression" for the purpose of better playability (above, para. 97), or circular arrangement of the tone fields to keep the *inter-note region* as large as possible (above, para. 226 ff.) - no creative achievement which would be relevant under copyright law (although the features were already known from other instruments anyway, such as a central dome from the (humped) gong or the circular arrangement of tone fields from the *steel pan*). The fact that Defendants were the first to create an instrument of the *handpan* genre is irrelevant under copyright law because the idea is not protected under copyright law; rather, what is relevant is whether they implemented that idea in a way that is based on creative choices beyond its utilitarian purpose, and whether it can be ruled out that someone else would have created an essentially identical design. This, however, the defendants did not do with their purely handicraft activity. The design features described by the defendants as formative are all conditioned by the intended use and technical considerations (in detail above, para. 198 ff.). Neither "*could*" the defendants "*choose between numerous different design variations in their creation process*" (Statement of Defense, para. 246) nor have they shown that they effectively did so.
- 267 It is not true that a "*third party*" "*faced with the same task*" - i.e. to make the spontaneously and accidentally created prototype 1 playable with a view to its intended use and to improve its sound - "*could not possibly*" have created "*an identical work with the same characteristic features of the 'Hang'*" (Response, para. 253). Rather, a third party would also have created an almost identical sound object with the same technical-craft activity. The fact that the defendants are the first to have solved the task in this way would, even if this were true, be irrelevant in terms of copyright.
- 268 What the defendants say about the individual design features and their technical conditionality is equally false. Rather, a detailed technical examination of

the individual design features proves precisely that there was **no leeway for creative design decisions**, which the defendants would have used:

- 269 Thus, the **lens shape**, as explained in detail, is on the one hand due to **playing technique**. The starting point was already two half shells welded together, but they were too large. The task demanded that these be brought to a playable size - and in particular to a lower height (above, para. 92 ff.). The reduction in height inevitably led to the present lens shape (above, para. 97). As the defendants themselves point out, this is an ideal shape for the playing of the instrument on the lap - in accordance with its intended use (above, para. 199 ff.). In this respect, the choice of the lens shape is conditioned by the purpose of use. On the other hand, the lens shape consisting of two spherical segments is also necessary from a **tonal point of view**, as it makes it possible to limit the sound fields and thus serve as an ideal "neutral screen", to prevent noise and to stabilize the structure of the playing surface and of the entire instrument (above, marg. no. ff.). 203 ff.). The defendants are unable to counter this with anything of weight. In particular, the lens shape is not merely a quality feature, as the defendants claim - just as a circular wheel is not a quality feature, even if a bicycle with oval wheels could be ridden.
- 270 The defendants then claim that the "*design of the sound fields*" offered "*countless variants*" (Response, para. 248). On the one hand, this is not true and, on the other hand, the defendants fail to recognize that they do not claim any copyright at all in the "*design of the sound fields*" and that, according to their submission, this is not even relevant for the overall impression of the "Hang" (above, paras. 216 ff.). On the other hand, the defendants do not even address the **arrangement of the sound fields in a circle**. For good reason: The circular arrangement was already part of prototype 1 and thus the starting point. Furthermore, the arrangement is on the one hand due to **playing technique, since it is** the best arrangement for playing with the hand (above, para. 219 ff.). On the other hand, the arrangement is also conditioned by **tonal** considerations, especially since an arrangement in a circle allows to create the largest possible *internote region* between the individual tone fields (above, paras. 226 ff.)
- 271 Nothing else applies with regard to the **central tone field on the upper sphere segment** or the **dome** there. These, too, are **due to playing and sound technology** (above, Rz. 229, 230 ff. and 233 f.).
- 272 The "*opening on the plexus holder*" (Response, para. 249), by which the Defendants mean the **resonance opening** on the underside, is indispensable for a Helmholtz resonator and is already therefore necessary from a sound

engineering point of view (above, para. 242). It was also already present in Prototype 1 and thus part of the starting point and not part of the solution of the problem. Its "*positioning*" in the middle of the lower sphere segment is on the one hand due to the playing technique, as it allows the bass frequency to be lowered by selectively closing and opening the legs when playing on the lap in accordance with the intended use. On the other hand, a central position is also ideal for tuning the individual tone fields from the inside with the hammer, which is necessary both for tuning in and for retuning (above, para. 248 ff.). Finally, as far as the defendants also refer to the "*design*" of the resonance opening, they fail to realize on the one hand that they do not claim any copyright on it and that, according to their submission, this is not supposed to be relevant for the overall impression (above, marg. no., marg. no., marg. no.). 246). On the other hand, the inwardly directed neck is not a creation of the defendant but was formed according to the recommendation of car tuners and is already known from other instruments (supra, para. 247).

273 Finally, the defendants state that the **color of** the "Hang" also has no technical relevance (Response, para. 250). Thus, the defendants fail to recognize that the color of the "Hang" is in no way based on creative decisions by the defendants but is an accidental by-product of the processing of the metal. On the other hand, however, according to the defendants, the color is not at all to be formative for the overall impression, and they also take issue with various *handpans* in other colors.

274 Thus, **all the design features that** supposedly characterize the overall impression of the "hang" fulfill a technical function and are conditioned by it. They were largely already part of the starting point. There is no allegedly formative shape component that has individual character and is not at the same time predetermined by the purpose of use. The "Hang" is also not protected by copyright for this reason.

275 The defendants then comment on the **relationship between design and copyright**. As already explained in the statement of claim, objects of utility can also be protected by a design - the "Hang" was also protected by a design (Claim I, para. 149 f.; Claim II, para. 154 f.; Claim III, para. 152 f.) - and the protection by copyright lasts significantly longer (70 years after the death of the author) than that by design law (maximum 25 years from deposit). The copyright protection requirement of individuality must therefore be set significantly higher than the design law protection requirement of individuality (Claim I, para. 295; Claim II, para. 395; Claim III, para. 772). What the defendants argue against this was last explicitly rejected by the Federal Supreme Court in 2017 (BGE 143 III 373, E.

2.6.2 - *Max Bill bar stool*; cf. also BGE 110 IV 102, E. 2 - *Harlequin dolls*; BGE 106 II 71, E. 2.a - *Kasperli figures*; SHK URG-David, Einführung N 27; EGLOFF, op. cit., Art. 2 N 26; MEER, Urteilanmerkung zu BGE 143 III 373, sic! 2017, p. 727). There is no reason to return to this.

276 Finally, the defendants claim that they were awarded the **Bern Music Prize** for the "Hang" and that "*the first prototypes of the 'Hang'*" were "*awarded*" the **Bavarian State Prize** at the special Supplementation Exempla. This was to be seen as an indication that the "Hang" was considered a work in the sense of the URG (Response, para. 241 f.). The defendants fail to recognize that the criteria according to which the mentioned prizes were awarded have nothing to do with the copyright protection requirements. Thus, the Berner "Musikpreis" is awarded to musicians who have a decisive influence on the Bernese music scene (above, para. 171), and not, for example, to product designers, sculptors or visual artists. The Bavarian State Prize 2000 for special technical achievement in craftsmanship was awarded - as the name already indicates - for the technical and not for the creative achievement of the defendants - and not even in connection with the "Hang", as the defendants want to make believe, but in connection with their "Pang" instruments (above, paras. 167 ff.). Thus, in none of these awards were the requirements for protection relevant for copyright relevant. Nothing can be derived from them in favor of a copyright protection of the "Hang" (see also sic! 2003, p. 731 ff., E. 6.2 - *garlic press*; EGLOFF, loc. cit. Art. 2 N 26).

277 In summary, it can thus be stated that neither the various prototypes nor the individual variants of the "Hang" are protected under Swiss copyright law.

4.2. Non-existence of copyright under German law

4.2.1. No protection due to lack of protection under Swiss law

278 According to Art. 2 (7) of the Revised Berne Convention (**RBC**), if a work of applied art is protected in its country of origin only as a design, in another country of the Union likewise only that protection may be claimed which is accorded to designs there. This provision is to be understood to the effect that if an article of applied art is not protected by copyright in its country of origin, an invocation of copyright in another country of the Union is excluded (provided that the latter grants protection to designs in principle). This is intended to prevent - in deviation from the principle of national treatment - that a work of applied art is better protected in the countries of the Union (here: Germany and the

Netherlands) than in the country of origin (here: Switzerland; cf. HILTY, Die Bedeutung des Ursprungslands in der Berner Übereinkunft, in: Rehbinder/Larese (ed.), Die Berner Übereinkunft, 1986, p. 201 ff, p. 215). The application of Art. 2 (7) Berne Convention must be based on the specific object of use: i.e. if this is not protected by copyright in the country of origin because it does not meet the requirements for protection there, copyright protection in other countries of the Union is also excluded *per se*. In this respect, reference can be made to the relevant case law and doctrine from the Netherlands on Art. 2 (7) RCC (below, paras. 308 ff.).

279 As already explained (above, para. 255 ff.), the "Hang" is not protected under Swiss copyright law. The lack of protection under Swiss law leads, according to Art. 2 (7) RCC, to the fact that there can be no copyright in the "Hang" in Germany either. Therefore, it is unnecessary to examine whether the requirements for protection under German copyright law would be fulfilled. These would only have to be examined if, contrary to expectations, the court here should come to the conclusion with regard to Swiss copyright law that the "Hang" is protected by copyright. As shown below, however, the requirements for protection under German copyright law are also not fulfilled anyway:

4.2.2. In any case, there is no protection under German copyright law

280 Contrary to the defendant's view, the "Hang" is not a copyrighted work under German law within the meaning of Section 2 (1) No. 4 DE-UrhG.

281 The defendant's reference to the decisions of the Düsseldorf Regional Court of August 11, 2020 and the Hamburg Regional Court of August 20, 2020 (Response, para. 261 et seq.) is unhelpful for several reasons:

- *First*, the German courts reached their preliminary decisions **based on a different and also incomplete set of facts**. They had much less information at their disposal, which, moreover, was largely based on the one-sided, and in part also incorrect, submissions of the defendants. Above all, the courts had much less (and partly incorrect) information on the history of the origin of the "Hang", its musical precursors and the individual technical functions of its elements (above, para. 120 ff.).
- *Secondly*, the German decisions are, of course, not **binding** and therefore have no bearing on the proceedings here (Claim I, para. 325; Claim II, para. 425; Claim III, para. 802). In this respect, it is also not a matter of establishing that any German courts were "*wrong*" in their judgments, as

the defendants believe (Statement of Defense, para. 262). The court here can and must make the decision according to its own assessment on the basis of the facts established in the proceedings here.

- *Thirdly*, both cases are only **preliminary injunction proceedings**. It is well known that in preliminary injunction proceedings a court always makes only a preliminary decision (Claim I, para. 325; Claim II, para. 425; Claim III, para. 802). In none of the cases were the decisions accepted as final and conclusive. Moreover, in preliminary injunction proceedings, the court conducts only a limited (summary) review. When issuing them, the court makes only an initial assessment. The evidentiary requirements are lowered in such proceedings. It is sufficient to establish facts that are based to a significant extent on the submissions of one party.

282 It is therefore also simply incorrect for the defendants to *claim* that the German decisions " *were made in full knowledge of all the arguments put forward here by the plaintiffs*" (Response, para. 261). The opposite is the case: in the German proceedings, not even a rudimentary argument was made to the same extent on the history of the origin of "Hang" and the technical functions of its features as is the case in the proceedings here. Moreover, the factual assertions made in the legal documents and affidavits were in part false, as can be seen from the documents submitted in the present proceedings, for example the assertion that the "*accidental first*" was the result of long development and design work (above, para. 122 ff.). Consequently, the German courts were also unable to rule on copyright protection on the basis of the facts (comprehensively) presented in the present proceedings.

283 Furthermore, in its judgment of August 20, 2020, which the defendants quote in excerpts (Response, para. 267), the Hamburg Regional Court was significantly guided by the (incorrect) idea that many brass instruments sound the same. This point is irrelevant, however, because it is not a matter of the protectability of a specific sound under copyright law, but of the design of a concrete object of use (already Claim I, para. 327 f.; Claim II, para. 425 f.; Claim III, para. 803).

284 In fact, there are numerous judgments in Germany in which copyright protection of utility articles has just been rejected. For example, the Federal Court of Justice (BGH GRUR 2012, 58 - *Seilzirkus*) denied copyright protection for the following climbing net:



285 The court reasoned that there were no individual design features that went beyond what was technically necessary (emphasis added):

*"According to the findings of the Court of Appeal, which are free of legal errors, the plaintiff's climbing nets at issue here are **not creations of an individual character** [...].*

*According to the case law of the Federal Court of Justice, copyright protection for an object of utility can therefore only be considered if its design not only embodies a technical solution, but also has an aesthetic content created by an artistic achievement. It is true that a design which merely embodies a technical solution can also have an aesthetic effect. **However, only the design which is based on an artistic achievement is protected by copyright** [...].*

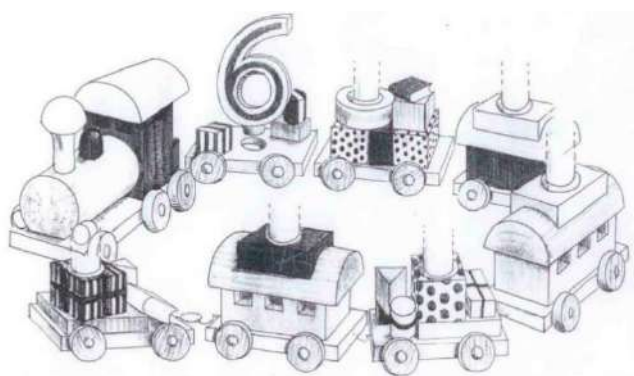
*According to these standards, it **cannot** be assumed based on the findings made by the Court of Appeal without any error of law that the plaintiff's climbing nets are creations of individual character and thus a work of applied art.*

The Court of Appeal assumed that the plaintiff had neither sufficiently demonstrated nor was it otherwise evident through which individual design features, which went beyond the technical idea and its realization, the

*plaintiff's spacenets could have obtained copyright protection. The development of the climbing nets was initially a technical idea. It had solved the technical task of constructing a piece of play equipment suitable for climbing from a pole and ropes. The technical objective was expressed in particular by the fact that the design had been registered for the grant of a patent. The plaintiff's products implement the technical concept in a simple and rational manner. This alone did not constitute an artistic design achievement. A creative design of the individual parts - such as the mast, the ropes, the anchorages or the connecting links - was not recognizable. **Insofar as the nets achieved an aesthetic effect, this was based on the technical construction.** "*

Supplement 159: Judgment of the German Federal Court of Justice of May 12, 2011, Case No. I ZR 53/10 (GRUR 2012, 58) - *Rope Circus*

286 Even in the well-known **birthday train case**, which the defendants would like to refer to in their comments on Swiss law (Response, para. 258), the Higher Regional Court of Schleswig **denied copyright protection in the** follow-up to the BGH decision. In this case, the question was whether copyright protection exists for the birthday procession depicted below:



287 In this decision, the court found that this birthday train did not have sufficient individuality to be considered a work of art. It was merely based on an existing model (i.e. a slow train) and only slightly modified. The court stated:

"The changes that the plaintiff has made to the existing slow train are not sufficient to give the birthday train sufficient individuality of its own and thus work quality. The old train already had other trailers in addition to passenger trailers. It was not as colorful as the one designed by the plaintiff, but it already existed in a colored version (in the catalog: 'Der kleine Bunte'). From the number train, the plaintiff took over a slightly modified form of a wagon with a number structure. In this respect, the plaintiff's design is based on well-known models without any conspicuous changes. It may be that the plaintiff was guided in its design by its preference for graphically clear design from the region of the Erzgebirge. However, it cannot be seen that her design deviates significantly from the design of the model. This is also composed of simple shapes. The basis of the steam locomotive and the wagons are flat rectangles made of wood. The superstructure consists of cuboids or round pieces, all of which have a clear form and no frills. The roofs of the steam locomotive and the passenger cars have an approximately semicircular shape. The plaintiff adopted all this more or less unchanged. The fact that it has been guided in the changes by certain ideas and preferences says nothing about the level of creation of the result. "

- Supplement 160:** Judgment of the Higher Regional Court of Schleswig of September 11, 2014, Ref. 6 U 74/10
- Supplement 161:** Judgment of the Federal Court of Justice of November 13, 2013, Case No. I ZR 143/12 (BGH GRUR 2014, 175) - *Birthday Train*

288 In addition, case law has united copyright protection for the wristwatches shown below:



289 In support, the court stated (emphasis added):

*"The previously known set of forms presented by the defendant shows that essentially **previously known design features** from watch design were **combined** with each other in the samples in suit. However, this combination of previously known design elements does not yet justify the fact that, in the opinion of circles that are receptive to art and reasonably familiar with art appreciation, it is possible to speak of an 'artistic' achievement in the present case. In this context, it must be taken into account that the designer of an aviation chronograph has **little room for individual design from the** outset due to the technical function of a watch, the additional chronographic functions and the usual analog representation of the time on a dial with the aid of three hands and a date display. **Also the reception of the contested designs in professional circles cannot justify an artistic impression.**"*

Supplement 162: Judgment of the Hamburg Regional Court of January 26, 2018, Case No. 308 O 488/16

290 As far as the protection of **musical instruments is concerned**, even the well-known "Les Paul" guitars were not granted copyright protection in Germany. In its decision (judgment of December 7, 1995, file no. 3 U 168/92), which was subsequently also confirmed by the Federal Court of Justice (BGH GRUR 1998,

830 - *Les Paul guitars*), the Hamburg Higher Regional Court stated the following (emphasis added):

"On the one hand, **everything** that is **technically conditioned** must be left **out of consideration** when determining the creative. For example, a solid body results in a **flatter shape** because the instrument would otherwise be too heavy, and **control knobs** are indispensable on an electric guitar; somehow they must be arranged on the top of the guitar in relation to each other in such a way that their operation is not impeded. A square is exceptionally obvious in this regard, may it be rectangular, diamond-shaped or square. Creative is hardly the choice of one of these figures. Secondly, this consideration ignores the fact that many things encountered on 'Les Paul' guitars were known in instrument making long before Les Paul, especially the guitar in its basic forms [...]

Although his instrument unquestionably offers a harmonious and appealing appearance, Les Paul has not strayed so far from given forms in its design that his own contribution could be considered creative. **The not entirely remote combination and variation of known or necessary elements is not sufficient for this.** "

Supplement 163: Judgment of the Hamburg Higher Regional Court of December 7, 1995, Ref. 3 U 168/92

291 The parallel to the present case is obvious: the defendants, too, ultimately created a simple musical instrument, combining and modifying already known and necessary design elements. However, the defendants cannot monopolize a musical instrument for themselves. They therefore stylize this instrument into a work of art (above, para. 79 ff.). The "Hang" was essentially created by placing two *Steel Pan shells* on top of each other and fixing them (above, para. 86 ff.). The resulting hollow body with resonance opening is a generally known feature of numerous instruments and, of course, a necessary element to be able to produce the desired tones at all. Incidentally, most of the design features for which the defendants claim protection today were already to be found in the very first prototype. It even already had circularly arranged tone fields and a resonance opening on the underside (above, para. 91). In this respect, it was simply an obvious combination and modification of known and necessary elements.

Everything else was then only a technical-craftsmanly further development of the prototype, but not an expression of creative decisions (above, para. 95 ff.). In the end, it was only a matter of making the prototype playable and developing it further in terms of playing and sound (above, paras. 92 ff.). This has nothing to do with a work.

292 The defendants will not succeed in proving creative decisions in view of the genesis of the "Hang" (above, para. 84 ff.). Moreover, the burden of proof of the claim prerequisites is on the defendants. This also applies to a negative declaratory action (see, for example, OLG Hamburg, judgment of July 23, 2020, marginal no. 51 - *ITPULSE*):

"The Regional Court also correctly assessed the burden of proof in the context of a negative declaratory action and considered the defendant to have the burden of proof with regard to the asserted copyright claim. In the case of a negative declaratory action, the declaratory plaintiff only has to prove that the defendant is aware of a claim based on a certain fact of life. In contrast, the plaintiff in the role of the declaratory defendant has the burden of proving those facts from which he derives his claim, because also in the case of a denying declaratory action - albeit with reversed party roles - the subject matter of the dispute is the substantive claim, the non-existence of which is in dispute (BGH NJW 2012, 3294). In a negative declaratory action, therefore, the plaintiff usually bears only the burden of establishing that the defendant is famous of a right; the action is successful, i.e., the defendant is deprived of his right if he does not prove those facts for which he (e.g., as a creditor) bears the burden of proof (Foerste, in: Musielak/Voit, ZPO, 17th ed. 2020, § 256 marginal no. 38). "

Supplement 164: Judgment of the Hamburg Higher Regional Court of July 23, 2020, Case No. 5 U 18/14 - *ITPUse*

293 Protectability in Germany can also not be derived from the ***Brompton judgment*** of the ECJ repeatedly cited by the defendants (judgment of 11.06.2020, C-833/18, EU:C:2020:461 - *Brompton*) (see, for example, Response, para. 8 and 268 f. and the warning letters). It is true that the ECJ assumes an autonomous concept of work under Union law. However, the defendants themselves state

that a central requirement in the ECJ case law is own intellectual creation (statement of defense, para. 264). This requirement is also found in German copyright law with the requirement of personal intellectual creation, so that the differences in German law are ultimately of a purely conceptual nature (LOEWENHEIM/LEISTNER, Handbuch des Urheberrechts, § 6, marginal no. 9 f.).

294 The defendants draw the wrong conclusions from this judgment. They believe that an artistic performance is now no longer required according to the case law of the ECJ (Response, para. 265). This is incorrect. The defendants deliberately quote the ECJ judgment incompletely and reproduce only one paragraph of the judgment. The decisive passages read (emphasis added; para. 22 f.):

*"According to settled case-law of the Court of Justice, the term 'work' has two components. First, it must be an original work which is its author's **own intellectual creation** and, second, it must express such a creation (see, to that effect, judgment of 12 September 2019, Cofemel, C- 683/17, EU:C:2019:721, paragraphs 29 and 32, and the case-law cited therein).*

*As regards the first element, it is settled case-law of the Court of Justice that an object can be considered original only or already **when it reflects the personality of its author by expressing his free creative choices** (judgment of 12 September 2019, Cofemel, C- 683/17, EU:C:2019:721, para. 30 and the case-law cited therein). "*

Expressed creative decisions are in the result nothing else than an artificial performance.

295 At the same time, it follows from this that - contrary to what the defendants suggest - the ECJ has **not lowered the protection threshold of** copyright law:

- As early as 2013, the Federal Court of Justice clarified that works of applied art are not subject to any requirements other than the general copyright protection requirements of a personal intellectual creation (Federal Court of Justice GRUR 2014, 175, marginal no. 15 - *Geburtstagszug*; on this already Claim I, marginal no. 331; Claim II, marginal no. 429; Claim III, marginal no. 806). In its *Cofemel judgment*, the ECJ also took this view (six years after the change of jurisdiction in Germany) (already

Action I, para. 331; Action II, para. 429; Action III, para. 806). This was once confirmed again in the *Brompton judgment*.

- According to the case law of the ECJ, the rule-exception relationship between design and copyright as already described remains, with copyright being the exception (already Action I, para. 334; Action II, para. 432; Action III, para. 809). With the uniform concept of work, the ECJ precisely does not want to establish too generous standards in Member State law (LOEWENHEIM/LEISTNER, loc. cit., § 6 marginal no. 10; LEISTNER, Uniform European concept of work also in the field of applied art, in: GRUR 2019, p. 1114 ff; GRÜNEBERG, Die Entwicklung des Urheberrechts im Jahr 2019, in: ZUM 2020, p. 175 ff, p. 180 f: "*copyright protection of design remains an exceptional case*").

296

In the *Brompton ruling*, the ECJ also emphasized that **originality** cannot be **established by purely functional characteristics**. It further emphasized that even if there is a choice with regard to the form of an object, it cannot be concluded by implication that there is necessarily a work in the sense of copyright, but that the requirements of the concept of a work must also be met in this case (emphasis added):

*"In this respect, it should be emphasized that the criterion of **originality** cannot be satisfied **by the components of an object which are characterized only by their technical function**, since it follows, inter alia, from Article 2 of the WIPO Copyright Treaty that copyright protection does not extend to thoughts. Indeed, to protect thoughts or ideas by copyright would amount to monopolizing ideas to the detriment of technical progress and industrial development (see, to this effect, judgment of 2 May 2012, SAS Institute, C406/10, -EU:C:2012:259, paras. 33 and 40). However, if the expression of these components is dictated by their technical form, the various possibilities of implementing an idea are so limited that idea and expression coincide (see, to this effect, judgment of 22 December 2010, Bezpečnostní softwarová asociace, C393/09, -EU:C:2010:816, paras. 48 and 49). "* (para. 27)

"Nevertheless, it is **for the referring court to examine whether, despite this circumstance, that bicycle constitutes an original work arising from an intellectual creation.** " (para. 30)

"As has been pointed out in paragraphs 24, 26 and 27 of the present judgment, this is **not the case where the creation of an object has been determined by technical considerations, by rules or by other constraints which have left no room, or such a limited room, for the exercise of artistic freedom that the idea and its expression coincide.** " (para. 31)

"Even if there is a **choice** as to the form of an object, it **cannot be concluded that that object necessarily falls within the concept of 'work' within the meaning of Directive 2001/29.** In order to determine whether that is indeed the case, it is for the referring court to ascertain whether the conditions [intellectual creation and expression] set out in paragraphs 22 to 27 of the present judgment are satisfied. " (para. 32)

297 The instructions to the referring court were then as follows (para. 34 f.):

"Consequently, in order to determine whether the product at issue is protectable under copyright law, it is for the referring court to determine whether the author of the product, in choosing its form, has expressed his creative ability in an independent manner by making free and creative choices and by designing the product to reflect his personality. "

"In this context, and since it is merely the originality of the product concerned that is to be assessed, the existence of **other possible forms** capable of achieving the same technical result, while suggesting the existence of a **choice, is not decisive in assessing the factors which guided the creator in his choice.** "

298 Not only do the defendants attach the wrong significance to the **Brompton judgment**, as shown, but they also conceal the fact that the referring court,

following the ECJ judgment, **precisely denied copyright protection of the Brompton bicycle** in application of the criteria provided by the ECJ. In its judgment of March 16, 2021, the Corporate Court of Liège considered, among other things, that the ECJ's reservations were based in particular on not hindering development, innovation or technical progress by granting an exclusive right with a potentially very long term of protection on technical results. It should be avoided that an idea, i.e. the form which is necessary for a technical result - here: the folding of the Brompton bicycle into three different positions - is protected by copyright (para. 57). Next, the court examined those elements which, according to the plaintiff Brompton, should characterize the overall impression of its bicycle - the curved bicycle frame, the triangular rear frame and the course of the (loose) brake cables (para. 70 ff.). It concluded that all these elements were determined by technical specifications and were not based on free and creative decisions reflecting the personality of the author.

Supplement 165: Judgment of the Tribunal de l'entreprise de Liège of March 16, 2021, Case No. A/17/03553 - *Brompton*

299 If the principles of the *Brompton judgment* are applied here, it follows that copyright protection must be ruled out (contrary to the statement of defense, para. 270 ff.). The decisive conclusion in this judgment is that there is no own intellectual creation if the designs are predetermined by technical considerations (above, para. 296). This is precisely what the BGH emphasized many years ago (BGH GRUR 2012, 58 para. 19 f. - *Seilzirkus*; emphasis added):

*"The Court of Appeal correctly assumed that only those features of an article of daily use can justify copyright protection which are not solely technically conditioned but are also artistically designed. **Technically conditioned features of an object of utility are those without which it could not function** (cf. Schulze, in: Dreier/Schulze, UrhG, 3rd ed., § 2, marginal no. 47). **This includes both features that must be used in similar products for technical reasons and features that are used for technical reasons but are freely selectable or interchangeable** (cf. BGH, GRUR 2010, 80 marginal no. 27 = WRP 2010, 94 - LIKEaBIKE). Insofar as the design of such features is based solely on technical requirements, they cannot confer copyright protection on an object of utility (cf. BGH, GRUR 1982, 305 [307] -*

*Büromöbelprogramm; GRUR 2004, 941 [942] = WRP
2004, 1498 - Metallbett).* "

Supplement 159: Judgment of the German Federal Court of Justice of
May 12, 2011, Case No. I ZR 53/10 (GRUR 2012, 58) -
Rope Circus

300 All features of the "hang" are predetermined by technical considerations and thus technically conditioned (contrary to Statement of Claim, para. 270), so that no room remained for sufficiently free creative decisions by Defendants 2 and 3. This is also supported by the history of the origin of the "Hang". In this regard, reference can be made in detail to the analogous explanations on Swiss law (above, para. 262 ff.)

301 As already explained in detail, "Hang" is a lenticular brass instrument that can be played by hand on the lap and has various tone fields as well as a Helmholtz resonance (above para. 178 ff.):

302 The **lens shape** was created by fixing two *steel pan shells*. For technical reasons, i.e. to make the "*too fat*" and "*too large*" prototype playable at all (above, para. 92 ff.), the height and diameter of the prototype were subsequently reduced (above, para. 97). The "Hang" is intended to be an instrument that can be played by hand on the lap (above, paras. 92 ff, 178 ff. and 199 ff.). The lens shape of the "Hang" is also technically necessary to achieve the desired tonal effect (above, para. 203 ff.).

303 The **dome** and its arrangement in the central tone field is conditioned by playability (above, para. 230 ff.) and also necessary from a tonal point of view. In short, it serves to stabilize the center of the tone field by means of a curvature (above, marg. no. ff.). 233 ff.).

304 The **resonance hole** is technically necessary for sound generation, as in any instrument built on a Helmholtz resonator (above, para. 242 ff.). The central arrangement on the underside is, on the one hand, due to playability and, on the other hand, necessary in order to tune the tone fields (above, marg. no. 239 ff. and 248 ff.).

305 **Circularly arranged tone fields** can already be found in the *steel pans* on which the "Hang" is based. In the case of the "Hang," they are also conditioned by playability because the tone fields can thus be reached with the hands in the same way (above, paras. 219 ff.). The circular arrangement is also necessary

from a tonal point of view in order to ensure good vibration isolation and thus minimize unwanted vibrations from other tone fields (so-called *crosstalk*) (above, marg. no. ff.). 226 ff.).

306 The effort, the toil and the costs of the created product must be disregarded when assessing copyrightability. It is not the investment or the diligence, but only the creative activity that is protectable under copyright law (BGH, GRUR 1985, 1041, 1048 - *Inkasso-Programm*; ECJ, judgment of 01.03.2012, C-604/10, ECLI:EU:C:2012:115, para. 42 - *Football Dataco/Yahoo*; DREIER/SCHULZE, *Urheberrechtsgesetz*, 7th ed. 2022, Section 2 UrhG para. 53). German law thus differs from the traditional English legal system, where copyrights arise as the result of "skill and labor" and are thus regarded, as it were, as a reward for the author's investment in the production of the work. For this reason, it is irrelevant for protectability under German law whether Defendants 2 and 3 created the "Hang" in a process lasting several years, as they claim (Statement of Defense, para. 79), but this is not the case anyway (above, para. 119).

Supplement 166: Judgment of the Federal Court of Justice of May 9, 1985, Case No. I ZR 52/83 (GRUR 1985, 1041) - *Collection Program*

307 Finally, the general principle that **ideas are not protected by** copyright naturally also applies in Germany. Everyone is free to take up ideas, for example the idea of producing jewelry pendants in the shape of a heart, hammer, vice and similar motifs (BGH GRUR 1979, 119, 120 - *Modeschmuck*). Only when an idea has taken on a concrete form can copyright protection begin (DREIER/SCHULZE, loc. cit., § 2 marginal no. 37). Thus, insofar as the defendants are ultimately only concerned with claiming the idea for a new type of musical instrument (above, para. 74 ff.), copyright protection is out of the question.

Supplement 167: Judgment of the Federal Court of Justice of October 20, 1978, Case No. I ZR 160/76 (GRUR 1979, 119) - *Cos-tume Jewelry*

4.3. Non-existence of copyright under Dutch law

4.3.1. No protection due to lack of protection under Swiss law

308 As already explained (above, para. 255 ff.), the "Hang" is not protected under Swiss copyright law. As in Germany, the lack of copyright protection under

Swiss law according to Art. 2(7) RCC already excludes that the "Hang" is protected by copyright in the Netherlands. Advocate General Drijber of the Dutch Supreme Court (**HRN**) vividly summarized the legal situation in this regard in his opinion of October 15, 2021, ECLI:NL:PHR:2021:983 - *Kwantum/Vitra*.

Supplement 168: Submissions of Advocate General Drijber of 15 October 2021, ECLI:NL:PHR:2021:983 - *Kwantum/Vitra*.

309 With regard to the meaning of Article 2 (7) of the Rome Convention, Advocate General Drijber stated the following in his submissions (para. 1.2):

"In deze zaak spitst de discussie zich toe op de uitleg van art. 2 lid 7 van de Berner Conventie (hierna: BC), het belangrijkste wereldwijde auteursrechtenverdrag. Die bepaling onderwerpt de internationale auteursrechtelijke bescherming van werken van toegepaste kunst (zoals designmeubelen) aan een voorwaarde van materiële reciprociteit (hierna: de materiële reciprociteitstoets). Deze toets strekt ertoe, aldus de Hoge Raad in het arrest MAG/Edco c.s. uit 2011 (hierna: het MAG/Edco-arrest), dat aan een voorwerp als werk van toegepaste kunst geen auteursrechtelijke bescherming wordt geboden als die in het land van oorsprong niet aan dit voorwerp toekomt. Net als in de onderhavige zaak waren in de zaak MAG/Edco de Verenigde Staten het land van oorsprong van de betrokken voorwerpen. "

In English:

"This case involves the interpretation of Article 2(7) of the Berne Convention (hereinafter: Berne Convention), the most important worldwide copyright treaty. This provision subjects international copyright protection of works of applied art (e.g., designer furniture) to the condition of substantive reciprocity (hereinafter: substantive reciprocity test). According to the 2011 Supreme Court ruling in MAG v Edco c.s. (hereinafter: MAG v Edco ruling), this criterion means that an object is not entitled to copyright protection as a work of applied art if the same protection does not apply to that object in its country of origin. "

310 Advocate General Drijber then addressed the question of whether reciprocity within the meaning of Article 2 (7) of the UCC should be examined in the abstract or in the concrete, i.e. with reference to the subject matter for which copyright protection is claimed (para. 3.33):

"Verder rijst hier de vraag of de 'lex originis-voorwaarde' concreet of abstract moet worden getoetst. Deze vraag stond centraal in het reeds genoemde en hierna te bespreken MAG/Edco-arrest uit 2011. Bij een abstracte toetsing volstaat voor het aannemen van reciprociteit dat de categorie van werken waartoe het litigieuze voorwerp behoort, in het land van oorsprong voor auteursrechtelijke bescherming in aanmerking komt. De toetsing vindt plaats op 'systeemniveau' en is enkel gericht op de vaststelling van een eventuele auteursrechtelijke 'beschermbaarheid' van een bepaalde categorie van werken in zijn algemeenheid. Bij een concrete toetsing moet voor het aannemen van reciprociteit worden vastgesteld dat het specifieke voorwerp waarvoor bescherming in het aangezochte land wordt gevraagd (dus het werk in kwestie), in het land van oorsprong auteursrechtelijk is beschermd. De toetsing is gericht op de vaststelling van de aanwezigheid van een daadwerkelijke auteursrechtelijke bescherming. "

"Furthermore, the question arises whether the "lex origine" condition is to be examined in concrete or abstract terms. This question was the focus of the aforementioned MAG/Edco judgment of 2011, which will be discussed below. In the case of an abstract test, it is sufficient for the presumption of reciprocity that the category of works to which the disputed subject matter belongs enjoys copyright protection in the country of origin. The examination takes place at the 'system level' and aims exclusively at establishing a possible copyright 'protectability' of a certain category of works in general. Under a concrete test, in order for reciprocity to be assumed, it must be shown that the specific subject matter for which protection is sought in the requested country (i.e., the work in question) is protected by copyright

in the country of origin. The purpose of this test is to determine whether effective copyright protection exists. "

311 To answer this question, the Advocate General then referred to a judgment of the Supreme Court (judgment of 28.10.2011, ECLI:NL:HR:2011:BR3059 - MAG/Edco), which ruled in favor of a **concrete** reciprocity test (para. 3.37):

"In het MAG/Edco-arrest, waarin het ging om auteursrechtelijke bescherming van Amerikaanse zaklampen, heeft de Hoge Raad echter in principiële termen en zonder voorbehoud gekozen voor concrete toetsing van de materiële reciprociteit. Daarmee volgde de Hoge Raad de conclusie van A-G Verkade, die in zijn conclusie alle voor- en tegenargumenten had opgesomd en afgewogen en uiteindelijk koos voor concrete toetsing. Het MAG/Edco-arrest maakt niet alleen duidelijk dat de materiële reciprociteit concreet moet worden getoetst, maar ook hoe concreet, namelijk zo concreet mogelijk, aan de hand van 'alle factoren' die bepalend zijn voor de auteursrechtelijke bescherming in het land van oorsprong. Ik citeer de desbetreffende overwegingen van de Hoge Raad integraal (mijn onderstrepingen):

'Uitgangspunt moet zijn dat de rechter tot taak heeft te oordelen over de aan hem voorgelegde vordering tot het bieden van auteursrechtelijke bescherming ten aanzien van een concreet voorwerp als werk van toegepaste kunst. Het is in dit kader dat de rechter in voorkomend geval de door art. 2 lid 7 Berner Conventie van hem verlangde materiële reciprociteitstoets dient uit te voeren. Die toets strekt ertoe dat aan een voorwerp als werk van toegepaste kunst auteursrechtelijk geen bescherming wordt geboden als die in het land van oorsprong niet aan dit voorwerp toekomt.

Daarom ligt in de rede dat de rechter die toets op een zodanige manier uitvoert dat hij aan de beide partijen (...) rechtsbescherming biedt die zo veel mogelijk gelijk is aan de rechtsbescherming die zou zijn geboden indien de zaak zou zijn berecht door de rechter van het land van oorsprong. De rechter zal dan ook bij het uitvoeren

van die toets dienen te letten op alle factoren die in het land van oorsprong bepalend zijn voor de vraag of, en zo ja, in hoeverre de partij die in Nederland aanspraak maakt op auteursrechtelijke bescherming van het betrokken voorwerp als werk van toegepaste kunst, in het land van oorsprong een zodanige bescherming geniet. Tot de genoemde factoren behoren onder meer niet alleen de in het land van oorsprong bestaande algemene of categoriale uitsluiting van of drempels voor auteursrechtelijke bescherming van werken van toegepaste kunst als die van het voorwerp waarover de rechter heeft te beslissen, maar ook de in het bijzonder met het concrete werk samenhangende factoren die in de weg (zouden) staan aan auteursrechtelijke bescherming in het land van oorsprong.

Is bij deze toets gebleken dat in het land van oorsprong auteursrechtelijke bescherming aan het betrokken voorwerp als werk van toegepaste kunst toekomt, dan zal de rechter vervolgens naar de hier te lande geldende regels hebben te beoordelen of die bescherming ook in Nederland moet worden verleend.

Bij dit alles moet worden aangetekend dat het in de eerste plaats de partijen zijn die de rechter ten aanzien van de al of niet geboden auteursrechtelijke bescherming in het land van oorsprong (zo nodig) de gegevens omtrent het recht van dat land zullen hebben te verschaffen. Daarbij geldt in het bijzonder dat de partij die aanspraak maakt op deze bescherming op grond van de hoofdregel van art. 150 Rv. de feiten zal hebben te stellen en zonodig hebben te bewijzen waaruit blijkt dat auteursrechtelijke bescherming in het land van oorsprong niet alleen niet is uitgesloten maar ook met betrekking tot het voorwerp waarvoor die bescherming wordt ingeroepen, wordt geboden. Immersers, alleen als dit naar het oordeel van de rechter voldoende komt vast te staan, kan aan die partij die auteursrechtelijke bescherming in Nederland worden toegekend. (HR 28 oktober 2011, ECLI:NL:HR:2011:BR3059, NJ 2012/604, m.nt. P.B. Hugenholtz (MAG/Edco c.s.), rov. 5.2.3)."

In English:

"However, in MAG v Edco, which concerned the copyright protection of American flashlights, the Supreme Court decided in favor of a concrete test of substantive reciprocity in principle and without reservation. In doing so, the Supreme Court followed the conclusion of A-G Verkade, who had listed and weighed all the pros and cons in his opinion and ultimately decided in favor of a concrete test. The MAG/Edco ruling makes clear not only that substantive reciprocity must be examined concretely, but also how concretely, namely as concretely as possible, based on 'all factors' that determine copyright protection in the country of origin. I quote the relevant considerations of the Supreme Court in full (underlining added):

'The starting point must be that it is the task of the judge to assess the claim for copyright protection presented to him in relation to a concrete object as a work of applied art. Within this framework, the court must undertake the examination of substantive reciprocity provided for in Article 2(7) of the UCC. The purpose of this examination is to ensure that an object is not protected by copyright as a work of applied art if that object is not entitled to such protection in its country of origin.

It is therefore reasonable for the court to conduct this examination in such a way as to provide both parties (...) with legal protection as similar as possible to that which would have been offered if the case had been - heard by the court of origin. In this examination, the court must therefore take into account all factors which are decisive in the country of origin as to whether and, if so, to what extent the party claiming copyright protection for the subject matter in question as a work of applied art in the Netherlands enjoys such protection in the country of origin. These factors include not only the general or categorical exclusion or thresholds for copyright protection for works of applied art, such as the

subject matter on which the court in the country of origin is called upon to decide, but also the factors relating specifically to the specific work that (would) exclude copyright protection in the country of origin.

If this examination has shown that the object in question is protected by copyright in the country of origin as a work of applied art, the court must examine, in accordance with the rules applicable here, whether this protection must also be granted in the Netherlands.

In this context, it should be noted that it is primarily the parties who must provide the court with information about the law of the country of origin (if necessary) in order to determine whether or not copyright protection exists in that country. In particular, the party claiming such protection under the main rule of Section 150 of the Dutch Code of Civil Procedure must set out the facts and, if necessary, prove that copyright protection is not only not excluded in the country of origin, but is actually granted in respect of the subject matter for which protection is claimed. For only if, in the opinion of the court, this is sufficiently proven, can that party be granted copyright protection in the Netherlands. (Supreme Court, October 28, 2011, ECLI:NL:HR:2011:BR3059, NJ 2012/604, with comment P.B. Hugenholtz (MAG/Edco c.s.), para. 5.2.3)".

312 The Advocate General concurred with this view and advocated a **concrete reciprocity test**, which is now also advocated by the prevailing doctrine (para. 3.38):

"Ik denk dat de Hoge Raad hier een gelukkige keuze heeft gemaakt. Vanuit een oogpunt van wederkerigheid, dat mijns inziens in dit verband doorslaggevend zou moeten zijn (zie 3.30), ligt een concrete toetsing meer voor de hand. De bedoeling van reciprociteitstoetsen is te voorkomen dat buitenlandse werken meer bescherming genieten dan het land van oorsprong daaraan toekent. Die bedoeling - hoe men daarover ook moge denken vanuit een oogpunt van

auteursrechtelijke bescherming en unificatie - komt het beste tot haar recht door middel van een concrete toets. Ook wijs ik erop dat sinds het MAG/Edco-arrest de concrete toetsing in de auteursrechtelijke literatuur als een gegeven wordt aanvaard. Zo zijn Spoor/Verkade/Visser 'omgegaan':

'Beslissend is of het werk in kwestie zelf in het land van herkomst auteursrechtelijk beschermd is, niet of werken van toegepaste kunst in het algemeen, of althans werken van dezelfde soort als het in geschil zijn de werk, aldaar voor die bescherming in aanmerking komen.' (Spoor/Verkade/Visser, Auteursrecht 2019, p. 892. Zie ook Geerts/Verschuur, Kort begrip 2020, p. 244-245.)"

"I think that the Supreme Court has made a good decision here. From the point of view of reciprocity, which I think should be decisive in this context (see 3.30), a concrete test is more obvious. The purpose of the reciprocity check is to prevent foreign works from enjoying more protection than the country of origin grants them. This intention-regardless of how one views it from the standpoint of copyright protection and unification-is best expressed by a concrete test. I also point out that since the MAG/Edco ruling, the concrete test has been accepted as a given in the copyright literature. For example, Spoor/Verkade/Visser have 'changed their view':

'The decisive factor is whether the work in question is protected by copyright as such in the country of origin, and not whether works of applied art in general, or at least works of the same kind as the disputed work, are eligible for protection there.' (Spoor/Verkade/Visser, Auteursrecht 2019, p. 892. see also Geerts/Verschuur, Kort begrip 2020, pp. 244-245)"

313 Under Dutch law, based on Art. 2 (7) of the Berne Convention, it is therefore relevant first and foremost whether the "Hang" is protected by copyright at all under the law of the country of origin, Switzerland. As shown above, this is not the case (above, para. 255 ff.). Against this background, an examination under

Dutch law is unnecessary. The "Hang" also does not enjoy copyright protection in the Netherlands. Only if, contrary to expectations, the court here should come to the conclusion that the "Hang" is protected by copyright with regard to Swiss copyright law, would the requirements for protection under Dutch copyright law still have to be examined at all. As will be shown in the following, this is not the case either:

4.3.2. Requirements for protection under Dutch copyright law (in response to the statement of claim, paras. 274 to 288)

314 The plaintiffs have already explained in the statement of claim that and why the "Hang" does not meet the requirements for protection under Dutch copyright law (Claim I, para. 340 et seq.). As explained, a work must represent a personal intellectual creation of the author, and the free and creative decisions of the author must be reflected in the work. However, this is exactly what the "Hang" lacks: Prototype 1 was created spontaneously and by chance, and the further development was based exclusively on technical and craft considerations. There were no relevant creative decisions by the defendant (above, para. 84 ff.).

315 Dutch case law confirms this view. Technical features do not fall within the scope of creativity protected by copyright. There is no work if the original character is limited to what is necessary to achieve a technical effect. Likewise, elements are excluded from copyright protection that merely serve a technical effect or are the **result of a selection too limited by technical principles** (Action I, para. 344; HRN, Judt. v. 16.06.2006, ECLI:NL:HR:2006:AU8940 - *Lancôme/Kecofa*; HRN, Judt. v. 22.02. 2013, ECLI:NL:HR:2013:BY1529 - *Stokke/H3*).

Supplement 169: Judgment of the Hoge Raad of June 16, 2006, ECLI:NL:HR:2006:AU8940 - *Lancôme/Kecofa*

Supplement 170: Judgment of the Hoge Raad of February 22, 2013, ECLI:NL:HR:2013:BY1529 - *Stokke/H3*.

316 In paragraph 274 et seq. of the response, the defendants list what they consider to be the relevant requirements for protection under Dutch copyright law. The defendants' statements are at best incomplete. For example, in its judgment of May 30, 2008, ECLI:NL:HR:2008:BC2153 - *Endstra*, the Supreme Court did not hold, contrary to the defendants' assertions, "*that the requirement of an 'own, original character' merely means that the work was created independently and thus may not be taken over the work of another author*"

(emphasis added; Response, para. 279). Instead, the Supreme Court considered (E. 4.5.1):

*"Dat het voortbrengsel een eigen, oorspronkelijk karakter moet bezitten, houdt, **kort gezegd**, in dat de vorm niet ontleend mag zijn aan die van een ander werk. "*

In English:

*"The requirement that the creation must have its own original character means, in **short**, that the form may not be borrowed from that of another work. "*

Supplement 171: Judgment of the Hoge Raad of May 30, 2008,
ECLI:NL:HR:2008:BC2153 - *Endstra*

317 Furthermore, it does not follow from this decision of the Supreme Court that a "low threshold should be set" for the requirement of "creative human activity and thus creative decisions", which should exclude "**only** those forms of expression" which are "so banal or trivial that no creative effort of any kind can be discerned behind them" (emphasis added; Response, para. 280). Rather, the Supreme Court held that such banal and trivial expressions are excluded from copyright protection "in any case" ("*in elk geval*"). In addition, other forms of expression that lack sufficient creativity are also not protected by copyright (HRN, Judt. v. 30.05.2008, ECLI:NL:HR:2008:BC2153, E. 4.5.1 - *Endstra*). This needs to be emphasized, especially since the Supreme Court has not made any restriction in this respect - contrary to what the defendants seem to assume.

Supplement 171: Judgment of the Hoge Raad of May 30, 2008,
ECLI:NL:HR:2008:BC2153 - *Endstra*

318 The fact that the threshold is not "low" is also clear from the judgment which the Court of Appeal in The Hague - the "*most influential court for intellectual property in the Netherlands*" (Response, para. 278) - issued in this case following the rejection decision: The recordings at issue, of conversations that the late Willem Endstra had had with the police in the back seat of a car between March 2003 and January 2004, were not protected by copyright. Following the Supreme Court's decision, the Court of Appeal in The Hague succinctly ruled that Willem Endstra's statements could not be considered to be based on a creative achievement of significance, and therefore no copyright existed in them

(judgment of 16.07.2013, ECLI:NL:GHDHA:2013:2477 - *Endstra v Nieuw Amsterdam*).

Supplement 172: Judgment of the Hoge Raad of 16 July 2013, ECLI:NL:GHDHA:2013:2477 - *Endstra/Nieuw Amsterdam*.

319 Defendants further cite an earlier Supreme Court decision of February 24, 2006, ECLI:NL:HR:2006:AU7508 - *Technip/Goossens*. According to the defendants, it should follow from this that also decisions based on scientific or technical knowledge, insights and experience and relating to objective information and conditions can constitute creative decisions leading to copyright protection (Response, para. 280 supra). This decision was received very critically in Dutch doctrine (inter alia QUAEDVLIEG, AMI 2006/05) and has become outdated in view of the case law of the Supreme Court and the ECJ since then, as stated by the authoritative doctrine (e.g. SPOOR/VERKADE/VISSER, *Auteursrecht*, 2019, pp. 90 et seq, para. 3.12) and, for example, the District Court of The Hague in 2016 (judgment of 09.11.2016, ECLI:NL:RBDHA:2016:13329, E. 4.5 - *Leerlijnen voor educatieve uitgaven*; similarly Court of Appeal of The Hague, judgment of 23.07.2019, ECLI:GHDHA:2019:3060, E. 5.11: *It cannot be concluded from the Technip/Goossens judgment that the selection and arrangement of scientific data or data based on didactic knowledge can also be protected by copyright if there is no or only too little scope for free and creative decisions in this selection or arrangement*).

Supplement 173: Judgment of the Hoge Raad of February 24, 2006, ECLI:NL:HR:2006:AU7508 - *Technip/Goossens*

Supplement 174: Judgment of the District Court of The Hague of November 9, 2016, ECLI:RBDHA:2016:13329 - *Leerlijnen voor educatieve uitgaven*.

Supplement 175: Judgment of the Court of Appeal of The Hague of 23 July 2019, ECLI:GHDHA:2019:3060 - *GEU/Snappet*.

320 The Defendants also overstate the significance of the Supreme Court's judgment of April 12, 2013, ECLI:NL:HR:2013:BY1532 - *Stokke/Fikszo* (Response, para. 281). For example, they overlook the fact that the observations on fashion, style and trend (Response, para. 281, sixth point) were not made in connection with the question of protection, but with the question of infringement. Furthermore, they omit the important nuances highlighted below (E. 4.6.e):

*"Voorts geldt dat de enkele omstandigheid dat het werk of bepaalde elementen daarvan, passen binnen een bepaalde mode, stijl of trend niet betekent dat het werk of deze elementen zonder **meer** onbeschermd zijn. Onderzocht moet worden of de vormgeving van de (combinatie van de) verschillende elementen zodanig is dat aangenomen kan worden dat met het ontwerp door de maker **op een** voldoende **eigen wijze** uiting is gegeven aan de vigerende stijl, trend of mode. "*

In English:

*"Moreover, the mere fact that a work or certain elements thereof are part of a particular fashion, style or trend does not mean that the work or those elements are **automatically** unprotected. The test is whether the design (or combination) of the various elements is such that the creator has expressed the prevailing style, trend, or fashion in a **sufficiently individualized manner**. "*

Supplement 176: Judgment of the Hoge Raad of April 12, 2013, ECLI:NL:HR:2013:BY1532 - *Stokke/Fikszo*.

321 Contrary to the defendant's assertions (Statement of Claim, para. 282), the plaintiff's account of the Supreme Court's judgment on the Tripp-Trapp chair (judgment of 2202.2013, ECLI:NL:HR:2013:BY1529 - *Stokke/H3 Products*) is neither "*false*" nor "*misleading*". As already stated in the application (Application I, para. 354), the Supreme Court upheld the judgment of the Court of Appeal of The Hague, excerpts of which are also included in the Supreme Court's decision. Indeed, the requirements for copyright protection formulated in this judgment support the plaintiff's position that the "Hang" is not protected by copyright, which will have to be returned to (below, paras. 352 ff.).

Supplement 170: Judgment of the Hoge Raad of February 22, 2013, ECLI:NL:HR:2013:BY1529 - *Stokke/H3*.

322 As the defendants themselves rightly point out, under Dutch law the party claiming copyright protection is obliged to set out and explain which elements of the work for which protection is claimed are said to be the result of the author's free and creative decisions (Response, para. 288). Thus, the burden of

proving creative decisions is on the party claiming that an item is protected by copyright. The defendants have not provided this proof in the present case. The "hang" is not the result of creative design decisions, but of technical and craftsmanlike knowledge (in detail above, paras. 84 ff.). The requirements for protection under Dutch law are not met, as explained below on the basis of Dutch and European law.

4.3.3. Examples of interpretation under Dutch law (in response to the statement of claim, paras. 289 to 305)

323 The defendants wish to infer from the *Van Dale/Romme* and *Stokke* decisions that the "*mere fact that the author has made decisions other than those dictated by technical and functional requirements (i.e., subjective design decisions) [...] is generally regarded as a sufficient basis for establishing the existence of copyright protection*" (Response, para. 290). This is not true and does not do justice to the complex balancing that must be done when deciding whether an object is protected by copyright under Dutch law. Referring to the judgments of the Supreme Court of 16 June 2006, ECLI:NL:HR:2006:AU8940, E. 3.3.2 - *Lancôme/Kecofa* and of 19 September 2014, ECLI:NL:HR:2014:2737, E. 4.2 - *Rubik/Beckx*, the Advocate General of the Supreme Court van Peurse held the following in *GEU/Snappet* (Stn. v. 25.06.2021, ECLI:NL:PHR:2021:639, para. 3.5 - *GEU/Snappet*; confirmed by the Supreme Court, Judgment v. 17.12.2021, ECLI:NL:HR:2021:1906 - *GEU/Snappet*):

"Het werkbegrip vindt zijn begrenzing waar het eigen, oorspronkelijk karakter alleen oplevert wat noodzakelijk is voor het verkrijgen van een technisch effect. Elementen van het werk die alleen een technisch effect dienen of te zeer het resultaat zijn van een door technische uitgangspunten beperkte keuze, zijn van bescherming uitgesloten. [...] De enkele omstandigheid dat hetzelfde idee op uiteenlopende wijzen kan worden vormgegeven, brengt niet mee dat de gekozen vormgeving een eigen oorspronkelijk karakter heeft. "

In English:

"The concept of a work finds its limit where its own original character yields only what is necessary to achieve a technical effect. Elements of the work which serve only a technical purpose or which are too much the result of

a choice limited by technical considerations are excluded from protection. [...] The mere fact that one and the same idea may be designed in different ways does not mean that the design chosen has a character of its own. "

- Supplement 177:** Motions of Advocate General van Peursem of 25 June 2021, ECLI:NL:PHR:2021:639 - *GEU/Snappet*.
- Supplement 178:** Judgment of the Hoge Raad of 17 December 2021, ECLI:NL:HR:2021:1906 - *GEU/Snappet*.
- Supplement 169:** Judgment of the Hoge Raad of June 16, 2006, ECLI:NL:HR:2006:AU8940 - *Lancôme/Kecofa*
- Supplement 179:** Judgment of the Hoge Raad of 19 September 2014, ECLI:NL:HR:2014:2737, E. 4.2 - *Rubik/Beckx*.

324 To supposedly substantiate their legal opinion, the defendants refer in paragraph 289 et seq. of the statement of defense to various Dutch judgments which are supposed to prove that the Dutch courts have already granted copyright protection to various utility articles. While it is undisputed that objects of daily use can also be protected by copyright as long as they meet the corresponding (correctly understood) requirements for protection, the decisions cited by the defendants are unhelpful with respect to the "Hang", which will be explained below by way of example on the basis of some of the decisions (see below, para. 325 ff.). In addition, there are various, more recent decisions of Dutch courts which denied copyright protection to utility articles and were withheld from the court by the defendants, which will also be discussed below (below, para. 337 ff.).

325 The first decision relied on by the defendants is a decision of the Leeuwarden Court of Appeal of January 10, 2012 ECLI:NL:GHLEE:2012:BV0720 - *Esschert/S&S* (Response, para. 292 et seq.). The court found that the fire basket illustrated below should be protected by copyright:



326 This is a decision in preliminary injunction proceedings, in which the court took the preliminary view that the fire basket was protected by copyright. It is clear from the decision that the defendant had not seriously defended itself or that the counter-arguments had essentially been limited to the sweeping and abstract assertion that copyright had generally not been written for such objects of utility (E. 3.14 f.: "*auteursrecht niet is geschreven voor dit soort gebruiksvoorwerpen*"), which unsurprisingly did not convince the court. The creative decisions on which the judgment was based, on the other hand, had apparently not been disputed - unlike in the present case.

Supplement 180: Judgment of the Court of Appeal Leeuwarden of 10 January 2010 ECLI:NL:GHLEE:2012:BV0720 - *Esschert/S&S*.

327 As far as the dress coat is concerned, to which the defendants refer in paragraph 296 of the response, it is not apparent what they want to deduce from this in their favor. Moreover, there is a much greater scope for design in the case of that coat. The copyright does not exist in the coat as such (consisting of an upper opening for the neck, a lower opening for the legs, two sleeves and a fastener) or in its features determined by the purpose, but at most with reference to some very specific design features in which there was creative leeway. The defendants are silent on this.

328 The defendants then rely on the judgment of the Court of Appeal of The Hague of September 1, 2020, ECLI:NL:GHDHA:2020:1620 - *Tribù/Borek*, which concerned the copyright protection of a chair (Response, para. 297 et seq.). The Court of Appeal took into account in particular that the intellectual creation of the designer is expressed in particular in the design of the frame and the seat

shell of the Natal chair and in the way they relate to each other and are connected (E. 4.5). This is clearly more evident from the other illustrations included in the decision (below left) than in the one provided by the defendants in their response (below right, Response, para. 297):



- 329 The Court of Appeal of The Hague considered in this respect that the combination, selection, and arrangement of non-protected design elements, which is based on personal taste and personal preferences, "may be" original and protected by copyright in its entirety (E. 4.11: "*oorspronkelijk kan zijn en voor auteursrechtelijke bescherming in aanmerking kan komen*"; emphasis added) and not "is" (but according to Statement of Claim, para. 291). Apart from that, the defendants deliberately conceal that in those proceedings the defendant had failed to substantiate that the combination of the individual design elements bears the personal stamp of the creator (E. 4.11). Thus, this case also contributes nothing to the substantiation of the alleged copyright protection of the "Hang".

Supplement 181: Judgment of the Court of Appeal of The Hague of September 1, 2020, E-CLI:NL:GHDHA:2020:1620 - *Tribù/Borek*.

- 330 The defendants further rely on a 43-year-old decision of the Amsterdam Court of Appeal concerning the following onion crate (judgment of June 29, 1979, BIE 1982/31 - *Onion Crate*; Response, para. 303):



331 Apart from the fact that the considerations in this judgment were very brief and outdated in view of the Dutch and European case law since then (the face considers, among other things, an added value on an aesthetic level - "een meerwaarde van esthetisch nivo" - which would no longer be admissible today), the judgment is essentially based on a statement by a professor submitted by the plaintiff. In this regard, the court held that the defendants did not refute this statement and did not offer any other expert witnesses in the appeal proceedings. Thus, this decision also does not really help in the search for an answer to the question of copyright protection of the "Hang" under Dutch law.

Supplement 182: Judgment of the Amsterdam Court of Appeal of June 29, 1979, BIE 1982/31 - *Onion Crate*

332 Furthermore, the defendants cite a 30-year-old decision of the Amsterdam Court of Appeal on the following children's wheel (judgment of 29.10.1992, BIE 1994/63 - *Children's wheel*; Response, para. 304):



333 As already in the case of the *onion box decision* (above, para. 330 f.), this "precedent" - with a two-sided decision of the district court and even a one-sided decision of the court of appeal - is also extremely sparsely reasoned. Moreover,

this decision is also out of step with the latest developments in national and European copyright law. For example, the decision does not contain any examination of originality, such as was stipulated in the *Cofemel decision* of the ECJ, and the decision does not mention technical requirements with a single word, nor are such requirements taken into account. It is therefore also not relevant in the present case.

Supplement 183: Judgment of the Amsterdam Court of Appeal of October 29, 1992, BIE 1994/63 - *Children's walking wheel*

334 The last decision on which the defendants rely concerns an injunction issued by the Arnhem Court of Appeal in connection with the design of two ovens (judgment of 07.06.2011, ECLI:NL:GHARN:2011:BR2358 - *NIBE/Interfocos*; Response, para. 305):



335 In this decision, which was only preliminary, the Court of Appeals briefly addressed the technical limitations of certain design elements of the stove and, after summarizing those design elements, stated (E. 4.12):

"Naar het oordeel van het hof hebben al deze onderdelen weliswaar een gebruiksfunctie, maar kan niet gezegd worden dat de vormgeving daarvan zozeer het resultaat is van een door technische uitgangspunten beperkte keuze dat de Contura kachel niet als een auteursrechtelijke beschermd werk kan worden aangemerkt. "

In English:

"Although all of these elements have a utilitarian function, the court finds that it cannot be said that their design is so much the result of a choice limited by technical starting points that the Contura stove cannot be considered a copyrighted work. "

Supplement 184: Judgment of the Court of Appeal Arnhem of 7 June 2011, ECLI:NL:GHARN:2011:BR2358 - *NIBE/Interfocos*.

336 The design elements taken into account by the court in this examination were the soapstone, the wood storage compartment, the round shape, the wood shelf, the recess above the door, the shaker grille at the bottom, the storage drawer, the slider and the oven compartment (E. 4.12), and not the "*cylindrical shape without ornamentation*" or the "*90-degree opening*" mentioned by the defendants in paragraph 305 of the response. It can only be conjectured why the defendants list other design elements here than the court had considered.

337 The decisions cited by the defendants are therefore of no help to them. In contrast, the defendants fail to **mention** the **actually relevant case law**. There is, in fact, a whole series of more recent Dutch judgments in which copyright for utility articles has been denied. In addition to the case law already mentioned in paragraph 352 of Claim I, some of these judgments are discussed below by way of example:

338 In its judgment of July 13, 2021, ECLI:NL:GHARL:2021:6712 - *Rubik/Beckx*, the Court of Appeal of Arnhem-Leeuwarden dealt with the famous **Rubik's** cube (also called **Rubik's** cube). The Rubik's Cube is a three-dimensional logic game or spinning puzzle, in which a single-colored side is to be obtained by spinning:



Supplement 185: Judgment of the Court of Appeal Arnhem-Leeuwarden of July 13, 2021, ECLI:NL:GHARL:2021:6712 - *Rubik/Beckx*.

339 More than a decade ago, Rubik filed a preliminary injunction against Beckx alleging copyright infringement of the Rubik's Cube. In 2011, the Utrecht District Court found that the design of the Rubik's cube (without the colored areas) was technical and rejected Rubik's claims (judgment of Oct. 12, 2011, ECLI:NL:RBUTR:2011:BT7141 - *Rubik/Beckx*). Rubik appealed this ruling and supplemented its claims by relying on both the specific design of the cube and the colored sides. The Arnhem Court of Appeals then ruled that the Rubik's Cube was protected by copyright, but only in connection with the combination of six colored sides and the nine individual partial faces, not in its shape design as such (judgment of Sept. 25, 2012, Case No. 200.098.052 - *Rubik/Beckx*).

340 Rubik and Beckx then sued each other on the merits. In 2018, Rubik's claims were only partially upheld by the District Court of Midden-Nederland with respect to the shape of the grid (i.e., the contrasting edges between the individual mini-cubes that make up the Rubik cube) with its specific width and specific color in combination with the six contrasting specific colors and their positioning on the cube (judgment of Jan. 31, 2018, ECLI:NL:RBMNE:2018:317 - *Rubik/Beckx*).

Supplement 186: Judgment of the District Court of Midden-Nederland of January 31, 2018, ECLI:NL:RBMNE:2018:317 - *Rubik/Beckx*.

341 The main question that the Arnhem-Leeuwarden Court of Appeal then had to deal with was whether the Rubik's Cube with and/or without its colored faces was protectable by copyright. In this assessment, the issues of originality and technical functionality were of central importance, and the Court of Appeal based its assessment on the relevant case law of the ECJ (Judg. v. 26.02.2011, C-393/09, EU:C:2010:816 - *Bezpečnostní softwarová asociace*; Judg. v. 12.09.2019, C-683/17, EU:C:2010:816 - *Cofemel*; Judgment v. 11.06.2020, C-833/18, EU:C:2020:461 - *Brompton*). The specific question to be answered was whether - even if the Rubik's cube or parts thereof were not exclusively dictated by their (technical) function - the remaining scope for design decisions is so limited that free creative decisions cannot be assumed.

342 The Court of Appeal considered - like the District Court before - the specific width, color and thickness of the grid of the cube as not technically defined, because a different thickness and other colors or, for example, numbers or symbols are possible, and therefore considered the grid in combination with the specific contrasting colors to be protected by copyright. However, the Court of Appeal considered the **design of the Rubik's cube per se, i.e.**, without the colored areas, to be **highly technically defined due to the function of the cube**, namely a three-dimensional logic game. The appeals court noted that this also applied to the movement of the individual mini-cubes, which is the fundamental element of the game. Therefore, the court held that the **Rubik's cube itself was not protected by copyright** (Judt. v. 13.07.2021, ECLI:NL:GHARL:2021:6712 - *Rubik/Beckx*).

Supplement 185: Judgment of the Court of Appeal Arnhem-Leeuwarden of July 13, 2021, ECLI:NL:GHARL:2021:6712 - *Rubik/Beckx*.

343 This decision, which applies the framework set by the ECJ, clearly shows that it is essentially a matter of what scope remains for creative decisions in addition to the technical function of the object. As stated by the Court of Appeal, the scope of the Rubik's cube was so limited that free and creative decisions can no longer be assumed. As with the "Hang", the Rubik's cube is also an interactive, "playable" object which - subject to free and creative decisions for design elements such as colors - is not protected by copyright.

344 As a further example of application from Dutch case law, a decision of the Leeuwarden Court of Appeal from 2012 regarding a **footrest** can serve (Judt. v. 05.06.2012, ECLI:NL:GHLEE:2012:BW7540 - *Fussstütze*). The Court of Appeal agreed with the District Court that all the allegedly **defining features of the footrest**, namely the size, the rounded corners and the octagonal shape (thus achieved), the 17 lines in the shape of a wide V, the choice of material and the color, are **predominantly determined by the functional and technical requirements for a footrest**, so that the **idea coincides with its expression**.

Supplement 187: Judgment of the Court of Appeal Leeuwarden of June 5, 2012, ECLI:NL:GHLEE:2012:BW7540 - *Footrest*.

345 Another decision of the District Court of The Hague concerns a new **bouquet-like water balloon filler**, i.e., a device that can be attached to a faucet to subsequently fill several water balloons at the same time (Judgment of 15.09.2017, ECLI:NL:RBDHA:2017:10588 - *Bunch O Balloons*):



346 With regard to copyright, the court held (referring, inter alia, to the *Stokke/Fikszo* decision, also cited by the defendants) that the concept of a work under copyright law finds its limits where its own, original character concerns only that which is necessary to achieve a technical effect. Elements of the work that serve only a technical effect or are too much the result of a selection limited by technical considerations are excluded from copyright protection. Referring to the considerations regarding the plaintiff's design rights (in which, among other things, it was assumed that there are only a limited number of actual alternatives; E. 4.3.9), the court concluded that the water balloon filler at issue is **not protected by copyright** (E. 4.4).

Supplement 188: Judgment of the District Court of The Hague of September 15, 2017, ECLI:NL:RBDHA:2017:10588 - *Bunch O Balloons*.

347 Another illustrative decision of the Court of Appeal in The Hague dates back to 2021 (judgment of 06.042021, ECLI:NL:GHDHA:2021:1371 - *Philips/Lidl*). The decision concerned the Philips ST3D razors (below left) and Lidl Silvercrest (below right):



348 The ruling by the Court of Appeal in The Hague was preceded by a legal dispute that lasted more than half a decade. Philips had requested that the first-instance judgment be set aside, in which the District Court of The Hague had ruled that Philips' razor was protected by copyright, but that Lidl had not infringed this copyright. Referring to the *Cofemel decision* of the ECJ, the Court of Appeal found that the concept of work consists of two elements. First, the object in question must be an original in the sense that it represents its own intellectual creation of its author. Secondly, the creation must be expressed. The court also emphasized that there is no intellectual creation in this sense if the design decisions are technically conditioned. It then held that Philips' razor was not protected by copyright, taking into account, among other things, older Philips razors. The existing differences were either too technically determined or too trivial to lead to copyright protection.

Supplement 189: Judgment of the Court of Appeal of The Hague of April 6, 2021, ECLI:NL:GHDHA:2021:1371 - *Philips/Lidl*.

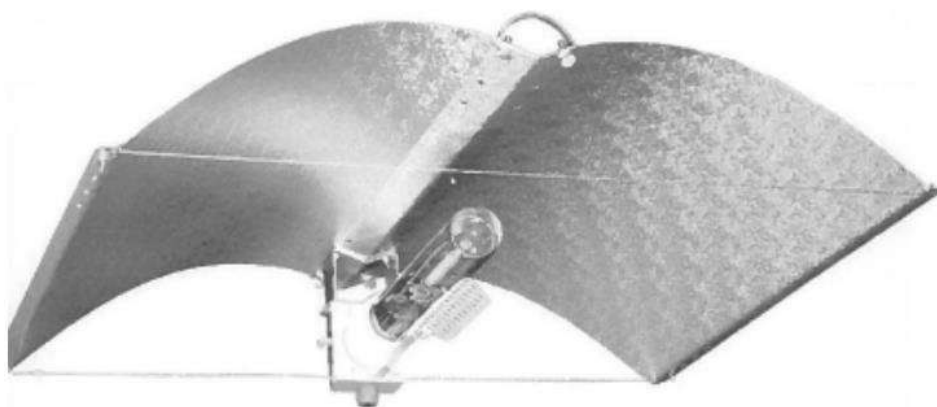
In another decision from 2016, the District Court of The Hague dealt with the design of protective covers for e-bike batteries (judgment of 31.08.2016, ECLI:NL:RBDHA:2016:10130 - *Rider/Trading To*):



349 The court considered that copyright protection of such covers was out of the question, since the choice of the plaintiff's design seemed to be determined exclusively by technical considerations, or at least was the result of a choice that was too limited by technical considerations. With reference to the label and its placement, the court considered that these were such banal or trivial elements that they could not in themselves give rise to a copyright for the protective covers.

Supplement 190: Judgment of the District Court of The Hague of 31 August 2016, ECLI:NL:RBDHA:2016:10130 - *Driver/Trading To*

350 Another case decided by the District Court of The Hague in 2017 concerns an adjustable reflector device (judgment of 21.062017, ECLI: NL:RBDHA:2017:6743 - *Hygro/Futurecare*):



351 In the opinion of the court, the plaintiff had not sufficiently substantiated that the design does not consist exclusively of what is required to achieve a technical effect. The plaintiff had conceded that the characteristic elements have a technical effect (which also applies to the "hang"). It had claimed, but only inadequately substantiated, that these elements could just as well have been designed differently. The court therefore denied copyright protection to the reflector device.

Supplement 191: Judgment of the District Court of The Hague of 21 June 2017, ECLI:NL:RBDHA:2017:6743 - *Hygro/Futurecare*.

4.3.4. Application of the principles to the "hang"

352 As already stated above and in the statement of claim (Claim I, para. 340 et seq.), the "Hang" is not protected under Dutch copyright law. The plaintiffs refrain from repeating these arguments at this point and will limit themselves in the following to a statement on the defendant's comments in para. 306 et seq. of the statement of defense.

353 Contrary to the defendants' assertions in paragraph 307 f. of the statement of claim, a Dutch court would not assume that the shape of the "Hang", including

the four features put forward by the defendants, is protected by copyright. As noted above, Prototype 1 was created spontaneously and accidentally by simply joining two pre-existing *Steel Pan shells* together, which is not a creative decision. Prototype 1 and its further developments were based exclusively on technical considerations, or at least all decisions made were so limited that they cannot be considered free and creative (above, para. 84 ff.). Neither the prototypes nor the individual variants of the "Hang" are consequently protected by copyright. This was also decided by the Court of Appeal Arnhem-Leeuwarden in the *Rubik/Beckx* case. Applying the relevant criteria from national and European case law (Cofemel and *Brompton*), the court found that the design of the Rubik's cube is to a large extent technically determined due to the function of the cube as a three-dimensional logic game (above, para. 338 ff.). The same applies to the "Hang". In order to fulfill its function as an instrument, the "Hang" requires the features which, according to the defendants, should shape its overall impression, or at least the alternatives are so limited that there can be no question of free and creative decisions having been made in the development of the "Hang". The history of development proves this impressively (above, para. 84 ff.).

354 It is also incorrect that the "Hang" is said to have no function (Response, para. 311). The "Hang" was obviously created as a very specific instrument (above, para. 79 ff, 92 ff. and 178 ff.) and thus fulfills a specific function (just as the Rubik's cube fulfills a specific function). As already explained, the development of the "Hang" was driven by this function or the corresponding task. The Defendants refined the prototype with this function in mind by adding technical features and thus improved the instrument over time (supra, para. 92 ff.).

355 The defendants are then mistaken if they believe "*that craftsmanship and technical skill and knowledge also played a role in the creation of the 'Hang'*" is "*completely irrelevant to the question of copyright protection*" (Response, para. 315). As shown, the corresponding case law is outdated (above, para. 319 and 337 ff.).

356 The defendants further refer to the copyright protection of furniture (statement of defense, para. 315 a.E.). However, the defendants overlook the fact that only those pieces of furniture are protected by copyright which bear the personal stamp of the author and are an expression of free and creative decisions. This is often seen by the public as a particular "design" of such a piece of furniture in which the creative decisions are manifested. In the case of the "Hang", however, it was the function, not the design, that dictated the choices

made, or at least constrained them in such a way that they were not free and creative.

357 Finally, in paragraph 317 of the Response, the Defendants refer to the seizure of various *Handpans* in the Netherlands from Plaintiff 1. The Defendant's statements are misleading. For example, it claims that a Dutch court has endorsed or "confirmed" the statements made in the Statement of Defense by allowing a precautionary seizure. After all, the defendants also state that the court merely "summarily" examined the existence of the copyright in the "Hang" under Dutch law. Nevertheless, the statements of the defendants are incomplete and thus misleading: Precautionary seizures are very easily granted by the Dutch courts - usually *ex parte* within one day after filing the application. Most of the time, only the submissions of the plaintiff and the supporting documents submitted by him are taken into account. The situation was no different in the present case: The court relied exclusively on the submission of the defendant, which furthermore contained various untruths and in particular misrepresented the history of the origin of the "Hang" (above, para. 125 f.). In addition, the court could not even assess whether the "Hang" is protected under Swiss copyright law, which is a prerequisite for copyright protection in the Netherlands (above, paras. 308 ff.). Moreover, the threshold for granting such an application is extraordinarily low. No less important is the fact that the plaintiff for such a seizure is fully liable for the resulting damage to the other party. Contrary to what the defendants suggest in para. 319 of the response, the threshold for challenging such a seizure is, in contrast, high, as can be seen, for example, from the decision of the Supreme Court in the *Bijl/Van Balen case* (judgment of 30.06.2006, NJ 2007/483 - *Bijl/Van Balen*). The doctrine held on this (GROSHEIDE et al., *Handhaving van intellectuele eigendom*, deLex: Amsterdam 2016, p. 87):

"Dit arrest is een aanwijzing dat aan de motivering van de opheffingsgronden zwaardere eisen worden gesteld dan verwacht zou mogen worden op grond van de eenvoudige toewijzing van het verlov tot beslaglegging. "

In English:

"This ruling is evidence that stronger requirements are placed on the grounds for setting aside [the seizure] than would be expected based on the simple issuance of the seizure warrant. "

Supplement 192: Judgment of the Hoge Raad of 30 June 2006,
ECLI:NL:HR:2006:AV1559 - *Bijl/Van Balen*.

358 In the Netherlands, following the seizure, Defendant 1 brought proceedings on the merits before the District Court of The Hague against Plaintiff 1 on the grounds that, among other things, its copyrights in the EU had been infringed by Plaintiff 1. In view of the proceedings here, plaintiff 1 raised the defense of lis pendens. The District Court of The Hague subsequently ruled that it did not have jurisdiction with respect to the existence of the copyright in "Hang" and the alleged infringement by the defendant here as far as the Netherlands and Germany were concerned, but that it retained jurisdiction with respect to the other EU Member States. The District Court of The Hague stayed the proceedings there pending a final decision in the proceedings here in order to avoid conflicting decisions and decided that the seizure would remain in place until that time (judgment of 09.02.2022, ECLI:NL:RBDHA:2022:1033 - *PANArt/Ayasa Instruments*).

Supplement 193: Judgment of the District Court of The Hague of 9 February 2022, ECLI:NL:RBDHA:2022:1033 - *PANArt/Ayasa Instruments*.

Finally, we ask you, dear Mr. President, dear members of the Commercial Court, to approve the plaintiff's legal claims.

Mit vorzüglicher Hochachtung

Roger Staub

Manuel Bigler

Im Doppel

Beweismittel gemäss separatem Verzeichnis