
Pleading notes on the plaintiffs' first submissions at the main hearing on September 21, 2023

Dear Vice President Schlup,
Dear Commercial Judge Geelhaar-Beuret, Dear
Commercial Judge Emch-Fasnacht

In the name of and on behalf of the plaintiffs, I hereby make the first party submission pursuant to Art. 228 para. 1 ZPO:

1. legal framework

1 In the present case, it is undisputed that utility objects can in principle be eligible for copyright protection as works of applied art. This applies for Swiss law as well as for German and Dutch law. However, works of applied art are subject to certain special features. This is due to the fact that they always serve a purpose and therefore have elements that are technically or functionally conditioned. Insofar as the aesthetic effect of a utility object is based on such technically or functionally conditioned elements and not on free, creative design decisions (and thus on an artistic achievement), copyright protection is out of the question. The BGH decided this in para. 36 of the well-known and much-cited *Seilzirkus* ruling and drew a conclusion from this that is also noteworthy for the present case. I quote:

"... in the design of a work of applied art that serves a utilitarian purpose, it must be taken into account that the aesthetic effect of the design can only justify copyright protection insofar as it is not due to the utilitarian purpose and is technically conditioned, but is based on artistic achievement is based (...). This can lead to a work of applied art, which has just as great an aesthetic effect as a work of non-purposeful art, not enjoying copyright protection, unlike the latter." (BGH, judgment of May 12, 2011, case no. I ZR 53/10 [Supplement 159], para. 36 - *Seilzirkus*)

2 For us, this means the following: The "Hang" may have a certain aesthetic effect. It may even "please" one or the other. fall". However, we must not allow ourselves to be blinded by this. For, insofar as the "Hang" has a certain aesthetic effect, this is not due to the free creative design decisions of the defendant. We have shown this in detail in our legal briefs, and we will come back to this later .

3 Having said this, I will now address some examples of inaccurate statements of a legal nature made by the defendant in the rejoinder and discuss them in detail. correct:

4 First, the defendants claim that individuality under copyright law is not on the basis of a task; such a task originates from the field of patent law and contradicts the nature of artistic creation (duplicate, para. 25 and 88).

5 That is wrong. The **starting point** of creative activity is **always a certain tasks** (THOUVENIN, Irrtum: Je kleiner der Gestaltungs- pielraum, desto eher sind die Schutzvoraussetzungen erfüllt, in: Berger/Mac- ciacchini (eds.), Populäre Irrtümer im Urheberrecht, FS Hilty, 2008; STRAUB, In- dividuality as a key criterion of copyright law, in: GRUR Int. 2001, p. 1 ff., p. 5). The task is decisive for the assessment of individuality . It is an indispensable part of the examination of the requirement of statistical uniqueness and thus of individuality. This was stated by the Federal Supreme Court in BGE 134 III 166, E. 2.3.1 - *Arzneimittel-Kompendium* (with reference to BGE 130 III 714, E. 2.3 - *Wachmann Meili*; see also BGE 136 III 225, E. 4.2 - *Guide Orange*):

*"Then it is not unique, because there is a high probability that the **same** or essentially the same photograph would result from the **same task**."*

6 It must therefore first be determined what the specific task of the defendant was. It must then be examined whether the scope opened up for the solution of this task was

The scope for design was exploited in such a way that the solution of the task appears "unique" within the meaning of the case law cited. Therefore

it is necessary that **free, creative decisions** have been made to a sufficient extent . Decisions based on rational selection criteria or influenced by technical circumstances are not sufficient. This is because it is to be expected that they will be repeated, which is why there is a lack of individuality (see STRAUB, loc. cit., p. 6 with further references).

7 Secondly, the defendants consider that, even if individuality were to be assessed on the basis of a task, the definition of that task should not assume the solution. However, this is what the plaintiffs would do and thus fall into a **retrospective approach** (duplicate, para. 26 and 89). The defendants are also wrong here: We have always focused on the task at hand. The task that the defendants set themselves in the development of the "Hang" specifically . This task did not - as the defendants would have us believe today - consist of designing **some kind of** sound object "on a greenfield site". No, the task was very specifically about making the randomly and spontaneously created prototype 1 playable and improving its sound (replica, para. 92-94). This task runs through all development stages of the "Hang" and is documented by several quotations from the defendant himself. I will come back to this later. There can therefore be no question of the plaintiffs defining the relevant task on the basis of its solution, i.e. the "Hang".

8 Thirdly, the defendants are wrong if they believe that the reference point for the assessment of the individuality of the work is the **previously known forms** (Duplik, paras. 23-24, 26 and 77-80). As shown, the point of reference is the task. Previously known forms can only (but still) become relevant in this respect, than that they can **restrict the scope for design**. For example, protection under copyright law may be excluded if a shape does not deviate sufficiently from the previously known set of shapes (e.g. BGE 143 III 373, E. 2.6.2 - *Barstool*). However, this is by no means the only possible ground for exclusion of protection, and its absence should not simply be taken to mean that the requirement of individuality for protection exists. Just because an object deviates from previously known forms, i.e. is new, is it is by no means individual. Rather, individuality is also lacking, for example, if, as in the present case, no free creative decisions were made at all.

9 Fourth, the defendants appear to assume that copyright protection is only excluded if the function cannot be fulfilled in any other way than with the form at issue (duplicate, para. 27 and 81-87). In other words, they claim that only the **technical necessity** of a form excludes their copyright protection, but not their technical or functional conditionality (Duplik, para. 6 and 85). The defendants are also wrong in this respect.

10 In fact, restrictions on the scope for design can **also** result from technical requirements (BGer 4A_472/2021, E. 6.3.2 - *Feuerring*).

However, not everything that is not technically necessary is already individual. A design element is technically necessary if no alternative is technically available at all (for trademark law: BGE 129 III 519, E. 2.4.2 - *Lego*). In the case of technically necessary design elements, there is no scope for design at all. Copyright protection is therefore indisputably excluded. However, it is incorrect that this should only be the case for technically necessary design elements (but so Duplik, para. 27). Other **technically or functionally required form** elements cannot contribute to the individuality either. A form element is technically conditional if the subject matter could not function without it, even if alternatives exist. These are therefore features that are used for technical reasons - precisely so that the object functions in accordance with its purpose purpose - but which are also interchangeable (e.g. SENN, Zweckänderung bei einer Grundform als Individualitätskriterium, in: sic! 2023, p. 211 ff., p. 217 with further references).

11 The German Federal Court of Justice, for example, dealt with this issue in the aforementioned *Seilzirkus*-

decision (Exhibit 159) with such technically **conditioned** features. It held that the choice between various such design elements does not constitute a free creative decision. The utilization of a technical-con constructive design leeway or the choice between different technical features is not sufficient. For an object to be protected by copyright, the object must also be **artistically** designed. This means that **additional free** and **creative** decisions are necessary (esp. decisions are necessary (in particular replica, para. 284, 285 and 299; opinion of August 24, 2023, paras. 36-41 and 47). The situation is no different in the Netherlands (in particular opinion of August 24, 2023, para. 70). This also applies in Switzerland,

that decisions that follow rational criteria, e.g. are driven by technical considerations or circumstances, do not constitute free and creative decisions and therefore cannot lead to individuality (STRAUB, op. cit., p. 6; SENN, op. cit., p. 217.). In **all** relevant legal systems, decisions based on **technical** or **functional** considerations **are** therefore **not** considered free and creative decisions. .

12 Fifth, the defendants conclude from the points just discussed in the third and fourth that an article of daily use is not individualized only if the ell, i.e. it is only not protected by copyright "*if (1) the form does not deviate from previously known forms or (2) the form is necessary so that the corresponding object can fulfill its function*" (duplicate, para. 76). This has nothing to do with the Federal Supreme Court's definition of individuality. After all, not everything that is new (i.e. deviates from previously known forms) and is not technically necessary is "unique" for this reason alone. The defendants conclude from the existence of a scope for design that this has also been exploited in a creative manner. They conclude from the absence of individual grounds for exclusion of protection that the protection prerequisite of individuality exists. This is a fallacy.

13 Sixthly, the defendants argue that a **comparison with the design right** is inappropriate with regard to the protection requirement of individual character and the much shorter term of protection of the design right after the entry into force of the Design Act around twenty years ago is "*no longer justifiable*" (duplicate, para. 366). This assertion - especially from the pen of the defendant's legal representatives - is astonishing to say the least. It is diametrically opposed to the case law of the Federal Supreme Court . For example, in 2017 - and thus around 15 years after the Design Act came into force - the Federal Supreme Court stated the following on the distinction between copyright and design law (BGE 143 III 373, E. 2.6.2 - Bar- hocker):

"The scope of application of the URG on the one hand and the ... DesG ... on the other differ in that copyright law protects the 'individual', while design law protects the 'unique' performance. The protection of both laws applies to creative design. From the

*The fact that the scope of protection is different means that the requirements for individuality under copyright law must be **higher** than the individual character of design law. [...] A work of applied art protected by copyright can therefore only exist if the **artistic** design of a handcrafted product at least **clearly** and **indisputably** achieves the individual character under design law (Art. 2 para. 1 DesG)."*

The Federal Supreme Court has confirmed this clear position on the relationship between copyright and design law in various cases, for example also recently in BGer 4A_472/2021 - *Feuerring* (E. 6.1.2).

14 In practice, it is known that it is regularly very difficult or even impossible to enforce a design right registered at (not substantively examined at the time of registration) as legally valid. The difficulty lies in proving ownership.

part. This is the reason why design law cases rarely come before Swiss courts.

end up in the courts. This also shows that the threshold for copyright protection must be high. Design law grants a maximum term of protection of 25 years - in the case of the "Hang", protection would therefore already end in 2025. By contrast, copyright law grants protection for 70 years after the death of the author. If the copyright protection of the "Hang" were to be affirmed in the present case (and furthermore an infringement of copyright), this would have the consequence that not only today's instrument makers and players, but also their descendants, probably into **the 22nd century**, would neither be able to build nor acquire the handpans in dispute. We must be aware of this when assessing the individuality of the "Hang".

15 Seventh, the defendants go to considerable lengths to show that the alleged individuality is expressed in the "Hang" itself (e.g. Duplik, paras. 159-187). However, this is a wasted effort. According to Federal Supreme Court case law, two things are required in this regard (BGE 105 II 297, E. 3 - *Monsieur Pierre*):

"L'œuvre des arts appliqués doit s'imposer d'elle-même par son originalité et être reconnaissable comme telle."

16 If there is no individuality - because, as in the present case, no free creative decisions were made - it is therefore unnecessary to examine whether the individuality of the individual is not a factor.

Individuality is expressed in the work itself. Or, in other words: Just because a utility object such as the "Hang" may **look, as if it could be** the result of free, creative decisions, this is by no means sufficient for it to actually enjoy copyright protection. No, it must **actually** be the result of such decisions.

17 In summary, it can therefore be stated: For a commodity to be original in order to enjoy copyright protection, its form must be based on free **and creative decisions**. These free creative decisions must be such that it seems unlikely that a **third party faced with the same task would solve it in essentially the same way. Decisions based on technical considerations are irrelevant in this context**. The utilization of a technical-constructive design leeway is not sufficient. It represents a purely manual activity that cannot lead to a work protected by copyright.

18 The legal framework is thus established. Based on these premises, it must be examined at whether the defendants have acted with sufficient free creative decisions were made or whether they were rather active as craftsmen.

2. the defendants did not have any free creative freedom in the development of the "Hang". tive decisions made

19 The present case differs from the published judgments of the courts in one important respect. In those judgments, the actual design process regularly remains in the dark. The courts then have no choice but to deductively determine the possible free creative decisions that led to a particular design by comparing the design in question with the set of shapes at the time of the design. Here, however, things are different. We are in the privileged situation that the defendants have described the development history of the "Hang" in detail and meticulously before the trial - in more innocuous times. From

These published descriptions show beyond doubt that the defendants did not make any free and creative decisions in the development of the "Hang", but acted purely as craftsmen.

20 With this in mind, let us first look again at how **the** development of the "Hang" came about. The court will hear the witness Reto Weber on this this afternoon.

21 The defendants are instrument makers and have always made instruments in their workshop. *steelpans*. Reto Weber visited the defendants there in October 1999 and expressed his wish for a metal instrument similar to the round ghatam, which could be played with the hands while seated but had several tone fields (Complaint I, para. 58; Complaint II, para. 63; Complaint III, para. 61). What followed was described by the defendants themselves in various publications as follows (Complaint I, para. 60; Complaint II, para. 65; Complaint III, para. 63; Reply, paras. 86-90 and 222; Statement of November 4, 2022, para. 15):

*"At the suggestion of a ghatam player, we created a sphere from **half-shells** from the **steelpan construction lying around**, which contained a few concave clay fields hammered in" (Supplement 59, p. 1)*

*"The percussionist [Reto Weber] played on his three differently tuned ghatam at the same time and casually let it be known that he would like to get even more sounds out of his instrument . His 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 sheet metal bowls to light**. One of them was tuned to seven notes. When brought together, they formed a whole, the sounding sphere! **A new acoustic music instrument was born.**" (Supplement 40, p. 6)*

*"Reto Weber asked the pan builders whether it would be possible to develop an instrument that combines the melodic variety of a steel drum with the ease of use of a gatham. **Spontaneously**, Felix Rohner and Sabina Schärer **two half shells of a steel drum***

*on top of each other. That was the **birth of the 'premordial Hang'** ..."* (Supplement 109)

22 This process is as banal as its result:



23 It needs no further explanation that this banal process is not of free creative decisions. Prototype 1 was rather created spontaneously and by chance. Prototype 1 is therefore certainly not protected by copyright. Note in brackets: This did not, however, prevent the defendants from sending warning letters based on Prototype 1 (see Action II, Exhibits 83 and 85).

24 Prototype 1 was unsuitable as an instrument. Or, as the defendants put it expressed (Exhibit 107):

*"But this **accidental** first was an uncomfortable thing, simply **unplayable**."*

25 It was far too large and the sound was not yet fully developed. The defendants themselves described the task facing them in a number of publications (replica, para. 93). Defendant 2, for example, described the situation in a video as follows (Exhibit 38, from minute 26:54):

*"The ball was there. The sounds were there. The hand was on the metal. A new dimension. And now the journey began. **The first question is: 'Is it even possible to play this? fat', the musicians said. 'You have to make it smaller. It is brilliant. The instrument is brilliant, but it's too big. And then***

came this question from the bass. Not working well. Too much air. So we scaled it down. To this size [Defendant 2 shows a hug]."
(Exhibit 38)



26 Defendant 2 made similar statements in an interview with an Italian musician. ikmagazin for the record (Exhibit 110 [translation]):

*"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 difficult to carry and play on your knees, **so the next task was to reduce the size and improve the sound.**"*

27 This has been created: For the instrument makers, the **task** was now to **make prototype 1 playable and improve the sound.**

28 In order to solve this problem, the defendants first reduced the height and diameter of the **prototype 2** - which is absolutely obvious - (Exhibit 39, p. 2):

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

29 This **resulted in the lens shape**. This may appear more aesthetic than the chunky shape of prototype 1, but it is not based on a free creative decision, but on the playing and sound technology considerations just mentioned (replica, para. 97).

30 At the same time, the defendants shifted the **resonance opening** from the bottom to the top. the top side. This in an attempt to recreate the ghatam and obtain a bassy pulse. This is also not a free creative decision (Reply, para. 98). We also refer here to the defendant's description:

"Attempt to recreate the ghatam, small neck pointing upwards" (Supplement 30, p. 7)

*"Attempt to obtain a **bassy pulse** by means of a resonance hole failed."* (Supplement 30, p. 7)

31 The result of these changes, which were motivated by playing and sound we here:



32 With **prototype 3**, the defendants again tackled technical sound problems . They attempted to use a stopper to place a membrane inside the instrument. ments to vibrate in order to find the desired bassy pulse at :



33 This is also not a free and creative decision, but a purely manual technical decision (Reply, para. 101). Again, we quote the defendants:

*"In search of the **bass**, the cavity resonance. **Attempting to make a membrane vibrate inside with the aid of a plug.** The bass frequencies produced are weak. Experiment failed. failed."* (Supplement 30, p. 8)

34 Since the experiment had failed, the defendants again waived the stopper. In addition, the defendants found that the resonance hole on the top side led to acoustic instability (replica, para. 101; statement of November 4, 2022, para. 84). They therefore moved the resonance hole back to the underside of **prototype 4**, as they had already done with prototype 1 (replica, paras. 102 and 107). This is not a free creative decision. The fact that the resonance opening was again placed in the middle is banal. Almost everyone would place the resonance opening in the middle of the bowl.

35 The dome of the humpback gong had already aroused the interest of the defendants and they carried out technical research on the dome (replica, para. 156-157). They added therefore added a dome to prototype 4 to give it a sound similar to that of a gong (replica, para. 104):



36 Prototype 4 is therefore also based on purely technical decisions. We also cite the defendants in this regard (Reply, paras. 107 and 236):

*"However, in order to **conduct the vibrations inside the vessel to the outside**, the opening was retained and placed on the **lower half-shell** of the instrument. We called the **weak, deep bass long that could be excited at the opening Gu**.*

The Hang® received its Gu side." (Supplement 41, p. 2)

*"A **gong-like sound** that sounded like 'ding!' came to rest in the center of the upper half-shell, which from then on was called the **Ding side** ." (Supplement 41)*

37 In **prototype 5**, the **circumferential flange** is somewhat more prominent. This is also due to technical circumstances. The defendants looked for technical possibilities to **join** the two **shells** together. In prototype 5, they tried a welded seam, which, however, turned out to be too hard (replica, para. 111-112). The flange design is therefore not the result of a creative design decision either. In addition, the defendants designed the **resonance hole** differently. They added an **inward neck** to amplify the bass (replica, para. 113). The is not a free and creative decision.



38 As to the defendant's motivation, we again quote the defendant itself:

*"The resonance hole is called GU by the tuners. Driven by hand , **shaped according to the recommendation of car tuners** (Gebr. Gabathuler, Affoltern, Zurich)." (Supplement 30, p. 10).*

"Failed: Weld-riveted is too hard a connection, the instrument breaks apart if is dropped on its edge." (Supplement 30, p. 9).

39 After a year of tinkering, the defendants thus arrived at the **first generation of the "Hang"**. This differs from the prototypes only in that the surface was given a shimmering sheen and the dome was polished (replica, para. 116). According to the defendants, this is **without relevance** (statement of defense, para. 127).

40 This history, which the defendants themselves meticulously described and published, shows it in all clarity: the "Hang" is the result of a technical and technical further development of a spontaneously and accidentally developed prototype. In none of the development steps are free and creative design decisions on the part of the defendant recognizable, and certainly not in any of the development steps. not those that would be significant enough for the assumption of individuality in the copyright sense . It is also significant that the defendants do not mention any creative decisions in their numerous and extensive publications on the history of the creation (in particular enclosures 33, 38 and 40). Rather, the defendants improved the prototypes on the basis of newly gained knowledge of playing and sound technology. They searched for and found technical solutions to technical problems. This is a craft activity and not artistic creation. The "Hang" is consequently not protected by copyright.

41 Against this background, it would be superfluous to respond to the question of the functionality of the individual elements which, according to the defendants, constitute the individual character of the "Hang". As the defendants continue to largely dispute these functionalities in the duplicate, I will nevertheless briefly address them (detailed replica, para. 198- 254).

42 **About the lens shape:** We have already described how the lens shape of the "Hang" came about. The lens shape is particularly advantageous in terms of playing technique (Reply, para. 199-202). In the words of the defendant:

*"With a **diameter of 53 cm**, a **height of 24 cm** and a weight of 3.7 kg, the HANG has **ideal dimensions for playing with the hands and for the acoustic requirements**."* (Supplement 149)

43 According to the defendants, the shape of the lens is therefore also necessary for the sound. That makes sense. Striking a sound field generates vibrational energy. With the "Hang" as well as with the *steelpan*, this energy is directed to certain areas, the

Clay fields, limited. The clay fields are almost flat. They are embedded in a bowl with a uniform curvature. The curvature therefore changes along the boundaries of the sound field. This leads to the fact that the sound generated by the impact on

the vibrational energy generated by the sound field is reflected back at the edge of the sound field (replica, paras. 205-206). We have already heard this during the inspection at the instruction hearing (Prot. 517). In order to tune an instrument precisely and in a way that can be re- produced, it is essential that the curvature of the material surrounding the tone fields is the same in all directions. This is only the case with a spherical segment. The shape of the spherical segment is therefore already well known from the *steelpan* as a "neutral canvas" into which the sound fields can be incorporated (replica, para. 207). We have also already heard this at the instruction hearing (Prot. 517).

44 Nevertheless, vibrations can escape from the sound fields and lead to noise. Is used for both the top and bottom side

a ball segment is used, this makes it possible to optimally avoid such disturbing noises (replica, para. 210). This also stabilizes the playing surface and the entire instrument (replica, para. 211).

45 **On the circular arrangement of the sound fields:** These are simply

the most obvious, technically best and simplest arrangement (Replica, para. 219-220). Such an arrangement was already common at *Steelpan* (Rep- lik, para. 222; opinion of November 4, 2022, para. 15).

46 The arrangement of the tone fields in a circle also has an effect on the sound. As

mentioned at , vibrations can escape from a sound field. This can cause another sound fields are stimulated. In technical jargon, this is known as *cross-talk*. This *crosstalk* can be minimized by placing the sound fields as far apart as possible. This is achieved by evenly distributing the sound fields in a circular pattern (replica, para. 226-229).

47 **Regarding the central dome on the top:** the fact that there is also a sound field in the center follows from the uniform distribution of the tone fields just mentioned. Indentations or domes in the center of a sound field stabilize the overtones and influence the frequencies of the higher vibration modes, they lead to a softer, gentler sound (replica, para. 234-235; statement of 4 November 2022, para. 52-64). We have already discussed this on the occasion of
of the inspection at the instruction hearing (Prot. 517 f.). Also the defendants confirm the effect of the dome on the sound, for example:

"The dome geometry changed the sound. It had a beneficial effect on the modulation of the sound " (Supplement 33, p. 24)

48 That there is a dome and not an indentation in the central sound field, is due in particular to the playing technique. The dome is easier and more versatile to play (replica, paras. 230-231). We have already seen this in the instruction hearing (Prot. 518).

49 **Regarding the central resonance opening:** The "Hang" uses a so-called Helmholtz resonator. We know this from bottle flutes, for example, i.e. when is blown into the neck of a bottle. It requires a volume of air and a smaller opening in comparison (replica, para. 242-243). The frequency of the resonator depends, among other things, on the size and design of the opening. (replica, para. 244).

50 The fact that the resonance opening is positioned in the middle of the underside allows to play on the lap by closing and opening the legs. to change the size of the opening. This affects the sound of the Helmholtz resonator (replica, para. 239). This is also stated by the defendants (Exhibit 40, p. 20):

"If the Hang player takes the instrument on his or her lap, a bass tone is produced when the body of the instrument is stimulated with the root of the hand. By varying the angle of the leg, the pitch of the bass can be altered [...]"

51 However, the opening is also needed to tune the instrument. The instrument must also be tuned from the inside after the two shells have been joined together. (Claim I, paras. 120-121; Claim II, paras. 125-126; Reply, paras. 248-249; Statement of November 4, 2022, para. 139). The defendants dispute this in the rejoinder (paras. 337-338), which is surprising if only because they had previously stated the following

"It must be possible to work on the instrument from the inside." (Supplement 30, p. 9)

And further:

*"The size was given so that **the hand can go in**. Because we have to tune it, fine-tune it. [...] In a way **it's Felix's hand size**." (Supplement 154)*

52 The placement of the resonance opening in the center of the bowl makes it possible to work on all sound fields from the inside (Complaint I, para. 120; Complaint II, para. 126; Action III, para. 124; Reply, para. 250). We have already seen this at the instruction hearing (Prot. 519).

53 Thus, all elements of the "Hang" which the defendants describe as essential for their "work" are technically or functionally conditioned. The "Hang" may be may have been technically innovative at the time of its creation. However, technical innovation cannot be protected by copyright law into the next century. However, this is precisely what the defendants want to achieve with their various lawsuits and warnings, which have led to the present proceedings . This becomes particularly clear when one considers what the defendants repeatedly refer to as "their work", which is to be protected, (cf. e.g. Exhibit 89; Complaint II, Exhibits 84 and 86; Complaint III, Exhibit 89):



54 Thus, the defendants do not seek to protect anything other than the **idea of an instrument** with (a) a lens shape consisting of two spherical segments, (b) a central dome on the upper side, (c) sound fields arranged in a circle around the dome and (d) a resonance hole on the underside. However, it is well known that ideas are not protectable under copyright law (instead of many OFK URG-REHBINDER et al., Art. 2 N 4; BGE 70 II 75 - *Habla-Notenschrift*).

3. no copyright on the "Hang" in Germany and the Netherlands

55 If an article of daily use is not protected by copyright in its country of origin it is also not protected in the other contracting states - including Germany and the Netherlands - in accordance with Art. 2 para. 7 of the Berne Convention (Berne Convention). For details, please refer to our pleadings (Stel-statement of August 24, 2023, paras. 10-27 and 52-66; reply, paras. 278-279 and 308-313).

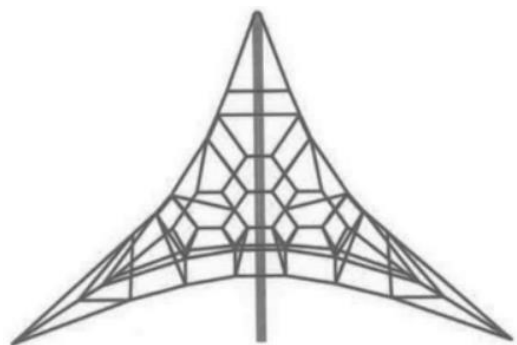
56 As far as the "Hang" is concerned, Switzerland is the country of origin. This is where the "Hang" was developed by the defendants based here, this is where it was mass-produced, from here it was sold all over the world, and hi- erwards, interested parties had to travel to acquire a "Hang". The fact that the "Hang" is said to have been exhibited in Germany for the first time does not change this (statement of August 24, 2023, paras. 4-9 and 67-68; statement of November 4, 2022, para. 102).

57 Because the "Hang" is not protected by copyright in Switzerland, the country of origin, copyright protection in Germany and in the Netherlands is excluded from the outset on the basis of Art. 2 para. 7 RBC. An examination under German and Dutch copyright law is unnecessary. I will therefore only briefly outline the legal situation there and refer you to our written submissions.

58 **Germany:** German copyright law protects a "personal intellectual creation" (Section 2 (2) DE-URG). There is no creation if the product merely uses previously known forms or those of the public domain. The creation must also have an individual character that reaches such a level of design or such a degree of aesthetic content that it can be considered an artistic achievement (Action I,

para. 301-328; Action II, para. 401-426; Action III, para. 778-803; Reply, para. 280-292 and 299-307; Statement of August 24, 2023, para. 28-51).

59 The *rope circus decision* of the BGH (Exhibit 159) is particularly relevant to the present case. I have already mentioned this at the beginning. The Federal Court of Justice held that technically conditioned design features and technical decisions based on considerations cannot justify copyright protection. Specifically, the case concerned a climbing frame for children. A climbing net - and even more so playground equipment in general - could have been designed in a completely different way. For example, several poles or chains could have been used. The climbing net would still have served its purpose. However, the choice between different options is primarily due to the purpose of the equipment and is technically conditioned. Exploiting the technical and constructive scope for design is not an artistic achievement. The climbing net is therefore not protected by copyright (statement of August 24, 2023, para. 37-38; Replica, para. 284-285).



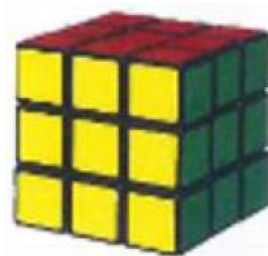
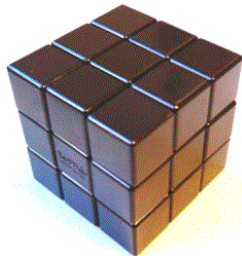
60 As shown, all design features of the "Hang" are tailored to the intended use. owed and technically conditioned. The defendants made exclusively technical technical decisions. Just because a sound object could be designed differently (just as a climbing net or playground equipment could be designed differently), this does not result in a copyright-protected work. Copyright protection under German law is therefore out of the question.

61 **ECJ case law:** The case law of the ECJ and in particular the *Brompton decision* do not change this. The ECJ assumes a fully harmonized nized concept of a work in the EU. In particular, it requires an original that is the author's "own intellectual creation". This corresponds to "personal intellectual creation" under German law (replica, para. 293). The

According to the ECJ, "own intellectual creation" presupposes that the subject matter in question expresses the free and creative decisions of the author. In the *Brompton decision*, the ECJ emphasized that purely functional memorabilia paintings, even if there is a choice, do not constitute originality in this sense. The *Brompton decision* did not lower the protection threshold for works of applied art in Germany (complaint I, 329-339; complaint II, paras. 427-437; complaint III, paras. 804-814; reply, paras. 293-298). In addition, **copyright protection for the Brompton folding bicycle was denied** by the referring court in the episode (even though folding bicycles and, even more so, means of transportation in general could be designed quite differently; Replik, para. 298; enclosure 165).

62 **Netherlands:** In the Netherlands, copyright protection requires that the work has an "original character of its own" and bears the "personal stamp" of the author. In short, the former means, that the form must not be borrowed from that of another work. Secondly, that the form must be the result of creative decisions. In terms of content this corresponds to the requirement of "own intellectual creation" in ECJ case law. A creative achievement is required in each case. Elements that merely serve a technical effect or are the result of a selection that is too strongly limited by technical principles do not contribute to the "personal stamp" and are excluded from copyright protection. The same applies to the choice between several technical alternatives (Complaint I, paras. 340-357; Reply, paras. 314-356; Statement of August 24, 2023, paras. 69-114).

63 Dutch case law is particularly illustrative and relevant on the Rubik's *cube* shown below, which was made in application of the framework provided by the ECJ and in particular the *Brompton decision* (Replica, para. 338-343; Opinion of August 24, 2023, para. 83 and 108-109; Supplements 185, 186 and 244). The *Rubik's cube*, like the "Hang" is an interactive, "playable" object. The Dutch courts held that the design of the cube itself, i.e. without the colored areas, is to a large extent technically predetermined due to the function of the cube as a three-dimensional logic game. The cube itself is therefore not protected by copyright. This is despite the fact that rotating puzzles and even more so logic games can generally take completely different forms.



64 If these principles are applied to the "Hang", it is not protected by copyright under Dutch law. The defendants have not creative design decisions were made. The design of the "Hang" is highly technical. This does not change the fact that other designs are possible for a sound object (just as other designs are possible for a rotating puzzle or a logic game).

65 The fact that some German and Dutch courts issue prohibitions against individual plaintiffs despite these requirements in the context of precautionary measures is due to the fact that these decisions were made on incorrect factual bases with regard to the history of the origins of the "Hang".
I will come back to this at the end of the party presentation.

4. the plaintiffs have an interest in a declaratory judgment

66 The court then ordered in the summons that the parties should also comment on the should also comment on the interest in a declaratory judgment. In the present case, the non-existence of copyrights can be established. It is therefore an action for continuation under material goods law. This is generally recognized, that no high requirements apply to the interest in a declaratory judgment and proof of a potential conflict situation is sufficient (instead of many MARBACH et al, Intellectual Property and Competition Law, 4th ed. 2017, para. 1024). This is the case in patent law (instead of many SHK PatG-SCHWEIZER, Art. 28 N 6), in trademark law (instead of many BSK MSchG-FRICK, Art. 52 N 21), in design law (instead of many SHK DesG-STUTZ et al., Art. 33 N 44), and cannot be different in copyright law.

67 It is therefore incorrect that - as claimed by the defendants - a fixed interest in a declaratory judgment should only exist if and to the extent that the plaintiff was warned (Duplik, para. 32 et seq.). In the case of a warning letter, there is certainly an

Interest in a declaratory judgment. However, this should not lead to the reverse conclusion: that there is no interest in a declaratory judgment without a warning. A warning is not necessary for an interest in a declaratory judgment (VOLKEN, in: Weinmann et al. (eds.), Schweizer IP-Handbuch, 2nd ed. 2021, Section 29, para. 1.18). There can also be no question that refraining from a cease-and-desist demand would *amount* to a "*popular action*" (Duplik, para. 37). It is not the case that anyone would then be entitled to sue even without an interest of their own. Rather, a potential conflict situation is necessary, but also sufficient.

68 The fact that the plaintiffs all have a sufficient interest in the findings they seek was already stated in the statements of claim and the
Replica in detail. Reference can be made to this (Replica, para. 14-72; Action I, para. 14-16, 168-172, 187-200, 215-220, 277-279; Action II, para. 14-21, 178- 180, 300-312, 338-343, 373; Action III, para. 14-19, 178-181, 295-302, 334-341, 355-365, 409-415, 715-721, 753-757). To summarize, the following:

69 On a **personal level**, the defendants announce on their website
<www.panart.ch> that they will take action against manufacturers and distributors of Handpans
will take legal action. They are therefore openly threatening **all** manufacturers and distributors of *handpans* with legal action if they do not cease their business activities. They emphasize this threat by pointing out that they have already successfully enforced claims against manufacturers and distributors of *handpans* (replica, para. 15-16).

70 All plaintiffs manufacture *handpans*, distribute *handpans*, or are organs of
Companies that do this. The threat on the defendant's website is directed directly to them. As a result, **their economic activity is significantly impaired**. They must all expect to be the next to be caught in the defendant's crosshairs. This uncertainty is unacceptable. Due to the threats made by the defendants on their website, all plaintiffs have an interest in a declaratory judgment (replica, para. 15-18). Anyone who, like the defendants, clearly and unequivocally threatens legal action cannot subsequently hide behind the argument that the addressees of this threat lack an interest in a declaratory judgment.

71 In addition, **most of the** plaintiffs were **warned directly** by the defendants (in detail replica, para. 36 [plaintiff 1], 38 [plaintiff 2], 40 [plaintiff 3], 49 [plaintiff 5], 51 [plaintiffs 6-9], 53 [plaintiff 10], 57 [plaintiff 12], 70 [plaintiffs 18- 21 and 23-25]). The plaintiffs who were not directly warned can be roughly divided into three groups.

72 A **first group** consists of **managing directors and shareholders** of directly warned companies (Reply, para. 47 [Plaintiff 4], 55 [Plaintiff 11], 64 [Plaintiff 15]). As such, they would have passive legitimacy for claims based on alleged copyright infringement (e.g. Action I, para. 285; Action II, para. 18 and 379, 383, 387). In addition, the defendants have already directly dismissed managing directors and shareholders in the past.
and shareholders directly in the past (e.g. Reply, para. 38 [Plaintiff 2] and 51 [plaintiffs 6 to 9]) or even applied for precautionary measures against them (Reply, para. 42 [plaintiff 4]). There can therefore be no question of this group of plaintiffs having no interest worthy of protection in the findings requested by them . It should also not be lost sight of that copyright is not a register protection right. A judgment, in which copyright protection is denied, is therefore not effective *erga omnes*, but only *inter partes*. Therefore, only a judgment rendered between a certain plaintiff and the defendants provides sufficient legal certainty for this plaintiff (Reply, paras. 19 and 32).

73 A **second group consists of group companies** of a directly admonished company (replica, para. 59 [plaintiff 13] and 61 [plaintiff 14]). They are responsible for the sale of *hand pans* within the Group. They were only not warned because the defendants had not properly informed themselves about the sales structure.
had not informed themselves properly about the sales structure. Now that the defendants are aware of this, it cannot be seriously denied that these sales companies have an interest in a declaratory judgment.
tion cannot be seriously denied. A comparable constellation exists in the case of plaintiff 22 (Reply, para. 72). It was informed immediately before the the warning letter to plaintiff 23. Plaintiff 22 operates the online store mentioned in the warning letter to plaintiff 23 and sells *handpans* there. It also has an interest in a declaratory judgment.

74 **Thirdly, a manufacturer of handpans**, whose instruments are sold in an ab warning letter to one of its distribution partners as copyright infringing

were designated (Reply, para. 56 [Plaintiff 16]). It is absurd that a manufacturer should have no interest in a declaratory judgment and have to stand idly by, if its products are criticized as infringing the law in a warning letter to one of its customers. Its managing director also has an interest in a declaratory judgment for the reasons set out in (Reply, para. 58 [Plaintiff 17]).

75 From a geographical point of view: it is undisputed between the parties that the plaintiffs distribute *handpans* in the countries for which they claim the non-existence of prerogatives.

The defendants are asserting their claims to the "Hang", i.e. in Switzerland, Germany and partly in the Netherlands. The defendants announced on their website that they would concentrate their actions "*initially on Europe*" (reply, para. 15). In their warning letters, they claimed in each case that the owner of the "worldwide *wide copyrights*" to the "Hang". None of the warning letters and none of the cease-and-desist declarations enclosed with them were limited to a specific territory. Rather, it is clear from this that the defendants not only demanded that the warned parties cease the distribution of *hand- pans* in a specific territory, but generally and everywhere (replica, para. 36, 40, 49, 53, 57, 70). The plaintiffs therefore also have a sufficient interest in the requested findings from a geographical ographical point of view. Moreover, even in the case of "territorially specific" warnings, an interest in a declaratory judgment would also exist in other countries (BGE 129 III 295).

76 From a factual point of view: The defendants believe that there is no interest in a declaratory judgment with regard to some prototypes and variants of the "Hang". This is absurd. The defendants claim a copyright to all prototypes and variants of the "Hang".

"Hang". Neither in their warning letters nor in their pleadings in the present proceedings did they limit their asserted copyright right to individual embodiments of the "Hang". Accordingly, the interest in declaratory judgment also relates to all prototypes and variants. Otherwise, it would be open to the defendants to continue to take action against the plaintiffs, e.g. on the basis of alleged copyrights to the "Low Hang" even if a copyright in the "Hang" of the first generation were denied in the present proceedings (Reply, para. 28). The understanding of the interest in a declaratory judgment advocated by the defendants is therefore not only not appropriate, but simply procedural nonsense.

77 In addition, in several warning letters the defendants have not yet and claimed that prototype 1 and its further developments were protected by copyright (replica, paras. 21-25). They therefore expressly warned against all prototypes and variants. Later, they even went on to issue a warning based on a line drawing. According to their website, this should also describe their work. The idea of a musical instrument expressed in the sketch covers at least prototypes 4 and 5. at least the prototypes 4 and 5 as well as all variants of the "Hang" (Replica, para. 26).

5. status of proceedings in Germany and the Netherlands

78 Finally, the court asked the parties to comment on the status of the foreign proceedings. Between some of the plaintiffs and the Defendant 1, proceedings were held before the Regional Court of Hamburg, the Regional Court of Düsseldorf and the District Court of Midden Nederland.

79 **Hamburg Regional Court:** On June 8, 2020, Defendant 1 filed a complaint against Plaintiff 3 filed an application with the Regional Court of Hamburg for the issuance of precautionary measures (interim injunction; Action I, para. 216; Exhibit 92). After an oral hearing, the district court issued the precautionary measure in a ruling dated 20 August 2020 (action I, para. 217).

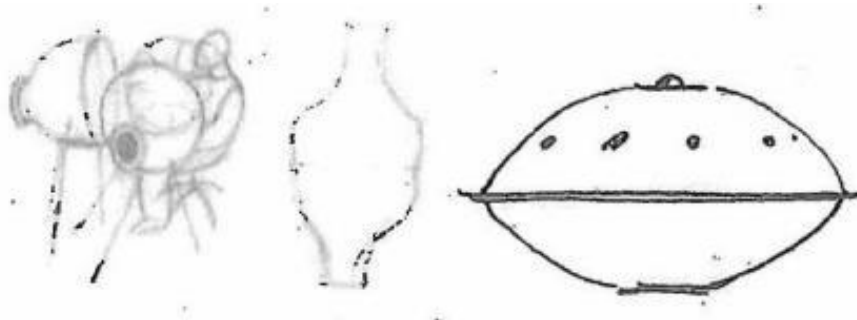
80 The judgment of the Regional Court of Hamburg (Exhibit 93 = Defendant Exhibit 2) is irrelevant for various reasons. As a general rule, measures decisions in Germany are in no way binding for the main proceedings, are based on a limited examination and reduced evidentiary requirements, and are purely provisional in nature. We have already explained this in detail elsewhere (Replik, paras. 120-124, 153 and 281-283; Klage I, paras. 218 and 325-328; Action II, paras. 175 and 425; Action III, paras. 175 and 802).

81 In the present case, the Hamburg Regional Court also relied on an incorrect history of the development of the "Hang". In its judgment, the Regional Court stated that the basic idea of the "Hang" was based on the fact that the downward or inward dome-like upward or outward facing shell of a *steelpan* (Supplement 93, p. 10). It referred to the "Black Baby", which the

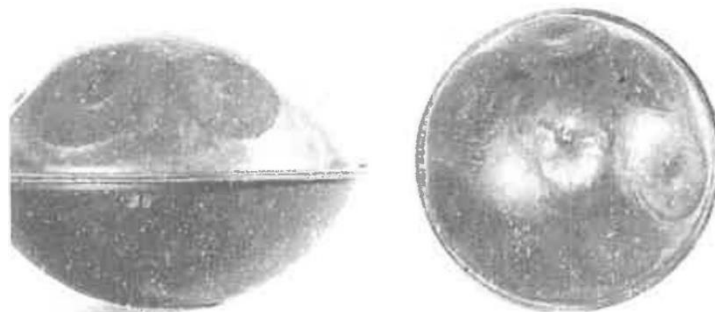
defendant in 1995 (replica, para. 153) - i.e. five years before Weber's visit, which marked the beginning of the development of the "Hang":



82 The defendants would then have made sketches for the further development of this form.
(Supplement 93, p. 10):



83 They would then have used these sketches to create the first draft of the "Hang" shown below
(Supplement 93, p. 11 f.), the massive Prototype 1, which they developed into
the "Hang" at after an exhibition in Munich:



84 These findings are based on false statements made by defendants 2 and 3 in
their affidavits (Reply, para. 121). None of them apply.

We have already shown how the prototype 1 actually came about on the basis of the defendant's publications. In addition, the Regional Court Hamburg was not aware of the technical facts. In particular, it did not have the expert opinion of Professor Woodhouse (Exhibit 150).

85 The judgment of the Regional Court of Hamburg is thus based on an incorrect and inaccurate assessment.

complete factual basis. Defendants 2 and 3 simply lied in their affidavits and omitted essential elements (replica, para. 121-122). For this reason alone, nothing can be derived from the judgment of the Regional Court Hamburg for the present proceedings.

86 Plaintiff 3 appealed against the judgment of the Hamburg Regional Court (Action I, para. 219). She later withdrew the appeal. This before the
In the meantime, proceedings have been initiated before the Bern Commercial Court and for cost reasons. The precautionary measure against applicant 3 therefore remains in place. There are currently no more proceedings pending in Germany in this regard.

87 **Düsseldorf Regional Court:** On September 21, 2020, Defendant 1 applied for the Order of a precautionary measure against plaintiff 5 (action I, para. 279). Without hearing plaintiff 5, the Düsseldorf Regional Court upheld the order on September 24, 2020 (Exhibit 98). The order was issued without justification. However, defendant 1 also relied on the aforementioned,
the content of the false affidavits of defendants 2 and 3.

88 If a precautionary measure is ordered by way of an order, as in this case, an objection can be lodged against it (section 936 DE-ZPO in conjunction with section 936 DE-ZPO).

§ Section 924 DE-ZPO; Exhibit 98, p. 15). Against the background of the present proceedings and for reasons of cost, the plaintiff 5 has refrained from taking interim measures. The precautionary measure therefore continues to apply. There are also no more proceedings pending in Germany in this regard.

89 **District Court of Midden Nederland:** The District Court of Midden Nederland ordered the On April 27, 2021, at the request of Defendant 1, the court confiscated various instruments and keys of Plaintiff 1. As we have already shown, such seizures are extremely common as protective measures in the Netherlands.

easily approved. Only a very summary examination is carried out. In contrast, the requirements for lifting the seizure on appeal are high (replica, para. 357). For these reasons alone, the

The seizure is not relevant to the present proceedings. In addition, the seizure was made without justification. The seizure

The application for seizure again contained false information about the history of the creation (replica, para. 125-126; enclosure 117).

90 Defendant 1 subsequently initiated the main proceedings before the District Court of The Hague . The court stayed the proceedings on the basis of the process (replica, para. 358; enclosure 193).

This concludes this first submission by the plaintiffs on the limited subject matter of the proceedings. The plaintiffs adhere in full to all legal claims and requests for evidence submitted to date and request that their legal claims be granted in full with costs and compensation to be borne by the defendants . Thank you for your attention.