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RSA / MBI

Transaction no. HG 20 117: Closing speech

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

In the name of and on behalf of the plaintiffs, we hereby submit to you the closing statement on the subject matter of the proceedings, which is limited in accordance with section 3 of the order dated January 24, 2022, holding that uphold all previous legal claims and motions in their entirety and request the dismissal of the defendant's motions, including the new motion made at the main hearing regarding the formulation of the dispositive (Proc. HV, p. 11).

1. formalities

- 1 By order dated October 23, 2023, the parties were granted a deadline to submit of the written closing submissions. This submission meets this deadline.
- 2 Before the actual closing speech, it is important to clarify the tendency of the s representatives in their letter dated October 20, 2023, in which they describe the settlement discussions in rem. With their letter, they want to

give the impression that the plaintiffs wanted to delay the proceedings with the settlement negotiations. The opposite is the case:

3 During a break in the proceedings on the second day of the main hearing, the defendant 3 approached the plaintiffs 2 and 21. The parties discussed their mutual desire for an amicable solution and agreed that the plaintiffs would contact the defendants at . Plaintiff 2 did so on September 29.

The defendant 3 wrote to the plaintiff 2 on September 2023 and offered by email to meet in person the following day at Bern for further discussions. A son of defendant 2 then informed that defendant 3 was currently away and therefore could not receive the plaintiffs . The plaintiffs then inquired about the possibility of a video call.

call. The defendants stated on October 12, 2023 (in an email apparently written by their legal representatives) that they were currently not prepared to talk to and would like to receive a formulated settlement proposal. . The plaintiffs sent such a proposal to the defendants on October 17, 2023 to . Although this proposal - while retaining the four elements that constitute the functionality of a *handpan* and are therefore non-negotiable - would have easily allowed the defendants' instruments to be visually distinguished from those of the plaintiffs, the defendants rejected it with curt pen words (again obviously written by their legal representatives).

off. While the plaintiffs wanted to use the time available for constructive discussions, the defendants consistently refused to do so. They made no offer of talks or a settlement.

4 In the following, the plaintiffs will show why the prototypes and variants of the "Hang" in dispute do not enjoy copyright protection under Swiss law (chapters 2-4). Due to of Art. 2 para. 7 RBÜ, this result also applies to German and Dutch law. national copyright law (Chapter 5). However, there is also no copyright protection under the substantive copyright law provisions of these two jurisdictions (Chapter 6). Finally, the plaintiffs have an interest in a declaratory judgment (Chapter 7).

2. overview of the result of the evidence

5 The defendants bear the burden of proof for those facts from which it could be inferred that the individual prototypes and variants of the "Hang" are works protected by copyright. This requires for **free, creative design decisions**. It must be possible to exclude the possibility that a third party would arrive at the same or an essentially identical design if given the same task (BGE 134 III 166,

E. 2.3.1 - *Arzneimittel-Kompendium*; BGE 130 III 714, E. 2.3 - *Wachmann Meili*; BGE 136 III 225, E. 4.2 - *Guide Orange*). **Technical-manual decisions**, i.e. those based on rational selection criteria or technical considerations, are **not sufficient** because it can be assumed that such decisions will be repeated (STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, in: GRUR Int. 2001, p. 1 ff., p. 6 with further references; see also SENN, Die Zweckänderung bei einer Grundform als Individualitätskriterium?, in: sic! 2023, p. 211 ff., p. 216 f.). However, even if not only technical-craft decisions but also design-creative decisions are made, not just any such decisions will suffice. Rather, the **requirements for individuality under copyright law must be set high**. This is particularly the case because design law would otherwise become superfluous and copyright law grants extremely long protection (in the present case probably into the next century; Art. 29 para. 2 lit. b CopA) and the freedom of imitation upheld in Switzerland would be undermined by an all too easy affirmation of individuality (see also VOLKEN/STAMPFLI, Führt die Rechtsprechung zum Urheberrecht zu einer Aushöhlung des Designrechts?, in: SJZ 2023, p. 1020 et seq, p. 1025 f.; SENN, loc. cit., p. 218; see also the compilation of the case law on non-protected works of applied art in Supplement 158).

- 6 The defendants would therefore have **had to firstly substantiate and secondly prove sufficiently free, creative design decisions**. **Neither** The defendants did **neither the one nor the other**. This is not surprising: We are in the privileged situation that the defendants have described the history of the creation of the "Hang" in detail and eloquently prior to the trial. are described. Nowhere there are free, creative decisions described. On the contrary, it is clear from their description of the development that the defendants **developed** the prototypes **solely on the basis of technical considerations**, i.e. that they were purely manual workers, and that the various prototypes pens and variants of the "Hang" are therefore not individual. Therefore, the defendants in the present proceedings are not relying on free, creative decisions, but solely on a comparison with the existing set of shapes. Based on this comparison, they claim that the "Hang" has an individual character. However, such a comparison at best shows that a form is new. However, just because something is new does not make it individual (already BGE 105 II 297, E-3.a - *Monsieur Pierre*: "*La nouveauté ... ne suffit pas pour qu'il y ait œuvre d'art.*"). The defendant's comparison does not allow any conclusions to be drawn as to whether the defendants made sufficiently free, creative design decisions in the development of the "Hang" or whether it is rather a matter of technical and technical (further) development.

7 This means that the **main proof of the protection requirement** incumbent on the defendants **fails. requirements**. In any case, however, the plaintiffs had provided evidence to the contrary, and not only because the "Hang" is based on **purely manual activity** as shown, but also because the four essential elements of the "Hang" are **ultimately functional**. The defendants argued that (any) instrument does not necessarily have to have these four elements. However, with the scale reported by the defendants, nothing would ever be technically necessary. The spherical shape of a football would not be technically necessary because a ball could theoretically also be egg-shaped. That cannot be the case. From the point of view of technical conditionality or functionality, the decisive factor must be whether an element can also be designed differently and still fulfill its technical function to the same extent while the purpose of the useful object in question remains the same. This is not the case with any of the four elements of the "Hang".

3. the defendants must be provided with evidence of free, creative design decisions. not succeeded - on the contrary, the opposite is true

3.1 What it's not about: sound, awards, quality, success, aesthetics Salary etc.

8 We heard several times at the main hearing that the special sound of the "Hang" or the *handpan* touches people. The plaintiff 21 (Daniel Bernasconi) described the effect of the sound as "*magical*" (Prot. HV, p. 21, line 14). Reto Weber recorded: "*It had a special sound that went straight to the gut and triggered emotions.*" (transcript of the AGM, p. 18, lines 54-55 of). And defendant 3 described the sound of the "Hang" - note: not its form - as the defendant's art: "*How it sounds is our art*" (Report, p. 45, lines 170-171).

9 In the present case, however, it is not about the sound of the "Hang", but **solely and** al- It's **all** about its **design**. In order to be protected by copyright, the form of the prototypes and the variants of the "Hang" must be the result of sufficiently free, creative design decisions, which - if such decisions were made at all - must also be expressed in the work.

10 The **prices** received by the defendants are therefore irrelevant, and where They are happy to point this out (e.g. Prot. HV, p. 6 and 10; Prot. IV, p. 514). It is not about the defendant's contribution to music as recognized by the Bern Music Prize. And it is also not about special technical

Achievement in craftsmanship, for which the defendants received the Bavarian State Prize (and nota bene not for special *creative* achievement or special design, for which category a prize was also awarded - but not to the defendants; cf. replica, para. 169; Exhibits 132 and 133).

- 11 However, not only the sound, but also umpteen other factors put forward by the defendants
The circumstances cited are of no relevance for the assessment of copyright protection : This applies, for example, to the **quality of** the "Hang" constantly repeated by the defendants (e.g. Prot. HV, p. 38, line 183: "*That is why we fight for our quality*"). The quality or goodness of an object is not a relevant criterion for individuality (already the Message URG, BBl 1989 III 521; SIWR II/1-VON BÜREN/MEER, para. 190). The repeatedly emphasized (alleged) **aesthetic content** of the "Hang" is also irrelevant; it is not a criterion that can be assessed objectively, but a subjective evaluation, on which copyright protection under Art. 2 para. 1 CopA should not and cannot depend (e.g. EGLOFF, Das neue Urheberrecht, 4th ed. 2020, Art. 2 N 17, with further references). The same applies to the **success of** the instrument (Prot. HV, p. 6 or p. 38, line 188: "*We are happy to have been successful*"). Success is not an indicator of original individuality (e.g. TISSOT et al., Propriété intellectuelle, 2019, para. 30; see also CJEU, judgment C-833/18, para. 37 a.E. - *Brompton*). Correspondingly, the Anglo-Saxon approach of "what is worth copying is worth protecting" is also completely alien to continental European copyright law (BEUTLER/STUTZ, Copyright v. droit d'auteur, in: recht 1998, p. 1 ff., p. 3).

3.2 Task: Improving the playing and sound quality of the random and spontaneously created prototypes 1

- 12 The defendants believe that artists did not set themselves any tasks and that there was no need for a

therefore does not belong in copyright law (Prot. HV, p. 9). This is wrong: Product design in particular is not developed in a "vacuum", but rather based on a certain task (THOUVENIN, Irrtum: Je kleiner der Gestaltungsspielraum, desto eher sind die Schutzvoraussetzungen erfüllt, in: Berger/Macciachini [eds.], Populäre Irrtümer im Urheberrecht, FS Hilty, 2008; STRAUB, loc. cit., p. 5). This task is an indispensable part of the examination of the individuality required under copyright law (e.g. BGE 134 III 166, E. 2.3.1 with further references - *Arzneimittel-Kompodium*).

- 13 In the course of the main hearing, the defendants also seem to have come to this realization . However, they then formulated the task incorrectly. The task was not: "*Build me a ghatam from sheet metal*" or even "*Build me an instrument from sheet metal with more tones*" (Prot. HV, p. 8, par. 7, and p. 28 f., lines

359-373). The **task**, as it was **specifically** set for the defendants here and which must therefore be assumed in the assessment of individuality, was rather to **make** the accidentally and spontaneously created **prototype 1 playable and to improve the sound** (replica, para. 92 et seq.). This is established by di-verse pre-trial statements made by the defendant itself (Replica, para. 93; Exhibit 38, from min. 26:54; Exhibit 110; Exhibit 39, p. 2).

14 Before we address the fact that the defendants have not proved that they
In answering this specific task, we have made free, creative design decisions to a sufficient extent, we will first look at the starting point of the task, i.e. the random and spontaneous prototype 1 to be developed further.

3.3 Prototype 1 was banal and was created spontaneously and by chance while tinkering around (legal claim no. 1.i.a)

15 Prototype 1 was undisputedly created during a **visit by Reto Weber** to the plant instead of the defendant. The court questioned him about this. There are no indications that Reto Weber had an interest in a positive outcome of the present proceedings for the plaintiffs or that his credibility would be affected.
would otherwise be impaired in any way. However, Reto Weber's description of the genesis of the "Hang" was **again attacked by the defendants**. For example, the defendants published a counter-affidavit.
in the Schweizer Musikzeitung on an interview with Reto Weber (replica, para. 164 f.). The plaintiffs were also informed after the main hearing that Reto Weber had been criticized by the defendants' representatives for his presentation of the genesis of the "Hang" - i.e. the very topic on which he was interviewed.
he was questioned by the court - was warned immediately before the publication of his book "Drummin'" published this April. All of this may have prompted him to make rather cautious statements, at least to the extent that these could potentially have proved detrimental to the defendants.

16 As Reto Weber confirmed at the main hearing (Prot. HV, p. 17, lines 20- 25), during his visit to the defendant's workshop he expressed the wish for a metal instrument modeled on the ghatam, which can be played with the hands while sitting and has several tone fields. In the

According to Reto Weber, he and the defendants then started "*tinkering around*" (Prot. HV, p. 17, lines 28). This **tinkering around was just as banal as its result:** "*At that time we had taken two steelpans, put them on top of each other upside down. "* (Prot. HV, p. 17, lines 31-32). Prototype 1 - as stated by the defendants themselves several times before the trial (enclosures

107, 108 and 109; replica, para. 88) - was a spontaneous product of chance. The activities of the defendants were limited to this - and they also described this several times in advance (Replica, para. 89; Exhibit 40, p. 6; Exhibit 32, p. 6; Exhibit 59, p. 1; Exhibit 86) - to reach under the workbench, pull out two existing trays and fix them in place. Anyone in the defendant's position would have done the same (Prot. HV, p. 29, lines 371-373). With the best will in the world, **no free, creative design decision** can be recognized in this (and certainly not a sufficient one).

- 17 Because no free, creative design decisions had been made during this visit by Reto Weber, the defendants in the lawsuit found themselves in a difficult position. to set off various **smokescreens**. For example, they referred to a **"creation" story written by themselves** (Defendant's Exhibit 45; Prot. HV, p. 35, lines 43-45, and p. 42 f., lines 43-46). It is illuminated in primarily the history of the defendant as an instrument maker. However, for the presently disputed question of copyright protection of the prototypes and variants of the "Hang", the career and personality of the defendant is of particular importance. without relevance. The decisive factor is the individuality of the work and not the individuality of the author (BGE 143 III 373, E. 2.1 - *Barstool*). The defendants may come across as creative freelancers , but this does not mean that the "Hang" is the result of free and creative decisions. free and creative decisions. The other instruments developed by the defendants and mentioned in the history are also irrelevant. They have nothing to do with any copyright protection for the "Hang" and, in particular, do not mean that the extraction and screwing together of two pre-existing shells is a sufficiently free, creative design decision. free, creative design decision. There is a single paragraph on prototype 1 in the defendant's supplement mentioned at (defendant's supplement 45, p. 15). **There is no mention of free, creative decisions.**

- 18 The defendants also claimed at the main hearing that the shells used for prototype 1 were **not Steelpan shells, but Pang shells**. A *steelpan* always connects a shell with a shell, so there are no individual *steelpan shells* (without shells). shells) (e.g. Prot. HV, p. 43, lines 71). This quibbling is doomed to failure if it is intended to serve the attempt to attribute copyright protection to the two shells used in prototype 1. The defendants themselves have referred to the two trays used as *steel pan* trays (e.g. Exhibit 38, from min. 26:54 "*two trays of steel pans*"). As shown (submission of November 4, 2022, paras. 34-36 and 69), separate Steelpan trays were already in existence long before the defendants first came into contact with *Steelpan* (see figure below). In addition, a circular arrangement of the

of tone fields is common, especially for *steel pans* with low tuning (submission of November 4, 2022, para. 15; Exhibits 127, p. 200, and 195, p. 105). There could therefore be no question of the two shells, which were screwed together in the prototype 1, being protected by copyright.



19 During the inspection at the main hearing, the defendants made the following statements
In addition, the defendants asserted for the first time that prototype 1 **did not** have a **resonance aperture** (Prot. HV, p. 51). . This is disputed and was never presented by the defendants in the assertion phase. Rather, it was undisputed there that the

Prototype 1 had a resonance aperture. The defendant's new factual assertions regarding the alleged lack of a resonance opening are therefore **belated** and can no longer be heard. They would also be unsuitable to contribute anything to the alleged copyright protection of the "Hang", since the attachment of a resonance opening is as banal as it is technically and functionally conditioned (below, para. 45).

20 Finally, the defendants claimed in their interviews that they had **given** Reto Weber the **prototype 1** (Prot. HV, p. 35 f., line 88; Prot. HV, p. 43, line 81). This, too, is disputed and was confirmed by the defendants in the hearing.

never presented during the main phase. The interview with Reto Weber does not contain any indication that this could be the case. On the contrary: Reto Weber told that he had only received a first-generation "hang" and not a prototype (minutes of the AGM, p. 18, lines 49, 64 and 68). It must be assumed that
that the defendants (here too) **did not tell the truth**.

21 **Prototype 1** was therefore the **starting point and not the result** of the task facing the defendants. In the words of defendant 2: "*And now the Go away.*" (Supplement 38, from min. 26:54). The clunky prototype 1 (see also Prot.

HV, p. 48-50) was, in the words of the defendant as well as Reto Weber, "*unplayable*" (Prot. HV, p. 17, line 32, and p. 19, line 125; Exhibit 107). The task was now to **make it playable and to improve the sound** (Rep- lik, para. 92 f.; Exhibit 38, from min. 26:54; Exhibit 110; Exhibit 39, p. 2).

3.4 The development of prototypes 2 to 5 was a purely technical and technical activity (legal claim no. 1.i.b)-e))

22 The questioning of the defendants did not reveal any indications that they had been involved in the

The defendants also argued that they had made free, creative design decisions in the development of the individual prototypes. The development history written by the defendants also is completely silent on this (Defendant's Exhibit 45, p. 15 f.). As already explained in earlier submissions and documented in detail by several quotations from the defendants themselves and , they were purely responsible for the further development of the prototypes. technically and creatively active and not in terms of design:

23 In the case of **prototype 2 (legal claim no. 1.i.b))**, the defendants reduced the diameter and height. This was done in order to allow play on the lap (at Supplement 39, p. 2; Supplement 30, p. 7). This was not a free, creative decision, but rather - because it was guided solely by technical considerations - a manual process. The result of this was the lens shape. It is therefore not an expression of free, creative decisions (replica, para. 97; opinion of November 4, 2022, para. 78-80). The defendants also shifted the resonance opening from the bottom to the top side. This in an attempt to obtain the (missing) bass pulse (Exhibit 30, p. 7; Exhibit 107, p. 3). This is also not a free creative decision (replica, para. 98). The inspection also revealed that there is a plate inside prototype 2 (Prot. HV, p. 51). The addition of this plate, which is not recognizable from the outside, is irrelevant.

24 In the case of **prototype 3 (legal claim no. 1.i.c))**, the defendants added a plug. They also added a new plate (Prot. HV, p. 53 f.). In doing so, they attempted to make the plate inside - which, according to , was already present in prototype 2 - vibrate (Exhibit 30, p. 8). This also does not represent a free creative decision, but was based solely on technical considerations (replica, para. 101; statement of November 4, 2022, paras. 83-84).

25 In **prototype 4 (legal claim no. 1.i.d))**, the resonance aperture was to the center of the underside, where they were already located in the prototype. 1 had been located. This was because the resonance opening on the top had led to instability . The shift was therefore based purely on technical considerations and was not a free, creative design decision (replica, para. 101 and 107; statement of November 4, 2022, para. 90; enclosure 41, p. 2).

26 In addition, the defendants added the following to the center of the upper side of prototype 4 add a **dome**. The addition of this dome is the **only** thing that

defendants put forward in the interrogation as (alleged) creative, design decisions in the development of the "Hang" (Prot. HV, p. 41, lines 321-326, when asked where in the defendants' publications creative design decisions were described: "*I can say one.*"). As to this dome, we have now heard from the defendants in the course of the proceedings **five different stories (at least)** in the course of the proceedings:

- Sometimes the dome is supposed to be a design reduction of the plug (Duplik, para. 170).
- This time it is said to be a convex mirror (response, para. 121).
- times it is supposed to be an eye (Duplik, para. 178) (i.e. exactly the opposite of a mirror...).
- The erratic stones on the Gurten are supposed to be recognizable (Prot. HV, p. 41, line 325).
- And sometimes it is supposed to be a stumbling block (Prot. HV, p. 41, line 326).

27 These are easily recognizable motifs that were added later.

They have nothing to do with the actual reason for adding the dome. In fact, the defendants had conducted intensive research into the sound properties of domes, especially gongs, at the time (esp. Repl, para. 157-159). They noted that the dome shape has an effect on the sound (opinion of November 4, 2022, paras. 51-67). And it is precisely **because of these sound characteristics** (Exhibit 41, p. 2: "*gong-like sound*"; Exhibit 39, p. 2: "*gong-like sound*"), the defendants opted for a dome on the proto-type 4 (replica, para. 104). The dome is therefore not based on a creative design decision, but rather on a technical decision (just as the choice of a certain string thickness for a violin, for example, is not a free creative decision). The decision to **place the dome in the middle** and point it **outwards** instead of inwards was **banal**, as it corresponds to the placement and design of the dome on the gong, cymbals etc., which has been known for centuries. (replica, para. 157).

28 In **prototype 5 (legal claim 1.i.e))**, the resonance opening was given a longer neck.

According to the defendant's own statements, this design followed technical sound considerations and the recommendation of car tuners (supplement 30, p. 10; reply, para. 113). The resonance opening according to the tuner recommendation

This is by no means a free, creative design decision by the defendant. In addition, the connection of the two shells was spot-welded (Prot. HV, p. 56). At the time, the defendants were looking for technical possibilities to join the two shells (replica, para. 111; Exhibit 30, p. 9). The connection should not be too soft, but also not too hard. In the search to join the shells with spot welding using a suitable joining method is not a free creative decision. Furthermore, the defendants polished the dome (Prot. HV, p. 56). According to the defendants, this is irrelevant for the alleged copyright protection, so that for this reason alone, the assessment of copyright protectability cannot be based on this. In any case, the polishing of the dome is banal and does not lead to a form based on sufficient free creative decisions (just as little as the polishing of cutlery does).

29 Thus, even after the witness and party interviews, it is clear that **no prototype** was **used. is based on free, creative design decisions**. Instead, the design was based on sound and technical considerations. The defendants' work was therefore technical and not artistic. They did not develop the prototypes to create a more attractive shape, but to produce an optimal sound and make the instrument playable; they were not looking for an attractive design, but an appealing sound. This was also the reason why the development of the instrument took a long time.

30 In their own words, the defendants studied "*quite a number of technical and acoustic [and not plastic or aesthetic] problems of the prototypes ... and find a solution*" (Supplement 32, p. 37; Repl, para. 108). This was also confirmed by the questioning of the defendants. Defendant 2 stated: "*We studied that. And the shell had to be planned, paid for, the curvature selected, the flange, the size, the thickness, the material etc. There are many parameters. That's a lot of parameters.*" (Prot. HV, p. 40, lines 270-272). What he writes here is the **epitome of craftsmanship**. This may well have been laborious. However, for the assessment of copyright protection in Continental European droit d'auteur systems, including Switzerland and EU copyright law, the **effort** that went into a design is of **no relevance** (Botschaft URG, BBl 1989 III 521). The situation is different - but irrelevant here - in the Anglo-Saxon copyright systems: There, it is primarily the investment in the form of work, money, etc. that is protected, but of course not every investment (BEUTLER/STUTZ, loc. cit., p. 3).

3.5 The design of the different variants of the "Hang" is not based on hin-free, creative decisions (legal request no. 1.ii.a)-e))

31 The **"Hang" of the first generation (legal claim no. 1.ii.a))** - it is also a matter of These are not, as claimed by defendant 3 (Prot. HV, p. 42, lines 37- 38), terms originating from the plaintiffs, but the defendants themselves spoke of different "generations" (e.g. enclosure 40, p. 14) - no free, creative design decisions can be found: The surface surface became somewhat "black", making the instrument less "tinny". (Prot. HV, p. 57). The dome and resonance opening were polished (Prot. HV, p. 57). Although these appear to be (also) free design decisions for the first time, they are so banal that they certainly cannot qualify as sufficient to establish copyright protection for the form of the "Hang". The defendants themselves also assume that these *"optical refinements"* (statement of defense, para. 127) are legally irrelevant in terms of copyright . For this reason alone, they may not be relied upon (reply, para. 116).

32 As far as the **"low Hang" (legal claim no. 1.ii.b))** is concerned, the defendants have neither asserted nor demonstrated free, creative design decisions. was shown. It differs from the "Hang" of the first generation essentially by its deeper mood (Prot. HV, p. 59; Klage I, para. 79). A deeper mood and any resulting (but not alleged) effects on the form are not the result of free creative decisions.

33 Brass was brushed into the surface of the **second-generation "Hang" (legal claim no. 1.ii.c)** (claim I, para. 82), which was already oxidized on the visual inspection object (Prot. HV, p. 59 f.). The brushing of the brass was happened indisputably because it had an effect on the sound (Complaint I, para. 82; Exhibit 40, p. 14 *"By brushing in brass ... we succeeded in refining the timbre"*), and thus for purely technical sound considerations. Nothing else applies to the brass ring: The defendants were not able to show that this was the result of free creative decisions. Rather, it was added to protect the instrument in the event of a fall and to protect the player from the sharp edge (Reply, para. 252; Claim I, para. 126; Claim II, para. 131; Claim III, para. 129; Supplement 40, p. 14). The ring was therefore also based solely on technical considerations.

34 Finally, with regard to the **"Integral Hang" (legal request no. 1.ii.d))** and the **"Free Integral Hang" (legal request no. 1.ii.e))**, the applicants have The defendants also did not assert any free, creative design decisions, let alone prove any such decisions.

35 It is therefore clear that the defendants did not make any **free and creative design decisions** for any of the variants of the "Hang" and certainly not such **decisions** that would be sufficient for individuality under copyright law. Individuality must therefore be denied in the absence of sufficient free, creative decisions. It is therefore also unnecessary to examine whether the (alleged) work in The individual prototypes and variants must express what would also be required for copyright protection (e.g. Message, BBl 1989 III 521; BGE 105 II 297, E. 3 - *Monsieur Pierre*). In other words, it is **not sufficient** that a form possibly **looks as if** it is the result of free, creative design. It must also actually be the result of such decisions. The flowery and wordy description of the "Hang" by the defendant's representatives does not, in other words, mean that it is half protected by copyright.

36 The lamenting description of the "Hang" is also an accumulation of **empty words**, which we should **not be blinded by**. may be allowed. One example of this is the constantly repeated term **"sound sculpture"**. The defendants' representatives wanted us to believe that this meant a sculpture in the conventional sense, a sculpture. According to the Defendant itself, **however, the sculptural refers to the sound** (Exhibit 39, S. 5). This completely ignores **the** question of copyright protection to be assessed here of the form (already replica, para. 81). In any case, the defendants did not refer to the "Hang" as a sound sculpture for decades, but as what it is: an instrument (replica, para. 79 et seq.). The defendants also gave repeatedly argued that the "Hang" was a **"social sculpture"** with a "harmoniously designed *harmonious design*" (e.g. statement of defense, para. 124; Duplik, para. 73). By a *"social sculpture"* or a *"social sculpture"*, however, the defendants themselves mean something completely different. It is not about the sculptural form of an object, but about **making music together** - this represents a social sculpture. a social sculpture. Defendant 2 stated: *"We were in Trinidad and played there, saw what a sculpture it is, 100 people in their village playing it. It's a social sculpture."* (Prot. HV, p. 39, lines 247-249; see also Defendant's Exhibit 45, where the steel *band* and not the *steelpan* is consistently referred to as a social sculpture). This also has nothing to do with a copyright to a form. As a final example, the defendant 2's explanations of **"floating bowls"** should be mentioned (Prot. HV, p. 40, lines 279-281). Defendant 2 did not know the answer to the question of what was supposed to be "floating" about the bulky prototype 1 (Report, p. 40, lines 283-295).

3.6 Interim conclusion

37 The defendants did not succeed in proving that the design of the prototype pens and variants of the "Hang" was based on sufficiently free, creative decisions. is based on the design. On the contrary, the plaintiffs have provided evidence to the contrary that the design is exclusively the result of technical craftsmanship. **Copyright protection** must be **denied** for this reason alone.

4. the individual elements of the "Hang" are dictated by its purpose

38 Since the defendants were guided exclusively by technical considerations in the development and design of the "Hang", it is surprising that not that the four **elements of the "Hang"** cited by the defendants - lens shape, circularly arranged sound fields, central dome and resonance opening - **individually and together** are **exclusively functional**. This also leads to the exclusion of copyright protection (SENN, loc. cit, s. 216 f.; HILTY, Urheberrecht, 2nd ed., 2020, paras. 188 and 192; see also BGer 4A_472/2021, E. 6.3.2 - *Feuerring*, according to which restrictions on artistic freedom can also result from technical requirements, i.e. from the functional elements specified by the purpose of use).

39 According to the defendants, the decisive factor should be whether an instrument must have these four elements in order to produce a sound comparable to the "Hang". . This is wrong in two respects: Firstly, the specific sound of the "Hang" is not relevant. The defendants have never been able to demonstrate when because a sound is supposed to be "comparable" in the first place, and completely arbitrarily claims that any instruments such as a tube instrument played with flip-flops would sound comparable to the "Hang" (Statement of defence, para. 144; Reply, para. 191; Exhibit 143). Secondly, it is not possible to rely on any other instrument . The defendants have even gone so far as to claim that digital that digital instruments should be relevant (e.g. Duplik, para. 253). As a result, this would mean that nothing would ever be technically necessary. This is because the sound of a *handpan* could also be fed into an electric piano. That is of course nonsense.

40 Rather, the decisive factor in the assessment of technical necessity must be whether the **technical functions** that fulfill the features of the respective article of daily use are **fulfilled to the same extent** with a **different design of these features** while the **purpose remains the same**. If this is to be understood, the technical-functional requirements for the object of use are such that there is no need for a different design.

The court does not have any leeway in designing the subject matter, and copyright protection is excluded for this reason alone (e.g. HILTY, loc. cit, para. 192 with further reference, according to which copyright protection is out of the question if a design is limited to the non-interchangeable components that are already characteristic of the object of use). For example, the function of a bar stool is characterized by the supports that carry a seat at a certain height and a footrest (BGE 143 III 373, E. 2.8.2 - *Bar stool*). The purpose cannot simply be extended to any other seating furniture; for example, a chair with shorter legs/support likes or an omitted footrest would not be an alternative. The supports of the bar stool can, however, be angled or vertical without the purpose being achieved less well as a result. Angled supports are therefore not technically necessary. Nor can it be said that angled beams would be the best choice in technical and functional terms, which according to the Federal Court may not be monopolized via copyright (BGE 143 III 373, E. 2.8.3 - *Barstool*; see also BGer 4A_472/2021, E. 6.3.2 - *Feuerring*).

41 The plaintiffs have substantiated in the proceedings that the four disputed elements of the "Hang" in the sense just described are technically necessary (see Action I, para. 100 et seq.; Action II, para. 105 et seq.; Action III, para. 103 et seq.; Reply, para. 198 et seq.; First party submission, para. 42 et seq.). A different design of the elements would lead to a different instrument and would therefore be outside the intended purpose or would not be technically and functionally equivalent. This is also supported by the result of the evidence:

42 **Lens shape:** The defendants themselves stated that the "Hang" was due to the lens shape. The applicant 21 (Daniel Bernasconi) explained that, in order to limit the vibrational energy to a sound field, the surface surrounding the sound field must have a greater *curvature*. The plaintiff 21 (Daniel Bernasconi) explained that in order for the vibration energy to be limited to a sound field, the surface surrounding the sound field must have a greater curvature than the sound field itself (mechanical impedance change). In order to enable precise and reproducible tuning of the tone fields, it is essential that the body into which the tone fields are incorporated has the same curvature in all directions (Prot. HV, p. 25 f., lines 217-225 and 233-243; Prot. IV, p. 517), which is also confirmed by Prof. Woodhouse (Supplement 150, p. 2 f.; replica, para. 205-210). This is only the case with a spherical segment - as is already known from the playing surface of the *steelpan* and is formed automatically when sheet metal is expelled. It is also clear from the statements of the plaintiff 21 and the good that an octagonal shape - like any other body with flat geometries (pyramids, cubes, etc.) - would not work due to the vibrations of these surfaces. body with flat geometriesThe octagonal shape - like any other (pyramids, cubes, etc.) - would not work due to the vibrations of these surfaces; it would simply result in a worse instrument (Prot. HV, p. 26, lines 233-236; Exhibit 150, p. 2;

Replica, para. 207). In addition, the plaintiff 21 and Prof. Woodhouse, confirmed that a spherical segment is necessary for the underside, in particular because on the one hand this stiffens the instrument as a whole and on the other avoids interfering noises (Report HV, p. 25, lines 225-228; Exhibit 150, p. 3). The two spherical segments together form the lens shape. A different design of the body would not be technically and functionally equivalent and would also lead to a different instrument. In terms of playing technique, the lenticular shape is also advantageous because it allows the instrument to be played particularly well with the hands on the lap (Prot. HV, p. 25 f., lines 228-230; replica, para. 199-202). For this type of instrument, the lenticular form is therefore simply the best choice in technical and functional terms, or the ideal form (Prot. HV, p. 26, line 257; Prot. HV, p. 31, line 88). This cannot be monopolized via the copyright. Other *handpan makers* do not have to put up with technically and functionally inferior alternatives.

- 43 **Tone fields arranged in a circle:** The limitation of vibrations to a sound field is never perfect. Vibration energy can escape from a sound field, which can excite other sound fields (*crosstalk*). The best One way to prevent this is to place the sound fields as far apart as possible . The uniform distribution leads to the circular arrangement of the tone fields around a central tone field (supplement 150, p. 4: "*The best way to do minimize crosstalk is to separate notes by a large amount of internote surface. This accounts for the uniform distribution of notes in a circle around the shell, with one note in the center.*"). A different arrangement of the tone fields would not be equivalent in terms of sound. The circular arrangement is also particularly advantageous in terms of playing technique , as it ensures easy and good playability (Prot. HV, p. 26, lines 261-264; replica, margin no. 220). A circular arrangement of the tone fields is therefore technically and functionally appropriate. The **shape of the sound fields** also has a direct influence on the sound when struck, as the defendants themselves admit (response, para. 170).

- 44 **Central sound field with dome:** The fact that there is a sound **field in the** middle of the instrument field follows from the above-mentioned even distribution of the tone fields. A dome in the center of a tone field has an effect on the sound, making it softer (Prot. HV, p. 26 f., lines 273-275; Prot. IV, p. 517; Replic, para. 233-235; statement of November 4, 2022, para. 51-64). The defendants themselves also confirmed: "*The dome geometry changed the sound. It had a beneficial effect on the modulation of the sound*" (Exhibit 33, p. 24). Plaintiff 21 (Daniel Bernasconi) also experimented with other dome shapes. As he confirmed, an indentation, for example, leads to a deterioration in acoustics and stability (Prot. HV, p. 23, lines 109-113). Also

Plaintiff 2 (Ralf van den Bor) stated that the dome has a positive effect on the sound (Prot. HV, p. 32, line 94). The fact that there is a dome rather than an indentation in the center of the sound field is not only due to the pursuit of a better sound, but also for ergonomic and technical reasons. An indentation would not be as easy to play as a dome (appendix 150, p. 3: *"to enable it to be struck more easily in this apex position, given that the hand and fingers have a different type of trajectory and orientation at the apex of the instrument."*; Prot. HV, p. 27, lines 275-277; replica, para. 234). If a central tone field or a cup pel in the central tone field were dispensed with, the result would be a technically and functionally inferior instrument.

45 **Resonance aperture:** Such an **aperture** is indisputably mandatory for a Helmholtz resonator

(Exhibit 150, p. 4; Reply, paras. 242-244). As was shown at the negotiations seen and heard, the central placement also enables the tuning work inside the instrument (Prot. HV, p. 27, lines 280-288, and p. 32, lines 107-109; Prot. IV, p. 519; Exhibit 150, p. 4; Reply, paras. 248-250).

On the other hand, it also allows you to open and close the legs to influence the frequency of the Helmholtz resonance. This was also shown in the negotiations (Prot. HV, p. 27, lines 288-289; Prot. IV, p. 518 f.). Without a resonance aperture, the instrument would therefore not function as it does now, and a different placement would lead to massive technical and functional limitations.

46 Thus, the evidence establishes that the four cases brought by the defendants in the elements of the "Hang" are **technically necessary**. There are no technically equivalent alternatives to the individual elements (and even if there were, copyright law would not protect any technical features). Much more, the supposed alternatives (e.g. octagonal shape, non-circularly arranged tone fields, indentation instead of dome, lateral resonance opening) would lead to an inferior or even different instrument. If, contrary to expectations, the court should come to a different conclusion, the further further offers of evidence in this regard, in particular the expert opinions offered (replica, para. 199 ff.), would have to be accepted. For this **reason, copyright should** also be denied.

47 The bottom line is that the defendants are not concerned with achieving a certain design, but The interplay of the four functional elements should be protected. However, this interaction is not a work in the sense of copyright law, but an **idea** for an instrument, which as such **cannot** be **protected** by copyright law.

48 Even if the individual features of the "Hang" are not technically defined in this sense, the would be necessary, this would by no means mean that the "Hang" would therefore have an individual character. Admittedly, there would then be a certain scope for design. However, it **cannot** and must **not be** inferred from the **existence of creative leeway** that this has been **exhausted through sufficiently free and creative decisions**. As shown above, there can be no question of this here. In particular, technical features cannot justify copyright protection.

5. copyright protection in Germany and the Netherlands is not possible due to excluded from Art. 2 para. 7 RBÜ

49 Copyright protection in Germany and the Netherlands is ruled out from the outset if an article of daily use is not protected in its original state.

country of origin is not protected by copyright (Replica, para. 278 f. and 308 ff.; opinion of August 24, 2023, para. 3 ff. and 52 ff.). The "Hang" was developed in Switzerland by an SME based here, its name comes from the Bernese German word for hand , series production of the instrument took place in Bern and it was distributed around the world from here. Consequently, **Switzerland** must be regarded as the **country of origin** (opinion of August 24, 2023, para. 4 et seq.). The defendants also see this in the same light : *"It is simply a strong story from Bern"* - and not from Munich or Frankfurt (Prot. HV, p. 39, lines 239-240).

50 The defendant's representatives may dispute this, but they have not succeeded in proving a different country of origin (in particular the statement of 24. August 2023, para. 8). In this context, the defendants also attempted to substantiate their submission in the course of the interrogation of the parties (Prot. HV, p. 37, lines 150-151). However, these submissions are late and therefore not to be taken into account. It is not admissible for a party to attempt to make up for what has been omitted up to that point in the evidence proceedings or in the party interview.

51 Switzerland is therefore the country of origin of the "Hang". As shown, the "Hang" is not protected by copyright in Switzerland (chapters 2-4). For this reason alone, copyright protection in Germany and the Netherlands is excluded. In any case, the requirements for protection would not be met under German and Dutch copyright law either:

6. the prototypes and variants of the "Hang" would in any case be subject to German and Dutch copyright law are not protected

6.1 The foreign rulings on measures are irrelevant

52 The foreign rulings on measures are irrelevant, not only because they are only because they are of a purely provisional nature and therefore not prejudicial, but in particular because they are based on an incomplete and incorrect factual foundation (esp. and incorrect factual basis (in particular the replica, para. 280 et seq.). On the one hand, the **technical aspects** of the Hang were **not taken into account**, in particular the expert opinion of Prof. Woodhouse (Exhibit 150) was not available to the courts. Secondly, the courts - based on false descriptions in the defendants' affidavits - assumed an equally **false history** (Reply, para. 120-127; First Party Submission, para. 79 et seq.). The defendants conceded this half-heartedly: "*It may be that one or the other was not known at the time as is the case today.*" (Prot. HV, P. 6). This is what anyone who does not wish to be convicted of a deliberately false affidavit says. The defendants have published extensively on the history of the origins of . It is not clear how they could have suddenly "*known*" the history of origin "differently" or "*not as ... as ... today*". The fact that the defendants nevertheless refer to these decisions (e.g. Prot. HV, p. 14: "*The Regional Court of Hamburg as a specialized court has now made this decision.*") speaks for itself. In contrast, they deliberately ignore the fact that a Spanish court already denied a copyright in the "Hang" in 2012. right to the "Hang" (Prot. HV, p. 41, lines 335-336; Exhibit 33, p. 35; Exhibit 32, p. 10).

6.2 No copyright protection in Germany

53 The relevant legal situation in Germany was described in detail by the plaintiffs (in particular replica, para. 280 et seq.; statement of August 24, 2023, para. 30 ff.). According to the case law of the BGH, **technically conditioned features cannot justify copyright protection**. The BGH considers all features without which the object of use would not function to be technically conditional can. This includes both features that **must** be used in **similar products** for technical reasons as well as features that are **used for technical reasons** but are freely selectable or interchangeable. It is not sufficient to exploit a technical and constructive design leeway (BGH, judgment of May 12, 2011, file no. I ZR 53/10 [Supplement 159], 1st headnote, para. 20 f. and 30 - *Seilzirkus*). However, even if

not only a technical-constructive, but also an artistic scope of design exists, this is not sufficient for the affirmation of a copyright. Rather, this must also be utilized (opinion of August 24, 2023, para. 42 et seq. with further references). Cf. on the whole for example MÜLLER/PECHAN, Vom Geburtstagszug bis zur Fussgymnastiksandale, in: WRP - Wettbewerb in Recht und Praxis 11/2022, p. 1353 ff., para. 55-57:

"Not every exploitation of the scope for design fulfills the requirements for reaching the level of creation within the meaning of Section 2 UrhG. The mere fact that a product creates its own, aesthetically striking visual effect beyond its intended use is not sufficient to justify copyright protection. Technical design solutions do not justify copyright protection, irrespective of whether they represent the only technically possible design or one of several or even many technical solutions for achieving the purpose of use. Copyright protection requires the utilization of an artistic design scope through free and creative decisions."

54 **ECJ case law does not change this** (e.g. MÜLLER/PECHAN, loc. cit, para. 22: "on one and the same line" and para. 25: "no differences in essence in the Relationship between the concept of work under EU law and the concept of work to be applied under German law "). In the **Brompton decision** (judgment of June 11, 2020, Ref. C-833/18), the ECJ confirmed what was already valid in Germany due to the *Seilzirkus decision*. The protection threshold was thus not lowered, nor does it follow that everything that is not technically mandatory would be protected by copyright (esp. replica, para. 293 et seq.). Moreover, the referring court subsequently concluded that the Brompton *bicycle* is not protected by copyright, although there are countless alternatives for the design of a folding bicycle (Tribunal de l'entreprise de Liège, judgment of March 16, 2021 [Exhibit 165]).

55 As already explained above, the prototypes and variants of the "Hang" lack free creative decisions. The combination of two pre standing shells to prototype 1 is not a free and creative decision sufficient for copyright protection. In the further development of the prototype types to the "Hang" of the first generation, the defendants were ultimately guided by technical considerations and optimized the prototypes on the basis of sound and playing technique considerations. This does not constitute or lead to an artistic achievement within the meaning of copyright law,

that the personality of the defendant is reflected in the shape of the "Hang". The four elements of the "Hang" are also technically mandatory. There are no technically equivalent alternatives for a similar instrument. A different design of these four elements would result in a technically inferior or even a different instrument in terms of playing or sound. However, even if one assumed that there was a choice, the choice between different options would be purely technical and therefore irrelevant in terms of copyright. For example, a central dome is used for purely technical reasons, namely because it produces a special sound (just as the choice between ropes or chains or between different net designs is technically conditioned in the *rope circus*, see BGH, judgment of May 12, 2011, case no. I ZR 53/10 [Exhibit 159], para. 28 f.). If at all, the four elements of the "Hang" therefore utilize a technical-constructive design leeway. This is not sufficient for copyright protection. Insofar as the variants of the "Hang" - for example with the polish - also touched on a creative scope of design, the design decisions are so banal that even they are not sufficient for the affirmation of a copyright. The various prototypes and variants of the "Hang" are therefore not protected under German copyright law either.

6.3 No copyright protection in the Netherlands

56 Dutch copyright law also requires sufficient free, creative decisions for copyright protection to be considered. Not excluded
The choice between various technical alternatives is particularly native (in particular the opinion of August 24, 2023, para. 70 et seq.). The various decisions on the Rubik's cube are particularly illustrative - because they also concern an interactive, playable object of use. Several Dutch courts came to the unanimous conclusion that the Rubik's cube is not protected by copyright because the elements of the puzzle are technical and functional. The fact that a rotating puzzle can also be designed differently does not change this (reply, para. 338 ff.; opinion of August 24, 2023, para. 83 and 108 f.). For the same reasons as for Swiss and German law, there is therefore no copyright protection for the prototypes and variants of the "Hang" under Dutch law either.

7. interest in declaratory judgment

57 The existence of an interest in a declaratory judgment can be contested after the main hearing. there are no longer any serious doubts. On the one hand, the (belated)

Antrag der Beklagten auf positive Feststellung des Urheberrechtsschutzes (Prot. HV, S. 11) einer verkappten Feststellungswiderklage gleich. Zum anderen haben Daniel Bernasconi (Kläger 21) und Ralf van den Bor (Kläger 2) eindrücklich beschrieben, dass die fortbestehende Ungewissheit für *Handpan*-Bauer und -Händler nicht länger hinnehmbar ist (Prot. HV, S. 22 f., Zeilen 89-98 und 122-123, und S. 32 f., Zeilen 126-140), was der Vizepräsident zutreffend mit einem Tätigsein unter einem "Damoklesschwert" umschrieb (Prot. HV, S. 32, Zeilen 133-134). Auch die angebotene Befragung der weiteren Kläger würde ergeben, dass sie alle über ein hinreichendes Feststellungsinteresse verfügen.

8. Kostennote

58 Schliesslich reichen wir hiermit unsere Kostennote ein.

Beilage 261: Kostennote vom 24. November 2023

Mit vorzüglicher Hochachtung

Roger Staut

Sechsfach, Beilage im Doppel

iv Z. G. 17.12.23

