High Court of the Canton of Bern	**Supreme Court of the Canton of Bern**	Et¥6E6Ak6Ek
Commercial Court	Commercial Court	

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Decision

HG 20 117

Bern, June 16, 2026

Composition

Presiding Judge Schlup (Chair / Vice President), Commercial Judge Geelhaar-Beuret, Commercial Judge Emch-Fasnacht

Court Clerk Blatter

Parties to the Proceedings

Ayasa Instruments B.V., Noordmark 73, 1351 GG Almere, Netherlands

Plaintiff 1

Ralf van den Bor, Noordmark 72, 1351 GG Almere, Netherlands

Plaintiff 2

Plaintiff 1 and Plaintiff 2, represented by Attorney Dr. Roger Staub and/or Attorney Manuel Bigler, Walder Wyss AG, Seefeldstrasse 123, P.O. Box, 8034 Zurich

World of Handpan GmbH, Schleissheimer Street 47, 80797 Munich, Germany

Plaintiff 3

Eitle Emanuel, Schleissheimer Street 47, 80797 Munich, Germany

Plaintiff 4

Plaintiff 3 and Plaintiff 4, represented by attorneys Bernard Volken and/or Pascal Spycher, Troller Hitz Troller, Münstergasse 38, 3011 Bern

Kammen Marten Marten Mercks GbR, Heimatstrasse 19, 79102 Freiburg, Germany

Plaintiff 5

Kammen Stephan, Heimatstrasse 19, 79102 Freiburg, Germany

Plaintiff 6

Marten Malte, Eichenstrasse 9, 72226 Simmersfeld, Germany

Plaintiff 7

Marten Sebastian, 18 Rue du Schurmfeld, 67100 Strasbourg, France

Plaintiff 8

Mercks Alexander, Freiburger Street 24, 79112 Freiburg, Germany

Plaintiff 9

Plaintiffs 5 through 9, represented by Attorney Dr. Roger Staub and/or Attorney Manuel Bigler, Walder Wyss AG, Seefeldstrasse 123, P.O. Box, 8034 Zurich

Thomann GmbH, Hans-Thomann-Strasse 1, 96138 Burgebrach, Germany

Plaintiff 10

Hage Musikverlag GmbH & Co. KG, Eschenbach 542, 91224 Pommelsbrunn, Germany

Plaintiff 12

Plaintiffs 10 and 12, represented by attorneys Bernard Volken and/or Pascal Spycher, Troller Hitz Troller, Münstergasse 38, 3011 Bern

Thomas Würmli, Oberer Haselweg 5, 5727 Oberkulm

Plaintiff 18

Sabine Würmli, Oberer Haselweg 5, 5727 Oberkulm

Plaintiff 19

Jérémie Poux, Rue du Nord 147, 2300 La Chaux-de-

Fonds, Plaintiff 20

Bernasconi Daniel, Sägholzstrasse 35, 9038 Rehetobel

Plaintiff 21

Handpanwelt.ch GmbH, Güterbahnhofstrasse 6, 9000 St. Gallen (UID: CHE-372.256.936)

Plaintiff 22

Rauber Kay Ferdinand, Berneggstrasse 19, 9000 St. Gallen

Plaintiff 23

Markus Brönnimann, Grubenweg 2, 3362 Niederönz

Plaintiff 25

Plaintiffs 18 through 23 and Plaintiff 25, represented by Attorney Dr. Roger Staub and/or Attorney Manuel Bigler, Walder Wyss AG, Seefeldstrasse 123, P.O. Box, 8034 Zurich

v.

PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern

Defendant 1

Felix Rohner, c/o PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern

Defendant 2

Sabina Schärer, c/o PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern

Defendant 3

all represented by Attorney Dr. Michael Ritscher and/or Attorney Dr. Stefan Schröter and/or Attorney
Dr. Timmy Pielmeier, MLL Legal AG, Schiffbaustrasse 2, P.O. Box 1765, 8031 Zurich

Subject **Copyright**

Lawsuit HG 20 117 dated October 27, 2020

Lawsuit HG 20 133 dated December 4, 2020

Lawsuit HG 21 2 dated December 31, 2020

Answer to the Complaint dated May 11, 2021

Rejoinder (in summary proceedings) dated May 11, 2022

Duplic (in summary proceedings) dated October 18, 2022

Reply by Plaintiffs 1 and 2, 5–9, 18–23, and 25 dated September 25,
September 2025

Reply by Plaintiffs 3, 4, 10, and 12 dated September 25, 2025

Duplicate of November 20, 2025

Considerations:

1. Background

1. The **plaintiffs** originally consisted of 25 individuals and legal entities residing in Switzerland, Germany, or the Netherlands who manufacture and/or distribute hand-played, lens-shaped brass instruments known in the scene as “handpans.”

   Defendants 2 and 3 are natural persons who, around the turn of the millennium, first created metal percussion instruments in the form at issue here and gave them the name “Hang” (a Bernese German term for “hand”). Together, Defendants 2 and 3 designed various versions of the “Hang.” **Defendant** 1 is the legal entity—managed by Defendants 2 and 3—through which, among other things, the “Hang” is distributed.

2. By complaints filed on October 27, 2020 (“K-I”; Case No. HG 20 117), December 4, 2020 (“K-II”; former [pre-merger] Case No. NG 20 133), and a complaint filed on December 31, 2020 (amended on January 12, 2021) (“K-III”; former case number NG 21 2), the plaintiffs (hereinafter “Plaintiffs”) sought**, as their principal claim,** a **declaration** from the Commercial Court of the Canton of Bern that certain instruments depicted in the statements of claim (namely: 10 versions of the “Hang” developed by Defendants 2 and 3, including certain prototypes) do **not** enjoy **copyright protection** in **Switzerland, Germany,** and the **Netherlands**. The proceedings were consolidated by the then-presiding judge on January 18, 2021, at the request of the parties, and were thereafter continued under case number HG 20 117 (p. 256 and p. 261 [unless otherwise noted, the following page references refer to case file NG 20 117]).

3. With the consent of the parties, the consolidated **proceedings** were initially **limited** to the question of the copyrightability of 10 variants of “Hang” in Switzerland, Germany, and the Netherlands (order of January 24, 2022, p. 486). In its decision of July 2, 2024, the Commercial Court dismissed claim No. 1 of the complaints to the extent that it was admissible (namely, insofar as the court recognized the plaintiffs’ standing to seek a declaratory judgment regarding the individual versions of “Hang” under the relevant legal systems). For further details, reference is made to the Commercial Court’s **decision** of 2. July 2024 (pp. 1423 ff.), on which the present decision is based.

4. With regard to the **claims of Plaintiffs 11, 13, 14, 15, 16, and 17** (Plaintiffs 2, 4, 5, 6, 7, and 8 in the proceedings previously conducted under case number HG 20 133), the Commercial Court declined to hear the claims in their entirety due to lack of standing to seek a declaratory judgment (see decision of July 2, 2024, Operative Part, para. 1, p. 1517), with costs apportioned proportionally.

5. On the merits, the court concluded in its decision of July 2, 2024 — to put it simply — that the "Hang," as embodied by the actual designs/versions depicted below, is to be classified as a work protected by copyright (depending on the specific circumstances, namely taking into account the version and the applicable legal system; the list and illustrations correspond to the plaintiff's legal claims, item 1):

   i. Prototypes of the "Hang":

      d. Prototype 4:

      e. Prototype 5:

(see following page)

“Hang”:

a. First generation of the “Hang”:

b. “Low Hang”:

c. Second generation of the “Hang”:

d. “Integral Hang”:

e. “Free Integral Hang”:

6. **Plaintiffs** 1–23 challenged the decision of July 2, 2024, by filing an appeal with the Federal Supreme Court. In its judgment of February 18, 2025, the Court dismissed the appeal to the extent that it was admissible (Federal Supreme Court 4A_466/2024 of February 18, 2025, p. 1551 et seq.). Consequently, the **decision to decline to hear** the case with respect to plaintiffs 11, 13, 14, 15, 16, and 17, as well as with respect to certain legal issues concerning certain plaintiffs, is now **final** (see decision of July 2, 2024, Operative Part, paras. 1 and 5–7, p. 1517; see
also Federal Supreme Court 4A_466/2024 of February 18, 2025, E. 1.3, p. 1558 et

seq.).

However, the **Federal Supreme Court did not address** the substantive issue of copyright protection for “Hang” (requirements for an independently appealable interim decision were not met; the appeal was therefore inadmissible). A specific reproduction of the relevant operative paragraphs 4 and 8 through 11 of the decision of July 2, 2024, is omitted; instead, express reference is made to them (p. 1517).

7. Parallel to the appeal proceedings before the Federal Supreme Court, the defendants and Plaintiff 24 (Plaintiff 7 in the proceedings under the former case number HG 21 2) reached an out-of-court settlement. Plaintiff 24 subsequently withdrew his complaint (or, more precisely, his alternative claim set forth in paragraph 6) in accordance with the agreement (p. 1523 et seq.), and the proceedings were subsequently dismissed by order dated
October 2, 2024 (p. 1535 et seq.).

II. Subject Matter of the Present Proceedings / Legal Claims

8. Since the Commercial Court, in its decision of July 2, 2024, clarified the question of the fundamental copyright protection of “Hang,” i.e., affirmed such protection and accordingly dismissed the action for a declaratory judgment (reference is also made here to the relevant considerations in that decision), it must be examined whether the remaining 18 plaintiffs (i.e., the original plaintiffs excluding plaintiffs 11, 13, 14, 15, 16, 17, and 24) infringe the defendants’ copyrights through certain acts, such as offering for sale, selling, or manufacturing certain “handpans” **(alternative claim / infringement issue**—again in the form of a negative declaratory judgment).

9. Furthermore, in the same legal claims, the plaintiffs seek a (negative) declaration that their actions do not infringe “any copyrights of the defendants” **(alternative claim)** and that **the defendants have “no claims”** against the plaintiffs arising from such actions**.** In their replies (dated September 25, 2025 [hereinafter “Reply I” for those of Plaintiffs 1–2, 5–9, 18–23, and 25, and “Reply II” for those of Plaintiffs 3, 4, 10, and 12]), the plaintiffs raise an **additional (sub-)contingent claim** and request a declaration that the plaintiffs, through certain acts (such as the production, offering, sale, distribution, and making available of their “handpans”), **do not infringe any copyrights of the defendants in those versions** of the
“Hang”—in respect of which the Commercial Court, in its decision of
July 2, 2024, and that the defendant has no claims against the plaintiffs arising from such acts. Compared to the previous alternative claims, the new claims state that the plaintiffs do not infringe **the defendants’ copyrights in the versions of the “Hang” described in the claims** (as opposed to “do not infringe the defendants’ copyrights”). By way of example, the following is an **excerpt** from the (alternative and sub-alternative) claims filed by Plaintiff 1 and Plaintiff 2 (and filed verbatim [with the exception of the naming of the plaintiffs and the specific instruments] on behalf of the other plaintiffs) **contingent** and **sub-contingent claims** from K-I, Claim No. 2, and Rejoinder I, Claim No. 2.1 (pp. 15 and 1697):

“2. In the alternative to Legal Claim No. 1: It should be determined that Plaintiff 1 and Plaintiff 2, by manufacturing, offering for sale, selling, distributing, and making available the musical instruments listed below a) in Switzerland, b) in Germany, and c) in the Netherlands, do not infringe the Defendants’ copyrights, and that the Defendants have no claims against Plaintiff 1 or Plaintiff 2 arising from such acts: [followed by illustrations under subparagraphs a) through f) of six “handpans” belonging to Plaintiff 1 and Plaintiff 2]”

“2.1 In the alternative to Claim 2: It should be determined that Plaintiff 1 and Plaintiff 2, by manufacturing, offering for sale, selling, distributing, and making available the musical instruments as described in Claim 2(a)–(f) in Germany and the Netherlands, do not infringe the defendant’s copyrights in the musical instruments as set forth in Claim 1(ii)(a), and that the defendant has no claims against Plaintiff 1 or Plaintiff 2 arising from such acts.”

10. These questions arise—depending on the specific circumstances—under **three legal systems** (Switzerland, Germany, the Netherlands).

11. As a result of the (final) decision to dismiss the case on July 2, 2024, and the withdrawal of the complaint, the “handpans” of Plaintiffs 11, 13, 14, 15, 16, 17, and 24 are **no longer relevant**. Excluded from this are “handpans” from plaintiffs who have withdrawn from the case but which are (also) distributed by plaintiffs still participating in the proceedings and were included in the corresponding legal claims (namely in the case of Plaintiff 10, who distributes the instruments of Plaintiffs 12, 13, 14, and 15 as well as 16 and 17; see K-II RB para. 2ggg and para. 2hhh, p. 32 [HG 20 133]).

12. For a **comprehensive presentation of the legal claims—**which include a large number of “handpans” and dozens of pages of visual material, please refer to the presentation in the complaints K-I through K-III (p. 15 et seq. [HG 20 117]; p. 13 et seq. [NG 20 133]; pp. 771 et seq. [HG 21 2]), as well as in Replies I and II (both dated September 25, 2025, pp. 1659 et seq. and 1695 et seq.).

III. Case History

13. For the history of the proceedings **up to July 2, 2024**, reference is made to the statements made above as well as to the corresponding considerations in the decision of July 2, 2024 (Decision of July 2, 2024, E. 1 et seq., pp. 1427 et seq.).

14. In its decision of July 2, 2024, the Commercial Court dismissed the claims (or the respective principal claims) to the extent that it considered them admissible (pp. 1423 et seq.).

15. Plaintiff 24’s withdrawal of the complaint is dated September 10, 2024 (p. 1523 et seq.). The corresponding order dismissing the case was issued on October 2, 2024 (p. 1535 n.).

16. In its judgment of February 18, 2025, the Federal Supreme Court dismissed the appeal filed against the decision of July 2, 2024, to the extent that it was admissible (p. 1551 et seq.).

17. On April 9, 2025, the defendants filed a new submission. In it, they also requested that a second exchange of briefs be waived, and that, in the alternative, a second exchange of briefs be conducted and—provided the plaintiffs did not also waive a trial—that the trial be scheduled as soon as possible (p. 1569 et seq.).

18. By order dated April 11, 2025, the proceedings were resumed in light of the (reasoned) judgment of the Federal Supreme Court dated February 18, 2025 (4A 466/2024; dispatched on April 7, 2025), which had been received on April 8, 2025. The plaintiffs were given the opportunity to comment on the new submission and on the further course of the proceedings (pp. 1602 ff.).

19. The plaintiffs' statement regarding the new submission dated April 9, 2025, is dated May 12, 2025. It was submitted to the post office on May 13, 2025 (pp. 1606 ff.) and was thus filed late (see pp. 1611 ff., 1614 ff.). From a procedural standpoint, the plaintiffs requested a second round of written submissions.

20. In a statement dated May 26, 2025, the defendants declared that they were waiving their right to a trial and requested, in amendment to the procedural motion of April 9, 2025, that a provisional date be set for the second oral hearing, that short deadlines be set for the parties to file their reply and rejoinder, and that the date for the second oral hearing be canceled should the plaintiffs waive their right to have it held (p. 1622 et seq.).

21. By order dated May 27, 2025, the parties were given the opportunity to comment on the deadlines to be set for the second exchange of pleadings (p. 1625 et seq.).

22. The parties' respective submissions are dated June 10 and June 17, 2025 (p. 1628 et seq.; p. 1635 et seq.).

23. By order dated June 24, 2025, the plaintiffs in the full-scope proceedings were given until September 25, 2025, to file a reply, and the defendants were given until November 20, 2025, to file a rejoinder. At the same time, a survey was announced to determine a (provisional) date for the main hearing (p. 1641 et seq.).

24. By order dated August 12, 2025, in the event that the plaintiffs did not withdraw their claims, the main hearing to be held in that case was scheduled for January 27, 2026 (pp. 1645 ff.).

25. By order dated August 13, 2025, it was determined that the four plaintiffs 3, 4, 10, and 12 would now be represented by attorneys Volken and/or Spycher (p. 1656 ff.).

26. Plaintiffs 1, 2, 5–9, 18–23, and 25 filed their reply on September 25, 2025 (hereinafter referred to as “Reply I”; received by the Commercial Court on September 29, 2025; pp. 1695 et seq.).

27. Plaintiffs 3, 4, 10, and 12 filed their reply on September 25, 2025 (hereinafter referred to as “Reply II”; received by the Commercial Court on September 26, 2025; pp. 1659 ff.).

28. By order dated September 30, 2025, the defendants were given until November 20, 2025, to file a rejoinder (pp. 1881 ff.).

29. The defendants filed their rejoinder on November 20, 2025 (received by the Commercial Court on November 21, 2025; pp. 1886 ff.).

30. By order dated November 21, 2025, the plaintiffs were given until December 1, 2025, to notify the court whether they (like the defendants) would waive their right to a second trial (pp. 1987 ff.).

31. In a submission dated December 1, 2025, the representatives of Plaintiffs 3, 4, 10, and 12 stated that they did *not* wish to waive their right to a second trial. At the same time, they filed a motion to stay the proceedings until the preliminary ruling requests No. C-580/23 and No. C-795/23, pending before the European Court of Justice (ECJ), have been resolved, as the outcome of those cases is relevant to the present proceedings (p. 1992 et seq.).

32. In a submission dated December 1, 2025, the representatives of the remaining plaintiffs announced that holding the main hearing was indispensable for them and also commented on the reply (pp. 2000 ff.).

33. By order dated December 4, 2025, the submissions of December 1, 2025, were served on both parties, and it was determined that the second oral hearing, provisionally scheduled for January 27, 2026, would take place (Art. 233 ZPO e contra-rio). Plaintiffs 1, 2, 5–9, 18–23, and 25, as well as the defendants, were given the opportunity
to comment within 10 days on the motion to stay proceedings filed by Plaintiffs 3, 4, 10, and 12 (pp. 2008 ff.).

34. In a submission dated December 9, 2025, Plaintiffs 1, 2, 5–9, 18–23, and 25 responded to the motion to stay and commented on the judgment of the CJEU dated December 4, 2025, which had been issued in the meantime in that case (pp. 2012 ff.).

35. In a submission dated December 9, 2025, the defendants also filed the judgment of the CJEU dated December 4, 2025, and requested that the motion to stay be dismissed as moot (p. 2022).

36. By order dated December 15, 2025, the motions to stay filed by Plaintiffs 3, 4, 10, and 12 was dismissed as moot (pp. 2024 ff.).

37. The summons to continue the main hearing is dated January 6, 2026 (p. 2028 et seq.).

38. In a submission dated January 16, 2026, Plaintiffs 3, 4, 10, and 12 filed their response to the judgment of the ECJ dated December 4, 2025 (p. 2034 et seq.).

39. In a submission dated January 26, 2026, Plaintiffs 1, 2, 5–9, 18–23, and 25 filed the article from the newspaper "Schweiz am Wochenende" dated January 24, 2026, into the record (p. 2048).

40. On January 27, 2026, the trial resumed before the Commercial Court in Bern (p. 2052 et seq.).

41. The bill of costs from the defendant's legal representatives was submitted to the court during the main hearing (p. 2082 et seq.).

42. The bill of costs from the legal representatives of Plaintiffs 1, 2, 5–9, 18–23, and 25, as well as the motion to correct the minutes, was received by the Commercial Court on February 23, 2026 (p. 2091 et seq.).

43. The bill of costs from the legal representatives of Plaintiffs 3, 4, 10, and 12 is dated March 2, 2026 (pp. 2101 et seq.).

44. By order dated March 5, 2026, the court gave the parties the opportunity to comment on each other's bills of costs. At the same time, it indicated that it would rule ex officio on the few (minor) points in the "Motion to Correct the Transcript" or to supplement it, and gave the defendant as well as Plaintiffs 3, 4, 10, and 12 the opportunity to submit any comments (voluntarily) (p. 2109 et seq.).

45. The defendant's waiver of the right to comment on the plaintiffs' cost statements and the motion to correct the minutes was received by the Commercial Court on March 12, 2026 (p. 2113).

46. The response from Plaintiffs 3, 4, 10, and 12 to the defendant's bill of costs was received by the Commercial Court on March 16, 2026 (p. 2115 et seq.).

47. The response from the remaining plaintiffs to the defendant's bill of costs was received by the Commercial Court on March 17, 2026 (p. 2120).

48. By order dated March 17, 2026, the responses were served on both parties (p. 2123 et seq.).

49. By order dated June 16, 2026, the motion to correct the minutes was denied (p. 2127 et seq.).

IV. Procedural Matters

50. The court examines ex officio whether the requirements for litigation are met (see Art. 60 of the Swiss Code of Civil Procedure of December 19, 2008 [ZPO; SR 272]). The national civil procedure law of the forum is decisive—even in international cases—(see BGE 141 III 294, para. 4 = Pra 106 [2017] No. 5; BGE 139 III 278, para. 4.2); in the present case, therefore, the ZPO.

50.1 The Commercial Court of Bern has both international and territorial jurisdiction. The defendants have **entered** an **appearance** in the proceedings (see, e.g., KA, para. 21, p. 280; see Art. 24 of the Lugano Convention of October 30, 2007 [LugÜ; SR 0.275.12] and Art. 18 ZPO), especially since jurisdiction would exist in any case (Art. 2(1) LugÜ in conjunction with Art. 109(2) of the Federal Act on Private International Law of December 18, 1987 [IPRG; SR 291] and Art. 10(1)(a) and (b) of the ZPO). Jurisdiction exists both in international cases (with respect to Plaintiffs 1–10 and 12, who, unlike the Defendants, each have their (domicile) or residence abroad) and in domestic cases (with respect to Plaintiffs 18–23 and 25, who, like the Defendants, have their (domicile) or residence in Switzerland).

50.2 **Subject-matter** jurisdiction for intellectual property infringement actions arises from Art. 5(1)(a) of the Swiss Civil Procedure Code (ZPO) in conjunction with Art. 7(1) of the Introductory Act to the Civil Procedure Code, the Criminal Procedure Code, and the Juvenile Criminal Procedure Code [EG ZSJ; BSG 271.1].

Applicable Law

51. Intellectual property rights are governed by the law of the state in which protection of the intellectual property is sought (Art. 110(1) IPRG). With regard to the question of whether the plaintiffs are infringing the copyrights of Defendants 2 and 3, the law of the country of protection applies (see JEGHER/KUNZ, in: BSK IPRG, Art. 110, note 13; VISCHER/MOsi-MANN, in: ZK IPRG, 3rd ed., Art. 110, note 4). In line with the considerations regarding the interest in a declaratory judgment, this means that, for the present decision, Swiss copyright law applies with respect to Plaintiffs 18–23 and 25, German copyright law applies with respect to Plaintiffs 1–10 and 12, and Dutch copyright law applies with respect to Plaintiffs 1 and 2 (see also the decision of July 2, 2024, specifically paras. 25 et seq., 27 et seq., and 52, pp. 1441 et seq., 1460 et seq.).

Interest in a Declaratory Judgment

52. The (sub)alternative claims raised are also so-called declaratory actions, which require the plaintiffs to have a **specific interest in a declaratory judgment** (see Art. 59(2)(a), Art. 88 of the Swiss Civil Procedure Code (ZPO), and Art. 62 of the Copyright Act of October 9, 1992 [URG; SR 231.1]; Decision of July 2, 2024, E. 25.1 et seq., pp. 1442 et seq.).

Issue of Copyright Infringement

52.1 In their rejoinder, the defendants argue that there is no interest in a declaratory judgment. They contend that the (remaining) plaintiffs have not demonstrated that they

specifically had to anticipate an **action for infringement** and disgorgement of profits, especially since the defendants had **not** filed **a counterclaim** in the present proceedings (reply, para. 29 et seq., p. 1896).

52.2 In this regard, the defendants' argument cannot be accepted. In the decision of July 2, 2024, it was explained for all remaining plaintiffs here why the **cease-and-desist letters** sent by the defendants gave rise to a legally relevant dispute. This uncertainty extends primarily, though not exclusively, to the fundamental question of copyright protection, particularly since the defendants, in these cease-and-desist letters, either demanded that the plaintiffs sign a cease-and-desist declaration and/or threatened legal action. For details regarding these cease-and-desist letters, reference is made to the explanations in the decision of July 2, 2024. Even if, therefore, **higher requirements** for a legal interest in protection may be imposed in negative infringement actions (as compared to negative declaratory actions against the general existence of an alleged copyright) (see, for example, MÜLLER, in: SHK URG, 2nd ed., Art. 61 N 14), these requirements are met in the present case. The remarks made in the decision of July 2, 2024, regarding the cease-and-desist letters can thus, in principle, (also) be applied to the **infringement issue raised** in the plaintiffs' (sub-)**alternative claims**, especially since the cease-and-desist letters indicate which features the defendants considered to be protected and which "Handpans"—with which characteristics or features—they had objected to as infringing. Any requirements beyond this (see Rejoinder, para. 29 et seq., p. 1896, citingH.a. Federal Supreme Court 4A 466/2024 of February 18, 2025, E. 3.5), such as, in particular, a counterclaim that has *actually* been filed, are not necessary in the present case with regard to the question of (non-)infringement; otherwise, the interest in a declaratory judgment would be made dependent on the defendants' procedural conduct. In other words, the uncertainty in the present case extends not only to the question of whether the "Hang" is eligible for protection, but also to the question of potential **infringement** by the plaintiff's contested actions involving its own "Handpans."

Question of the General "Non-Existence of Claims"

52.3 However, this conclusion does not apply to the question raised in **the same legal claims** (alternative claims, identically worded also in the new sub-alternative claims submitted with Replies I and II) regarding **the** general **non-existence of claims** or the **forfeiture** of any claims by the defendants: In these, the plaintiffs seek, cumulatively with the declaration of non-infringement ("and")**,** a **declaration** that **"the defendants** have **no claims"** against the individual plaintiffs **arising from such acts**.

52.4 The **cease-and-desist letters** relevant to the present case**,** from which an interest in a declaratory judgment could be derived, are broadly worded with regard to the possible claims. They refer to "copyright infringements" and "claims for cease and desist, for information about past infringements, and for damages" (as in the case of Plaintiff 1 (and 2), [KB-I 83]), of a "violation of §§ 15 UrhG et seq., which gives rise to our client's claims for injunctive relief, disclosure, and destruction of the unauthorized copies" (Plaintiffs 3 (and 4) [KB-I 81]) and Plaintiff 5

(and 6–9) [see KB-I 82]), of “[infringement] of our client’s copyright usage rights within the meaning of §§ 15 UrhG et seq. as well as her design rights within the meaning of Art. 19(1) GGV. Furthermore, you are committing [...] avoidable misrepresentation of origin within the meaning of § 4 No. 3 a) UWG” and “judicial enforcement of the existing claims” (Plaintiffs 10 [KB-II 83] and 12 [KB-II 85]) or, respectively, “which is why, by distributing them, you are infringing our client’s copyright under Art. 10 URG, thereby giving rise, pursuant to Art. 62 et seq. URG gives rise to claims for injunctive relief, disclosure, damages, and the destruction of unauthorized copies” (Plaintiffs 18–23 [KB-III 83, 84, 85, 86], virtually identical for Plaintiff 25 [KB-III 88]. This reflects the fact that copyright grants the owner a **bundle of rights** (see, e.g., Art. 9 et seq. URG; §§ 12 et seq., 15 et seq. of the Act on Copyright and Related Rights [“UrhG”]; Art. 1, 12 *Auteurswet* [“Aw”]) and—beyond copyright—further legal claims cannot be ruled out.

52.5 A declaratory judgment is intended to definitively resolve disputed legal issues; otherwise, the function of the declaratory action as a means of legal protection would be called into question (see MARKUs, in: BK ZPO, 2nd ed., Art. 88 N 58). With the negative declaratory relief they have sought, the plaintiffs **are** in fact **seeking a comprehensive clarification of the** legal situation regarding the **claims to which** the defendants may **be entitled and/or which may be asserted against the plaintiffs,** which is not—and cannot be—covered by the purpose of the declaratory action. In particular, it is not apparent from either the legal claims themselves or the accompanying statement of reasons which *specific* claims against the individual plaintiffs are alleged not to exist. In their statement of reasons, the plaintiffs essentially argue that the defendants had led them (as well as the entire “community”) to believe for years that they had no objection to the design of “handpans.” It follows from this that this part of the legal claims is not aimed at the forfeiture **of specific claims** in **individual cases,** but rather at a blanket forfeiture of any claims in connection with the design of “handpans.” However, taking into account the defendants’ interests—which must be considered in a negative declaratory action (see WEBER, in: BSK ZPO, 4th ed., Art. 88 N 23)—this goes too far, even further than in the case of an infringement claim; there can be **no** interest in a declaratory judgment on this point. This is because the court cannot anticipate whether and **which** rights the defendants would or will actually assert against the individual plaintiffs with respect to **which acts**, **during which period**, and regarding which “handpans,” nor can it determine who would or will assert such claims; this is solely a matter for the defendants. In this respect, the plaintiffs’ case differs—despite the existence of a cease-and-desist letter and/or individual concrete legal steps (in particular, preliminary injunctions; see, e.g., KB-I 92 and 93, 97 et seq., KB 193, and KAB 37A; see also the November submission dated
April 9, 2025, para. 15, p. 1572)—from the general public or from other dealers and/or manufacturers of “handpans.” With regard to the question of whether the defendants are **generally** “entitled to **no claims**,**” the unreasonableness required** for a declaratory interest has **not been demonstrated** (in the Commercial Court’s view, this conclusion “all the more” aligns with the conclusions reached in BGer 4A 466/2024 of
February 18, 2025, in E. 3).

52.6 One reaches the same conclusion by examining this aspect in light of the requirement that **the legal claim be specific**: Given the arguments in the pleadings, the relevant portion of the legal claims—despite its cumulative wording—aims to establish that the defendants are entitled to "no claims"—even if a copyright infringement is affirmed. The wording "no claims" clearly goes beyond copyright claims, especially since—regardless of the affirmation of copyright protection—it cannot be ruled out that claims based on other legal grounds *might* exist, which, however, is not a matter for the court to determine. If the court finds that infringements have occurred (and dismisses the action for a declaratory judgment), it seems virtually impossible, given the legal status of a person recognized as an author, that the defendants, as rights holders, would be entitled to "no claims" at all. If the court denies the existence of a copyright infringement (and grants the action for a negative declaration), this would indeed mean that, from a copyright law perspective, no claims for copyright infringement (can) exist; however, even in this case—not least in light of the established copyrightability of "Hang"—this would not justify the conclusion that there are "no claims" at all.

52.7 Consequently, the relevant portion of the legal claims is **not admissible;** therefore**,** the issue of forfeiture or waiver raised by the plaintiffs can be assessed only in the context of claims that have actually been asserted.

Prototypes

52.8 Furthermore, insofar as **Plaintiffs 10 and 12** assert that, with respect to them, **Prototypes** 1–3 of the "Hang" pursuant to K-II, RB § 1(i)(a–c) (p. 4 et seq. [HG 20 133]) should be taken into account as "potentially infringed subject matter" for the purposes of the infringement analysis (see Rejoinder II, para. 21, p. 1673, as well as the corresponding subsidiary claims, paras. 2.1 and 3.1, pp. 1662 et seq.), their arguments must be dismissed. Although Plaintiffs 10 and 12 were, in principle, granted a legal interest in a declaratory judgment regarding the issue of protection by the decision of July 2, 2024 (see decision of July 2, 2024, E. 33.1 and 35, pp. 1452, 1453 et seq.), However, the legal claims regarding these prototypes were deemed contradictory (see decision of July 2, 2024, E. 49.1 et seq. and 52, pp. 1459 et seq.). The decision of July 2, 2024, therefore does not address the question of copyright protection for these prototypes (see Operative Part, para. 4, dismissal for lack of jurisdiction). The question of infringement (alternative claim), however, only becomes relevant after copyright protection has been granted to a potentially infringed work. For this reason, Plaintiffs 10 and 12 **cannot** be granted a legal interest in a declaratory judgment regarding **the question of infringement** with respect to Prototypes 1–3, especially since the action for a declaratory judgment does not serve to clarify merely theoretical legal questions. The corresponding legal claims are **not to be considered to this extent** (see K-II RB para. 2 [Plaintiff 10] and para. 3 [Plaintiff 12]; Rejoinder II RB para. 2.1 [Plaintiff 10] and para. 3.1 [Plaintiff 12]).

New Sub-Contingent Claims / Amendment to the Complaint

52.9 In support of the new claims (which are raised in the same manner by all plaintiffs), Plaintiffs 3, 4, 10, and 12 argue that—in light of the dismissal of the principal claim by decision of July 2, 2024 — the question now arises as to "which" of the defendant's copyrights should be taken into account in the infringement analysis. These can only be rights to *specific* versions of the
"Hang," as the subsidiary claims now make clear (Rejoinder II, para. 4, p. 1664). The **sketch** with four design features should not be taken into account in this regard (see Rejoinder II, para. 13, p. 1667 et seq.).

53. The defendants question the **admissibility** of the new alternative claims, in which the plaintiffs seek a declaration of non-infringement with respect to specific versions of "Hang." The defendants argue that, in this regard, the plaintiffs have not sufficiently distinguished between the **physical copy of the work** and the intangible property embodied therein—the work itself (Duplicate, para. 32, p. 1896).

53.1 An amendment to the complaint is admissible, among other things, if the amended or new claim is to be assessed under the same type of proceedings and is substantively related to the previous claim (Art. 227(1)(a) ZPO). This requirement is, in principle, met in the present case.

53.2 Regarding the substantive issue of **the relevance of the sketch** or the **question of the** specific work, reference is made to E. 63 et seq. below, although the following can already be anticipated: The defendant holds copyrights to the work "Hang," which is embodied in various versions. In the context of these proceedings, it will (only) be necessary to examine whether the plaintiffs, by manufacturing or distributing, etc., their "Handpans," infringe the defendant's **copyrights** in "Hang" under the respective legal systems. Contrary to the plaintiffs' contention, this examination does not aim to determine "which" copyrights in "which" version have been infringed. On the merits, the sub-contingent claims clarify the contingent claims, with each addressing the question of whether the described acts, in connection with the "handpans" submitted to the court, are to be deemed copyright infringements under specific legal systems. Based on the explanations provided above and in E. 65 et seq. below, the answer to this question is the same for all (sub-)conditional claims, particularly since any copyrights do not exist in the specific copies of the work. However, in light of the discussions regarding the interest in a declaratory judgment (including the corresponding decisions to dismiss the case on 2 July 2024), the plaintiffs' alternative claims are limited solely to those issues for which the individual plaintiffs have a sufficient interest (particularly with regard to the relevant legal system).

53.3 The **remaining procedural requirements** are **met,** and the claims may therefore be admitted.

Burden of Proof

53.4 The allocation of the burden of proof is governed by the *lex causae* (Federal Supreme Court 5A 723/2017 of December 17, 2018, para. 5.1; BGE 124 III 134, para. 2b/bb). In this case, Swiss, German, and Dutch law are applicable, meaning that the allocation of the burden of proof is assessed according to these legal systems. What they have in common is

that the question of the burden of proof does not depend on a party's role in the proceedings (see also the decision of July 2, 2024, para. 61 with further references, p. 1465, and ANDERs, in: Anders/Gehle, Civil Procedure Code, 81st ed., § 256, margin note 54), meaning that in copyright disputes, the party asserting a claim bears the burden of presentation and proof for all facts from which the claim derives, while the opposing party must present and prove the facts that negate, preclude, or bar the claim (see WIMMER, in: Schricker/Loewenheim, 6th ed., § 97, margin no. 349).

53.5 The factual issue in the present case is whether a specific act (e.g., reproduction) took place on the part of the plaintiffs. The plaintiffs do not dispute that they actually perform (or have already performed in the past) the acts mentioned in their claims with the "handpans" described therein. With regard to Plaintiffs 18 and 19 as well as Plaintiff 25, it must therefore be assumed that they do not manufacture their "handpans" themselves (see also the subsidiary claims in sections 2.1 and 7.1, in which the
"manufacturing" has been omitted compared to the alternative claims), especially since no corresponding statements can be found in Complaint K-III or Rejoinder I. The plaintiffs dispute the existence of copyright infringements to the extent that they assume that the
"handpans" they produce and/or distribute do not fall within the scope of protection of the "Hang." Whether a specific act constitutes a copyright infringement within the meaning of the applicable legal systems (see, e.g., Art. 62 URG; § 97 UrhG; Art. 1, 27, 28 Aw) is a legal question to be assessed by the court; therefore, the plaintiffs' arguments on this point miss the point (see minutes of the continued hearing, p. 22, p. 2073). This question can be answered, among other things, on the basis of the evidence presented and the detailed descriptions contained in the pleadings regarding the appearance of the "handpans" alleged to be infringing, including photographic material.

v. On the substance

On the issue of copyright infringement through acts involving individual "handpans" (alternative and further alternative claims)

Background / Decision of July 2, 2024

54. **Defendants** 2 and 3 are natural persons who have devoted themselves to the construction of sheet-metal musical instruments for decades. Originally coming from the construction of steel pans (an idiophone originating in the Caribbean and typically played with mallets; see, e.g., the illustration in K-I, para. 45 [p. 46] and KB-I 26), Defendants 2 and 3 first created hand-played instruments in the form at issue here around the turn of the millennium and named them "Hang" (a Bernese German term for "hand"). The range of hand-played metal-sounding instruments available from the defendants includes, in addition to the "Hang," several differently shaped idiophones, as illustrated below (see KA, para. 129, p. 312 [product range as of May 2021], see also KAB 15–20 and 148; see also, most recently, the new idiophone "Hang 'Plexus'" [KB 360, pp. 1 and 2 ff.] depicted in the statement of Plaintiffs 1, 2, 5–9, 18–23, and 25 dated December 1,

2025, p. 2004 [KB 360, pp. 1 and 2 ff.; see also the minutes of the continued general meeting, p. 15, p. 2066]):

"Hang" Gubal"

"Hang" Bal"

"Hang" Gudu"

"Hang" Gede"

"Hang" Balu"

"Hang" Godo"

55. The basis for determining whether acts involving the plaintiff's instruments/"handpans" infringe the defendants' (no) copyrights (alternative claim) or the defendants' copyrights in certain versions of the "Hang" (subalternative claim) is the decision of July 2, 2024, which has not yet become final in this respect. The origin of the "Hang" over 25 years ago stemmed from a challenge posed to Defendants 2 and 3 by a percussionist:

Based on the "ghatam" (a clay percussion instrument from India [see the illustration below from K-I, para. 88, p. 70, front right])

Defendants 2 and 3 were to create a

- idiophone made of sheet metal;
- playable by hand;

- capable of producing various tones and
- equipped with a cavity, a Helmholtz resonator, or a resonance hole

, taking into account certain additional requirements resulting from the assignment (Decision of July 2, 2024, E. 66 et seq., pp. 1469 et seq.).

56. In its decision of July 2, 2024, the Commercial Court found that the design of the “Hang” was **not dictated by technical constraints** (Decision of July 2, 2024, E. 66.4–86.4, pp. 1471 ff.). For all three relevant legal systems (Switzerland, Germany, the Netherlands), the court further held that Defendants 2 and 3 had utilized the **creative leeway** available to them (and previously defined) in a **manner relevant to copyright law** and had created a **copyright-protected work** with the “Hang” (see also Decision of July 2, 2024, E. 102 et seq., 106, 113, 121, pp. 1493 et seq., 1499, 1503).

57. The Commercial Court considered the artistic impression of the design—which is determined by the **layout, the lines, and the interplay of all four elements**—to be relevant (decision of July 2, 2024, E. 103, p. 1493 et seq.). **Taken together**, these elements form a **distinctive combination of features.** The **simple** yet clear **lines,** the **symmetries**, and the **arrangement of the elements** were deemed relevant (horizontally mirrored, **equally sized spherical segments; a vertical axis** between the dome and the resonance hole; tone fields arranged **concentrically** around the dome **in a ring-like pattern**, located at the center of each segment and spaced at approximately equal intervals from one another). The Commercial Court recognized the “Hang” as an object with an otherworldly appearance, in which the use of the seemingly very simple **lens shape—particularly in combination** with the centrally located dome projecting outward—has a particularly distinctive effect. This is reinforced by the **contrast** between the simple bottom half—with the resonance hole, which appears as a “throat” leading into the cavity—and the upper half of the shell, which is fitted with tone fields and features a protruding dome. Since the “Hang” also differs from the previously known repertoire of forms, it was ultimately assessed as something **new and unique** (Decision of July 2, 2024, E. 104, p. 1494).

Parties’ Positions According to the second exchange of briefs in the unrestricted proceedings (Rejoinder I and II / Duplicates)

58. The four plaintiffs 3, 4, 10, and 12 (see Rejoinder II) take the position that any copyright protection could apply only to **specific versions** of “Hang.” In particular, they argue that from the (mere) presence of the four disputed elements (or the sketch set forth below and included in the plaintiffs’ principal claims [see K-I, II, and III, RB para. 1J])

it cannot be concluded that a “handpan” with these four features “automatically” constitutes a copyright infringement, especially since such a sketch **does not convey** the **overall impression** (Rejoinder II, paras. 10 et seq., 13 et seq., p. 1666 et seq.). Such an interpretation would amount to impermissible **protection of a concept** (see also the minutes of the continued hearing, p. 12, p. 2063).

59. The four plaintiffs mentioned above assert (under German law) that their instruments present a **different overall impression** than the “Hang,” **in particular due to** differences in the tone fields (proportions between the tone fields and the rest of the instrument, more angular separations, different numbers of tone fields, tone fields that “stand out from the rest,” tone fields on the lower shell, differently colored “dimples” [indentations in individual tone fields]), different surface designs (color schemes, logos, decorations), a more technical overall impression, differently designed domes (oval, colored, some concave, some absent), and different “shoulders” [the area between the central tone field and the other tone fields; see K-I, para. 35, p. 43], different sizes, shapes, and proportions of the lens shape, and different designs of the resonance hole (in some cases none at all) (Rejoinder II, para. 44, p. 1682 et seq.). Furthermore, they refer to the arguments set forth in the respective complaints (i.e., K-I for Plaintiffs 3 and 4, and K-II for Plaintiffs 10 and 12). In these descriptions, the plaintiffs describe their “handpans” and their specific features individually (in particular, the number of tone fields, a description of the “shoulder,” the shape and size of the dome, any tone fields placed on the underside, surface design such as coloration, engravings, etc.) and provide details on materials and dimensions (see K-I, para. 200 et seq., p. 115 et seq. [Plaintiffs 3 and 4] and K-II, para. 181 et seq. [Plaintiff 10] and para. 313 et seq. [Plaintiff 12], p. 109 ff. and 229 ff. [HG 20 133]). A similarity at the level of the “concept” of four abstract features does not constitute copying at the creative level relevant under copyright law, according to the plaintiffs during the continued main hearing on January 27, 2026 (see transcript of continued main hearing, pp. 11 ff., 27, pp. 2062 et seq., 2078).

60. **The remaining plaintiffs 1, 2,** 5–9, 18–23, and 25 (see Rejoinder I) argue that the “Hang” established a **new category of instruments** (Rejoinder I, para. 82 et seq., pp. 1728 et seq.) and that, **by definition**, a “handpan” must possess the four disputed characteristics to still be considered as such; otherwise, it would be a different or **inferior instrument** (Rejoinder I, para. 100 et seq., p. 1735 et seq.). The combination of these four characteristics constitutes a **concept** (Minutes of the continued oral hearing,

p. 9, p. 2060). If copyright protection were to apply to (merely) these specific features, this would amount to **concept protection** (see Rejoinder I, para. 150, para. 153, p. 1755 et seq., 1757).

61. These plaintiffs also explain in detail which design elements, in their view, should—when considered individually—fall outside the **scope of protection** (Rejoinder I, para. 161 et seq. [p. 1759 et seq.], e.g., different proportions of the lens shape, additional tone fields [at the top or bottom], dome shape and geometry, dimensions of the "shoulder," etc.). They, too, describe their "handpans" and their specific features individually (in particular, the number of tone fields, the shape of the dome, the shape and number of tone fields, a description of the "shoulder," color scheme, any tone fields placed on the bottom side, etc.) and provide details on materials and dimensions (see, e.g., K-I, para. 173 et seq., pp. 99 et seq. [relevant to Dutch law]; K-I, para. 220 et seq., pp. 129 et seq. [relevant to German law]; K-III, para. 182 et seq. [relevant to Swiss law]). The adoption of the design principle (the "concept" for combining the four features) must be permissible; therefore, the infringement analysis should not be based on the adoption of the design principle but rather on its specific implementation (Minutes of the continued hearing, p. 9, p. 2060).

61.1 Under **Swiss copyright law**, **Plaintiffs** 18–23 and 25 argue that the "handpans" at issue clearly differ from the defendant's instruments in **their overall impression** and therefore do **not** constitute **an infringement** of copyright **protection** (Rejoinder I, para. 135 et seq., p. 1750 et seq.).

61.2 Under **German copyright law**, **Plaintiffs 1,** 2, and 5–9 argue that, based on the most recent case law of the Federal Court of Justice ("BGH") regarding the copyright protection of utilitarian objects, the "Hang" should not have been granted protection due to a lack of "artistic achievement" (Rejoinder I, para. 439 et seq., p. 1826 et seq.) and that its scope of protection is consequently "zero" (Rejoinder I, para. 478 et seq., p. 1840 et seq.). In any case, a very narrow scope of protection would have to be assumed, such that even minor deviations would fall outside the scope of protection or would not constitute a copyright infringement (Rejoinder I, para. 482 et seq., p. 1840 et seq.). Furthermore, the defendants had granted Plaintiffs 1 and 2 rights of use (Rejoinder I, para. 602 et seq., p. 1867 et seq.).

61.3 **Plaintiffs** 1 and 2 also argue that, under **Dutch copyright law**, the "Hang" is not protected according to the latest standards of harmonized European copyright law (Rejoinder I, para. 620, p. 1872). In any case, however, there is no infringement of the scope of protection, and thus no violation has occurred (Rejoinder I, para. 621 et seq., p. 1872 et seq.). For a detailed description of their six instruments, they refer to the discussion of German law (Rejoinder I, para. 632 et seq., p. 1877 et seq.). Even under Dutch law, the defendants would have granted Plaintiffs 1 and 2 rights of use (Rejoinder I, para. 634 et seq., p. 1878).

62. The **defendants** take the position that the "Hang" constitutes a work and is neither a category of instruments nor a concept, especially since the Commercial Court had already addressed the issue of protectability in its decision of July 2, 2024 (see Duplic, para. 12 et seq., 69 et seq., 182 et seq., p. 1892 et seq., 1906 et seq., 1935 et seq.). The scope of protection of the

"Hang" was exceptionally broad due to its distinctiveness from the previous known forms (Duplik, para. 149 et seq. [Swiss law], 260 et seq. [German law], and para. 313 [Dutch law], pp. 1928 et seq., 1955 et seq., 1967). All of the "handpans" to be examined in the present proceedings would exhibit, almost without exception, the **four** disputed design features and must be classified as infringing. Any deviations, such as slightly modified elements or additional elements, were insignificant and would not render the design of the "Hang" unrecognizable (see, e.g., Rejoinder, paras. 4, 70, as well as 134, 154 et seq., pp. 1890, 1907, 1925, 1929 et seq. [CH], 254 et seq., 264 et seq., pp. 1953 et seq., 1956 [DE], 302, 305 et seq., p. 1964 et seq. [NL]). Furthermore, licenses were granted to Plaintiffs 1 and 2 (Duplik, 273 et seq. [German law] and para. 319 et seq. [Dutch law], p. 1957 et seq., 1972 et seq.).

On the relevance of the sketch / on the question of the work

63. The **plaintiffs** argue that the **sketch** of a "Hang" (or, according to the plaintiffs' characterization, an "abstractly conceived intangible work") cannot be **relevant** to the question of **copyright infringement**. Rather, the analysis must be based on **specific copies of the work** (see, e.g., Rejoinder II, para. 10 et seq., p. 1666 et seq. [German law] and Rejoinder I, para. 143 et seq., p. 1752 et seq. [Swiss law]; see also Minutes of the continued hearing, p. 7, p. 2058), i.e., the specific versions of the "Hang" depicted in Claims 1 and E. 5 above. It cannot be inferred from the Commercial Court's reasoning of July 2, 2024, to what extent the decision affirms the eligibility of the "Hang" for protection and what role the sketch plays alongside copyright protection of the specific models (Reply II, para. 12, p. 1667).

64. The **defendants** respond that a distinction must be made between tangible and intangible property, which is why **the intellectual work** (and not photographs of individual copies of the "Hang") must be used as **the point of reference** for the infringement question. According to the Commercial Court's decision, the four elements defined in the statement of claim, item 1, *and* the sketch were therefore decisive (Duplik, para. 175 et seq., p. 1934 et seq.; see also minutes of the continued hearing, p. 13, p. 2064).

Assessment

65. Copyright law deals with works of literature and art, that is, with **intellectual creations** (see Art. 1(1)(a) in conjunction with Art. 2(1) URG; §§ 1 and 2(2) UrhG; Art. 1 and 10 Aw). These are intangible assets. Works as the subject matter of copyright (intangible assets) must be distinguished from **copies of works,** i.e., the physical objects that **embody** or materialize the **intellectual work** (ZECH/ANGER, in: FS Sutter-Somm, p. 1155; see Art. 10 URG; see also RAUE, in: Dreier/Schulze, 8th ed., § 2, margin note 27, with further references).

66. Given that, for copyright protection, the intellectual content must find expression in a tangibly perceptible form (see REHBIN-DER/HAAS/UHLic, in: OFK URG, 4th ed., Art. 2 N 3), a work—as a creative idea that has taken shape—may result in a copy of the work (ZECH/ANGER, in: FS Sutter-Somm, p. 1155, citing Art. 10(2)(a) and (b)

URG).

Although a work does not necessarily have to be fixed on a medium (see also Art. 29(1) URG; DUE, in: Dreier/Schulze, 8th ed., § 2, margin no. 27), works of fine art, photographs, or architectural works are inconceivable without a physical medium (BARRELET/EGLOFF, The New Copyright Law, 4th ed., Art. 29, note 7). In the field of **idiophones** relevant here, these considerations can also be applied to objects of applied art: The work "Hang" is therefore dependent on being embodied on a medium, i.e., a copy of the work or a "version" of the "Hang," to be **embodied**.

67. In their principal claims (K-I, II, and III, RB para. 1), the plaintiffs requested that the Commercial Court declare that sheet-metal percussion instruments with four verbally defined design features, as shown in the disputed sketch, "namely" in certain "actual designs" in the form of various versions of the "Hang," are **not** protected by **copyright.** These claims were **dismissed** by the Commercial Court in its decision of July 2, 2024**.** In paragraphs 106, 114, and 121, the Commercial Court held that "the 'Hang,' in certain embodiments as described in the claims, is protected by copyright as a work" and reproduced the sketch once again in the context of its summary conclusions (E. 123.1). Only the finding contained in E. 123 of the decision needs to be clarified here to the effect that **the "Hang," as embodied by its more closely examined versions,** constitutes **a work protected by copyright**, which was also expressed accordingly in E. 106, 114, and 121.

68. The intellectual work "Hang" is **embodied** in its **various versions** as a work of applied art**.** Each version (see, in this regard, the plaintiff's claims, para. 1, subpara. i) d–e and subpara. ii) a–e) is an **actual embodiment** of the **same** work, particularly since the features justifying protection, as set forth in the decision of July 2, 2024, are present in all of these versions.

69. For this reason alone, it cannot be said that the sketch is irrelevant, especially since it is an integral part of the plaintiff's claims. The **sketch** must therefore be taken into account as a partial aspect, although copyright protection extends only to the work actually embodied in a copy of the work (and not, for example, to a sketch)**.** This also applies to the **infringement proceedings.** In such proceedings, it must be demonstrated *what* the work actually looks like, which may be done with the aid of this sketch. Consequently, when assessing infringement, one must generally proceed on the basis of a specific copy of the work (and not on the basis of abstract, intangible works or even a "complete body of work" understood as an abstraction of the work's variants; see THOUVENIN, in: FS Hilty 2024, p. 47). However, this does not mean that, in the present case, different assessment results would apply to various copies of the work that exhibit precisely these characteristics, especially since, according to the plaintiff's legal claims, point 1, all versions are "actual embodiments" of sheet-metal percussion instruments with the same four design characteristics. Rather, the assessment made for one version or embodiment of the work "Hang" will also apply to the other versions, especially since the overall design deemed worthy of protection—which is the result of the

selection, combination, and arrangement decisions made by Defendants 2 and 3, is the same in these versions. Consequently, no differing copyright protection could be derived from different versions of the "Hang," especially since they embody one and the same work, the "Hang."

70. Accordingly, even the new alternative claims would not lead to a situation *where each* of the potentially infringing "Handpans" would have to be compared with *every* version of the "Hang" (and/or where different results might ensue). In any case, for any copyright claims by the defendant, it would suffice if just one version were to render the plaintiffs' "Handpans" inadmissible (see Federal Supreme Court 4A 472/2021; 4A 482/2021, judgment of June 17, 2022, para. 7.2).

"Handpan" as a New Category of Musical Instruments

71. The plaintiffs further argue that the **instrument category** "handpan" **necessarily** exhibits the four disputed design features (Rejoinder I, para. 100 et seq., p. 1735 et seq.). Any deviation from these features would result in a **different** instrument. Accordingly, they seek to ensure that the discussion focuses solely on the *specific* design of the individual elements (e.g., proportions of the lens shape, oval dome, etc.) (see Rejoinder I, para. 104, p. 1735 et seq.), rather than on their mere presence. To support their position, they submit a survey of "the public and retailers" to the court record (see Rejoinder I, para. 152, p. 1756 et seq.). They argue that the scope of protection cannot extend so far as to require third parties to manufacture a **different instrument** (Rejoinder I, para. 153, p. 1757). Under copyright law, only a slavish reproduction can be prohibited; otherwise, there is a risk of a (economically unjustified) de facto monopoly (Rejoinder I, para. 155, pp. 1757 et seq.).

72. The **defendants**, for their part, argue that these issues have already been conclusively clarified in the Commercial Court's first decision. In their view, this is yet another veiled attempt to raise the issue of technical constraints in the creation of the "Hang" (see Duplik, para. 71 et seq., p. 1907 et seq.). The defendants cast doubt on the value of the survey, particularly since some of the plaintiffs themselves participated in it (see also Rejoinder, para. 95 et seq., p. 1913 et seq.).

Assessment

73. In fact, these **issues** are **no longer relevant** to this part of the proceedings**.** Insofar as this (once again) raises the issue of **the design flexibility** available for the manufacture of a "handpan" (see also Rejoinder I, para. 14, p. 1705 et seq.: "Consequently, the design freedom of manufacturers of musical instruments of this type is very limited today."), the plaintiffs are no longer to be heard on this matter; reference is made to the considerations in the decision of July 2, 2024. In paragraph 65.3 of that decision, it was held that the plaintiffs' argument—that the four disputed design features are found "in all handpans"—does not hold up. Therefore, the four elements cannot be described as "generally customary features" of a "handpan," as the plaintiffs do (see Rejoinder II, para. 50,

p. 1686). To avoid definitions motivated by litigation tactics and given that the “Hang” was novel in its appearance (and there was a corresponding lack of suitable reference objects), the “Hang” was not defined based on the characteristics of a specific “class” of instruments, but rather on the question of **its intended use** and—linked to this—the underlying purpose of the “Hang” (Decision of July 2, 2024, para. 66, p. 1469). Furthermore, the fact that the defendants regard the instrument “Gubal,” which succeeded the “Hang,” as a “new instrument” (see Rejoinder I, para. 106, p. 1737) is irrelevant from a copyright perspective, especially since this is not a valid (legally relevant) distinguishing criterion. Even if, moreover, the design at issue here had become the standard “established” among manufacturers, sellers, and buyers, this would not constitute evidence of a generic term, but rather the result of long-standing copyright infringements (as will be explained below) and, as such, should not be obscured by a “generic term.” It is therefore unclear what the plaintiffs could infer from the surveys they submitted among “handpan” musicians and manufacturers (see KB 305 and 306), especially since certain plaintiffs, as representatives of the “scene,” participated in them themselves. From a legal perspective, it would seem entirely conceivable to also designate the defendant’s subsequent instruments—which serve the same purpose as the “Hang” but do not feature the same combination of the four design features at issue here—as “Handpans” (see also the decision of July 2, 2024, E. 100, 76, pp. 1492 ff., 1476, and E. 54 above).

On the “Hang” as an Alleged Concept

74. The plaintiffs then raise the question of whether a “handpan” that exhibits the four disputed features (which, in their view, must necessarily be the case; see E. 71 above) can be considered a copyright infringement at all (see, for example, Rejoinder I, para. 150, p. 1755 and Rejoinder II, para. 11 et seq., p. 1666 et seq.): An idiophone with **these four features** merely constitutes a **concept in the public domain for a** (initially novel) **musical instrument**, and such protection is foreign to copyright law (Rejoinder I, para. 150, p. 1755 et seq.; see also Minutes of the continued hearing, p. 9, p. 2060). For the plaintiffs, therefore, the mere **adoption of the four design features** does not in itself constitute an infringement of the scope of protection (Rejoinder I, para. 141, p. 1752). This is because the scope of protection cannot be defined on the basis of an **abstraction** of a copy of the work (Rejoinder I, para. 142 et seq., p. 1752 et seq.). Accordingly, one may not rely abstractly on the presence of the four features (Rejoinder I, para. 148 et seq., p. 1754 et seq.). Anyone wishing to manufacture a “handpan” is limited to producing a lens-shaped instrument with a central dome, an opposing resonance hole, and tone fields arranged in a circular pattern (Rejoinder I, para. 152, p. 1756 et seq.). Plaintiffs 3, 4, 10, and 12 make a similar argument when they state that the decision of July 2, 2024, did not confirm that the four elements alone are sufficient to establish eligibility for protection (Rejoinder II, para. 10 et seq., in particular 14, p. 1666 et seq.).

75. During the main hearing, the plaintiffs reaffirmed their position that, in the context of the infringement analysis, the concept of the “Hang”—or, so to speak, its

design principle, must be separated from the specific embodiment (Minutes of the continued main hearing, p. 8 et seq., p. 2059 et seq.). In the present case**,** only a correspondence at the level of **the abstract idea—**not the specific embodiment**—** can be affirmed (Minutes of the continued main hearing, p. 27, p. 2078), which is why the scope of protection of the "Hang" must be limited, at most, to nearly identical instruments (Minutes of the continued main hearing, p. 10, p. 2061). In their initial pleadings, Plaintiffs 3, 4, 10, and 12 assume that the four characteristics as such do not even constitute "abstract basic principles […], but rather ideas" (Minutes of the continued hearing, p. 12, p. 2063).

76. The **defendants** counter that the plaintiffs are engaging in **circular** reasoning. According to the decision of July 2, 2024, the four features of the "Hang" were recognized not as part of a concept but as an expression of design decisions (see Duplik, para. 182, p. 1935 [CH], para. 259, p. 1954 et seq. [DE]). According to the decision, the four features were recognized as neither technically predetermined nor functionally determined (with reference to E. 66.4, 69 et seq., and 68 of the decision of July 2, 2024). Consequently, the "Hang" is merely one of countless embodiments of a sheet-metal idiophone (Reply, para. 259, p. 1954 et seq.). In any case, this is a legal question that cannot be resolved by evidence. Ultimately, the plaintiffs' aim is to raise anew the issue of the technical constraints in the design (which was rejected in the decision of July 2, 2024), although, pursuant to Art. 229 ZPO, the plaintiffs are no longer permitted to comment on this issue (see Duplik, para. 72 et seq., p. 1907 et seq.).

Assessment

77. In the legal systems relevant here, **concepts** (as well as ideas, rules, or recipes) **cannot** be **protected** under copyright law **in the absence of expression** (see, e.g., REHBINDER/Hws/UHLIG, in: OFK URG, 4th ed., Art. 2 N 4 with further references; ECJ, C-310/17, Judgment of November 13, 2018, para. 39 et seq. [KB 327]; see also Hoge Raad der Nederlanden [HR], ECLI:NL:HR:2013:BY8661, Judgment of March 29, 2013, para. 3.4 f. [KB 248, 248A]).

78. When the plaintiffs argue that **"concepts"** are **not subject to** copyright, they are once again raising the **issue of eligibility for protection** (see Art. 2 URG; § 2 UrhG; Art. 1, 10 Aw; see also ECJ, C-310/17, judgment of November 13, 2018, para. 39 [KB 327]). Since a decision by the Commercial Court between the parties to the present case already exists on this issue, reference may in principle be made to it (decision of July 2, 2024), especially since it is not apparent why the plaintiffs are raising this argument only in the context of the second exchange of pleadings in the full-scope proceedings. Be that as it may, the "Hang"—or rather, the combination of its four characteristics—**cannot** be regarded as **a design for a musical instrument**, especially since the "Hang" cannot be said to lack expressiveness. In the aforementioned decision, it was held that the "Hang," as an article of use, is the concrete **result of an underlying problem-solving task** (see decision of July 2, 2024, E. 66 et seq., pp. 1469 ff. and E. 55 above), in the solution of which the available creative leeway was utilized in a manner relevant to copyright law. For this reason alone, it is clear that in the case of the

"Hang," the stage of an idea—which is not eligible for copyright protection—has been left behind, meaning that the combination of features can no longer be viewed as an "idea" or a "concept" (hence the incorrect statement of 16. January 2026, para 21 [pag. 2038], where reference is made to the protection of an "idea itself"). If anything, the concept underlying the "Hang" (which still lacks the necessary form of expression) would consist of a **metal idiophone,** playable by hand, capable of producing **various tones**, and equipped with a **cavity**, a **Helmholtz resonator**, or a **resonance** hole. Subsequently, Defendants 2 and 3 also created Idiophones with the same intended use as the "Hang," without featuring the combination at issue here [Decision of July 2, 2024, E. 76 and 100, pp. 1476, 1492 ff. "Hang Gubal" or "Hang Balu," KAB 148]; and E. 54 above). Following the plaintiff's line of argument, an **underlying** and non-protectable concept could be constructed from any number of everyday objects through appropriate abstraction of their design features (and the four disputed features are expressly designated as such in the plaintiff's legal claims, para. 1). Accordingly, a comparison with the "Weissbierglas" case is not warranted: the subject of the dispute was a beer glass in which, for the first time, the design of a wheat beer glass was combined with a soccer ball (see Rejoinder I, para. 496 et seq., p. 1844 f. and Rejoinder II, para. 50 f., p. 1686). In that case, the court considered that the original creative contribution did not lie in the fact that the creator had, for the first time, integrated a wheat beer glass with a soccer ball positioned directly above the base; consequently, the adoption of precisely this idea in the contested glass was also deemed not to constitute an infringement (Higher Regional Court of Cologne, 6 U 115/09, judgment of October 14, 2009, para. 1b, 2b [KB 344]). A similar line of reasoning can be applied to the Dutch Flywheel/Ripracer case, in which the adoption of the features—handle, pull cord, and removable wheel—was found not to constitute copyright infringement (see Replik I, para. 627, p. 1874; Judgment of the District Court of The Hague dated November 9, 2005 [KB 352, 352A]). Applied to the present case, this merely implies that the adoption of the idea (which was new at the turn of the millennium but not eligible for protection) or the task of creating a hand-operated "sheet metal ghatam" with various tones, a hollow chamber, and a resonance opening, does not constitute a copyright infringement. However, it cannot be concluded from this that every hand-played idiophone intended to function as a "sheet metal ghatam" must (or may) adopt the selection, combination, and arrangement of the design features of the "Hang."

79. Nor does all of this imply that the infringement assessment could be conducted solely on the basis of the sketch (see E. 63 et seq. above).

Functionality

80. The plaintiffs then argue that a "handpan" with design features other than the four in question would be an **inferior instrument** (see Rejoinder I, para. 109 et seq., p. 1738 et seq.). The four (abstractly defined) **features are functional components** (Rejoinder I, paras. 109–126, 145, pp. 1738 ff., 1753). Consequently,

their adoption must be permitted, so that the discussion can focus solely on the **specific design of the elements** (Rejoinder I, para. 145, p. 1753; see also Rejoinder II, para. 62, p. 1690, and minutes of the continued hearing, p. 12, p. 2063). Accordingly, Plaintiffs 3, 4, 10, and 12 argue that the adoption of "merely functional or generally customary features" does not constitute an infringement (Rejoinder II, para. 50, p. 1686).

81 The **defendants** argue that this (once again) raises the question of technical determination (Duplicate, para. 72, p. 1907), noting that the Commercial Court had already addressed issues regarding any existing technical constraints in its decision of July 2, 2024. In that decision, the Commercial Court had found that the four characteristics were not functionally determined.

Assessment

82. Insofar as the plaintiffs implicitly raise the question in their submissions as to whether the **scope** for design in creating the "Hang" was dictated by constraints (which is evident not least from the same expert opinion that has been requested once again; see, e.g., Rejoinder I, para. 109 et seq., p. 1738 et seq. and Rejoinder of May 11, 2022, paras. 199 et seq., 203 et seq., 230 et seq., 233 et seq., 242 et seq. [p. 627 et seq.]), this—as the defendants correctly point out—was already the subject of the two exchanges of pleadings in the limited proceedings. In its decision of July 2, 2024, the Commercial Court answered this question in the negative, thereby creating sufficient scope for the creation of a work protected by copyright in the first place (see decision of July 2, 2024, E. 66.4 et seq., pp. 1471 et seq.).

83. Even to the extent that the plaintiffs argue that each of the features at issue here (or, ultimately, their combination) may be adopted as "**functional elements** of a work" (see Rejoinder I, para. 144, p. 1753; Rejoinder II, paras. 58 et seq., p. 1688 et seq.), their arguments must be dismissed. The Commercial Court held that each of the four elements, considered in isolation, **(also)** fulfills **a technical function**: a sound-producing body is required to isolate sound fields; the Helmholtz resonator requires a resonance opening as well as an air-filled cavity. The dome serves to produce a "gong sound." It was determined that the decisions regarding arrangement, combination, and selection made by Defendants 2 and 3—in the absence of even a remotely comparable reference object—**mutually influenced one another** (see decision of July 2, 2024, E. 69, pp. 1472 et seq.): Had Defendants 2 and 3 not decided to supplement the "hang" with a dome (instead of leaving the upper area either open or equipping it with "ordinary" tone fields), Defendants 2 and 3 would have decided to arrange the tone fields not only on the upper segment and/or not in a circular pattern, or if the defendants had not deviated from the concave playing surface—which is standard in steel pan construction—(or had not flipped the spherical segment), their product would not resemble the "Hang." Accordingly, it cannot be ruled out that a "Hang" with different design choices could exhibit different tonal characteristics (e.g., by isolating tone fields and/or domes at different locations, etc.). The extent to which Plaintiffs 3, 4, 10, and 12 infer from this a "de facto monopoly on a specific note" is not comprehensible (Rejoinder II, para. 58 et seq., p. 1688 et seq.). It has merely been established that the features combined in the form

of the "Hang" could each influence the sound and/or playability and, in some cases, also embody a technical solution (see Decision of July 2, 2024, E. 68 et seq., p. 1472 et seq.), especially since the specific sound characteristics depend on approximately 30 parameters (Decision of July 2, 2024, para. 68 et seq., 86.2, p. 1472 et seq., 1481 et seq.). It therefore follows from the decision that, despite the functional characteristics involved, Defendants 2 and 3 did not merely follow technical rules or principles when creating the "Hang," but rather deviated from them and disregarded them. They introduced rules that deviated from existing and established design practices and acted in accordance with them by creating, with the "Hang," a product that served as an example or model for the rules they had set for themselves (HABERSTUMPF, in: GRUR 10/2021, 1249 et seq., 1256). Furthermore, the defendants have demonstrated with some of their instruments that an idiophone that serves the same purpose as the "Hang" does not necessarily rely on the combination of the four design features (see, e.g., decision of July 2, 2024, E. 76, 100, pag. 1476, 1492 et seq., and E. 78, 54 above).

84. It does not follow from the aforementioned form of functionality—which could be attributed to the individual features—that a “handpan” must (or, from a copyright perspective, may) exhibit the same elements in the same arrangement and, consequently, the same overall design. Consequently, according to the decision of July 2, 2024, it was **not individual design features** at issue here or individual decisions made in this regard that justified protection, but rather the **result** of **the overall design** chosen by Defendants 2 and 3**.** Accordingly, it was not found that **individual parts**, viewed **in isolation**, contributed to the originality of the work as a whole or, as such, expressed the intellectual creation (see ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 66 [KB 361]; ECJ, C-5/08, Judgment of July 16, 2009, para. 38, 51 [KB 326]), and are sometimes even “works” in their own right (RAUE, in: Dreier/Schulze, 8th ed., § 2, para. 167; also SPOOR/VERKADE, § 4.12, p. 184 et seq. [KB 351]). The plaintiffs are therefore mistaken when they **“break down”** the “concept” into **individual features** (see, e.g., Statement of January 16, 2026, para. 14, p. 2037 [“This resulted in the four disputed features, which can be distinguished from one another and each serve their own technical purpose[sic]”]): For in the case of functional objects, individual technical features are always tools that lead to a product fit for use (ZENTEK/RITSCHER, Interplay of Copyright Law, Design Law, and Unfair Competition Law in the Protection of Functional Product Designs Against Imitation, GRUR 2024, 1153 et seq., footnote 45).

85. Following the plaintiffs’ line of reasoning, many everyday objects—such as the “Hang”—could be reduced **retrospectively** to individual, (also) functional characteristics: For example, the choice to use a steel bowl for a “fire ring” would be purely functional in nature, because a bowl (also) serves the function of supporting the horizontal steel ring attached to it and because

a fire can be lit inside it. The same could be said of the horizontal steel ring, because food can be cooked on it (a similar argument could also be made regarding various features listed by the Court of Appeal in The Hague, ECLI:NL:GHDHA:2020:1620, judgment of September 1, 2020, paras. 4.5.1–4.5.3 [KB 181, 181A]). Accordingly, the argument of Plaintiffs 3, 4, 10, and 12—that a match in "merely functional or generally customary features" does not constitute an infringement—cannot be accepted (see Rejoinder II, para. 49 et seq., p. 1685 et seq.), especially since it was already established in the decision of July 2, 2024, that in the case of the "Hang," there were precisely no "generally customary" features for a "Hang" or a "handpan" (see decision of July 2, 2024, E. 65.3, p. 1468; ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 62 [KB 361] refers to "technical, ergonomic, or safety-related constraints [...]" or "standards or conventions of the relevant industry"). The performance of Defendants 2 and 3 is therefore not comparable to that in the "Birkenstock" (as argued by the plaintiffs in Rejoinder I, para. 451, p. 1829 et seq.), since, unlike in the present case, there were clear specifications or concepts regarding the elements a sandal must consist of when those sandals were created (cf. the assessment of these sandals for the Netherlands by the Rechtbank Midden-Nederland, E-CLI:NL:RBMNE:2025:5837, judgment of November 12, 2025, para. 3.29 [KAB 176, 176A]).

86. Such decisions do not preclude copyright protection (see Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2025:5837, judgment of November 12, 2025, para. 3.14, 3.21 [KAB 176, 176A]). Rather, even according to the most recent case law of the CJEU, it is established that a work may be protected by copyright even if its creation was determined by technical considerations (CJEU, C-580/23 and C-795/23, judgment of December 4, 2025, para. 63 [KB 361]; see also ECJ, C-833/18, judgment of June 11, 2020, para. 26 et seq., 33 [KAB 68]).

87. The **distinction** between a "mere" function and the overall design protected by copyright must therefore be drawn where individual elements at issue here are adopted **without simultaneously adopting the decisions regarding arrangement, selection, and combination made by Defendants** 2 and 3, which were made during the creation of the "Hang" in its overall form and which influenced one another, especially since it is only in their **entirety** that they give rise to protection (Decision of July 2, 2024, E. 91 et seq., 104, pp. 1485 et seq., 1494). For this reason alone, the objection raised by Plaintiffs 3, 4, 10, and 12—that copyright "does not protect features"—is unfounded (Minutes of the continued hearing, p. 12, p. 2063): Copyright protection extends only to the (overall) design, especially since the decision of July 2, 2024, makes it clear that **individual features do not contribute to the originality**—that is, they are not **works in their own right**. The protection would not, in some cases, extend so far as to automatically classify (only) lens-shaped idiphones, (only) circular sound field arrangements, or (only) idiphones with central domes as

be classified as infringing copyright. A "handpan" without a dome therefore does not necessarily constitute a copyright-infringing "Hang without a dome" (as the defendants argue in their reply, para. 174, p. 1933 et seq.).

88. This must be taken into account in the subsequent determination of the **scope of protection**.

Copyright Infringement Under Swiss Law

89. Under Art. 10(1) of the Swiss Copyright Act (URG), the author has the exclusive right to determine whether, when, and how the work is used. The use of a work within the meaning of Art. 10 URG does not occur only in cases where the work is used in its **original, identical** form. Depending on the circumstances, use in a **modified form** may also constitute an infringement (HiLTY, Copyright Law, 2nd ed., para. 373). This applies in particular to changes in the new arrangement (e.g., omissions, additions, or alterations of elements that constitute a mere non-creative reworking of the existing work, which as such cannot establish the individual character of the change (see HILTY, Copyright Law, 2nd ed., margin no. 242). The question arises as to how far the used material must deviate from an underlying (protected) work in order to fall outside its sphere of protection, the so-called **scope of protection** (HILTY, Copyright Law, 2nd ed., margin no. 374). This refers to the **sphere reserved** for the rights holder's exclusive use of the protected work (THOUVENIN, Intellectual Property Law, margin note 671). This **imaginary concept** is formed by the **sum of all conceivable infringing acts.** The boundary must be drawn on a case-by-case basis (see HILTY, Copyright Law, 2nd ed., para. 375). The scope of protection encompasses the protected work itself and all similar works in which the individual characteristics of the protected work are recognizable (HILF, Copyright Law, 2nd ed., para. 375).

90. The starting point for determining the scope of protection is identifying **which elements** of a **work that give rise to protection interact** in the **context** chosen by the author (HILTY, Copyright Law, 2nd ed., para. 376). What is essential are the characteristics that, either on their own or in their interaction, confer individual character on the work (THOUVENIN, Intellectual Property Law, para. 674 with further references). As a general rule, the individual character of a work is not established by a single characteristic, but by the **interaction** of several (often many) characteristics that, taken together, result in individuality (THOUVENIN, in: FS Hilty 2024, p. 43). In this context, it is necessary to disregard those elements incorporated into the work that are in the public domain—i.e., that were drawn from the general repertoire without shaping the work's individual character (Art. 2(1) URG). However, elements in the public domain are not insignificant insofar as they—on their own or in combination with individual (creative) elements—have been brought into a relationship with one another in such a way that these **combinations** give rise to the work's individual character. Consequently, determining what constitutes the protected work does not involve an isolated examination of all elements and a distinction between pre-existing and new,

creative; rather, it requires a **contextual examination of the totality of all essential characteristics** of a work (HiLTY, Copyright Law, 2nd ed., para. 376).

91. The scope of protection for a utilitarian object is all the more limited the less pronounced the individual character of the work is—a character derived from the exercise of creative freedom (Federal Supreme Court 4A 472/2021; 4A_482/2021 of June 17, 2022, para. 7.3; see also Federal Supreme Court 4A 145/2024 of September 11, 2024, para. 2.2). If a work consists primarily **of non-protectable features** that are protectable only in their combination, **even minor deviations from this combination** fall outside the scope of protection (THOUVENIN, in: FS Hilty 2024, p. 43, with further references).

Positions of the Parties

92. The **plaintiffs** argue that, in the case of the "Hang," the scope of protection is narrow, and they explain in detail—and for each "handpan" individually—which modifications, in their view, would already fall outside the scope of protection (Rejoinder I, para. 157 et seq., p. 1758 et seq.; see also minutes of the continued hearing, pp. 10, 11, pp. 2061 et seq.).

93. The **defendants** argue that the scope of protection is exceptionally broad, since the design of the "Hang" differs significantly from the existing range of designs (see Rejoinder, para. 148 et seq., p. 1928; see also Minutes of the continued hearing, p. 18, p. 2069).

Assessment

93.1 In light of the considerations set forth in the decision of July 2, 2024, a contextual analysis must take into account the following essential characteristics of the work "Hang"—as embodied in its various versions pursuant to K-III, RB Section 1, subsections (i)(d)–(e) and (ii)(a)–(e)—which define its distinctive combination of features and are the result **of the** creative **decisions** regarding selection, arrangement**, and combination made by Defendants** 2 and 3. These decisions led to the "Hang" being perceived as something new and unique (see also the decision of July 2, 2024, para. 91 et seq., para. 104, pp. 1485 et seq., 1494):

The starting point or basis is, on the one hand, the defendants' selection of **the lens shape** as the "carrier medium," through which Defendants 2 and 3 departed from the concave playing surface familiar from steel pan construction. By joining two identical shell halves, the resulting cavity becomes a perfectly balanced, stable, and, as it were, floating resonating body (corresponding to the association with a "singing UFO," see KB 275; KA, para. 161), which in turn produces sounds that can be described as "spherical" or the special "magic" of the "Hang" (see minutes of the General Meeting of September 21–22, 2023, p. 21, line 13 ff., p. 28, line 349 ff., pp. 1244, 1251). The clear lines mentioned in the decision of July 2, 2024, are evident in two respects: Horizontally, they result from the freely chosen

contrast between the two halves of the shell—which are mirrored at the center. Defendants 2 and 3 have adorned the upper section with tone fields and a dome (not required by the assignment), while leaving the lower section “free of tone fields” (sometimes empty), thereby designing the — in and of themselves identical — shell halves in contrasting ways through their differing designs and separating them from one another on a plane of symmetry. The resulting polarity is evident in a clear “top” (featuring tone fields and an outward-facing dome) and a clear “bottom” with a simple, smooth, inward-facing resonance hole, which is also reflected in the relationship between the tone fields (facing inward) and the single dome (facing outward). **Vertically**, the lines of design emerge from the resonance hole (“throat”) leading into the interior or cavity of the instrument and from an opposing dome protruding from the interior of the instrument (vertical central axis), thereby uniting the elements of contrast and simultaneous harmony. The **symmetries** are evident not only in the aforementioned mirroring of the shell halves but also, in particular, when viewing the upper shell halves of the “Hang”: The dome protruding from the instrument (which consists of a [smaller] hemispherical segment) represents the superimposed center around which the tone fields, arranged at roughly equal distances from one another, circle (concentric). This circular form reflects the fact that the creators of the “Hang” were not bound by conventional music-theoretical conventions: Rather, the equivalence of the individual tone fields created by the circular form should be seen as a symbol of the infinite variety of playing possibilities for intuitive performance (see Decision of July 2, 2024, E. 69, see also E. 96.3), whereby Defendants 2 and 3 again clearly distanced themselves from what was previously known, in particular from steel pan construction (Decision of July 2, 2024, E. 96.3).

93.2 In this assessment, particular consideration was also given to the fact that Defendants 2 and 3 were operating in a completely **unexplored field without any significant models or reference objects**, and that they primarily relied on their own formal experiments (see, e.g., excerpt from KA, paras. 162 and 179, pp. 323, 329 et seq.; KAB 45; see also Decision of July 2, 2024, E. 90, 95.1 et seq., 96.2 et seq., 97.1):

93.3 The aforementioned characteristics—which give rise to protection and are effective only in their interplay (and thus giving rise to copyright protection) are the result of the creative decisions regarding selection, combination, and arrangement made by Defendants 2 and 3, which were established in the decision of July 2, 2024, and which constitute the design language and lines characteristic of the "Hang."

Guidelines for the Infringement Analysis

94. With this understanding of the protected work, the **third party's design**—alleged to infringe the intellectual property rights—must then **be evaluated in relation to it.** Once again, the aim is not to isolate, element by element, the similarities and differences from the protected work. Rather, the **third party's design** must also be subjected to **a contextual overall assessment** in order to determine to what extent the **characteristic features** of the protected work have been combined in the third party's design in such a way that a comparable **overall impression** is created for the audience (HILTY, Copyright Law, 2nd ed., para. 377). The similarity in features that do not possess individual character either on their own or in their interaction does not constitute an infringement of the scope of protection (THOUVENIN, Intellectual Property Law, para. 674). Minor deviations that do not appear decisive in the overall impression do not necessarily fall outside the scope of protection, even when the scope of protection is narrow (see Federal Supreme Court 4A_472/2021 of June 17, 2022, para. 7.3).

Elements that are intended to fall outside the scope of protection on their own

95. This refutes the **argument of certain plaintiffs** that the following elements**,** considered in isolation (and under all legal systems (see Replik I, para. 157 et seq., p. 1758 et seq. [CH] para. 510 et seq., p. 1848 et seq., with reference to para. 157 et seq. [DE] and para. 633, p. 1878, with reference to 510 et seq. [NL]) **should be excluded from the scope of protection across the board:**

Different proportions of the lens shape (see Rejoinder I, para. 161 et seq., p. 1759 et seq.)

95.1 In this regard, the **plaintiffs** argue that, for example, "Instrument 1" of Plaintiff 1 and Plaintiff 2 is 3.7 cm higher than the "Hang," resulting in a different design language (more massive, rounder, more voluminous) (Rejoinder I, para. 162 et seq., p. 1759 et seq.; KB 321; see also the

main hearing on January 27, 2026, the first-generation "Hang" instrument, the integral "Hang," and "Instrument 1" [from left to right], excerpt from the minutes of the continued main hearing, p. 6, p. 2057):

The **defendants**, however, argue that the exact proportions were precisely not decisive for copyright protection (Duplik, para. 157 et seq., p. 1930 et seq.).

95.2 The specific proportions of the lens shape were not recognized as relevant under copyright law (see, e.g., Federal Supreme Court 4A_472/2022 of June 17, 2022, in which, among other things, the differences between a spherical dome combined with a hollow cylinder [compared to a spherical dome] were decisive). The plaintiffs' reference to this very case in Rejoinder I, para. 158 (p. 1758) and Rejoinder II, para. 55 (p. 1687 et seq.), according to which even minor deviations would fall outside the scope of protection, is therefore of little significance. The same applies to the "Vitrinenleuchten"-case mentioned in Rejoinder I, para. 494 (p. 1844) and Rejoinder II, para. 49 (p. 1685 et seq.)—in which an infringement was ruled out due to altered proportions: in that case, the specific proportions chosen—unlike in the "Hang" case—were relevant to the question of protection of the "Vitrinenleuchte" (correctly noted in the Rejoinder, para. 159, p. 1930; see judgment of the Hamburg Higher Regional Court of November 25, 2021, 5 U 12/20, paras. 57, 62 [KB 231]; see also Federal Court of Justice, I ZR 173/21, judgment of December 15, 2022, paras. 12, 22, 26, 32 [KB 232]). Contrary to the plaintiffs' view, it is also undisputed that a "handpan"—even if "more voluminous" or "rounder"—consists of two identical spherical segments, resulting in a lens shape (see also the wording of all RB Section 1 and the minutes of the continued main hearing, p. 25, pag. 2076: "The lens shape is proportioned differently in all of the plaintiffs' instruments."). Furthermore, it became clear as early as the first main hearing on September 21–22, 2023, that for the protected "Hang," no specific proportions of the lens shape were used, as is also evident from "Figure 1 of all 9 objects examined" (Minutes of the main hearing of September 21–22, 2023, p. 48, pag. 1271).

95.3 A variation on the same basic "lens" shape (still a lens, but taller, more bulging, more spherical, etc.) therefore does not automatically fall outside the scope of protection, although it cannot be ruled out that a change in the lens shape could (also) lead to a different design language.

The shape or appearance of the individual tone fields or domes (see Rejoinder I, paras. 168 et seq. and 174 et seq., p. 1761; see, e.g., minutes of the continued oral hearing, pp. 22 et seq., p. 2073 et seq.)

95.4 In this regard, the plaintiffs argue that the contours of the tone fields are designed to be "more distinctive," which constitutes a clear difference from the "Hang" (see, e.g., Rejoinder I, para. 168 et seq., p. 1761 et seq.; Reply II, para. 44, p. 1682 et seq.; see also minutes of the continued oral hearing, p. 22 et seq., p. 2073 et seq.).

95.5 With regard to the tone fields, it was their **circular arrangement** (on the upper half of the bowl) in particular—not the specific design of individual tone fields—that was considered relevant (see decision of July 2, 2024, E. 96 et seq., in particular 96.4). Altering the contours of the individual tone fields (while retaining a circular shape) therefore does not automatically fall outside the scope of protection, although it cannot be ruled out that (also) the alteration of tone field shapes could lead to a different design language.

More tone fields (Replica I, para. 171 et seq.)

95.6 The plaintiffs argue in this regard that several of their "handpans" have more tone fields than the
"Hang," especially since the Commercial Court had considered the reduction in the number of tone fields to be a material factor (Rejoinder I, para. 173, p. 1762 et seq.; see also minutes of the continued hearing, p. 23, p. 2074).

According to the decision of July 2, 2024, the circular arrangement on the upper half of the shell was, among other things, relevant. In this regard, it was taken into account that—in *comparison to the steel pan* (see E. 110.3 below)—the "Hang" used fewer tone fields, which were arranged in a single circle; it was also noted that Defendants 2 and 3 had experimented with other arrangements as well (see decision of July 2, 2024, para. 96 et seq., including 96.2 and the illustrations in para. 93.2 above). It must be taken into account that the addition of further tone fields may result in the arrangement no longer being (solely) circular (see also the decision of July 2, 2024, para. 96.2). Thus, it seems conceivable that the use of more tone fields could contribute to a different design language; however, it cannot be said that more tone fields, while retaining a circular shape, would necessarily fall outside the scope of protection.

The shape of the dome (including the so-called "shoulder" [the area between the central tone field and the other tone fields; see K-I, para. 35, p. 43])

95.7 Here, the plaintiffs argue that certain domes of the plaintiffs' "handpans" are oval, whereas the dome of the "Hang" is always **circular** (see, e.g., Rejoinder I, para. 176, p. 1763 et seq.; see also Rejoinder II, para. 44, p. 1683, and the minutes of the continued hearing, p. 23, p. 2074).

95.8 While it is undisputed that oval domes do not (solely) consist of circular shapes (correct: Rejoinder I, para. 177, p. 1764), an oval dome still retains a clear concentric symmetry with the dome as its center (in the visual, not mathematical, sense relevant here). The court considers it

conceivable that the use of oval shapes may contribute to a different design language. However, it cannot be said that a differently shaped dome (e.g., oval) automatically falls outside the scope of protection.

Use of so-called "multiple domes" (see Rejoinder I, para. 178, p. 1764, Minutes of the continued hearing, p. 24, p. 2075)

95.9 It should also be noted here that, in the decision of July 2, 2024, the question of whether "single or multiple domes" are used was not decisive for the issue of protection. Furthermore, even in certain versions of the "Hang," multiple domes are or were used (see minutes of the General Meeting of September 21–22, 2023, pp. 62–64, p. 1285–1287). The court considers it conceivable that the use of multiple domes could contribute to a different design language. However, it cannot be said that the use of multiple domes would automatically fall outside the scope of protection.

Other dome geometries (e.g., Plaintiff 21's "bumps," Plaintiff 20's "spider web") (Rejoinder I, para. 182 et seq., p. 1765)

95.10 Here, too, the court can certainly conceive that other dome geometries might be suitable for falling outside the scope of protection, especially since certain of these forms exhibit innovative features. However, it cannot be assumed that they automatically fall outside the scope of protection.

The dimensions of the "shoulder" [the area between the central tone field and the other tone fields; see K-I, para. 35, p. 43] (see Rejoinder I, para. 188, p. 1767 et seq.):

95.11 In the decision of July 2, 2024, the question of the exact dimensions of the shoulder was not of decisive importance. While it seems conceivable that the use of different dimensions could also contribute to a different design language, it cannot be concluded from this that a change in this regard would automatically fall outside the scope of protection.

The specific design of the surfaces (i.e., color scheme and whether they feature decorations, etc.) (see Rejoinder I, para. 190 et seq., p. 1768 et seq.; Rejoinder II, para. 44, p. 1683)

95.12 It should also be noted in this regard that in the decision of July 2, 2024, the design itself—not the question of the specific surface design and/or color scheme—was decisive (see also BGE 113 II 190, para. I.2c; regarding color schemes, see Regional Court of Düsseldorf, 14c O 64/25, judgment of December 22, 2025, para. 47). Viewed in isolation, a change in color scheme is therefore not automatically sufficient to fall outside the scope of protection (contrary to the statement in the minutes of the continued hearing, p. 24, p. 2075).

Tone fields (also) on the lower shell (Replica I, para. 164 et seq., p. 1760 et seq.)

95.13 In this regard, the plaintiffs argue that certain instruments they produce also feature tone fields (and in some cases domes) on the lower half of the shell. In this regard, it should be recalled that, according to the decision of July 2, 2024, E. 96.2 and 101 (p. 1489, 1493), it was taken into account that Defendants 2 and 3 had arranged the

tone fields *only* on the top side

(see also the decision of July 2, 2024, para. 104, p. 1494), thereby clearly separating the shell halves horizontally. In the context of a settlement, it is therefore not insignificant if certain instruments additionally feature tone fields on the underside. It cannot be inferred from this that the addition of extra tone fields automatically excludes them from the scope of protection.

Offset domes (Replica I, para. 184 et seq., p. 1766 et seq.):

95.14 These are domes that are not centered but are (usually slightly) offset on the upper spherical segment (Replica I, para. 184, p. 1766). According to the decision, one must take into account, among other things, the opposite—i.e., polar—relationship between the upward-facing dome and the resonance hole directed inward (and thus toward the dome) (Decision of July 2, 2024, E. 101, p. 1493), as well as the vertical axis between the dome and the resonance hole (Decision of July 2, 2024, E. 104). In addition, the offset of the dome allows a "tuner," among other things, to isolate additional tone fields, which in turn can influence the circular arrangement of the tone fields (see, e.g., Rejoinder I, para. 187, p. 1767; Decision of July 2, 2024, para. 96.2, p. 1489). Such circumstances may influence the design and must therefore be taken into account, although this does not automatically mean that the scope of protection is exceeded.

Interim Conclusion

96. Overall, the court does not rule out that the differences cited by the plaintiffs may be significant in the context of a **case-by-case assessment**. Just as such changes do not automatically lead to a departure from the scope of protection, it cannot be stated categorically that they are entirely irrelevant. However, in order to establish a difference relevant under copyright law, there must (also) be differences—as part of an overall assessment—that lie within the elements justifying protection in the present case, especially since the infringement analysis must be conducted on the basis of a contextual overall assessment. This will need to be examined below. Taking the above considerations into account, **the** following **deviations do not automatically** fall outside the scope of protection but must **be examined more closely** in this context**:**

- O a dome that is offset or additionally attached (see Replica I, para. 184 et seq., p. 1766 et seq.);
- O missing domes (see, e.g., Rejoinder II, para. 44, p. 1683);
- O Additional (raised) tone fields (so-called "mutants"; see Replica I, para. 187, p. 1767, and the minutes of the continued oral hearing, p. 24, p. 2075);
- O a change in the "polarity" of the upper and lower shells through the addition of additional tone fields/domes on the underside (see Rejoinder I, para. 164 et seq., p. 1760 et seq.

97. The instruments to be examined under Swiss law are the "Handpans" of Plaintiffs 18–23 and 25 (see Legal Claims K-III; Rejoinder I, para. 193 et seq.). The reference work is the "Hang," as embodied in the five versions specified in K-III, Legal Claims, Section 1, Subsection ii a–e.

*Instruments of Plaintiffs 18 and 19* _(K-III, para. 182 et seq.: Rejoinder I, paras. 193–269)_

98. In the instruments distributed by Plaintiffs 18 and 19 (see K-III, RB § 2a — para. 2.ddd, pp. 771 et seq. [NG 21 2]), a **comprehensive** contextual **analysis** reveals that they **almost without exception** contain the **characteristic features** relevant to the protection of the "Hang" (see E. 93.1 et seq.). This applies to the "handpans" depicted or described in Replica I, paras. 194–205, paras. 209–214, 218–242, 246–251, paras. 258–269 (p. 1769 ff.). In their overall impression, these "handpans" represent a lens as their basic form (a departure from the concave playing surface typical of steel pan construction toward a seemingly floating resonating body/"UFO"), featuring a protruding center placed at the top center as a focal point, around which the (visually equal and in equilibrium) tone fields—spaced at roughly equal intervals from one another—circle. There is also a clear horizontal separation between the upper and lower shells (which are identical in themselves but nevertheless designed as polar opposites), in which the upper part is equipped with tone fields and the dome as the center, while the lower part is left empty. Just as with the "Hang," a vertical axis emerges from the resonance hole, which leads into the instrument and protrudes from the instrument on the opposite side in the form of the dome.

99. At the same time, the **differences** cited by the plaintiffs lie in areas that, individually and/or collectively, do not result in a departure from the adopted design language or the overall impression. The varying dimensions of the lens shape (including diameter and height) mentioned for these instruments, mere additions, or insufficiently significant modifications—such as different color schemes for the instrument or its parts (e.g., the shoulder, outer ring, or dome), additional surface decorations, shapes that are partly slightly oval rather than round (e.g., of the central tone field, the dome, and/or the shoulder), enlarged domes, slight differences in the size of the tone fields, "more strikingly" designed tone fields, a surface with a different tactile quality, one additional tone field (while retaining the circular shape), etc., do not sufficiently alter the overall impression (see K-III, para. 183 et seq., p. 943 et seq. [HG 21 2], Rejoinder I, para. 194 et seq., p. 1769 et seq.). Even a slightly oval shape—insofar as it is even discernible depending on the viewing angle—is still perceived as clearly concentric in the present case when viewed as **a whole**, as noted in E. 95.8. As for the multiple domes (or indentations on the dome) (see, for example, K-III, para. 192, p. 951 [HG 21 2]), these, too, are not sufficient to alter the overall impression to a significant degree, especially since multi-tiered domes (double and triple domes) were also used in the "Hang" (see minutes of the General Meeting of September 21–22, 2023, pp. 62 and 64 [Integral "Hang" and Free Integral "Hang"],

pp. 1285, 1287). Overall, the changes made amount merely to (non-creative) redesigns. The deviations in color, exact dimensions, additional decorations/mandalas, or a slightly adjusted shape of the shoulder and/or dome—as evident in the "Handpans" depicted below—therefore do not, either individually or in combination, fall outside the scope of protection, especially since the characteristic features have been retained. The **overall impression** created by these "handpans" **remains comparable to that of the "Hang."**

100. Consequently, acts relating to the following "handpans" constitute copyright infringement:

100.1 DB Handpan C# Ragadesh (K-III, RB para. 2a and para. 183 et seq.; Rejoinder I, para. 194 et seq.).

100.2 DB Handpan C Amara and C# Celtic Minor (K-III, RB § 2b and 2c and para. 185 et seq.; Rejoinder I, para. 197 et seq.)

100.3 DB Handpan D Kurd (K-III, RB § 2d and para. 189 et seq.; Reply I, para. 200 et seq.)

100.4 Prima Handpan C Ursa Minor, C# Anaziska, C# Mystic, and E Magic Voyage (K-III, RB sections 2e, 2g, 2i, and 2x, as well as paras. 191 et seq., 195 et seq., 199 et seq., and 229 et seq.; Rejoinder I, para. 203 ff.)

100.5 Prima Handpan C Ursa Minor, B Mystic, C Aegean, C Low Pygmy, A Celtic Minor, B Celtic Minor, C# Celtic Minor, D Celtic Minor, D Sabye, D Ysha Savita, D Kurd, F Magic Voyage, B Mystic at 432 Hz, C Amara at 432 Hz, C Aegean at 432 Hz, D Celtic Minor at 432 Hz, and C# Celtic Minor at 432 Hz (K-III, RB paras. 2f, 2h, 2j, 2k, 2m, 2n, 2o, 2p, 2q, 2r, 2w, 2z, 2aa, 2bb, 2cc, 2dd, and 2ee, as well as lines 193 ff., 197 ff., 201 et seq., 203 et seq., 207 et seq., 209 et seq., 211 et seq., 213 et seq., 215 et seq., 217 et seq., 227 et seq., 233 et seq., 235 et seq., 237 et seq., 239 et seq., 241 et seq., 243 et seq.; Rejoinder I, para. 206 et seq.).

With regard to this "handpan," it should be noted that even an additional element such as a **"mandala"** in the central tone field (see the decorations around the central tone field, Rejoinder I, para. 206 et seq., pp. 1772 et seq.) is not sufficient in this case to alter the overall impression (neither on its own nor in combination with the other changes), especially since all the characteristic features justifying protection were retained. Nor does a change in the overall impression result from the "distinctive contours" of the circularly arranged tone fields and the central tone field (see minutes of the continued hearing, p. 22 et seq., pag. 2073 et seq.). Reference can be made, by analogy, to E. 98 et seq.

100.6 Prima Handpan D Amara (K-III, RB para. 21, margin note 205 et seq.; Rejoinder I, margin note 209 et seq.)

100.7 Handpan by Nomade in C Amara (K-III, RB para. 2s, line 219 et seq.; Rejoinder I, line 212 et seq.)

100.8 Handpan by Nomade in D Kurd and in D Aegean (stainless steel) (K-III, RB para. 2u and 2v, para. 223 et seq., 225 et seq.; Replica I, para. 218 et seq.)

100.9 Prima Handpan F Magic Voyage (K-III, RB Section 2y, para. 231 et seq.; Replica I, para. 221 et seq.)

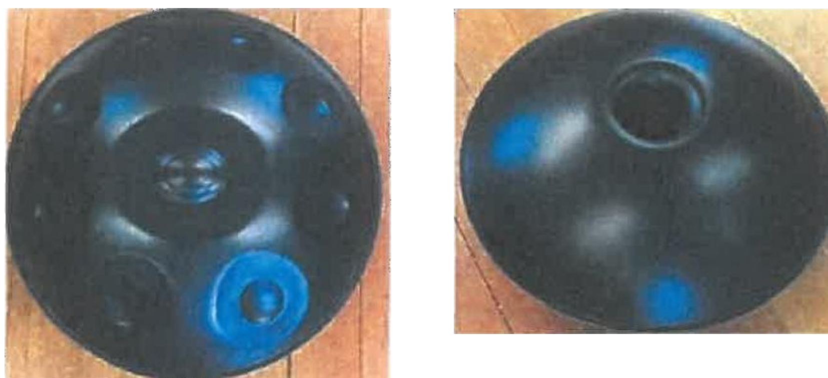
100.10 Prima Handpan C# Celtic Minor at 432 Hz and D Celtic Minor at 432 Hz (K-III, RB Sec. 2ff, 2gg, para. 245 ff., 247 f.; Replik I, para. 224 ff.)

100.11 EchoSoundSculpture F Magic Voyage and G Harmonic Minor (K-III, RB Sec. 2hh and 2ii, para. 249 et seq., 251 et seq.; Replica I, para. 227 et seq.)

100.12 Arra Handpan in D Major (K-III, RB Sec. 2jj, para. 253 et seq.; Replik I, para. 231 et seq.)

100.13 MAG Handpan B Amara and D Amara (K-III RB, sections 2kk and 211, lines 255 ff., 257 ff.; Replik I, lines 234 ff.).

100.14 MAG Handpan C# Annaziska (K-III, RB Section 2mm, para. 259 et seq.; Replik I, para. 237 et seq.)



100.15 Mercury Handpan C# Saladi and D Kurd (K-III, RB, paras. 2nn and 2pp, paras. 261 et seq., 265
et seq.; Reply I, para. 240 et seq.)

100.16 Mercury Handpan F Magic Voyage (K-III, RB No. 2qq, line 267 ff.; Replica I, line 246 ff.)

100.17 ShaktiPan B Celtic Minor, C# Celtic Minor, C La Sirena, and C Aegean (K-III, RB Sec. 2rr, 2ss, 2tt, and 2vv, para. 269 et seq., 271 et seq., 273 et seq., 277 et seq.; Reply I, para. 249 et seq.)

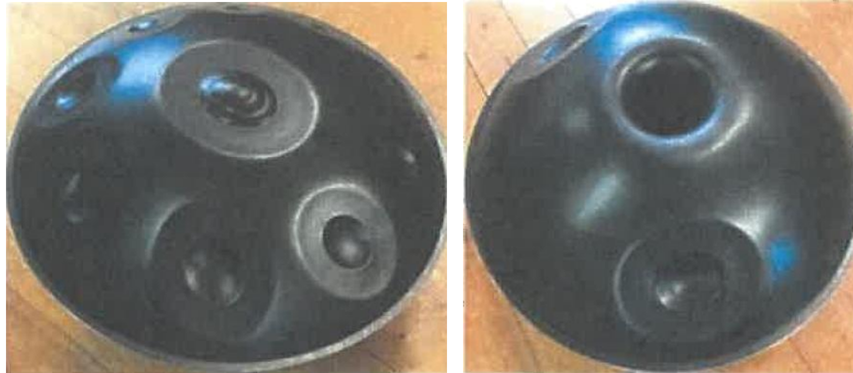
100.18 ShaktiPan D Moll (K-III, RB Sec. 2xx, para. 281 et seq.; Rejoinder I, para. 258 et seq.)

100.19 Ugur Handpan D Kurd (K-III, RB Sec. 2yy, para. 283; Reply I, para. 261 ff.)

100.20 PanAmor Handpan B Celtic Minor, C# Annaziska, D Sabye, and C# Aeolian at 432 Hz (K-III, RB Sec. 2zz, 2aaa, 2ccc, 2ddd, para. 285 et seq., 287 et seq., 291 et seq., 293 et seq.; Reply I, para. 264 et seq.)

100.21 PanAmor Pro Handpan in C# Amara (K-III, RB Sec. 2bbb, para. 289 et seq.; Replica I, para. 267
ff.)

100.22 Handpan by Nomade in D Kurd (K-III, RB Section 2t, para. 221 et seq.; Rejoinder I, para. 215 et seq.)

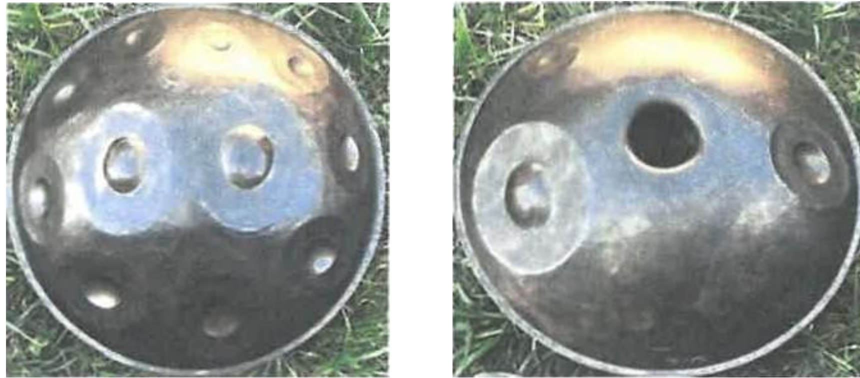


100.23 Mercury Handpan C# Annaziska (K-III, RB para. 2oo, para. 263 et seq.; Rejoinder I, para. 243 et seq.)

The same assessment also applies to the two "handpans" depicted above, which **feature individual additional tone fields** (so-called "bottom notes") attached to the lower segment (see Rejoinder I, para. 215, 243 et seq., p. 1774, 1780; see also minutes of the continued general meeting, p. 22, p. 2073): As noted in E. 95.13 and 96 above, the "polarity" of the two halves is relevant when considered as a whole. However, merely **adding** an additional feature (while retaining the other features or decisions that form the basis for protection) does not (yet) alter the **overall impression** in the present case (contrary to the minutes of the continued hearing, p. 22, p. 2073), even though the court considers additional tone fields to be a possibility for breaking with the "polarity" of the two shell halves. Furthermore, the only slight modifications made in the present case—such as more pronounced contours of the tone fields, an oval central tone field including a dome, altered dimensions of the shoulder, etc. (either individually or in combination)—are not sufficient to distinguish the design from the "Hang" in terms of its overall impression. Overall, this constitutes merely a non-creative redesign, in particular through the addition of an additional feature. Reference may be made, by analogy, to E. 98 f.

101. **By contrast**, the "handpans" depicted in Replica I, 252 ff. and 255 ff. (pag. 1783 f.), which look as follows, **no longer fall within the scope of protection**:

101.1 ShaktiPan C Medusa (K-III, RB para. 2uu, para. 275 et seq.; Replica I, para. 252 et seq.)



This “handpan” features two domes placed on the upper segment. This results in axial symmetry when viewed from the center, thereby clearly distinguishing this “handpan” from the “Hang’s” characteristic orientation toward a single center (concentric/point symmetry). A central dome—which could still be described as “opposite the resonance hole”—is no longer present here (especially since the tone fields no longer revolve solely around a single dome). In addition, there are three extra tone fields of varying sizes attached to the lower half of the bowl as *bottom notes*, arranged in what appears to be an irregular triangle. The resulting overall lines and symmetries are so different that this “Handpan” clearly differs in its design from the “Hang” and falls outside its scope of protection, especially since the present design also incorporates visually protruding tone fields of varying sizes (particularly on the underside).

101.2 ShaktiPan G# Harmonic Minor 13 Notes (K-III, RB para. 2ww, col. 279 ff.; Replik I, col. 255 ff.)

In this “handpan,” the additional tone field raised above the circle (see the upper half of the bowl on the left side) interacts, when viewed as a whole, with the “circular shape” of the tone fields (see also the decision of July 2, 2024, 96.2, p. 1489). As a result, the slightly oval and offset dome is (barely) no longer recognized as a clear (point-symmetric) center, especially since the tone fields no longer clearly circle concentrically around this dome. In combination with the additional tone fields on the lower segment, which are aligned with the resonance opening, the design of this “handpan” is (barely) suitable

to sufficiently distinguish itself, in its overall impression, from that of the “Hang” so as no longer to encroach upon its protected scope, especially since oval shapes were also used here (central tone field, dome).

102. Conclusion

In conclusion, it should be noted that 2 of the total of 56 “handpans” submitted by Plaintiffs 18 and 19 do not infringe upon the scope of protection of the “Hang.”

It is determined that Plaintiffs 18 and 19 do not infringe the Defendant’s copyrights in the “Hang” in Switzerland by offering, etc., the “Handpans” pursuant to K-III, RB paras. 2uu and 2ww.

Plaintiff 20’s Instruments

103. The “handpans” depicted in Rejoinder I, paras. 282–326 (p. 1791 ff.) adopt the characteristic features of the “Hang” almost without exception. With regard to the **overall impression** created thereby, reference may be made by analogy to E. 98 above. At the same time, the **differences** cited by Plaintiff 20 in various dimensions (including the height/diameter of the lens shape) amount to mere additions or insufficiently significant modifications, such as different color schemes for the instrument or its parts, patina, surface decorations, including their tactile properties, partly slightly oval instead of round shapes (e.g., central tone field, dome, or shoulders), differently shaped shoulders (described as “more distinctive” and “larger” or “more flattened”), larger domes, etc. (see only K-III, para. 312 et seq., p. 1064 et seq.; see also para. 304 et seq., p. 1056 et seq. [NG 21 2]). However, as already noted in E. 95.8, a slightly oval shape continues to be perceived as concentric from a design perspective, provided that no additional significant changes are made. The differences asserted by Plaintiff 20 therefore do not fall outside the scope of protection of the “Hang,” either individually or in combination.

104. With regard specifically to the **dome geometry** of Plaintiff 20 (see, e.g., Rejoinder I, para. 182, p. 1765, or the “wave-shaped indentations of the dome” described, for example, in K-III, para. 305 iv, p. 1057 [NG 21 2]), this feature, when considered on its own (and in combination with the other modifications) in the present case, is not yet sufficient to create a different overall impression, especially since multiple domes were used in the “Hang” design anyway (see minutes of the General Meeting of September 21–22, 2023, pp. 62 and 64, Integral and Free Integral Hang, pp. 1285, 1287). The details of the “spiderweb-like” dome shape may be apparent in a close-up (see illustration in Replica I, para. 182, p. 1765), but not within the context of an overall contextual assessment.

105. Overall, the changes made amount to (non-creative) alterations and do not fall outside the scope of protection of “Hang,” especially since its characteristic features have been retained. The overall impression created by

these “handpans” remains comparable to that of the “Hang.” Specifically, the following acts relating to the “handpans” constitute copyright infringement:

105.1 Djillhi D AMARA (K-III, RB para. 3e, margin note 312; Reply I, margin notes 282 et seq.)

105.2 Djilhi F Low Pygmy 8+1, F Low Pygmy 8+1, D Celtic minor 8+1, and C# Annaziska (K-III, RB para. 3f, 3i, 3n, and 3s, para. 313, 316, 321, 326; Rejoinder I, para. 285 et seq.)

105.3 Djillhi Prototype G Oxalis 10/2017, C# Mystery, and Djillhi C# Celtic minor triple C# (K-III, RB Sec. 3g, 3t, 3u, Lines 314, 327, 328; Replik I, Lines 288 ff.)

105.4 Djillhi C harmonic minor 9 (K-III, RB Section 3h, Line 315; Replik I, Line 291 ff.)

105.5 Djillhi F integral 12 (K-III, RB No. 3j, line 317; Replik I, line 294 ff.)

105.6 Djillhi E Kurd 13 (K-III, RB Section 3k, para. 318; Reply I, para. 297 ff.)

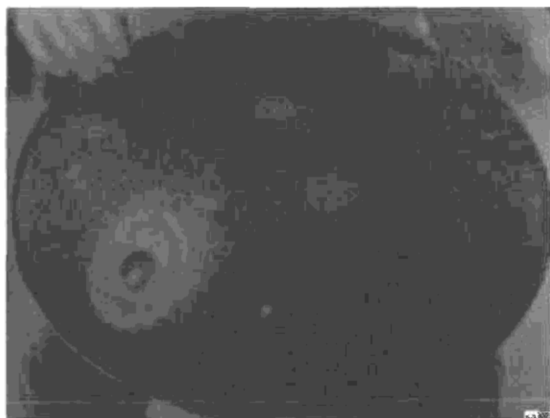
105.7 Djillhi E Romanian Hijaz and E Low shunko (K-III, RB Sec. 31 and 3m, para. 319 et seq.; Rejoinder I, para. 300 et seq.)

105.8 Djillhi D Kurd 8 and D Jailoy 8 (K-III, RB Sec. 3o and 3p, para. 322 et seq.; Rejoinder I, para. 303

#)

105.9 Djillhi D Satie majeur extended (K-III, RB Sec. 3q, para. 324; Rejoinder I, para. 306 ff.)

105.10 Djillhi D Hijaz 9 (K-III, RB Sec. 3r, line 325; Replica I, lines 309 ff.)



105.11 Djillhi C# Yashavaita 9 (K-III, RB Section 3v, para. 329; Reply I, para. 312 et seq.)

105.12 Djillhi C Onoleo 2019 (K-III, RB Section 3w, line 330; Reply I, lines 315 ff.)

105.13 Djillhi C Celtic minor triple C (K-III, RB Section 3x, line 331; Reply I, lines 318 ff.)

105.14 Djillhi B Celtic triple B 2019 (K-III, RB Section 3y, para. 332; Reply I, para. 321 et seq.)

105.15 Djillhi Prototype First Stainless C# PYGMY (K-III, RB Item 3z, line 333; Replica I, line 324 ff.)

105.16 Djillhi D Satie Majeur Lydian (K-III, RB Section 3a, para. 304 et seq.; Rejoinder I, para. 270 et seq.)

105.17 Djillhi D Kurd Prhygien (K-III, RB Section 3b, line 306 et seq.; Replica I, line 273 et seq.)

105.18 Djillhi C# Pygmy (C#/F#) Minor Pentatonic (K-III, RB Section 3c, line 308 et seq.; Replik I, line 276 et seq.)

Insofar as these "handpans" also feature tone fields on the underside (see K-III, para. 305, 307, 309, pp. 1056 et seq., 1058 et seq., 1060 et seq. [HG 21 2]), this (as yet) does not result in a different overall impression. Although this design "touches upon" the characteristic of the contrast between the two halves of the shell, the differences—both individually and in their entirety—are not sufficiently significant in this specific case to fall outside the scope of protection of the "Hang" (see also E. 100.23). E. 103 applies analogously here as well. With regard to the insufficient

remaining changes, reference can be made analogously to E. 99 above: The changes regarding the dimensions of the lens (e.g., height or diameter), the size of the dome, the oval shape of the dome or the central tone field, differences in color or ornamentation, patina, tactile characteristics of the surface, the shape of the shoulder, differences in size between the individual tone fields, or the presence of multiple tone fields (see also K-III, para. 303 et seq., pp. 1056 et seq. [HG 21 2]) are not sufficient in the present case (neither individually nor in combination) to sufficiently influence the overall impression within the framework of a contextual analysis.

106. By contrast, the "handpan" depicted in Replica I, para. 279 et seq., p. 1790 (K-III, RB para. 3d, para. 310 et seq., p. 1062 et seq. [HG 21 2]) and "Handpan" depicted here no longer falls within the scope of protection of the "Hang." Due to its two additional tone fields raised in a second row, it does not feature a (solely) circular arrangement of the tone fields. The slightly oval dome is no longer recognized as a clear (point-symmetrical) center, especially since the tone fields no longer circle solely around this dome. In addition, there are tone fields (or domes) arranged in a semicircle on the lower shell. Overall, this breaks with the symmetries and lines typical of the "Hang" and, when viewed in context, differs sufficiently in its overall impression, especially since oval shapes (particularly the central tone field and dome) and other dome geometries were also used here:

106.1 Djillhi D Kurd étendu (D/A) Prhygien (K-III, RB Section 3d, para. 310 et seq.; Replica I, para. 279
ff.)

107. Conclusion

In conclusion, it must be noted that 1 of the plaintiff's 26 "Handpans" submitted does not infringe upon the scope of protection of the "Hang."

It is determined that the plaintiff 20, by manufacturing, etc., the "handpans" in Switzerland in accordance with K-III, RB Section 3d, does not infringe the defendant's copyrights in the
"Hang."

The Plaintiff's Instruments 21

108. The "handpans" depicted in Replica I, paras. 327–332 and 339–341 (pp. 1799 ff., 1803) adopt the essential characteristics of the "Hang" **almost**

(for the assessment, reference may be made by analogy to the discussions regarding the preceding plaintiffs, in particular Plaintiff 20 above). At the same time, the differences listed by Plaintiff 21—such as variations in dimensions (e.g., height/diameter of the lens shape or slightly larger domes), mere additions such as engravings, or insufficiently significant modifications such as a different color scheme for the instrument and/or dome, "playful" decorations with a spiral pattern on the surface, partly slightly oval rather than round shapes (e.g., central tone field, shoulder, and dome), one fewer tone field (while retaining the circular shape), slight differences in size between the tone fields, "more prominent," more flattened, or larger shoulders, a printed logo, or a black rubber edge guard, etc. (see also K-III, para. 343 et seq., pp. 1078 et seq. [NG 21 2]). However, as already noted in E. 95.8, a slightly oval shape is still perceived as concentric from a design perspective, provided that no additional significant changes are made. The differences asserted by Plaintiff 21 therefore do not fall outside the scope of protection of the "Hang," either individually or in combination.

108.1 All of Plaintiff 21's "handpans" (with the exception of a single one; see Rejoinder I, para. 342, p. 1803) feature a dome composed of "bumps"; see also Rejoinder I, para. 40, p. 1713 et seq.). With regard to this dome geometry of Plaintiff 21 in particular, reference may generally be made to the remarks concerning Plaintiff 20 in E. 104 above. The court recognizes in the "bumps" developed by Plaintiff 21 (considered in isolation) elements of original creative features. However, these are not yet sufficient to constitute a blanket departure from the scope of protection: on the one hand, because Plaintiff 21 adopts the selection and arrangement decisions of Defendants 2 and 3—to place a dome in the center of the upper half of the shell (including the associated symmetries and concentricity) within the context of a contextual analysis, and this results in a comparable overall impression despite the "bumps." Furthermore, the bumps also appear—or rather, appear only—oval in the illustrations, i.e., when viewed from a certain distance. As explained elsewhere, the distinction regarding the shape of the central tone field or the dome (round or oval) is also not sufficient to fall outside the scope of protection of "Hang," especially since the dome in this case still appears as a superimposed center around which the tone fields revolve in a circular pattern (concentricity). The defendants' comments on the specific dome geometry of Plaintiff 21 are irrelevant to this question.

109. The following "handpans" fall within the scope of protection of the "Hang":

109.1 Soma Sound Sculptures Handpan (1+8) (K-III, RB para. 4a, margin note 343 et seq., 829 et seq.; Rejoinder I, margin note 327 et seq.)

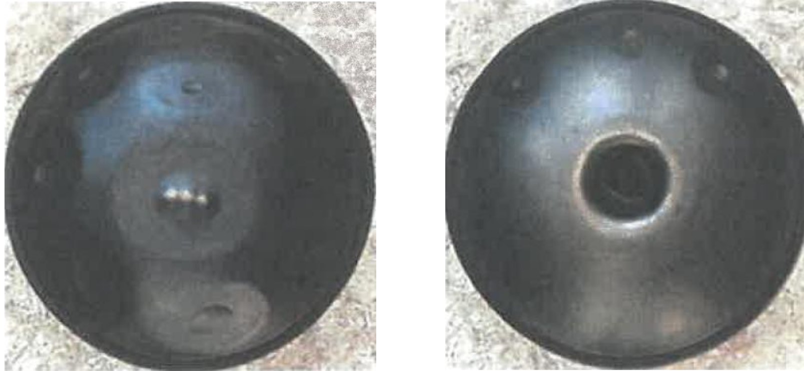
109.2 Soma Sound Sculptures Handpan (1+7 tone fields) (K-III, RB para. 4e, para. 351 et seq.; Rejoinder I, para. 339 et seq.)

109.3 Soma Sound Sculptures Handpan (1+9) (K-III, RB para. 4b, para. 345 et seq.; Replica I, para. 330 et seq.)

Insofar as this “Handpan” also features two tone fields (albeit with “bumps”) (see K-III, para. 346 vi), p. 1081 [HG 21 2]; Replica I, para. 332, p. 1800 et seq.), reference can be made here to E. 105.16 et seq. above. In the context of an overall assessment, this non-creative addition does not (yet) take the design out of the scope of protection of the “Hang.”

110. By contrast, the following "handpans" of Plaintiff 21 (K-III, para. 347 et seq., 349 et seq., and 353 et seq., pp. 1082 et seq., 1084 et seq., 1088 f. [HG 21 2]) are no longer covered by the scope of protection:

110.1 Soma Sound Sculptures Handpan (1+9 with offset tone field and offset bass) (K-III, RB para. 4c, para. 347 et seq.; Rejoinder I, para. 333 et seq.)



This "Handpan," with its additional tone field raised in a second row, "breaks" the circular arrangement of the tone fields. The slightly oval dome is no longer recognized as a clear (point-symmetric) center, especially since the tone fields no longer clearly circle around this dome. In addition, there are extra tone fields arranged in a small arc on the lower shell. Overall, this deviates slightly from essential elements of the "Hang" and, when viewed in context, differs sufficiently in its overall impression, especially since the present design also incorporates oval shapes (particularly the central sound field and the dome) as well as a different dome geometry (three "bumps"). For further information, see also E. 101.2.

110.2 Soma Sound Sculptures Handpan (1+10 with 2 offset tone fields) (K-III, RB para. 4d, para. 349 et seq.; Replica I, para. 336 et seq.)

The same applies—albeit more clearly—to this "handpan." Unlike the "Handpan" mentioned in E. 110.1 above, this instrument has two raised tone fields (upper half of the bowl), which results in a break from the circular arrangement of the tone fields. Added to this are the additional tone fields arranged in a large circular arc and the hump-like domes on the lower half of the bowl (the plaintiffs refer to "irregularly arranged tone fields," see Rejoinder I, para. 338, p. 1802). Here, the

slightly oval dome with its bumps clearly no longer functions as a point-symmetrical center, especially since the tone fields no longer circle solely around this dome. This "handpan" therefore differs sufficiently in its overall impression, particularly since oval shapes (especially the central tone field and the dome) as well as a different dome geometry (three "bumps") were used here as well.

110.3 Soma Sound Sculptures Handpan (11 tone fields (without bass note)) (K-III, RB para. 4f, margin note 353 f.; Replica I, margin note 342 ff.)

This "handpan" features—instead of a central tone field with a dome—three smaller "standard" tone fields. As a result, the arrangement of the tone fields no longer appears circular but resembles that of a steel pan (see, for example, the following illustration from Protocol IV of October 11, 2021 [revised, version dated January 24, 2022], pp. 13 ff. [Figure 1: Steel pan viewed from the front] (p. 501) or the illustration from K-I, para. 45, p. 46):

From a contextual perspective, this means that, on the one hand, the typical vertical axis between the dome and the resonance hole is missing, and on the other hand, there is no circular arrangement of tone fields. Although a polarity between "top" and "bottom" (a horizontal division), the absence of the dome—replaced by three tone fields—carries greater weight in a contextual analysis, especially since the tone fields no longer circle around a center (which is entirely absent here). In its overall impression, this "handpan" differs sufficiently from the "Hang."

111. Conclusion

In conclusion, it should be noted that 3 of the plaintiff's 21 "handpans" submitted do not infringe upon the scope of protection of the "Hang."

It is determined that Plaintiff 21 does not infringe the Defendant's copyrights in the "Hang" in Switzerland through the manufacture, etc., of the "Handpans" pursuant to K-III, RB Sections 4c, 4d, and 4f.

Instruments of Plaintiffs 22 and 23

112. The "handpans" depicted in Rejoinder I, paras. 346–384 (p. 1804 ff.) adopt, **almost without exception,** the essential characteristics of the "Hang**."** For the assessment, reference may be made by analogy to the discussions regarding the preceding plaintiffs.

113. The fact that the central tone field and the dome of the "handpans" of Plaintiffs 22 and 23 are oval and/or have multiple steps is, when viewed in context, still to be assessed as a non-creative adaptation: Thus, while the plaintiffs are correct in stating that the central tone field of, for example, the MAG "Handpans" is oval and rather large compared to that of the "Hang" (see, e.g., Rejoinder I, para. 348, p. 1804 et seq., with reference, inter alia, to paras. 176 et seq.). As already mentioned, the court considers the change in the upper tone field from round to oval, or its more pronounced shape, to be a possible element contributing to a sufficient modification. However, considered on its own or in combination with the other, merely slight changes made here, it is not sufficient: Differences that do not carry sufficient weight when viewed as a whole include, for example, the dimensions (height/diameter), ornaments or engravings, indentations on the dome, the color scheme of the instrument, dome, and outer rings, the surface texture, the shape of the shoulder, the number of tone fields (while retaining the circular shape), more distinctive tone fields, etc. (see also K-III, para. 367 et seq., pp. 1093 et seq. [NG 21 2]). The same applies to the appearance of their instruments, which the plaintiffs described as "rather clunky, angular" (see transcript of the continued main hearing, p. 23, p. 2074). Furthermore, during the on-site inspection at the first main hearing, it was clearly evident that certain versions of the "Hang"—which are also covered by copyright protection—indeed feature more distinctive central tone fields (see minutes of the main hearing of September 21–22, 2023, p. 55, p. 1278), especially since this aspect, considered on its own, did not in itself justify protection. The differences asserted by Plaintiffs 22 and 23 therefore do not, either individually or in combination, fall outside the scope of protection of the "Hang."

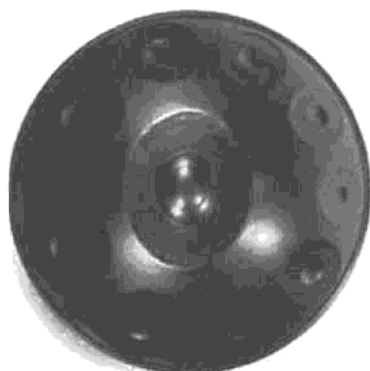
114. The following "handpans" are thus within the scope of protection of "Hang":

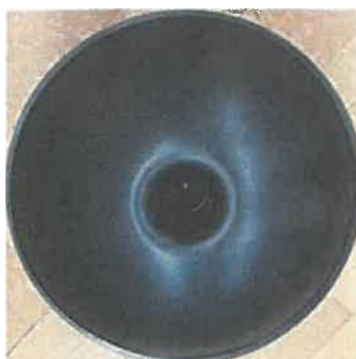
114.1 MAG C Aegean (9+1) (K-III, RB § 5a, para. 367 et seq., 833 et seq.; Rejoinder I, para. 346 et seq.).

114.2 MAG A Amara (7+1) (K-III, RB § 5b, para. 369 et seq.; Rejoinder I, para. 349 et seq.)

114.3 MAG B Amara (8+1), B Hijaz (8+1), and C# Annaziska (8+1) (K-III, RB Sec. 5c, 5d, 5e, para. 371 et seq., 373 et seq., 375 et seq.; Rejoinder I, para. 352 et seq.)

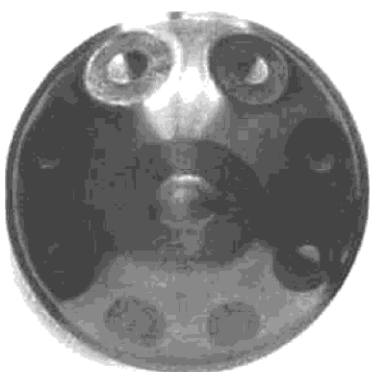
114.4 MAG D Celtic minor (9+1) and D Kurd (9+1) (K-III, RB paras. 5f, 5g, paras. 377 ff., 379 f.; Rejoinder I, paras. 355 ff.)





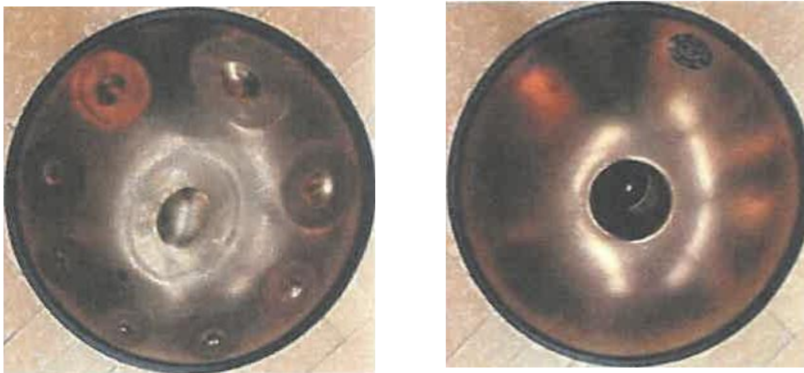
114.5 Ugur D Celtic minor (8+1) (K-III, RB para. 5h, para. 381 et seq.; Reply I, para. 358 et seq.)

114.6 Ugur D Celtic minor (8+1), F# Magic Voyage (8+1), and F-sharp Kurd minor (8+1) (K-III, RB § 5i, 5k, 51, para. 383 et seq., 387 et seq., 389 et seq.; Rejoinder I, para. 361 et seq.)



114.7 Ugur E Sabye (8+1) (K-III, RB Sec. 5j, para. 385 et seq.; Reply I, para. 364 et seq.)

114.8 Sela Cis Kurd, Cis Celtic minor, D Kurd, F Pygmy, and D Celtic minor (K-III, RB Sec. 5m, 5n, 5o, 5p, 5q; para. 391 et seq., 393 et seq., 395 et seq., 397 et seq., 399 et seq.; Reply I, para. 367 et seq.)



114.9 Sela Cis Kurd (nitrided steel), Cis Celtic minor (nitrided steel), D Kurd (nitrided steel), and D Celtic minor (nitrided steel) (K-III, RB paras. 5r, 5s, 5t, 5u, para. 401 et seq., 403 et seq., 405 et seq., 407 et seq.; Reply I, para. 370 et seq.)

115. Conclusion

In conclusion, it must be noted that none of the 21 “handpans” submitted by Plaintiffs 22 and 23 falls outside the scope of protection of the “Hang.”

The claim, i.e., K-III, RB para. 5 and para. 5.1, is to be dismissed to the extent that it is admissible.

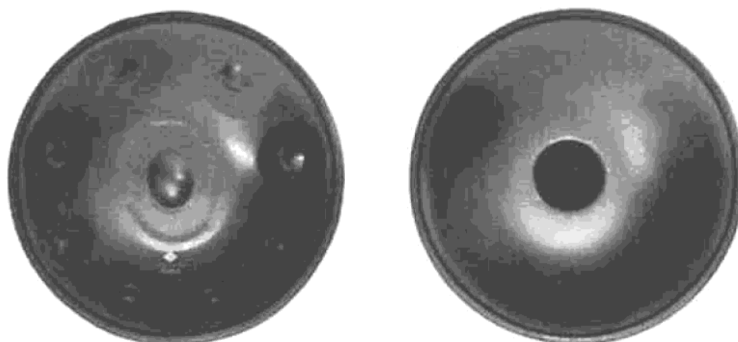
Plaintiff 25’s Instruments

116. The “handpans” depicted in Replica I, paras. 373–384 (p. 1810 ff.) incorporate the characteristic features of the “Hang,” which is why reference is made, by analogy, to the arguments of the preceding plaintiffs.

117. At the same time, the listed **differences**—such as variations in dimensions (height/diameter), mere additions, or modifications that are not sufficiently significant, such as different color schemes for the instrument, dome, or outer ring; “more distinctive” contours; “playful” decorations; engravings, smoother surfaces, partly oval instead of round shapes (e.g., central tone field, other tone fields, and dome), oval shoulders, differences in the sizes of the individual tone fields, one or two additional tone fields, “prominent” shoulders, or a “prominent light-colored” logo, etc. (see K-III, para. 723 et seq., pp. 1429 ff. [HG 21 2]; Rejoinder I, para. 373 ff., pp. 1810 f.). The oval shapes used here are also—as already noted in E. 95.8—still perceived as concentric from a design perspective, as long as no additional substantial changes are made. Although changes to the dome are recognized as a possible element for falling outside the scope of protection, this is not the case here, even if one of the domes, including the central tone field, appears very distinctive (see Rejoinder I, para. 379, p. 1812). The differences asserted by the plaintiff 25 therefore do not, either individually or in combination, fall outside the scope of protection of “Hang.”

The following instruments therefore fall within the scope of protection of the “Hang”:

117.1 Handpan SELA Harmony — D Kurd (K-III, RB para. 7a, para. 723 et seq., 841 et seq.; Rejoinder I, para. 373 et seq.)



117.2 Handpan SELA Harmony — D Amara Gold (K-III, RB para. 7b, para. 725 et seq.; Rejoinder I, para. 376 et seq.)

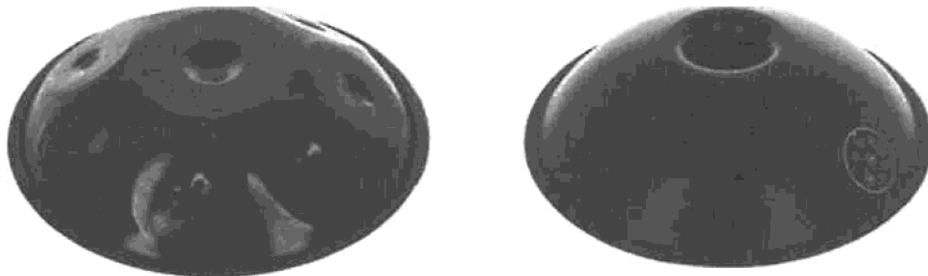
117.3 Handpan CONVEX — B Celtic minor (K-III, RB Section 7c, para. 727 et seq.; Rejoinder I, para. 379
ff.)

117.4 Handpan CHAYA B Celtic minor, B Kurd, C# Amara, D Celtic minor, and D Kurd (K-III, RB Sec. 7d, 7e, 7f, 7g, 7h, para. 729 et seq., 731 et seq., 733 et seq., 735 et seq., 737 et seq.; Reply I, para. 382
ff.)

118. By contrast, the “handpans” depicted in Rejoinder I, paras. 385–391 (p. 1813 et seq.), which look as follows, are no longer covered by the scope of protection:

118.1 MEINL Handpan — Dominant D — 8 Notes — White (K-III, RB para. 7i, para. 741 et seq.; Reply I, para. 385 et seq.)

118.2 MEINL Handpan — Natural D — 8-note — Black, Integral D — 8-note — Black, Raga Desya Todi D# — 8-note — Black, Equinox E — 8-note — Black, and Akebono F — 8-note
— Black (K-III, RB Sec. 7j, 7k, 71, 7m, 7n, para. 743 et seq., 745 et seq., 747 et seq., 749 et seq., 751 et seq.; Replik I, para. 389 et seq.)



These “handpans” feature a **concave** tone field in the central area instead of a dome**,** i.e., **one that** faces inward toward the interior of the instrument (Reply I, paras. 387 et seq. and 389 et seq., pp. 1813 et seq.; see also K-III, para. 741 et seq., 743 et seq., pp. 1447 et seq., 1449 et seq. [HG 21 2]). From a contextual perspective, this means that there is no superimposed center in the form of a dome, nor is there the typical vertical axis between the dome and the resonance hole. Although a polarity between “top” and “bottom” remains discernible (a horizontal division), and the lower half of the shell remains free of sound fields, this relationship changes in that the sound field positioned centrally at the top also leads into the instrument and thus assumes the characteristics of the sound hole. The absence of the dome, replaced by an inward-facing tone field, consequently carries greater weight within a contextual analysis (no parallel lines leading into the resonating body and out into a bulge on the upper side [dome]). In terms of overall impression, these “handpans” differ sufficiently from the “Hang,” especially since, in this case, oval shapes

(particularly of the tone fields) were also used.

118.3 Insofar as the statement of claim refers to **legal claim No. 7o** (see K-III, para. 751 et seq., p. 1457 [HG 21 2]), this cannot be found among the legal claims (see K-III, legal claims, No. 7, p. 872 [HG 21 2]), especially since the corresponding subsidiary claim, No. 7.1, from Rejoinder I merely mentions legal claims (a) through (n) (p. 1699). The reason for this is that (only) in the statement of grounds from K-III, para. 739 et seq., p. 1445 et seq. [HG 21 2] that a "handpan" is additionally listed, which was not included in the legal claims ("Handpan" MEINL — Dominant D — 8-note — Black, with reference to K-III, RB para. 7i), resulting in a change to the enumeration symbols. In terms of substance, there would be no differences with respect to this additional "handpan" compared to the instruments assessed above, especially since it is the same model from a visual standpoint. However, the court is prohibited from (partially) granting claims that were not submitted to it in this form. Unlike the models from K-III RB para. 7i–n (which are addressed in the statement of claim under paras. 7j–o), this is not merely an editorial oversight.

119. Conclusion

In conclusion, it should be noted that 6 of the plaintiff's 25 "handpans" submitted do not infringe upon the scope of protection of the "Hang."

It is determined that the plaintiff 25 does not infringe the defendant's copyrights in the "Hang" in Switzerland by offering, etc., the "handpans" pursuant to K-III, RB, sections 7i, 7j, 7k, 71, 7m, and 7n.

Antitrust-Based License Defense (Rejoinder I, para. 419 et seq.)

120. The **plaintiffs** assert a licensing defense under antitrust law in the event that "the scope of protection is extended so far that the entire category of instruments, including 'handpans' falls within it" (Rejoinder I, para. 134, para. 418 et seq., pp. 1750, 1820 et seq.). They assume that, under such an interpretation of the scope of protection, the defendants would hold a monopoly or a dominant market position in the product market for "handpans," or at the very least a position of relatively significant market power within the meaning of Art. 4(2)(b)of the Antitrust Act of October 6, 1995 (KG; SR 251), because the plaintiffs would be compelled to obtain a license in order to continue manufacturing "handpans." The **defendants** dispute this. On procedural grounds, they argue that this issue is not the subject of the proceedings, particularly since the defense can be raised only in the context of enforcing specific claims (Duplik, para. 213, p. 1942 et seq.). On the merits, they argue that the exclusive rights in favor of an author arising from copyright protection do not constitute competitive effects falling under antitrust law (Duplik, para. 214 et seq., p. 1943) and therefore no "abuse" could exist, especially since the plaintiffs had not indicated any willingness to grant a license in the first place (Reply, para. 223, p. 1945) and the other requirements for the defense were also not met (Reply, para. 224, p. 1945 et seq.).

Assessment

121. Antitrust-based licensing objections are **not the subject** of the present proceedings, which primarily revolve around the question of eligibility for protection and, in the alternative, the question of a copyright infringement; therefore, this issue need not be addressed in further detail.

Fair use defense regarding Plaintiffs 20 and 21 (Rejoinder I, para. 432 et seq.)

122. According to the account provided by **Plaintiffs 20 and 21,** they manufacture their "handpans" exclusively to order for their customers' private use (Rejoinder I, para. 435, p. 1824). Since customers are permitted under Art. 19(1) URG to manufacture their own "handpans" (but lack the necessary technical skills to do so), the manufacture of the "handpans" by Plaintiffs 20 and 21 also falls under the fair use exception pursuant to Art. 19(2) URG ("having them manufactured by third parties"). The **defendants** dispute this. An infringer cannot claim that its customers use the product solely for private purposes, especially since Plaintiffs 20 and 21 themselves reproduce the products for the purpose of sale (Duplicate, para. 228, p. 1946 et seq.). Plaintiffs 20 and 21 also allegedly stock instruments (Duplik, para. 106 et seq., p. 1917), which the plaintiffs in turn dispute (Statement of December 1, 2025, para. 13, p. 2004).

Legal Considerations

123. The fair use exception, as a statutory exception, precludes an act from constituting a copyright infringement (see GASSE t/OERTLI, in: SHK URG, 2nd ed., Introduction to Arts. 19–22, N 18), which is why this issue must be considered in the present proceedings.

124. The provision in Art. 19 URG permits users for personal use to have copies of works made by "third parties"—that is, by outsiders, service providers, and infrastructure providers—provided that these copies are intended for the rights holder's personal use. In doing so, the service provider may not copy more or in a different manner than the rights holder would be permitted to do under paragraph 1 (REHBINDER/HASS/UHLic, in: OFK URG, 4th ed., Art. 19 N 32). The purpose of this provision is to enable those entitled to private use who do not themselves have the necessary equipment to avail themselves of the private-use exception. However, the provision is not intended to enable third parties to engage in commercial activities that would compete with the author in his or her field of business (MARTi, "Copyright-Protected Private Use with the Involvement of Third Parties," p. 57 ff., with further references). For "having something produced" to exist within the meaning of this provision, the rights holder must place a specific order with the third party for reproduction, following which the reproduction then takes place (MARTi, Copyright-Protected Personal Use with the Involvement of Third Parties, p. 56 ff., with further references), and the third party must be a specific, predetermined individual (MARTi, "Private Use under Copyright Law with the Involvement of Third Parties," p. 58).

125. At this point, it is not necessary to address the question of whether Art. 19 URG applies in principle to Plaintiffs 20 and 21 or not. Rather, the statements by Plaintiffs 20 and 21—according to which they manufacture their “handpans” exclusively for private individuals on a made-to-order basis—prove to be unsubstantiated. Neither from their statements (nor from the party examinations offered for this purpose) would it be possible to determine which individuals ordered the “handpans” at issue here (if at all) and when, or whether their manufacture took place following the order, which is why it was not necessary to admit further evidence (see, e.g., Rejoinder I, para. 26 and 33, para. 435, pp. 1709, 1711, 1824). The acts of Plaintiffs 20 and 21 therefore constitute infringements of the Defendant’s copyright.

Overall Conclusion on Swiss Law

It is **hereby determined** that:

a) **Plaintiff 18** and **Plaintiff 19** do not infringe the defendant’s copyrights in the “Hang” in **Switzerland** by offering for sale, selling, distributing, and making available the musical instruments described in **claims 2uu and** 2ww of the complaint filed on December 31, 2020;

b) **Plaintiff 20** does not infringe the defendant’s copyrights in the “Hang” in **Switzerland** by manufacturing, offering for sale, selling, distributing, and making available the musical instrument described in Claim **3d** of the complaint dated December 31, 2020;

c) the **plaintiff 21** does not infringe the defendant’s copyrights in the “Hang” in **Switzerland** by manufacturing, offering for sale, selling, distributing, and making available the musical instruments described in **claims 4c, 4d, and** 4f of the complaint filed on December 31, 2020;

d) Plaintiff 25 did not infringe the defendant’s copyrights in the “Hang” by offering for sale, selling, distributing, and making available in **Switzerland** the musical instruments described in **claims 7i, 7j, 7k, 71, 7m, and 7n** of the complaint filed on December 31, 2020.

In all other respects**,** the **complaint filed on December 31, 2020,** is **dismissed to the extent that it is admissible.**

Copyright Infringements Under German and Dutch Law / Requirements of Union Law

Recent Developments

126. The **plaintiffs** assert that the **standards** for assessing copyright protection have **since changed,** i.e., as of July 2, 2024. Accordingly, the claims (or, more specifically, the relief sought in point 1 thereof) should have been granted by the decision of July 2, 2024 (see Rejoinder I, paras. 439 et seq. and 620, pp. 1826 et seq., 1872; see also the Statement of December 9, 2025, pp. 2012 et seq.; Rejoinder II, para. 56 et seq., p. 1688). In this regard, they refer—with respect to Germany—in particular to three judgments of the Federal Court of Justice (BGH) in the "Birkenstock" cases of February 20, 2025, and—with respect to harmonized EU law—to the Opinion of the Advocate General Szpunar of May 8, 2025 (KB 328–330 and KB 333, see also KB 332; see also Rejoinder II, para. 56, p. 1688). Under the new approach, free and creative decisions would no longer suffice; it must also be established that these decisions reflect the author's personality and are discernible in the work itself (Minutes of the continued plenary session, p. 9 et seq., p. 2060 ff.).

127. Essentially, according to the recent case law of the Federal Court of Justice (BGH), protection of a work requires "artistic" and not merely "creative" decisions (Rejoinder I, para. 441, p. 1826). Such decisions were precisely not found to exist in the decision of July 2, 2024. Given this situation, the Commercial Court is free to reconsider its (interim) decision of July 2, 2024 (see also Minutes of the continued hearing, p. 7, p. 2058).

128. The **defendants**, however, argue that the findings of the first part of the proceedings (i.e., the decision of July 2, 2024) are binding for the further proceedings, especially since there is no new legal situation in any case (Duplik, para. 235 and 7 et seq., p. 1948, 1891). The **plaintiffs**, in turn, dispute this**. It was precisely not possible** to challenge the decision of July 2, 2024, regarding the question of the registrability of the "Hang" was precisely not possible (see Statement of December 1, 2025, para. 15 [p. 2005] in light of the partial decision not to hear the case, Federal Supreme Court 4A_466/2024 of February 18, 2025; see also the minutes of the continued general meeting, pp. 7 and 16, p. 2058,
2067).

129. In their briefs dated December 9, 2025, both Plaintiffs 1, 2, 5–9, 18–23, and 25 (p. 2012 et seq.) and the defendants (p. 2022) submitted the **judgment of** the ECJ dated December 4, 2025, in Joined Cases C-580/23 and C-795/23 (mio/konektra) to the case file (see KB 361 and KAB 187). In their statement on this judgment, the plaintiffs (statement of December 9, 2025, para. 14, pp. 2016 et seq.; see also Rejoinder I, para. 457 et seq., p. 1832 et seq.; see also Statement of 16 January 2026, p. 2034 et seq.) that the Commercial Court, in its decision of 2 July 2024:

- equated the existence of a creative decision with the existence of "creative leeway." However, the existence of such leeway does not replace the identification of specific creative decisions that reflect the author's personality (see similarly Rejoinder I, paras. 439, 443, 460, pp. 1826 ff., 1833; see also Statement of January 16, 2026, para. 16, p. 2037);
- had derived "creative decisions" solely from a deviation from the previously known forms (see also the Statement of January 16, 2026, paras. 12, 17, pp. 2036 ff.); and
- had considered functional design decisions not to preclude copyright protection (see also the statement of January 16, 2026, para. 14 et seq., 5, p. 2037, 2035).

130. Accordingly, the plaintiffs—citing this very judgment of the CJEU—(once again) assert that if the Commercial Court had been able to take the aforementioned judgment into account, it would "undoubtedly have denied" copyright protection and that it is free to revisit this issue (Statement of December 9, para. 16, p. 2018; minutes of the continued hearing, p. 9 et seq., p. 2060 et seq.; see also Plaintiffs 3, 4, 10, and 12 in their statement of January 16, 2026, paras. 10, 18, p. 2036 et seq.).

Assessment

131. From the Commercial Court's perspective, there is no reason to revisit the legally relevant questions that were already addressed in detail in its decision of July 2, 2024, concerning the first part of the proceedings. The unity and consistency of the ongoing proceedings argue against this. As a general rule, the same issues should not be examined twice within the same proceedings in two decisions issued at different times. It is also worth mentioning, in passing, the principles of procedural economy and the requirement for expeditious proceedings.

132. Even if it were necessary to revisit the issues at hand or the decision, this would not, from a substantive perspective—i.e., in light of the aforementioned recent case law—have the effects on the present decision desired by the plaintiffs:

Artistic Achievement

132.1 The **"artistic achievement,"** which is required in judgments on **German copyright law** for the granting of copyright protection, stems from the traditional terminology of the Federal Court of Justice (BGH). In substance, there are no differences compared to the concept of a "work" under EU law (see, e.g., BGH, I ZR 18/24, judgment of February 20, 2025, para. 20 with further references [KB 332]; see also decision of July 2, 2024, E. 109.1 et seq., with further references, pp. 1496 et seq.; regarding the continued use of the term "artistic" in light of the most recent case law of the European Court of Justice (ECJ), see STIEPER, jurisPR-WettbR 12/2025, note 1, D II.). An "artistic work" means nothing **more and nothing less** than a creative, original work in the

field of art that reflects the individual personality of the author (Federal Court of Justice [BGH], I ZR 18/24, judgment of February 20, 2025, para. 23 with further references; KB 332). It is not apparent to the Commercial Court to what extent an "artistic" work claimed by the plaintiffs (Replica I, para. 439 et seq., pp. 1826 et seq.) constitutes an independent criterion to be examined in addition to the others, in the sense understood by the plaintiffs.

Previous known forms

133. Furthermore, even the deviation from the previously known **previous known forms** in the case of the "Hang" was **not the sole criterion** for concluding that the scope for creative expression had been exhausted. On the one hand, accompanying circumstances such as intentions during the creative process, sources of inspiration, or the repertoire of forms may be taken into account in the originality assessment (see ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 69 et seq. [KB 361]). If the creator of an object merely adheres to what was already known, this may, under certain circumstances, justify the conclusion that no creative achievement exists and that the design does not stand out from the designs of that time (as was the case, for example, with the "Birkenstock" sandal, for which "health sandals common at the time" existed (see Higher Regional Court of Cologne, 6 U 89/23, judgment of January 26, 2024, para. 121 et seq., see also Federal Court of Justice (BGH), I ZR 18/24, judgment of February 20, 2025, para. 31 [KB 332]). If, conversely, the creators—as was the case here—find themselves in a field **without "designs customary at the time"** (and accordingly without "standards or conventions" regarding the design of a product; see ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 62 [KB 361]), this must be taken into account in the assessment, as was done in the decision of July 2, 2024—not least on the basis of **the story of creation** (KAB 45). Furthermore, although novelty is admittedly not a criterion for protection, it may nevertheless be a factor to be taken into account in the case of utilitarian objects (as opposed to art without a specific purpose) (IAiA, "The elephant in the room of EU copyright originality: Time to unpack and harmonize the essential requirement of copyright, in: The Journal of World Intellectual Property, 2024, 1–20, 9). Accordingly, a "Fender" guitar body—which is designed to be futuristic, elegant, and timeless, and which, at the time of its conception, represented "something fundamentally new" because it was not found in the existing repertoire of forms—can also be regarded as the result of free, creative decisions (see Regional Court of Düsseldorf, 14C O 64/25, judgment of December 22, 2025, para. 38). That the "Hang" also represents "something fundamentally new" in the field of hand-played idiophones is clearly evident from the decision of July 2, 2024.

Creative Decisions That Reflect Personality

134. Works of applied art are always the result of the craftsmanship and decisions of their creators, which may be dictated by technical, ergonomic, or safety-related constraints or may arise from **standards** or **conventions** (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 62 [KB 361]). Nevertheless, the ECJ expressly states that copyright protection is possible even if **the creation** of the work

was **determined by technical considerations**, provided that the author nevertheless expressed his personality through

free and creative decisions (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 63 with further references [KB 361]).

135. What is therefore relevant is whether **free, creative decisions** were made. This criterion involves determining whether **creative leeway was utilized in a creative manner,** which is why terms such as "personal touch," "creative abilities," or "the creative spirit expressed in an original manner" are used (see RAUE, in: Dreier/Schulze, 8th ed., § 2, para. 7, with further references). Decisions that are surprising or unusual (as opposed to trivial, insignificant, or obvious decisions) tend to be **creative** in this sense. While the adoption of conventional or pre-existing designs is not creative, pre-existing elements can also be creatively combined, for example, through the selection and arrangement of pre-existing components. While it is creative to ignore existing trends, it is not creative to follow trends (BENTLY/DER-CLAYE/SGANGA/PEUKERT/MARGONI/SYNODINOU, The Protection of Works of Applied Art under EU Copyright Law — Opinion of the European Copyright Society in Mio/konektra, IIC (2025) 56:798-828, para. 36, 38, 39, 40). The concept of creativity is always associated with novelty, imagination, and a departure from what is already known: it refers to an individual's ability to think beyond conventional patterns and to create something new beyond repetition and convention (BERLAGE, The Evaluation of Originality under EU Copyright Law, p. 52), which, of course, can also be expressed through a combination of elements (contrary to the statement of January 16, 2026, para. 16, p. 2037; see also Regional Court of Düsseldorf, 14C O 64/25, judgment of December 22, 2025, para. 43). Since, in the field of utilitarian objects, the frequency of comparable works may also be taken into account (IAIA, "The Elephant in the Room of EU Copyright Originality: Time to Unpack and Harmonize the Essential Requirement of Copyright," in *The Journal of World Intellectual Property*, 2024, 1–20, 9), and since the "Hang" was classified as unique, the objection raised by Plaintiffs 3, 4, 10, and 12—that the novelty of a combination should not be a factor (see Statement of January 16, 2026, para. 16, p. 2037)—is without merit. It is therefore unclear why the distinctiveness of a previously unknown combination of features should not be taken into account (Statement of January 16, 2026, paras. 9, 12, p. 2036).

136. The defendants **selected, arranged**, and **combined** the design features of the "Hang" at issue here **in accordance with** their **own ideas**, thereby creatively exercising the design freedom available to them, as already noted in the decision of July 2, 2024, in particular in E. 91 et seq. and 104. They made these decisions regarding the idiophone to be created—which could be played by hand—**despite the near absence of existing models** (see also E. 93.1 et seq. above and the decision of July 2, 2024, in particular E. 64 et seq.). They worked with forms and specific selection and combination decisions that were, in some cases, surprising and unusual for solving the **task** at hand (moving away from the concave playing surface used in the construction of steel pans toward a self-contained, seemingly floating—

resonating body [“UFO”]), reduction of the sound fields to a single circle compared to the steel pan (in which a symbol of infinity and harmony can be seen, thus representing the player’s freedom to move away from the conventions of traditional music-making), combination with a dome—not required by the assignment—as a clear focal point protruding upward from the resonating body, aligned on the same axis as the opposite resonance hole). As a result, although some of these (geometric) shapes were already known (lens, circle, dome, etc.), they have distanced themselves so far from previously known designs that the final form they created appears “strange” (Decision of July 2, 2024, E. 104, p. 1494). The **decisions regarding selection, combination**, and **arrangement** made by Defendants 2 and 3, as mentioned in E. 93.1 et seq., are therefore **“free and creative”** in their combination**.** When considered as a whole (see DREIER/SCHULZE, 8th ed., § 2, para. 53; Decision of July 2, 2024, para. 104), they result in the characteristic appearance of the “Hang”—that is, the distinctive combination of features—through which the “Hang” is perceived as something **new and unique** (see decision of July 2, 2024, para. 104; ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 55,
82 [KB 361]).

137. Accordingly, in the present case, the threshold of “merely” free (but not additionally creative) decisions was clearly exceeded (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 82) [KB 361]; see opinion of December 9,
2025, para. 10, p. 2015 et seq.). The approach taken by Defendants 2 and 3 does not, in fact, constitute a simple “approach guided by what is technically feasible and practical,” as Plaintiffs 3, 4, 10, and 12 assert (Statement of January 16, 2026, para. 15, p. 2037). The design of the “Hang” cannot, therefore, be compared to the development of the “Birkenstock” sandals, nor can the decisions made by Defendants 2 and 3 be dismissed as mere choices between various technical options (see Rejoinder I, para. 451, p. 1829 et seq.; see also the decision of July 2, 2024, E. 111.5, p. 1499). In contrast to the development history of the “Birkenstock” sandals, no “common” elements of a hand-played idiophone could be identified in the case of the “Hang,” especially since it cannot be said that the selection, combination, and arrangement of the design elements followed “purpose-driven considerations or customary methods or standards” (see STIEPER, jurisPR-WettbR 12/2025, note 1 D II.). The fact that the “Hang” is still being manufactured (or copied) worldwide 25 years after its creation—though a subsequent circumstance that need not be taken into account in the originality assessment—nonetheless illustrates that the plaintiffs’ argument is flawed.

138. Nor is there any merit to the plaintiffs’ argument that a clear **line pattern** (e.g., using geometric shapes) is unsuitable as a basis for copyright protection (see minutes of the continued general meeting, p. 12, p. 2063; also the statement of January 16, 2026, para. 15, p. 2037): Copyright protection does not depend on non-functional ornamentation (see LOEWENHEIM/LEISTNER, in: Schricker/Loewenheim, 6th ed., § 2, para. 187), especially since even a collection of elements or a selection of elements that are not protected in and of themselves may also

constitute a work, provided that this collection or selection reflects the author's personality or reveals the author's personal imprint (Supreme Court, ECLI:NL:HR:2013:BY1529, judgment of February 22, 2013, para. 3.4 [KB 170, 170A]; Midden-Nederland District Court, ECLI:NL:RBMNE:2025:5837, judgment of November 12, 2025, para. 3.14, see also para. 3.29 [KAB 176, 176A], with further references; see also Court of Appeal of The Hague, ECLI:NL:GHDHA:2020:1620, judgment of September 1, 2020, in particular para. 4.3 [KB 181, 181A]; for German law, see only uE, in: Dreier/Schutze, 8th ed., § 2 para. 67). This is because even an object consisting of existing forms can be original if the creator has expressed his or her creative decisions in the arrangement of those forms (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 78 [KB 361]).

139. Contrary to the plaintiffs' assertions, the Commercial Court did not, in its decision of July 2, 2024, automatically infer the creativity of the decisions subsequently made from the existence of creative leeway. Rather, the court examined whether and to what extent Defendants 2 and 3 had utilized the (previously defined) scope of discretion in creating and arranging the four disputed features of the "Hang." In the words of the ECJ, the creativity of the decisions made was thus not presumed (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 65 [KB 361]; see decision of July 2, 2024, para. 87 et seq., esp. 91 et seq., pp. 1482 et seq., 1485 et seq.). It should be noted that copyright protection—contrary to the plaintiffs' assertion (see, e.g., statement of January 16, 2026, para. 14, 16, p. 2037)—is **not** to be assessed (solely) on the basis of **individual components while omitting an overall assessment** (see BGH, I ZR 18/24, judgment of February 20, 2025, para. 38 [KB 332]; see SUE, in: Dreier/Schulze, 8th ed., § 2 N 53), especially since individual technical features are tools that lead to a functional product (ZENTEK/RITSCHER, Interplay of Copyright Law, Design Law, and Unfair Competition Law in the Protection of Functional Product Designs Against Imitation, GRUR 2024, 1153 et seq., footnote 45).

140. It should also be noted that the ECJ had already required in its previous case law that "an object must reflect the **personality** of its creator *by* **expressing the creator's free and creative decisions** in order to be considered an original." (see, e.g., the further references in ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 49 [KB 361]), which is why it is not clear to what extent this criterion is intended to relate to the more recent case law (see Minutes of the continued plenary session, p. 9 et seq., pag. 2060 et seq.). In this respect, the plaintiffs' argument that the defendants failed to present "decisions recognizing this legal personality of Defendants 2 and 3" or that such decisions were not established in the judgment (Minutes of the continued hearing, p. 10, p. 2061). This is because an **additional assessment** as to whether these decisions reveal the (however it may be determined) **"author's personality**" (see Statement of December 9, 2025, para. 9, p. 2015; see also Statement of January 16, 2026, para. 16, p. 2037), does **not** constitute **a separate criterion** (see also ZENTEK/RITSCHER, "Interplay of Copyright Law, Design Law, and Unfair Competition Law in the Protection of Functional Product Designs Against Imitation," GRUR 2024, 1153 et seq., 1156 and

footnote 46). And even if it were assumed that it did constitute a separate criterion, this would also have been satisfied and established in the “Hang” case: The expression of personality is lacking—particularly in objects of applied art — when other manufacturers have created or are likely to create essentially the same form (BENTLY/DERCLAYE/SGANGA/PEUKERT/MARGONI/SY-NODINOU, The Protection of Works of Applied Art under EU Copyright Law — Opinion of the European Copyright Society in Mio/konektra, IIC (2025) 56:798–828, para. 49). In the case of the “Hang,” however, the decision of July 2, 2024, ruled out the possibility that a third party, faced with the same task, would have created the same or essentially the same work (see decision of July 2, 2024, para. 90, p. 1484 et seq.). Through their decisions, Defendants 2 and 3 personalized the idiophone to be created—which could be played by hand—in a unique manner, not least because of the near absence of existing models (see also para. 93.2 above and the decision of July 2, 2024, in particular paras. 64 et seq.) (see Opinion of Advocate General Szpunar, para. 67 [KB 333]) and thereby created a unique work imbued with their personality (ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 55, 82 [KB 361]) or, in other words, imparted their personal touch to the “Hang.” In other words, the design features of the “Hang” at issue here, in their combination or as the result of (sufficiently) free decisions regarding combination, arrangement, and selection, constitute an expression of the author’s personality—they confer a unique aspect on this object.

No Rule-Exception Relationship

140.1 Furthermore, the ECJ has also clarified that **no different assessment criteria** apply specifically to works of applied art, which is why there is **no rule-exception relationship** in the sense that higher requirements would have to be imposed when assessing originality than for other types of works (contrary to Replik I, para. 450, 471, 476, pp. 1829, 1836, 1838 et seq.; cf. ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 57 et seq. [KB 361]; by contrast, see the interpretation of the Higher Regional Court of Düsseldorf, 20 U 259/20, Judgment of June 2, 2022, para. 138, in denying copyright protection for USM furniture).

Regarding Dutch Law

141. The arguments made regarding EU law also apply to Dutch law. The “recently clarified standards of harmonized copyright law” described above (see Rejoinder I, para. 620, p. 1872) do not suggest here either that copyright protection for the “Hang” should be denied. In addition, it should be emphasized at this point that copyright protection for the Birkenstock sandals (Madrid, Arizona, and Florida) presented by the plaintiffs was recently affirmed in the Netherlands, with explicit reference to the contrary ruling of the Federal Court of Justice (BGH) of February 20, 2025 (see Rechtbank Midden-Nederland, E-CLI:NL:RBMNE:2025:5837, judgment of November 12, 2025, para. 3.29 [KAB 176, 176A]).

Conclusions

142. All in all, the recent developments would therefore not suggest an assessment that deviates from the decision of July 2, 2024.

Clarifications by the CJEU Regarding the Infringement Test

143. The CJEU has also clarified the **requirements** regarding the infringement analysis. The **infringement analysis** must **not** be based on a comparison of **the overall impression** of the designs (contrary to the previous position of the Federal Court of Justice, judgment of December 15, 2022, para. 32, with further references [KB 232]), as this criterion originates from design law (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 87; KB 361; see also Opinion of Advocate General Szpunar, para. 67 [KB 333]; see Rejoinder, para. 258 [DE] and para. 303 [NL]). What is decisive, rather**,** is whether **creative elements**—that is, those that are an expression of the decisions reflecting the personality of the author of the work—have been **recognizably incorporated** into the object alleged to be infringing (ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 86 with further references, 92 [KB 361]). In this context, even the reproduction of an **arrangement** of pre-existing elements considered original may constitute an infringement (Opinion of Advocate General Szpunar, para. 72 [KB 333]).

144. It must also be taken into account that—when creative elements are adopted—a finding of imitation cannot be **avoided** merely by making changes to elements that are not creative (see Opinion of Advocate General Szpunar, para. 70 [KB 333]). The scope of protection under copyright law is **not** to be determined on the basis of **the degree of individuality** (ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 88 [KB 361]; see also Opinion of Advocate General Szpunar, para. 68 et seq. [KB 333]).

145. In the present case, “free and creative” refers to the **result of the decisions regarding selection, combination**, and **arrangement** mentioned in para. 134 et seq. and made by Defendants 2 and 3**.** Accordingly, a **copyright infringement** exists if the object in question—in this case, the “handpans” — **recognizably incorporates** the decisions regarding combination, arrangement, and selection made by Defendants 2 and 3 in this manner, or, respectively, **“these elements,** i.e., those that are an expression of the decisions reflecting the personality of the author of this work” (ECJ, C-580/23 and C-795/23, Judgment of December 4, 2025, para. 86 [KB 361]). Contrary to the plaintiffs’ assertion (see minutes of the continued oral hearing, p. 10, p. 2061), it is not necessary to further demonstrate *to what extent* “the personality” of the authors is to be found in a contested object.

146. **The “creative elements”** of the “Hang” that are relevant to the subsequent infringement analysis are therefore not, for example, any of the four design elements at issue here (e.g., “lens shape” or “circularly arranged tone fields”), especially since these very elements, as such, did not constitute grounds for protection (see decision of July 2, 2024, para. 104, p. 1494).

Copyright Infringement under German Law

Scope of Protection:

Positions of the Parties

147. The **plaintiffs** argue that—assuming an “artistic” work—the **scope of protection** is **limited** (Rejoinder I, para. 482 et seq. [p. 1840 et seq.]; also Rejoinder II, paras. 52, 60 [p. 1687, 1689]). In the case of the “Hang,” even relatively minor deviations would suffice to rule out an infringement (Rejoinder I, para. 489 et seq., p. 1843 et seq.), including, in particular, altered proportions (determined purely by calculation) (Rejoinder I, para. 494, p. 1844 with reference to KB 231 [“Lighted Display Cases”]; see also Rejoinder II, para. 49 [p. 1685 f.]). Given the low level of design originality, protection of the “Hang” is limited to **identical copies** (see also minutes of the continued oral hearing, pp. 10, 11, pp. 2061 et seq.); otherwise, **protection of the concept** or **idea** would be introduced (Rejoinder I, para. 505 et seq., pp. 1847 et seq.).

148. The **defendants**, for their part, take the position that the features of the “Hang” that give rise to protection consist of the four design features (lens shape, central dome, opposing resonance hole, and circularly arranged tone fields) (Duplicate, para. 257, p. 1954). When compared to the “handpans” under review, no one could seriously claim that the design of the “Hang” (in the form of its four specific elements and its overall impression) is not recognizable in the plaintiffs’ “Handpans” (Duplik, para. 258, p. 1954). The adoption **of all or nearly all of these elements constitutes an infringement** (see also minutes of the continued hearing, p. 18 et seq., p. 2069 et seq.; see also Duplik, para. 268, p. 1956 et seq.). Assigning a “zero scope of protection” to a copyright-protected work prevents the practical enforcement of the granted right, which amounts to undermining legal protection (see Rejoinder, para. 250, p. 1952 et seq.). Overall, the defendants assume a very broad scope of protection, particularly due to the distinction from the prior art (see Rejoinder, para. 260 et seq., p. 1955 et seq.). Only minor modifications to “handpans”—such as slightly shifted domes—are practically imperceptible, which is why the “Hang” remains recognizable in all copies (Duplik, para. 265, p. 1956). An object that exhibits all of the elements must always fall within the scope of protection (see Rejoinder, para. 268, p. 1956), especially since the addition of further elements—such as extra tone fields or different shoulders—does not affect the four characteristics that give rise to protection (Rejoinder, para. 269, p. 1957).

Legal

149. A copyright infringement under § 97 UrhG does not occur only in the case of an identical, unlawful reproduction of a work. Based on the provision of § 23(1), first sentence, of the UrhG, according to which adaptations or other alterations of a work may be published or exploited only with the author’s consent, it follows that the scope of protection of the right of publication within the meaning of § 12 UrhG and the exploitation rights pursuant to § 15 UrhG extends—up to a certain limit—to **designs that deviate from the original** (BGH, I ZR

173/21, judgment of December 15, 2022, para. 27 with further references [KB 232]). When determining whether a modification of a work falls within the scope of copyright protection, it must be taken into account that any adaptation or other alteration within the meaning of § 23(1), first sentence, UrhG, insofar as it is embodied in a tangible form, also constitutes a reproduction within the meaning of § 16 UrhG. Reproductions include not only copies that are identical to the original; rather, the author's right of reproduction also encompasses adaptations of the work—even those that are more distantly related to the original (see Federal Court of Justice [BGH], I ZR 173/21, judgment of December 15, 2022, para. 28 [KB 232]). If, by contrast, the newly created work maintains a **sufficient distance** from the work used, then it does not constitute an adaptation or transformation within the meaning of § 23(1), first sentence (see § 23(1), second sentence, UrhG).

150. In its case law, the Federal Court of Justice (BGH) focuses on the objective characteristics that define the creative distinctiveness of the source work and then determines, by comparing the two works, whether (and to what extent) the new work incorporates the original creative features of the earlier work, thereby creating a corresponding overall impression, or whether the elements that form the basis of the earlier work's copyright protection fade into the background in the new work when viewed as a whole—that is, are no longer recognizable. In this regard, the Federal Court of Justice (BGH) emphasizes that a comparison of the respective overall impressions of the designs is decisive for the infringement assessment, within the framework of which all adopted creative features must be taken into account in an overall assessment (see BGH, I ZR 173/21, judgment of Dec. 15, 2022, para. 29 [KB 232]).

151. The **terminology** of the traditional infringement analysis, which sometimes focuses on an assessment of **the overall impression** (see as set forth in the Duplik, para. 254 et seq., p. 1953 et seq.), should not be retained in light of the most recent case law of the European Court of Justice (ECJ) (see ECJ judgment of December 4, 2025, para. 87 [KB 361]; see also STIEPER, jurisPR-WettbR 12/2025, note 1, C at the end and D III.; Regional Court of Düsseldorf, 14C O 64/25, judgment of December 22, 2025, para. 43). Furthermore, it must be taken into account that "an object that has been classified as a work [...] must enjoy protection in that capacity, whereby the scope of this protection does not depend on the degree of **creative freedom** of its author and is therefore no less than that of other works (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 88 [KB 361j). Since "free and creative decisions"—as in the present case—often lie precisely in the **combination of elements**, it is argued that it is the combination of elements alone that reflects the author's personality. In such cases, the **overall assessment of these elements—** on which the Federal Court of Justice (BGH) has hitherto based its determination of the overall impression—is likely to retain its significance (Regional Court of Düsseldorf, 14C O 64/25, judgment of December 22, 2025, para. 43). According to another view, against the backdrop of the latest case law of the European Court of Justice (ECJ), the following assessment framework is advocated in legal scholarship (STIEPER, juriSPR-WettbR 12/2025, note 1, D III and IV):

The line between derivative works under Section 23(1), first sentence, of the German

Copyright Act (UrhG) and free use under Section 23(1), second sentence, of the UrhG lies where no protectable elements

of the work are recognizably incorporated. Similarities or differences in the overall impression are not decisive in this regard.

A sufficient degree of external distance within the meaning of § 23(1), second sentence, UrhG is already present under a Directive-compliant interpretation of the provision, but only if **the elements taken from the original work** are **limited to** those that**,** neither on their own nor in their entirety, **express the author's creative achievement**—even if the original work remains recognizable as such.

1) First, a **comparison of the two** works must be made to **determine** which individual elements from the original work have been incorporated into the contested work in a recognizable manner (i.e., not merely as inspiration).

2) In a second step, it must then be examined **whether** the **creative individuality of the original author** is expressed **in these**—and only in these—elements. If this is the case, the right to adaptation under § 23(1), first sentence, of the German Copyright Act (UrhG) has been infringed.

152. As will be shown below, any differences in the assessment criteria set forth herein would have no bearing on the specific outcome of the infringement assessment relevant to the present case.

Assessment

153. The eligibility for protection of "Hang" was established through a **comprehensive assessment** of the protectable elements (DUE, in: Dreier/Schulze, 8th ed., § 2, margin note 53, with further references; see, for example, also BGH, I ZR 173/21, judgment of December 15, 2022, para. 19 [KB 232]; also decision of July 2, 2024, E. 104, p. 1494). Accordingly, the design of the "Hang" in the present case was eligible for protection; it was the **result of decisions regarding selection, combination, and arrangement** within the framework of an **overall design without any significant models**, especially since free and creative decisions often lie precisely in the combination of elements and it is only in this combination of elements that the author's personality is reflected (Regional Court of Düsseldorf, 14C O 64/25, Judgment of December 22, 2025, para. 43). For **details**, see E. 93.1 et seq. and E. 134 et seq. above. As shown above, the use of, for example, the basic lens-shaped form as such does not in itself constitute an infringement of the right of adaptation, because this element, as such, does not contribute to the originality of the work—that is, it is not itself a "work" (see also paras. 84, 87 above).

154. With regard to the plaintiffs' argument concerning concept or idea protection, reference can be made to the considerations set forth above (see E. 74 et seq.). Whether an infringement
— as the plaintiffs assert — can be ruled out if, although all characteristics are present, they are "implemented differently in form" (see minutes of the continued general meeting, p. 26, pag. 2077), this will have to be examined on a case-by-case

basis.

Instruments to be examined under German law:

155. The instruments to be examined under German law are the "handpans" of **Plaintiffs 1–10** and 12 (see K-I, RB para. and K-I paras. 2, 3, 4; K-II, RB paras. 2, 3, p. 13 et seq., 32 et seq. [NG 20 133]; Rejoinder I, para. 511 et seq.; Reply II, para. 22 et seq., p. 1674 et seq.). The reference work is "Hang," as embodied in the five versions according to K-I and II, RB para. 1, subpara. ii a–e; with regard to Plaintiffs 10 and 12, additionally according to K-II, RB para. 1, subpara. i d–e, although this will not be relevant to the outcome of the review.

Instruments of Plaintiffs 1–2

156. The "handpans" incorporate all of **the arrangement, combination, and selection decisions** made by Defendants 2 and 3 as mentioned in E. 153 (or, respectively, their results in the form of an overall shape of the "Hang" comprising multiple elements) in a recognizable manner. This is evident in the use of the **lens shape** as the basic form (a shift from a concave playing surface to a resonance chamber that appears to float, "UFO"), combined with a **dome** positioned at the top center as a clear focal point (an element of central importance not required by the assignment), around which circularly arranged tone fields **orbit** at roughly equal intervals (concentric; representing the freedom of the playing possibilities opened up). The polarity created by the filled upper half and the empty lower half of the shell results in a clear "top" and "bottom," thereby creating a horizontal separation of the shell halves—which are, in and of themselves, identical. The interplay between the dome and the resonance hole is also adopted in the sense of a vertically aligned axis: along this axis, the resonance hole leads into the instrument from below, while opposite it, another hemispherical segment protrudes from the instrument in the form of the dome. Since these elements express the creative individuality of the original authors, the right to adaptation under § 23(1), sentence 1, of the German Copyright Act (UrhG) has been infringed in this case, especially since the elements that constitute the basis for copyright protection do not fade into the background even when viewed as part of the overall design of the new version—that is, they remain recognizable.

157. In light of these similarities, even the specific **changes** alleged—such as alterations to dimensions, differences in the choice of materials, a different color scheme, oval shoulders, domes or central tone fields, double domes, etc. (see Rejoinder I, paras. 513, 516, 525, pp. 1849, 1851) do not alter this assessment. The same applies to other dimensions of the instrument or dome, unpolished domes, indentations on the dome, fewer or more tone fields (while retaining the circular shape), more pronounced tone fields or shoulders, or the surface texture (see K-I, para. 175 et seq., p. 99 et seq.). In particular, a visual inspection of the comparison from KB 321 [comparison of the second-generation Hang and Instrument 1] does not yield a different impression. Instrument 1 does indeed appear slightly "more bloated" compared to the "Hang" (see also illustrations in the minutes of the continued general meeting, p. 5 ff., pp. 2056 ff.). For example, the shoulder of the instrument

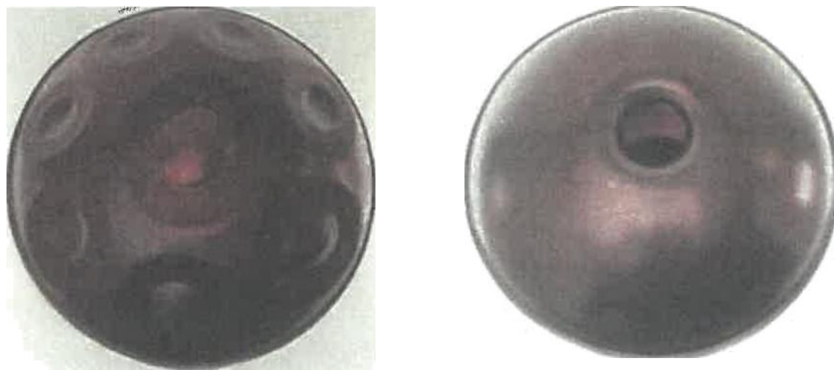
ment 1 extends “significantly further downward,” and that as a result the tone fields are located on the lower part of the upper shell half (see minutes of the continued hearing, p. 24, pag. 2075), does not outweigh the recognizable adoption of the elements relevant here, so that these changes have hardly any effect. The modifications put forward by Plaintiffs 1 and 2 therefore do not, in the present case—either individually or in combination—result in the adoption no longer being recognizable (which is why the threshold of “mere” inspiration has been exceeded) or that it could be concluded that, when viewed as a whole, the elements justifying protection fade into the background in the new design and are therefore no longer recognizable.

158. Specifically, the following “handpans” are at issue:

158.1 Instrument 1 (K-I, RB para. 2a, paras. 175 et seq., 362 et seq.; Reply I, paras. 511 et seq.)

158.2 Instrument 5 (K-I, RB para. 2e, margin note 183 et seq.; Rejoinder I, margin note 523 et seq.)

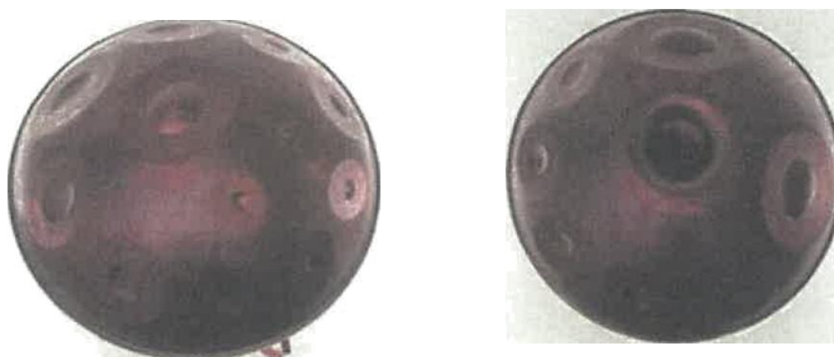
158.3 Instrument 2 (K-I, RB para. 2b, paras. 177 et seq.; Rejoinder I, paras. 514 et seq.)



159. The same assessment applies to Instrument 2, depicted above, which is why reference is made by analogy to the remarks above. The two "additional domes in two circular tone fields" mentioned by the plaintiffs (see K-I, para. 177 et seq., pp. 101 et seq. and Rejoinder I, para. 516, p. 1849) are not (quite) sufficient on their own or in combination with the other modifications to bring the design outside the scope of protection. On the one hand, the lens shape and the circular arrangement on the upper half of the bowl are still retained. Contrary to the plaintiffs' argument, the additional domes do not, in particular, break with the contrast between the dome and the resonance hole, especially since there is still a clear distinction between "top" and "bottom." Despite the two additional domes, the central dome at the top continues to be perceived as a superimposed center (and thus lies on the vertical axis with the resonance hole).

160. The "handpans" depicted in Rejoinder I, paras. 517–522 (p. 1850 et seq.) and paras. 526 et seq. (p. 1852), which look as follows, **no longer** fall **within the scope of protection**:

160.1 Instrument 3 (K-I, RB Item 2c, lines 179 ff.; Replica I, lines 517 ff.)

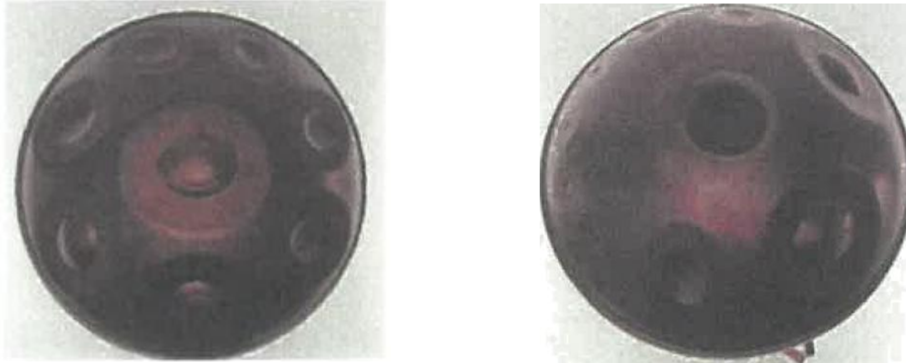


This instrument recognizably incorporates the lens shape and the central resonance hole on the lower half. The underside of Instrument 3 is additionally equipped with tone fields or domes in the shape of a large circular arc. Furthermore, Instrument 3 features two additional raised tone fields placed on the upper half of the bowl. This breaks the "circular shape" (see also the decision of July 2, 2024, E. 96.2, p. 1489). At the same time, the slightly oval-shaped and offset tone field at the top with a dome does not constitute a clear center surrounded by a ring of tone fields. As a result, essential elements that characterize the "Hang" are no longer recognizable but have, at most, been incorporated as inspiration. In the adopted elements (whether alone

or in combination), the creative individuality of the original authors is no longer expressed; rather, the elements that form the basis for copyright protection of the earlier work fade into the background when viewed as part of the overall composition of the new design and are therefore no longer recognizable.

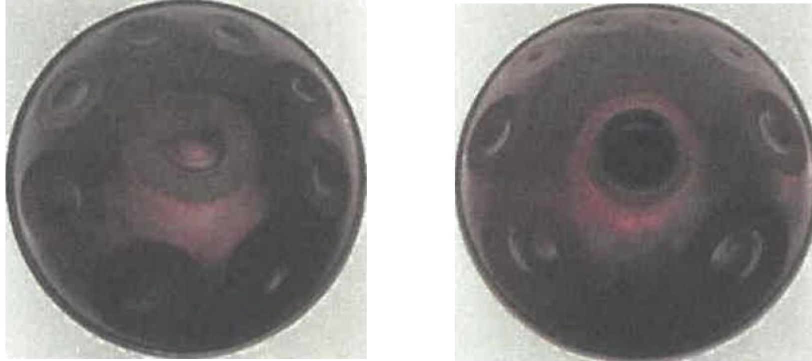
The same applies, albeit to a lesser extent, to "Instrument 4" and "Instrument 6"

160.2 Instrument 4 (K-I, RB para. 2d, margin note 181 et seq.; Replik I, margin note 520 et seq.)



Individual elements, such as the lens shape, a circular arrangement of tone fields, and a central resonance hole on the underside, are recognizably carried over. In contrast, the horizontal line pattern is disrupted in Instrument 4, as the lower half of the shell features two additional semicircles consisting of tone fields and domes of varying sizes. The upper half of the shell also features two additional domes in place of the usual tone fields (arranged in a circular pattern overall). In this way, Instrument 4 breaks with the "Hang" and breaks with the clear distinction between "top" and "bottom." Due to the four additional domes (placed at the top *and* bottom), the central dome no longer serves as a clear focal point (resulting in a change in concentricity and a break with the vertical axis of the dome and the resonance hole). Not least due to the four additional domes—extending horizontally downward and upward from the resonance body and pointing in different directions—a line that differs from that of the line that deviates from the "Hang." Furthermore, oval shapes were additionally incorporated in this work (particularly in the central dome). As a result, essential elements that characterize the "Hang" are barely recognizable anymore; at most, they have been adopted as inspiration. In the adopted elements (alone or in combination), the creative individuality of the original creators is not expressed; rather, the features that form the basis of copyright protection fade in the new design and are therefore unrecognizable. The addition of both extra domes in the upper tone field circle and the supplementation of the lower half of the bowl with two semicircles—consisting of tone fields and domes of varying sizes—combined with the use of oval shapes, is (unlike the "handpan" depicted in E. 168.9) is sufficient to remove the work from the scope of protection of the "Hang."

160.3 “Instrument 6” (K-I, RB para. 2 et seq., col. 185 et seq.; Rejoinder I, col. 526 et seq.)



For the assessment of Instrument 6, reference may be made by analogy to E. 160.2 above, although this instrument (unlike Instrument 4) does not contain additional domes within the upper tone field circle. Overall, not least due to the two additional domes on the underside (which extend transversely from the instrument and prevent the dome at the top center from appearing as a clear focal point) as well as the semicircular arrangement of the tone fields on the underside, the contrast between “top” and “below,” as well as the vertical axis between the dome and the resonance hole, which is evident not least in the comparison from KB 322 [comparison of the second-generation Hang and the instrument with bottom notes] (see also the illustration in Replica I, col. 165, p. 1760). Furthermore, oval shapes are also employed here (particularly in the area of the central dome). Overall, a (narrow) margin of sufficiency can be assumed here, especially since the elements giving rise to copyright protection are barely discernible in the new design when viewed as a whole. Incidentally, the configuration—apart from Instrument 4 discussed above—is comparable to the “handpans” assessed in "handpans" assessed in E. 169.1 and 169.2 below (albeit less narrowly, which is due not least to the double use of the dome on the underside and thus the more pronounced removal of the dome’s central function).

Conclusion

161. In conclusion, it should be noted that 3 of the total of 6 “Handpans” submitted by Plaintiffs 1 and 2 do not infringe upon the scope of protection of the “Hang.”

It is determined that Plaintiffs 1 and 2 do not infringe the Defendants’ copyrights in the “Hang” through the manufacture, etc., of the “Handpans” in Germany pursuant to K-I, RB Sections 2c, 2d, and 2f.

Instruments of Plaintiffs 3 and 4

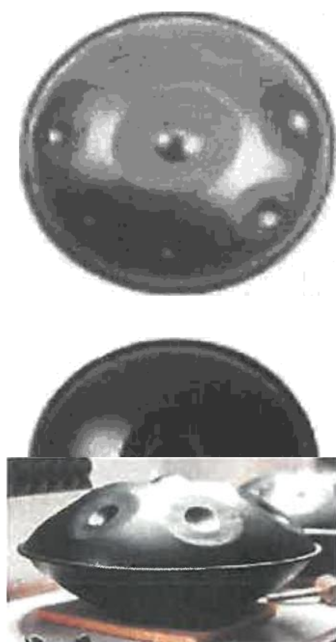
162. The “Handpans” depicted in K-I, para. 201 et seq. (p. 115 et seq.) and Rejoinder II, para. 25 et seq. (p. 1675) “Handpans” incorporate the relevant elements of the “Hang,” which resulted, in a recognizable manner, from the

arrangement, combination, and selection decisions of Defendants 2 and 3, in a recognizable manner. As already noted in E. 153, these elements constitute the creative individuality of the "Hang." For the assessment, reference may be made by analogy to E. 156 above, which also applies to the following instruments.

163. The changes/differences cited (see, for example, the instrument "The Economic Ones" in the minutes of the continued general meeting, p. 26, pag. 2077), such as different height-to-width ratios of the lens shape with less dramatic transitions (see also Rejoinder II, para. 44, pag. 1682 f.), a dome embedded differently into the surfaces, or differences in the (circularly arranged) sound fields regarding number, size, depth, and spacing with a different "visual rhythm" (see also Rejoinder II, para. 44)—none of these factors alter the matter, nor do oval domes instead of round ones or unpolished domes, one fewer tone field (while retaining the circular shape), smoother surfaces (see also Rejoinder II, para. 44), color schemes, flattened areas around the resonance opening, colored outer rings, color-contrasting sections within the sound fields, oval rather than round shoulders or smaller or larger shoulders, indentations on the dome, more pronounced sound fields or shoulders, engravings, or sound fields of varying sizes (see also K-I, para. 201 et seq., pp. 116 ff.) or elements that appear more "technical" (Replica II, para. 44). The changes cited thus do not, in this case—neither individually nor in combination—render the adaptation unrecognizable (which is why the threshold of "mere" inspiration has been exceeded), especially since an overall assessment of the elements underlying the copyright protection of the "Hang" would not lead to the conclusion that these elements fade into the background in the new design—that is, that they are unrecognizable.

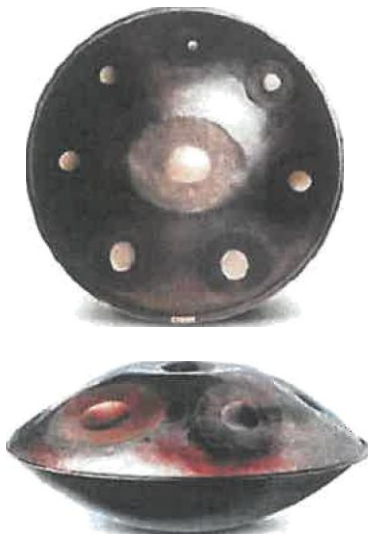
164. Specifically, the following "handpans" fall within the scope of protection of the "Hang":

164.1 The Economic Ones (K-I, RB para. 3a, margin note 201; Rejoinder II, margin note 25, p. 1675)



164.2 Unique Artworks (K-I, RB para. 3b, margin no. 202; Rejoinder II, margin no. 26, p. 1675)

164.3 Healing Frequency (K-I, RB para. 3c, margin note 203 et seq.; Rejoinder II, margin note 27, p. 1675)



164.4 El Clasico (K-I, RB Section 3d, para. 205; Rejoinder II, para. 28, p. 1676)

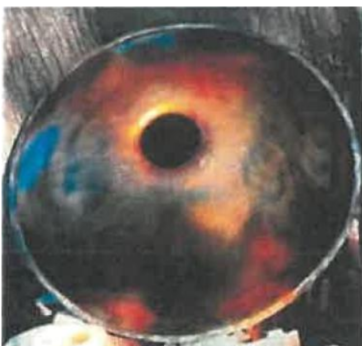
164.5 Mystic Ones (K-I, RB Section 3e, line 206; Rejoinder II, line 29, p. 1676)

164.6 Sonorous Union (K-I, RB Section 3f, para. 207; Rejoinder II, para. 30, p. 1676)

164.7 Modern Simplicity (K-I, RB Section 3g, line 208; Replica II, line 31, p. 1677)

164.8 Spirit Waves (K-I, RB, para. 3h, line 209 et seq.; Rejoinder II, line 32, p. 1677)

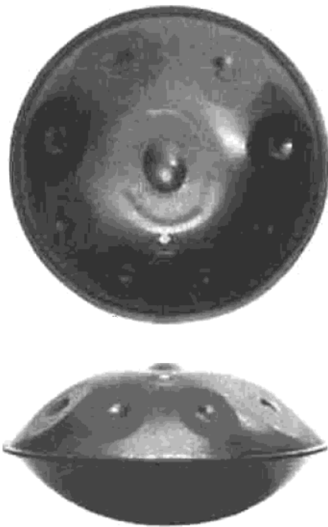
164.9 Windharps (K-I, RB Section 3i, line 211 et seq.; Rejoinder II, line 33, p. 1677)



The same applies (to a limited extent) to this "handpan" as well. Unlike the "Hang," this instrument features a single, additional raised tone field on the upper half of the bowl, as well as a laterally offset dome (see also K-I, para. 212, p. 125). Although the court considers modifications in this regard theoretically suitable for breaking with the circular shape or polarity (see also E. 95.13, 95.14, 96 above), the circular arrangement and the contrast between the (single) dome and the opposing resonance hole, in addition to the lens shape, remain just

and not merely adopted as inspiration, especially since an examination of the elements justifying the copyright protection of the "Hang" within the context of an overall assessment does not allow for the conclusion that these elements fade in the new design, i.e., are unrecognizable. The addition of merely a single, visually subordinate-seeming additional tone field—even with a slight shift of the (single) central dome—does not in itself cause this "handpan" to fall outside the scope of protection of the "Hang," especially since the relationship between the two halves of the shell ("top" and "bottom") has not been altered. Even when combined with the other changes cited—such as, in particular, the oval dome or shoulder, indentations, more distinctive tone fields in the color scheme, or the specific dimensions (see K-I, para. 212, p. 125)—this assessment remains unchanged. Consequently, the same applies here as for the "handpans" examined above.

164.10 Instrument 7 made of nitrided steel (K-I, RB Section 3j, para. 213; Replica II, para. 34, p. 1678)



164.11 Instrument 7 made of stainless steel (K-I, RB Section 3k, para. 214; Rejoinder II, para. 34, p. 1678)

Conclusion

165. In conclusion, it must be noted that none of the 11 “handpans” submitted by Plaintiffs 3 and 4 falls outside the scope of protection of the “Hang.”

The complaint, i.e., K-I, RB para. 3 and para. 3.1, is to be dismissed to the extent that it is admissible
.

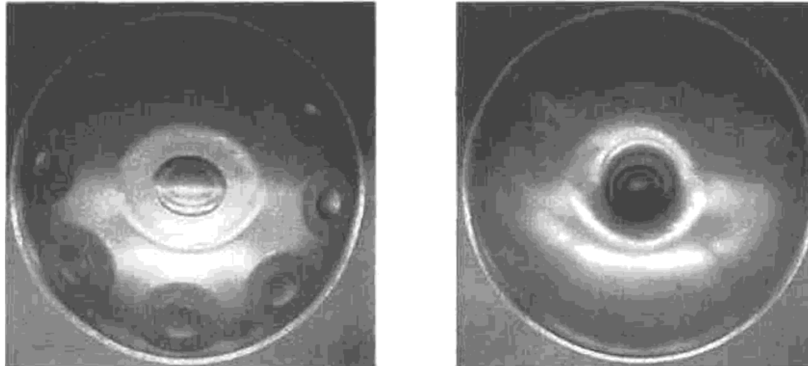
Instruments of Plaintiffs 5–9

166. The “handpans” depicted below from K-I, paras. 221–228, 233–240, 247–262, 265–268, 271 et seq., 275 et seq. (pp. 130–136, 141–148, 155–170, 173–176, 179 et seq., 183 et seq.)
incorporate the relevant elements resulting from the arrangements, combinations, and selections made by Defendants 2 and 3 **in** a recognizable manner. For the assessment, reference may be made to E. 156 above, which applies analogously to the following instruments.

167 The alleged modifications (see K-I, para. 221 et seq., pp. 130 et seq.; Replica I, para. 529 et seq., p. 1853 et seq.), such as oval and larger and/or unpolished domes, indentations on the dome, one additional tone field (while retaining the circular shape), tone fields of varying sizes or “more distinctive” tone fields, different color schemes, decorations/engravings, differently colored undersides, smoother surfaces, varying dimensions (e.g., diameter/height), oval and/or “prominent” shoulders, differences in the size of the tone fields, a damper in the sound hole, etc., do not alter this conclusion in light of these similarities. Thus, in the present case, these changes—neither individually nor in combination—result in the adaptation no longer being recognizable (which is why the threshold of “mere” inspiration has been exceeded), especially since even a consideration of the elements justifying the copyright protection of the “Hang” within the framework of an overall assessment would not lead to the conclusion that these elements fade in the new design, i.e., are unrecognizable.

168. Specifically, the works in question are the following:

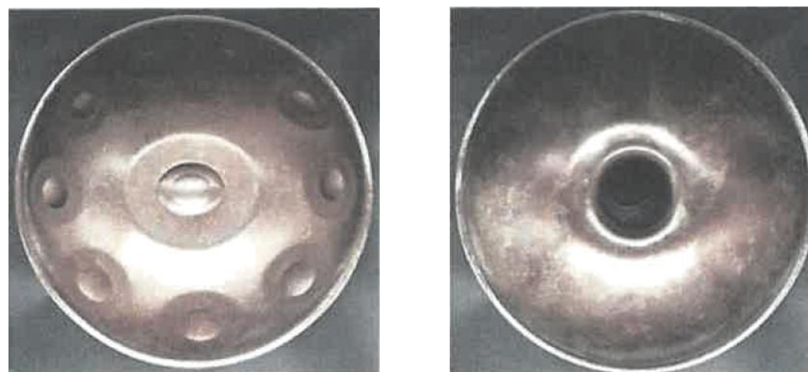
168.1 Ayasa Annaziska 9+1 and D Kurd 9+1 (K-I, RB § 4a, 4c, para. 222 et seq., 225 et seq.; Rejoinder I, para. 529 et seq.)



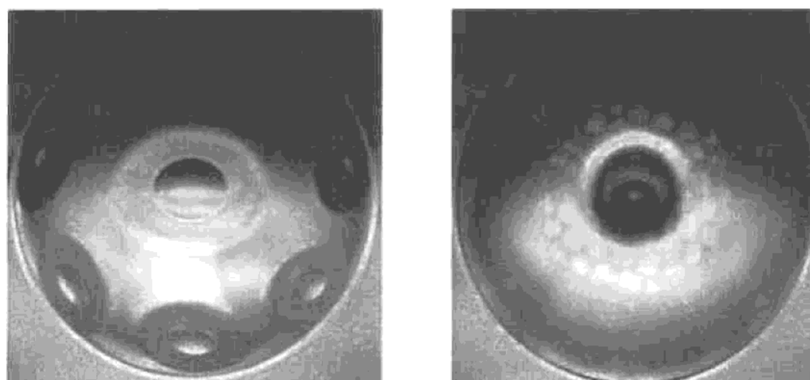
168.2 Ayasa Ashakiran 9+1 (K-I, RB para. 4b, margin note 224; Rejoinder I, margin note 532)

Since, according to the plaintiffs, this is "Instrument 1" of Plaintiffs 1 and 2, reference can be made to the above, in particular E. 156 et seq.

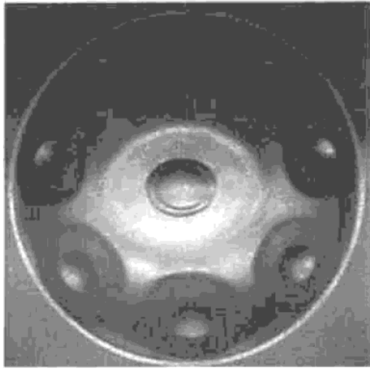
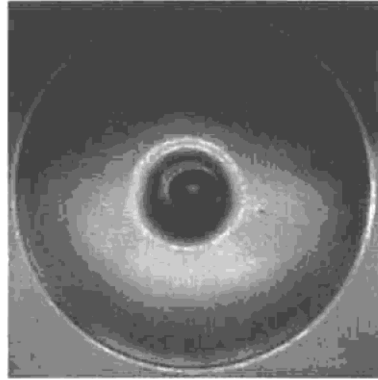
168.3 Ayasa STL E Romanian Hijaz 9+1 (K-I, RB para. 4d, para. 227 et seq.; Rejoinder I, para. 533 et seq.)



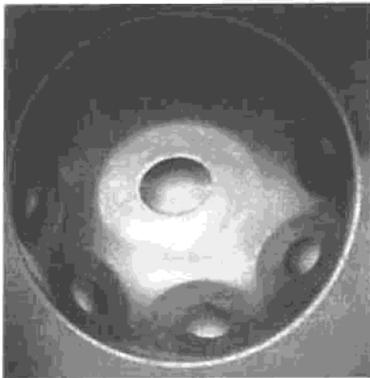
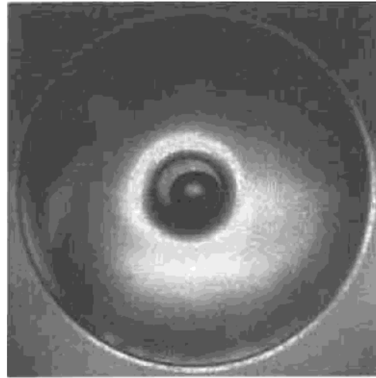
168.4 Gio D Amara 8+1 (K-I, RB para. 4g, para. 233 et seq.; Rejoinder I, para. 542 et seq.)



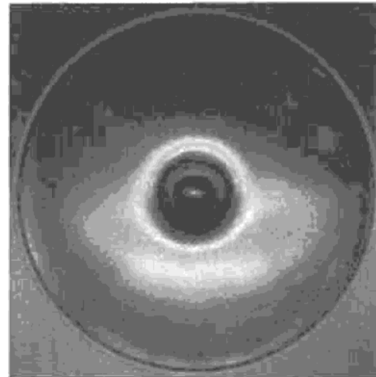
168.5 Gio C Avebury 8+1 (K-I, RB Section 4h, para. 235 et seq., 372 et seq.; Rejoinder I, para. 545 et seq.)

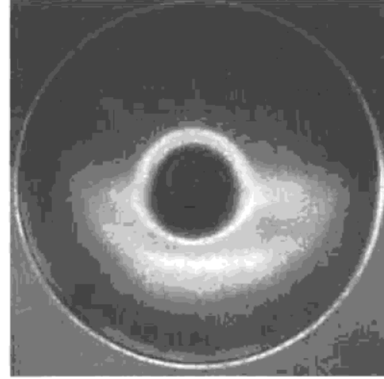
168.6 Gio C# Pygmy 9+1 (K-I, RB Section 4i, para. 237 et seq.; Rejoinder I, para. 548 et seq.)

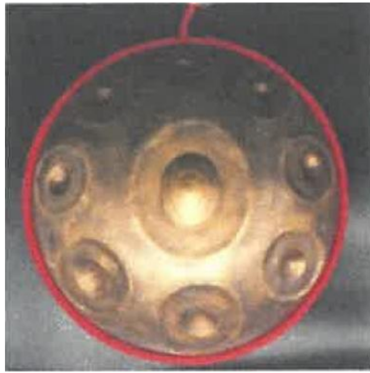
168.7 Gio E Pygmy 9+1 (K-I, RB Section 4j, para. 239 et seq.; Rejoinder I, para. 551 et seq.)



168.8 Soulshine 8+1 C Ursa Minor and C# Annaziska (K-I, RB Sec. 4n, 4o, para. 247 et seq., 249 et seq.; Reply I, para. 563 et seq.)



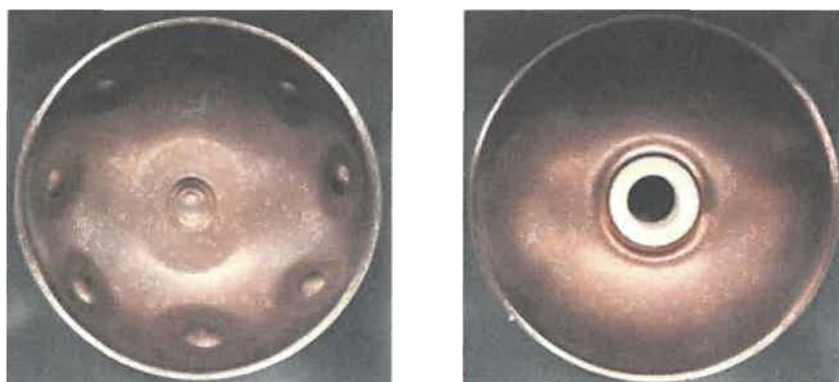
168.9 Soulshine 14+1 (K-I, RB § 4p, para. 251 et seq.; Rejoinder I, para. 566 et seq.)



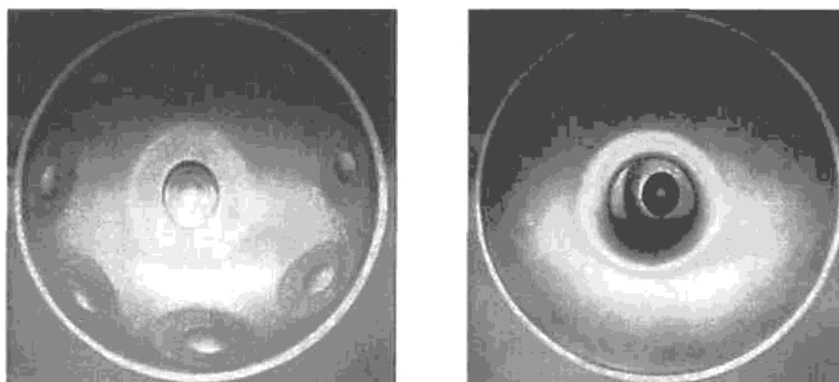
The same assessment applies—albeit only marginally—to this "handpan" as well: Here, too, the lens shape is recognizably adopted as the starting point, featuring a central dome attached to the instrument and protruding from it, as well as an opposing resonance hole and circular tone fields arranged in a circle around the dome. Admittedly, this instrument *additionally* features circular tone fields of varying sizes on the lower half of the bowl. However, this does not replicate the element of contrast between the two halves of the bowl (the upper half equipped with tone fields, the lower half empty and smooth), which was a factor that weighed in favor of the instrument in the assessment (Decision of July 2, 2024, E. 96.2, 101, 104) was implemented differently in the present case. It does seem conceivable that this "handpan" could also be played "upside down." Furthermore, oval shapes and a new element (tone fields of distinctly different sizes on the underside) are used in the present case. Nevertheless, and although changes in this regard may be relevant to breaking with the element of contrast between the two halves of the shell, the creative individuality of the original authors is still very clearly expressed in the adopted elements in the present case, especially since an examination of the elements justifying the copyright protection of the "Hang" within the context of an overall assessment would still fall just short of allowing the conclusion that these elements fade into the background in the new design—that is, that they are unrecognizable. Consequently, the addition of further tone fields in the form of (another) circle on the lower half of the shell does not yet result in this "handpan" falling outside the scope of protection of the "Hang" (even if combined with the other asserted modifications), especially since, ultimately, the circular shape present on the upper half of the shell

is transferred to the lower segment. The combination of the lens shape and the dome—which is considered particularly distinctive (see decision of July 2, 2024, para. 104)—is not "reinforced" by the differently designed bowl halves in this case, but it is also not sufficiently weakened. Reference is made to para. 166.

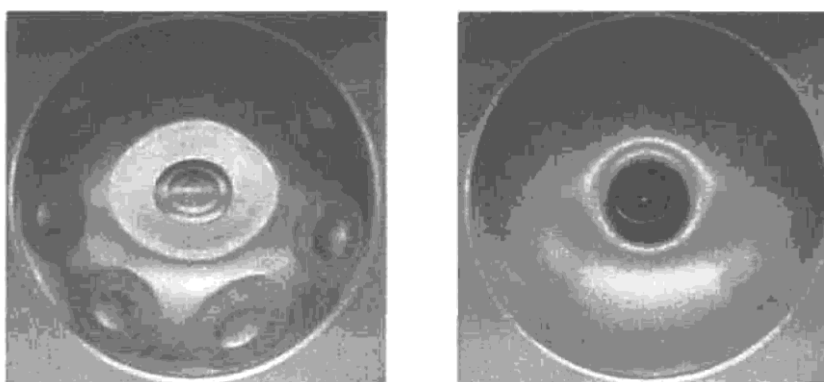
168.10 Leaf Mini B La Sirnea 8+1 (K-I, RB para. 4q, margin note 253 et seq.; Rejoinder I, margin note 569 et seq.)



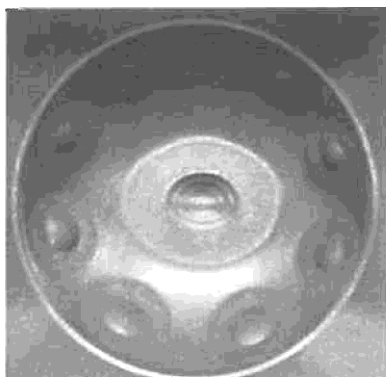
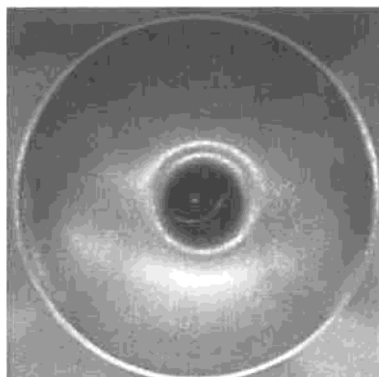
168.11 Leaf Mini Avalon 8+1 (K-I, RB § 4r, para. 255 et seq.; Rejoinder I, para. 572 et seq.)



168.12 MAG 8+1 Amara and Annaziska (K-I, RB Sec. 4s and 4t, para. 257 et seq., 259 et seq.; Rejoinder I, para. 575 et seq.)

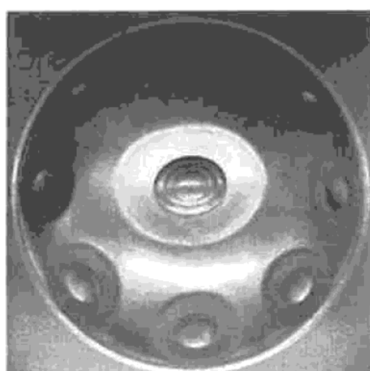
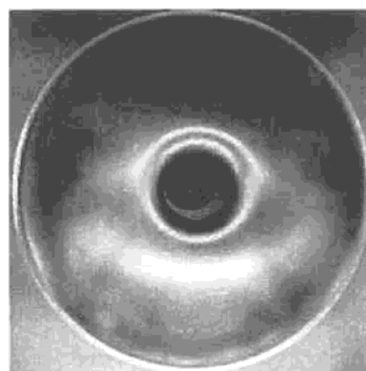


168.13 MAG 9+1 D Kurd (K-I, RB Section 4u, line 261 et seq.; Replica I, line 578 et seq.)

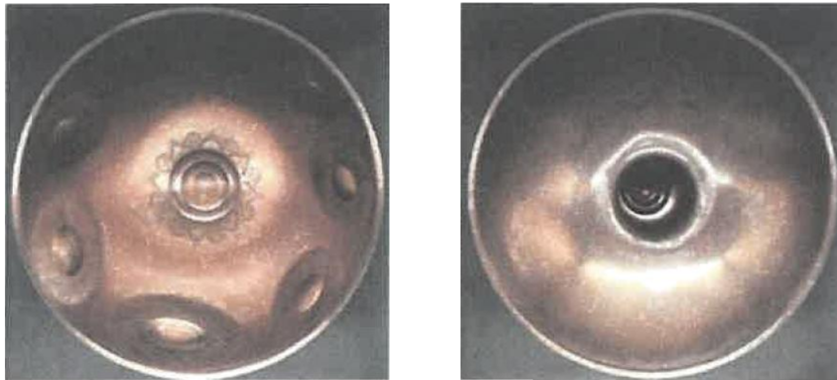



168.14 Manik Asha 8+1 (K-I, RB para. 4w, para. 265 et seq.; Rejoinder I, para. 584 et seq.)

168.15 Manik D Kurd 9+1 (K-I, RB Section 4x, para. 267 et seq.; Rejoinder I, para. 587 et seq.)

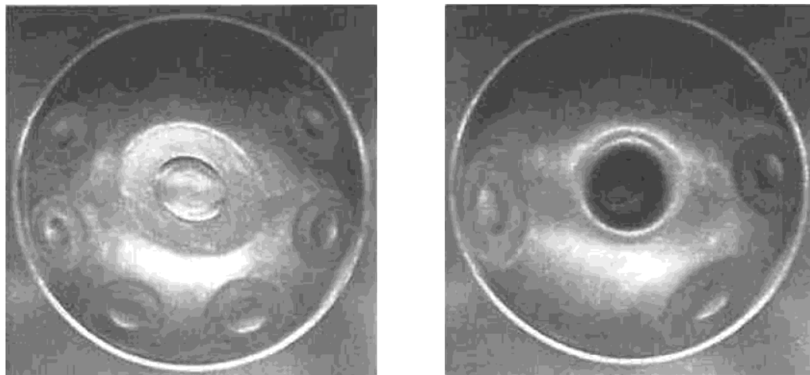



168.16 Taopan 8+1 (K-I, RB Section 4z, para. 271 et seq.; Rejoinder I, para. 593 et seq.)



Regarding the additional dome in the sound field circle (see illustration at bottom left), reference can be made to E. 159, as discussed above.

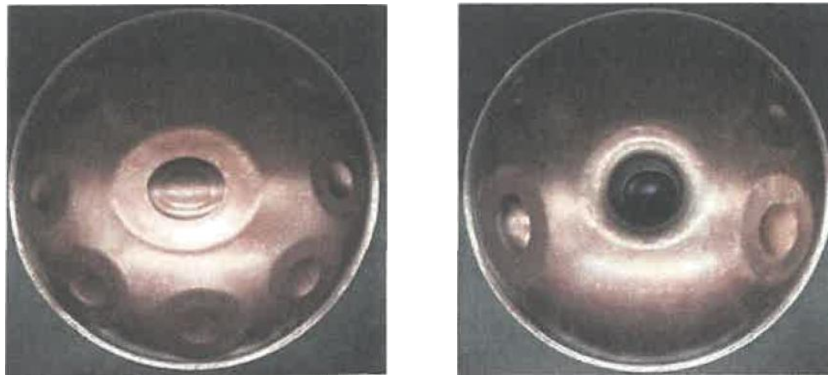
168.17 Karumi D Celtic 12+1 (K-I, RB Section 4bb, para. 275 ff.; Replik I, para. 599 ff.)



In this regard, reference can be made by analogy to the “Handpan” “Soulshine 14+1” in E. 168.9 above (a *fortiori).* Unlike the referenced “handpan,” the present model features only three additional tone pads on the lower half of the bowl, which is why the interplay between the contrasting halves of the bowl—specifically the clear distinction between “top” and “bottom”—is even less significant. The addition of merely three “ordinary” tone fields on the lower half of the bowl is therefore insufficient to cause this “handpan” to fall outside the scope of protection of the
“Hang” (even taking into account the other asserted modifications). Reference is made to E. 166.

169. In contrast, the following instruments fall **outside the scope of protection:**

169.1 Ayasa Ashakiran 15+1 stainless steel (K-I, RB para. 4e, margin note 229 et seq.; Replica I, margin note 536 et seq.)

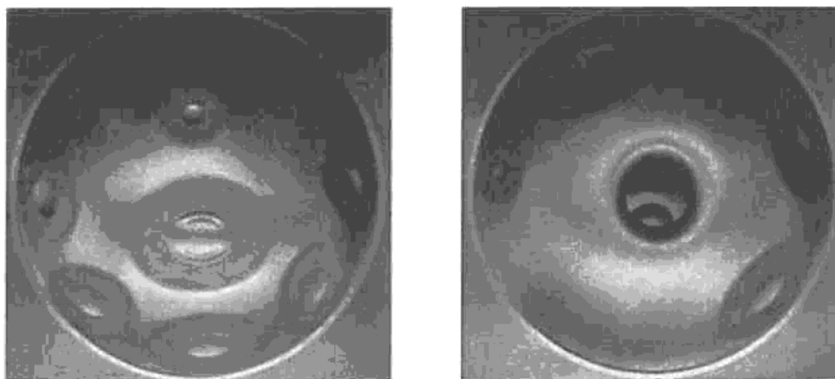


Individual elements, such as the lens shape and the circularly arranged tone fields, are recognizably adopted. In this instrument, the horizontal line pattern is broken by the addition of a semicircle on the lower half of the bowl, consisting of tone fields *and* domes of varying sizes. In contrast to the previously mentioned "Soulshine 14+1" model (E. 168.9), this element—particularly due to the additional domes—shifts the focus away from the central dome at the top toward the lower half of the bowl. Consequently, due to the dome placed on the lower half of the shell and extending horizontally downward from the resonating body, there is no longer a clear vertical axis between the central dome and the resonance hole. Thus, due to the additional tone fields—including a dome—this "handpan" sufficiently departs from the clear "top" and "bottom" characteristic of the "Hang," especially since the underside features an additional (transversely downward-facing) dome and, in this case, distinctly oval shapes were also employed (particularly the central tone field, including the dome). In this case, therefore,
— in contrast to E. 168.9 above — it can barely be considered mere inspiration. Although a certain concentricity remains due to the use of a central oval dome and the tone fields circling around it, (only) in the elements that have been recognizably adopted does the creative individuality of the authors fall very slightly short of being expressed; or, viewed as a whole, the elements justifying copyright protection fade very slightly in the new design and are therefore not recognizable. Reference is also made to E. 160.3 above.

169.2 Ayasa Ashakiran 15+1 nitrided steel (K-I, RB para. 4 et seq., para. 231 et seq.; Rejoinder I, para. 539
ff.)

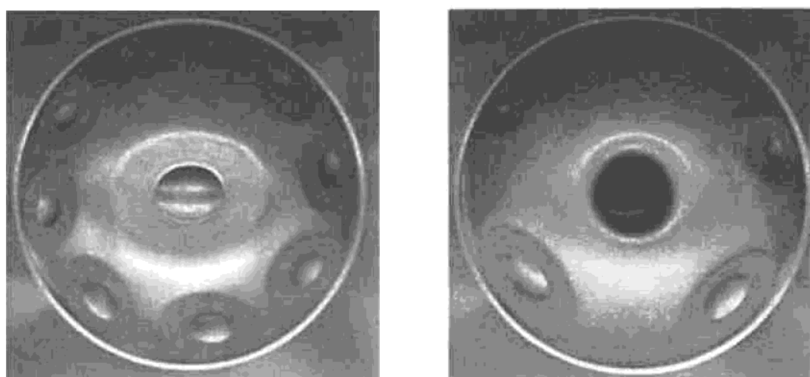
In this regard, reference is made to E. 169.1 above, especially since this "handpan"—apart from its color—visually corresponds to the model made of stainless steel.

169.3 Gio Equinox 14+1 (K-I, RB para. 4k, para. 241 et seq.; Replica I, para. 554 et seq.)



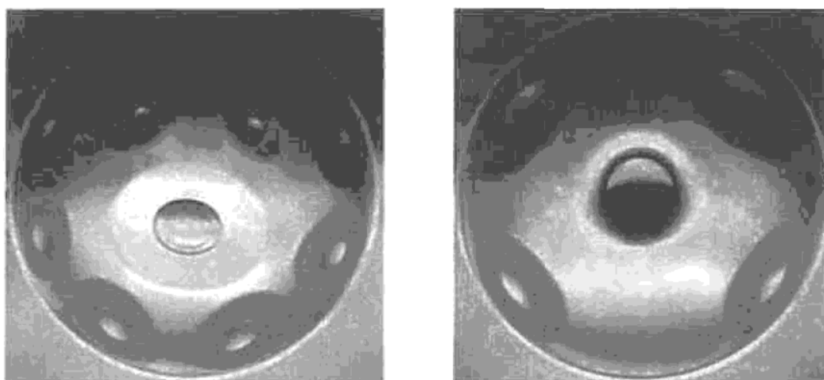
This “handpan” recognizably incorporates the lens-shaped element. The instrument features an additional, raised tone field on the upper half of the bowl and an offset dome. In combination with the distinct offset of the dome, this instrument plays with the elements of the (solely) circular arrangement of the tone fields (see also the decision of July 2, 2024, 96.2, p. 1489) as well as the dome as a clear center, especially since there are also “engravings” along the vertical axis between the dome and the sound hole. Added to this is the combination with the additional tone fields of varying sizes arranged in a semicircle on the lower spherical segment, which plays with the clear distinction between “top” and “bottom” (horizontal lines) (and in which lies a significant difference from the “handpan” “wind harps” of Plaintiffs 3 and 4 discussed above [E. 164.9]). It must also be taken into account that oval shapes were used (particularly for the central tone field and the dome). In the adopted elements (either alone or in combination), the creative individuality of the original authors is not expressed; rather, the elements justifying copyright protection fade into the background when viewed as part of the overall design of the new work and are therefore not recognizable.

169.4 Gio Ashakiran 15+1 (K-I, RB para. 41, margin note 243 et seq.; Rejoinder I, margin note 557 et seq.)



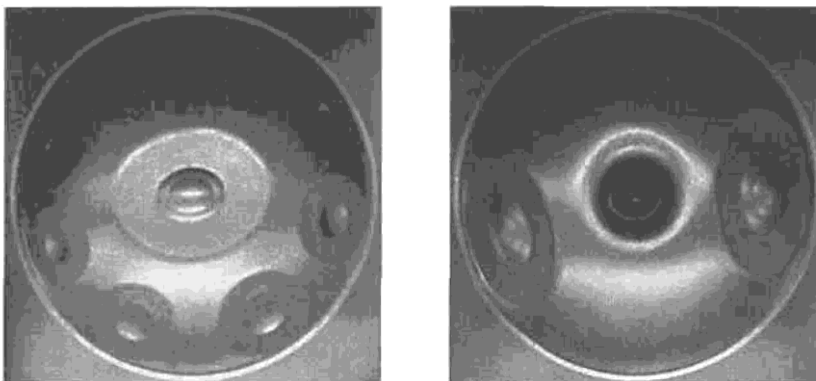
In this regard, reference may be made to E. 169.1 above. These remarks apply accordingly.

169.5 Gio E Kurd 15+1 (K-I RB para. 4m, margin note 245 et seq.; Rejoinder I, margin note 560 et seq.)



Reference can be made here to E. 169.3 above. Unlike the "Handpan" referred to, this instrument additionally features two raised tone fields as well as tone fields arranged in the shape of a
"square." Thus, this "handpan" departs more significantly from the circular arrangement of tone fields than the aforementioned "Gio Equinox 14+1," particularly since a "new" geometric element has been incorporated on the underside and oval shapes have also been used (central tone field including a dome). This further widens the gap from the "Hang," which is why its scope of protection is clearly no longer affected.

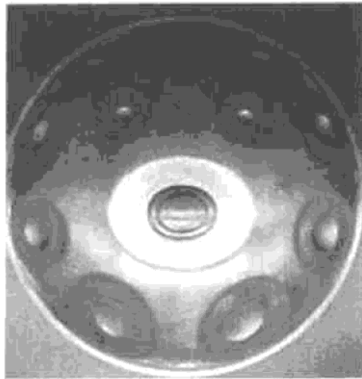
169.6 MAG 11+1 E Pygmy (K-I RB Sec. 4v, para. 263 et seq.; Replica I, para. 581 et seq.)



In this regard, reference can be made to E. 169.1 above. Unlike the referenced instrument, this "handpan" has two additional domes on the lower spherical segment, which sufficiently disrupts the clear horizontal division (distinct "top" and "bottom") found in the "Hang." The ratio of the domes to the resonance hole is also altered due to the two additional domes on the underside (change in the vertical axis). In addition, oval shapes were also used in this design (particularly in the area of the central tone field and the domes), and the domes attached to the underside extend across large portions of the segment, thereby standing out visually. In the adopted elements (alone or in combination), the

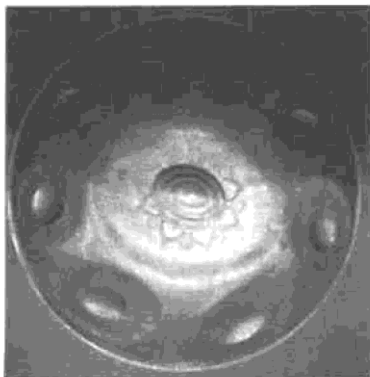
creative individuality of the original authors is not quite expressed, or rather, the elements justifying copyright protection are barely discernible when viewed as a whole within the new design and are therefore not recognizable.

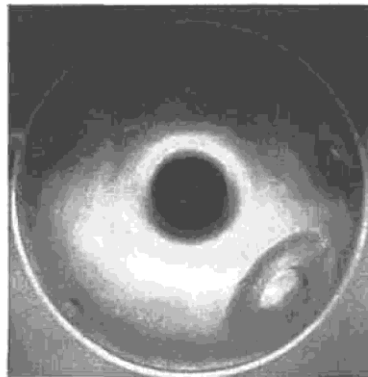
169.7 Manik F Low Pygmy 15 (K-I, RB para. 4y, margin note 269 et seq.; Replica I, margin note 590 et seq.)



In this regard, reference can be made to E. 169.3 and E. 169.5 above. Unlike the referenced “handpans,” this model features four domes on the underside, which, as with the instrument from E. 169.5, are arranged in the shape of a “quadrangle.” Clearly, the scope of protection is no longer affected overall.

169.8 Taopan 12+1 C# Annaziska (K-I, RB para. 4aa, margin note 273 et seq.; Replica I, margin note 596 et seq.)





For the assessment, reference can be made analogously to E. 169.1 above.

Conclusion

170. In conclusion, it should be noted that 8 of the total of 28 “handpans” submitted by Plaintiffs 5–9 do not infringe upon the scope of protection of the “Hang.”

It is determined that Plaintiffs 5–9 do not infringe the Defendant’s copyrights in the “Hang” in Germany by offering, etc., the “Handpans” in accordance with K-I, RB Sections 4e, 4f, 4k, 4l, 4m, 4v, 4y, and 4aa.

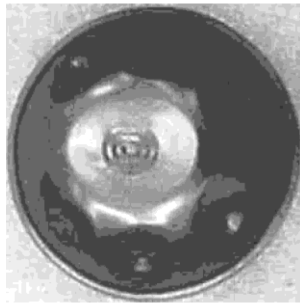
Instruments of Plaintiff 10

171. The “Handpans” depicted below from K-II, paras. 190 et seq., 220 et seq., 250 et seq., 258 et seq., 262 et seq., and 270 et seq., 272 et seq. (pp. 118 et seq., 148 et seq., 178 et seq., 186 et seq., 190 et seq., 198 et seq., 200 et seq. [HG 20 133]) incorporate the relevant elements resulting from the arrangements, combinations, and selections made by Defendants 2 and 3 in a recognizable manner. For the assessment, reference may be made to the preceding remarks, in particular E. 156.

172. The alleged **modifications** to the specific “handpans”—such as the specific dimensions and weight specifications, different height-to-width ratios, oval rather than round and/or unpolished domes, smoother surfaces, more pronounced tone fields and/or shoulders, engravings, tone fields of varying sizes, plastic rings around the resonance opening, more angular shoulders, the color of the instrument or the outer ring, different colors for the upper and lower shells, or a patina (see also K-II, para. 250 et seq., p. 178 et seq. [HG 20 133]; cf. also the minutes of the continued general meeting, p. 26 et seq., pag. 2077 et seq.) as well as a differently proportioned lens shape, a different rate of curvature of the shell’s arch, differences regarding the height and diameter of the central dome, differences in the circular arrangement of the sound fields with respect to the shape, size, and depth of the sound fields, etc., do not alter this conclusion. Thus, in the present case, these changes—neither individually nor in combination—result in the adaptation no longer being recognizable (which would constitute more than “mere” inspiration); rather, the elements justifying copyright protection do not fade into the background when viewed as a whole in the new design and are therefore recognizable.

173. The following instruments fall within the scope of protection of the “Hang.” They are as follows:

173.1 Harmonic Art HC15 / HM15 (K-II, RB para. 2e, 2x, para. 190 et seq., 228 et seq.; Rejoinder II, para. 36, p. 1679)



This “handpan” features an additional circle of tone fields on the underside (see also K-II, para. 190 et seq., para. 228 et seq., pp. 118 et seq., 156 et seq. [HG 20 133]). This case is to be assessed in the same manner as that of the “Soulshine 14+1” instrument of Plaintiffs 5–9, which is why reference is made here to E. 168.9 above. This is not altered by the fact that, according to the plaintiffs, the dome features “distinctive indentations” (K-II, para. 191, 229, pp. 119, 157 [NG 20 133]). Consequently, these “handpans” do not (barely) fall outside the scope of protection of the “Hang.”

173.2 Harmonic Art HM12 Amara CPI, Kurd D, Mystic C#, Ursa Minor D, (K-II, RB paras. 2t, 2u, 2v, 2w, paras. 220–227)

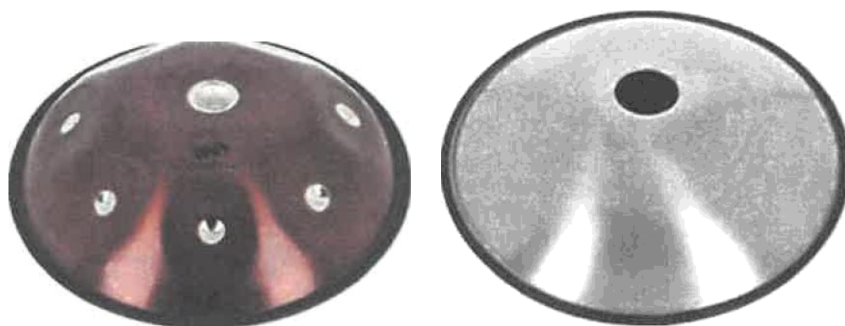
The “handpans” illustrated in K-II, lines 220–227, pp. 148–155 (HG 20 133) are described almost identically and can be discussed together. The “handpans” illustrated here feature a large circular arc consisting of four tone fields on the lower half of the bowl, which creates an element of contrast (though to a lesser extent than in the “handpan” HC15 / HM15 discussed earlier). Otherwise, this model corresponds to the “handpan” discussed above (see also E. 173.1). For the remainder of the discussion, please refer to
E. 168.17. The addition of four “ordinary” tone fields

on the lower half of the bowl is therefore not sufficient to cause this “Handpan” to fall outside the scope of protection of the “Hang” (even taking into account the other asserted modifications).

173.3 RAV Vast RAV Pan D Celtic Minor, D Hijaz, D Major, F Pygmy (K-II, RB paras. 2ii, 2jj, 2kk, 211, paras. 250–257; Rejoinder II, para. 39, p. 1680)

The “handpans” depicted in K-II, paras. 250–255, pp. 178–183 (NG 20 133) are described in virtually identical terms—apart from differences in color—which is why a mere difference in color does not lead to a different conclusion. The changes proposed for these “handpans”—including the color scheme and the aforementioned additional plastic ring around the resonance hole (see only K-II, para. 251 vii, p. 179 [HG 20 133])—do not alter the recognizable incorporation of the elements justifying protection pursuant to E. 171 et seq. The fact that the instrument “RAV Vast RAV Pan F Pygmy” from K-II, RB para. 211 (see illustration below) **additionally** features two tone fields on the lower half of the bowl does not alter this either. For further assessment, see
E. 168.9, 168.17, and 173.2 by analogy.

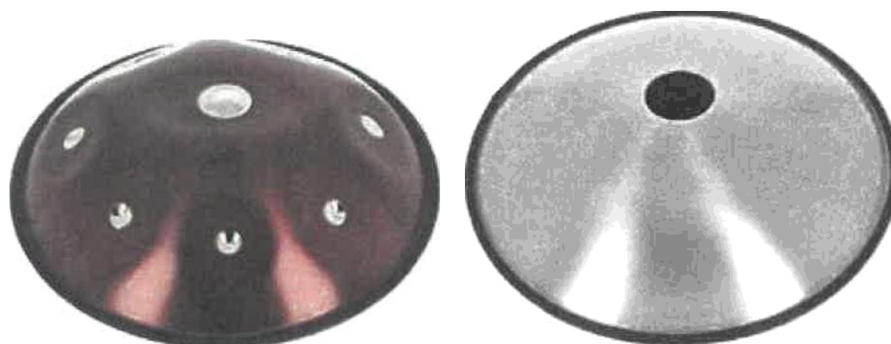
173.4 Metal Sounds Spacedrum Hitzazkiar (K-II, RB Section 2mm, Line 258 et seq.)



173.5 Metal Sounds Spacedrum Nitro Amara D, Celtic minor D, Equinox F, Sonoro D (K-II, RB Item 2oo, 2pp, 2qq, 2rr, lines 262–269)

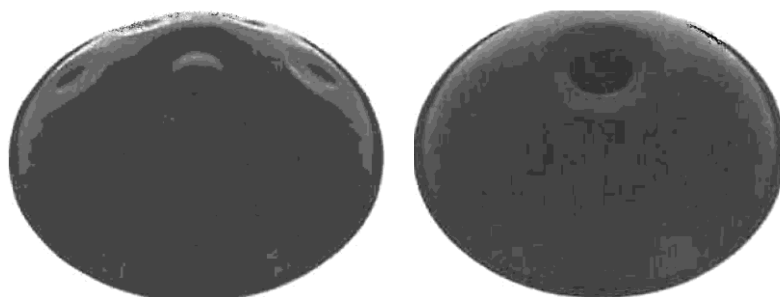
The “handpans” depicted in K-II, lines 262–269 (pp. 190–197 [NG 20 133]) are described in virtually identical terms—apart from differences in color. This does not lead to a different assessment.

173.6 Metal Sounds Spacedrum Ragadesh (K-II, RB Section 2ss, paras. 270 ff.)



173.7 SEW Handpan Basic Line / Professional Line (K-II, RB items 2tt, 2uu, 2vv, 2ww, 2xx, 2yy, 2zz, 2aaa, 2bbb, 2ccc, 2ddd, 2eee, lines 272–295)

The “handpans” depicted in K-II, para. 272–295 (pp. 200–223 [HG 20 133]) are described in virtually identical terms—apart from variations in color—and a different assessment is not warranted.



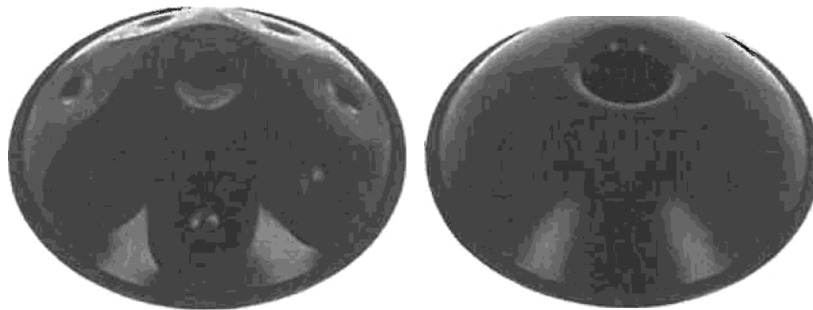
174. In contrast, the following instruments **no longer** fall **within the scope of protection** “Hang”:

174.1 Harmonic Art. HB1/2/3/4 HuBass (K-II, RB items 2a, 2b, 2c, 2d, paras. 182–189; Rejoinder II, para. 35, p. 1678)

The “handpans” depicted in K-II, paras. 182–189 (p. 110 ff. [HG 20 133]) and Rejoinder II, para. 35 (p. 1678) are described as being nearly identical. The lens shape and a resonance hole, located centrally on the lower half of the bowl, are recognizably reproduced. These “handpans” do not have a dome. Consequently, on the one hand, the element of a vertical axis leading to the resonance hole is missing, and on the other hand, there is no discernible central point around which the (mere) three existing tone fields would “circle.” Furthermore, their arrangement is no longer circular but can be perceived as “triangular” (see also the decision of July 2, 2024, E. 96.2, p. 1489). The tone fields extend over a large portion of the upper half of the shell. The areas in between form a symmetrical “Y.” In the adopted elements (alone or in combination), the creative individuality of the original authors is not expressed,

especially since an examination of the elements underlying the copyright protection of the “Hang”—viewed as a whole—leads to the conclusion that these elements fade in the new design and are therefore unrecognizable. The scope of protection of the “Hang” is clearly no longer affected.

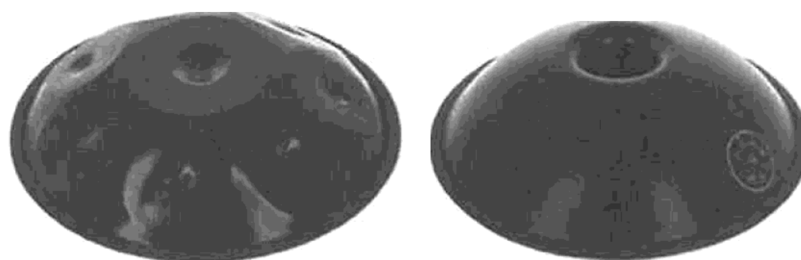
174.2 Harmonic Art HD (K-II, RB paras. 2f, 2g, 2h, 2i, 2j, 2k, 21, 2m, 2n, 2o, 2p, 2q, 2r, 2s, paras. 192–219; Rejoinder, II, para. 37)



The “Handpans” depicted in K-II, paras. 192–219 (p. 120 ff. [HG 20 133]) and Rejoinder II, para. 37 (p. 1679) are described in the same way and can be dealt with together. They do not have a dome placed at the top center, but rather a **recess** in the center of the top surface (see only K-II, para. 193 i, ii, p. 121 [NG 20 133]).

This “handpan” adopts the lens shape, circularly arranged tone fields on the top surface, and a resonance hole at the center of the bottom. Also recognizable is the separation between the upper half of the bowl with tone fields and the lower half without tone fields. However, without a dome, this “handpan” lacks the central point around which the tone fields could circle (concentricity). Furthermore, both central areas of the bowl halves (the indentation at the top and the resonance hole at the bottom) lead inward and toward each other, which is why no vertical, converging axis is recognizable here either. Added to this is the use of oval shapes (particularly in the area of the central tone field, including the indentation). In the adopted elements (alone or in combination), the creative individuality of the original creators is (barely) not expressed, especially since an examination of the elements justifying the copyright protection of the “Hang” within the context of an overall view leads to the conclusion that these elements fade into the background in the new design and are therefore unrecognizable.

174.3 Meinl Handpan HD3 Raga Desya Todi (K-II, RB para. 2fff, margin note 296 f.)

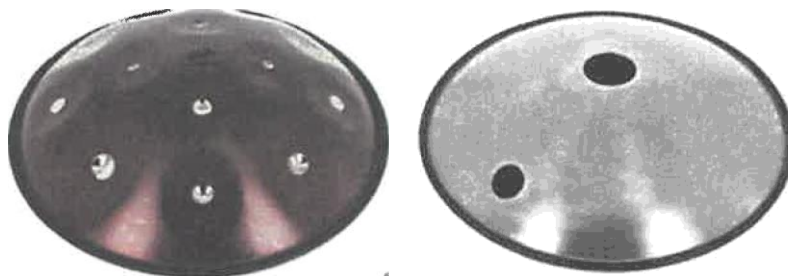


The remarks just made apply analogously to this "Handpan" as well (see K-II, para. 296 et seq., p. 224 et seq. [NG 20 133]).

174.4 Harmonic Art HR (K-II, RB Sec. 2y, 2z, 2aa, 2bb, 2cc, 2dd, 2ee, 2ff, 2gg, 2hh; para. 230–249; Rejoinder II, para. 38, p. 1680)

The "handpans" depicted in K-II, paras. 230–249 (p. 158 ff. [NG 20 133]) are described in the same way and can be discussed together. The lens shape and the circular arrangement of the tone fields on the upper half of the shell are clearly recognizable. This "handpan" has no dome on top (but rather a resonance hole) and a smooth underside (without a resonance hole). Although a horizontal separation between the upper and lower shells is also evident here, the resonance hole leads into the instrument from above, especially since it is located on the side equipped with tone fields. Compared to the "Hang," there is thus, as it were, a (partial) reversal. The creative individuality of the original creators is not expressed in the adopted elements (whether alone or in combination), especially since an examination of the elements underlying the copyright protection of the "Hang"—viewed as a whole—leads to the conclusion that these elements fade into the background in the new design and are therefore unrecognizable. The scope of protection of the "Hang" is clearly no longer affected.

174.5 Metal Sounds Spacedrum Chromatic (K-II, RB para. 2nn, margin note 260 et seq., p. 188 et seq. [HG 20 133]; Rejoinder II, margin note 40, p. 1681)



In this case, the lens shape is adopted. This instrument does not have a dome. On the upper half of the shell, four tone fields are placed instead of a central tone field (with a dome). As a result, the arrangement of the tone fields no longer appears circular but resembles that of a steel pan (see the illustrations from Protocol IV of October 11, 2021 [revised, version of January 24, 2022], p. 13
f. [Figure 1: Steel pan viewed from the front] (p. 501) or the figure from K-I, para. 45, both reproduced in E. 110.3 above).

Furthermore, an additional resonance hole has been cut into the lower half of the shell. Although a horizontal separation between the upper and lower shells is still discernible here, this “handpan” clearly no longer falls within the scope of protection of the
“Hang.” The creative individuality of the original authors is not expressed in the adopted elements (either alone or in combination), especially since an overall assessment of the elements justifying the copyright protection of the “Hang” does not lead to the conclusion that these elements are obscured in the new design—that is, that they are unrecognizable.

175. According to its statement, Plaintiff 10 also distributes instruments manufactured by Plaintiff 12 (see K-II, RB para. 2ggg, margin note 298) as well as by **Plaintiffs 16 and 17,** who have since withdrawn from the case (K-II, RB para. 2hhh, para. 299) and, in its claims, submitted precisely these instruments to the court for additional review.

Since **Plaintiff 12’s** instruments are to be examined accordingly, the result for Plaintiff 10 corresponds to that of Plaintiff 12 (K-II, RB § 2ggg in conjunction with 3a through 31). Reference is made to the explanations provided there.

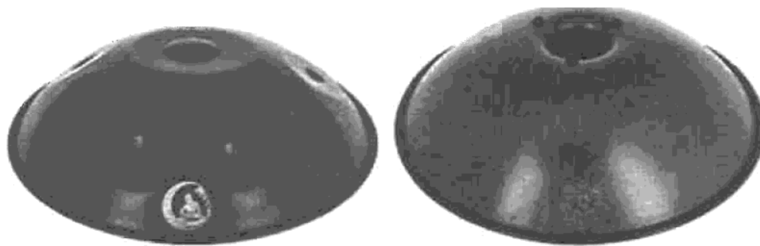
With regard to the **instruments of Plaintiffs 16 and 17**, it can be noted that these all fall within the scope of protection of the “Hang.” In this regard, reference can be made by analogy to E. 156. In view of the adopted elements, the asserted differences—such as, in particular, different dimensions, oval rather than round domes or and/or unpolished domes, indentations on the dome, more distinctive tone fields, oval rather than round tone fields, differences in size between the tone fields, engravings/imprints, nubs on the underside, the color of the instrument and the outer ring, or a smoother surface (see K-II, para. 344

et seq. and para. 357 et seq., pp. 255 et seq., 268 et seq. [NG 20 133]) do not alter this assessment.

The following "handpans" are involved:

175.1 Moon Cis-Ziska (K-II, RB Section 2hhh in conjunction with 4a, para. 345 et seq.)

175.2 Moon D-Integral (K-II, RB Section 2hhh in conjunction with 4b, para. 347 et seq.)



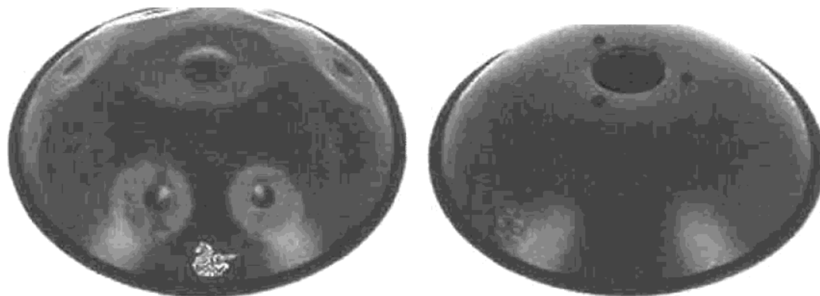
175.3 Moon D-Minor (K-II, RB Section 2hhh in conjunction with 4c, para. 349 et seq.)

175.4 Moon F Akebono (K-II, RB Section 2hhh in conjunction with 4d, Margin No. 351 et seq.)

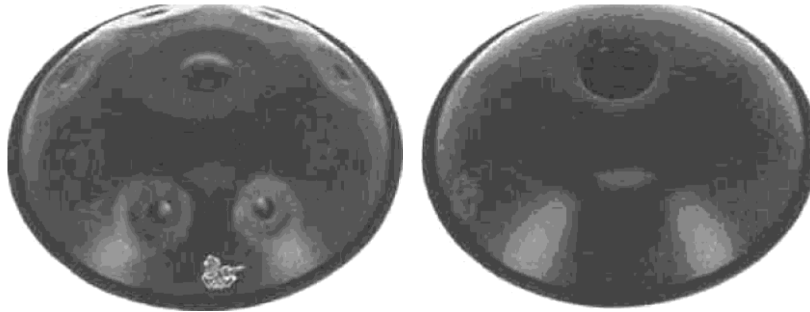
175.5 Moon D Hijaz (K-II, RB Section 2hhh in conjunction with 4e, para. 353 et seq.)

175.6 Moon Low Pygmy C (K-II, RB Section 2hhh in conjunction with 4f, Margin No. 355 et seq.)

175.7 Shamanic D Django (K-II, RB Section 2hhh in conjunction with 4g, para. 357 et seq.)



175.8 Shamanic D Hijaz (K-II, RB Section 2hhh in conjunction with 4h, Margin No. 359 et seq.)



175.9 Shamanic D-Moll (K-II, RB Section 2hhh in conjunction with 4i, para. 361 et seq.)

175.10 Shamanic F Akebono (K-II, RB Section 2hhh in conjunction with 4j, Margin No. 363 et seq.)

Conclusion

176. In conclusion, it should be noted that 30 of the total of 80 “handpans” submitted by Plaintiff 10 (58 [Plaintiff 10’s instruments] + 12 [Plaintiff 12’s instruments] + 10 [Plaintiffs 16 and 17’s instruments]) do not infringe upon the scope of protection of the “Hang.”

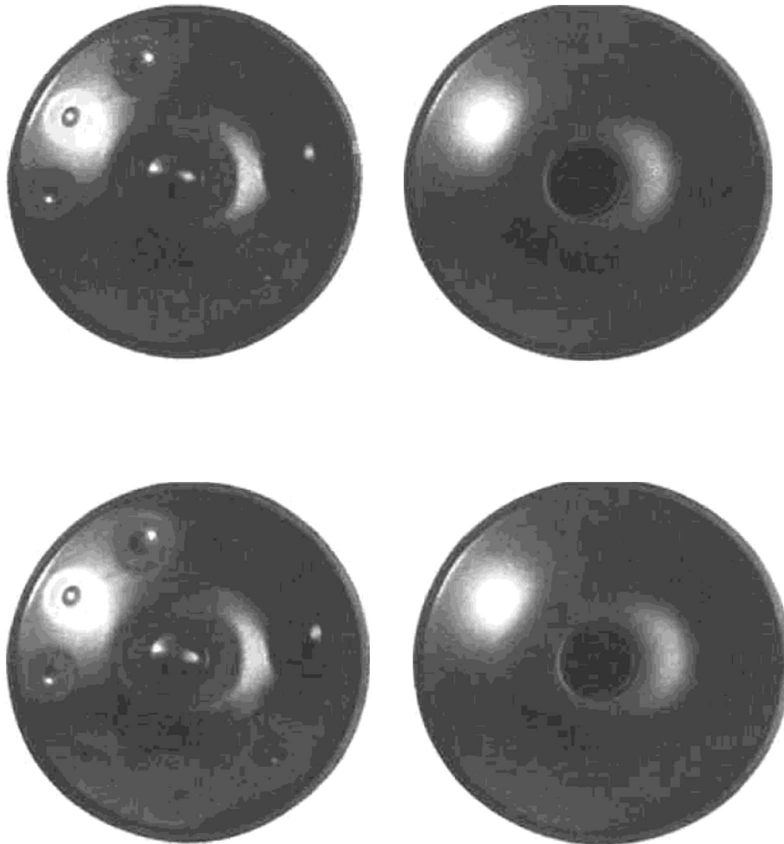
It is determined that Plaintiff 10, by offering, etc., the “handpans” in accordance with K-II, RB paras. 2a, 2b, 2c, 2d, 2f, 2g, 2h, 2i, 2j, 2k, 21, 2m, 2n, 2o, 2p, 2q, 2r, 2s, 2y, 2z, 2aa, 2bb, 2cc, 2dd, 2ee, 2ff, 2gg, 2hh, 2nn, 2fff, does not infringe the defendant’s copyrights in the “Hang” in Germany.

Plaintiff's instruments 12

177. All "handpans" distributed by the plaintiff 12 (K-II, para. 314 et seq., pp. 230 et seq. [HG 20 133]) fall within the scope of protection of the "Hang." For the assessment, reference is made by analogy to E. 156. In view of the elements that have been copied, the **differences** cited in this regard—such as different proportions or dimensions, oval rather than round domes, tone fields, or shoulders; more distinctive tone fields or shoulders; engravings; the color of the instrument or outer ring; smoother surfaces; unpolished domes; or differences in the size of individual tone fields (K-II, para. 313 et seq., pp. 229 et seq. [HG 20 133]) do not, in the present case—either individually or in combination—render the adaptation unrecognizable (which is why the threshold of "mere" inspiration has been exceeded). The same applies to modifications to the lens shape, such as a flatter curvature of the upper shell or different height-to-width ratios, a "less dominant" dome design with different diameters, a different number of tone fields (while retaining the circular shape), and different depths and distances between them (see minutes of the continued general meeting, p. 27, p. 2078). Thus, in the present case, these changes—neither individually nor in combination—result in the adaptation no longer being recognizable (which would mean the threshold of "mere" inspiration has been crossed); rather, the elements giving rise to copyright protection do not fade into the background when viewed as a whole in the new design and are therefore still recognizable.

178. Specifically, the following "handpans" are involved:

178.1 Sela Harmony / Sela Melody Handpan (K-II, RB paras. 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 31, paras. 314–337; Replica II, lines 41 ff., pp. 1681 f.)



Conclusion

179. In conclusion, it must be noted that none of the plaintiff's 12 "handpans" submitted takes the "Hang" outside the scope of protection.

K-II, RB para. 3 and para. 3.1 are to be dismissed, insofar as they are admissible.

Rights of Use

Positions of the Parties

180. **Plaintiffs** 1 and 2 further assert that the defendants granted them a free-of-charge, non-exclusive **right of use**, unlimited in terms of territory and duration, within the meaning of
§ 31(1), sentence 1, of the German Copyright Act (UrhG), which could be granted informally, including orally, tacitly, or by implication (Rejoinder I, para. 602 et seq., p. 1867 et seq.). The defendants had indicated to Plaintiff 2 "at least by implication" that they would permit him to manufacture "handpans" in the same form or had granted him a simple right of use without territorial or temporal restrictions (Rejoinder I, para. 606, p. 1868 et seq.). The **defendants** deny having granted licenses to anyone

(Duplicate, para. 273, pp. 1957 et seq.) and argue that high standards must be applied to declarations of intent regarding the granting of licenses (Duplicate, paras. 274 et seq., pp. 1958 et seq.). Plaintiff 1 was still afraid of legal enforcement by the defendants as recently as 2020, which is why he was aware that no license existed at that time (Duplicate, para. 281, p. 1960, citing KAB 157). Furthermore, it is not clear how Plaintiff 1 could have been granted rights of use, especially since it did not even exist in 2018 (Reply, para. 283 and 117, p. 1960, 1921).

Legal Considerations

181. A copyright infringement results from the use of a work without the consent of its author (see ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 84 with further references [KB 361]), although the existence of a license (and thus any consent) precludes a copyright infringement.

182. At issue is the **granting of a license in an international context** (email correspondence between the defendants, who are domiciled in Switzerland, and Plaintiff 1, who is domiciled in the Netherlands). Pursuant to Art. 110(3) IPRG, contracts concerning intellectual property rights are subject to the provisions governing the law applicable to contracts under the law of obligations and thus to the law of the state in which the party transferring the intellectual property right or granting the right to use it has its habitual residence (Art. 122(1) IPRG). This so-called "contract statute" governs, among other things, the conclusion, content, and interpretation of the contract (see MÖCKLIN-DOSS/SCHNYDER, in: CHK IPRG, 4th ed., Art. 122, note 5; VISCHER/MOSIMANN, in: ZK IPRG, 3rd ed., Art. 122, note 12, with further references; JEGHER/KUNZ, in: BSK IPRG, Art. 122 N 13). Since the transfer of rights by the defendant, who is domiciled in Bern, is at issue, Swiss law alone is applicable to the question of the granting of a license. The fact that the parties hold a different opinion on this matter (application of German or Dutch law) is irrelevant, especially since the applicable law must be determined and applied ex officio.

183. The transfer of rights of use in a work is not subject to any formal requirements and may also take place tacitly or through implied conduct. Whether and to what extent a transfer of copyrights was agreed upon in a contract is determined primarily by subjective interpretation, that is, according to the unanimous actual intent of the parties (Art. 18(1) OR). If this intent remains unproven, the parties' statements must be interpreted—based on the principle of good faith—to determine their presumed intent, in accordance with how they could and should have been understood based on their wording, context, and the totality of the circumstances. In the absence of an ascertainable, genuinely unanimous intent of the parties, specific rules must be applied in addition to the principle of good faith to determine the content of contracts concerning the transfer of copyrights. In particular, in cases of doubt, it must be assumed that the author has not transferred any powers beyond what is required by the purpose of the contract (theory of transfer based on purpose) (see Federal Supreme Court 4A 104/2008 of May 8, 2008, para. 4.2, with further references).

184. An offer is a binding declaration of intent to conclude a specific contract. It includes the intention to be contractually bound (ZELLWEGER/GUTKNECHT, in: BSK OR I, Art. 3 N 1). An offer must sufficiently define the content of the contract, specifically including the so-called essentialia negotii, particularly since the subsequent acceptance by the other party must, in principle, consist of an unconditional “yes” in order to bring the contract into existence (see ZELLWEGE@GUTKNECHT, in: BSK OR I, Art. 3 N 11). In the case of a license agreement as an innominate contract, the objectively essential element of the contract is the subject matter of the license, i.e., the licensed intellectual property (see VOGLER, Principles of Contract Law, § 13.9).

185. Interpretation must be based on the wording, the purpose of the contract, and other means of interpretation—such as, in particular, the conduct of the contracting parties, commercial practice, etc. (so-called “means of interpretation”)—taking into account rules of interpretation such as, for example, interpretation in good faith (see, on this subject, BÖTSCHi, Determination of the Nature and Scope of the Grant of Rights in a Copyright Agreement, p. 112 ff.; see also BGE 133 III 406 E. 2.2 regarding the wording).

185.1 Whether, based on the principle of good faith, a contract between the defendants and plaintiffs 1 and 2 is to be presumed is a legal question (see BGE 138 III 659 E. 4.2.1, with further references), whereby the burden of proof regarding the circumstances to be taken into account in the interpretation based on the principle of good faith rests with the plaintiffs.

Assessment

186. The text passage from 2018, to which Plaintiffs 1 and 2 refer, was part of an email exchange regarding an analysis of the plaintiffs’ “Handpan”/Uafer/als to verify whether it infringed a defendant’s patent. It was written by Defendant 2, sent to Plaintiff 2, and reads as follows (KB-I 79; see also K-I, para. 155, p. 92):

“Ralf, hello. Thank you very much for your help. We are glad that you do not infringe our patent; that means we are working in a completely different direction, even though you are building more or less the same design. Our work is based on a composite material and on hammer blows—in the tradition of the old tuners from Trinidad. If you become rich, you could give us some dollars—because you’re profiting from our raw concept. Building the lens with Ding and Gu wasn’t so easy! Be careful not to encourage banality and mass production: this will be the end of the spirit of creativity. All the best, Felix and the PANArt Team.”

187. The defendants dispute the formation of the contract, particularly since neither the plaintiffs’ statements, the submitted correspondence, nor the (sparsely described) circumstances or similar evidence would allow for the conclusion that the parties had expressed themselves in unison, understood one another, and reached an agreement based on that understanding. In light of the defendants’ denials and the fact that the plaintiffs’ assertions essentially amount to nothing more than a mere reproduction of the text passage cited above, neither an actual nor a presumed intent on the part of the parties to grant a license can be established from this.

The plaintiffs' arguments are limited to the assertion that the defendants would allow Plaintiff 1 to produce "more or less the same design." They do not explain what is (or could be) meant by this. Rather, it becomes clear from this that the statement already lacks a sufficiently definable subject matter of the license ("more or less the same design"), which is why no claim could exist from the outset. Furthermore, to what extent does a conditionally worded statement with parameters that cannot be further specified ("more or less the same design"; "[...] you become rich"; "some dollars"), which, according to the plaintiffs, were intended to be "ironic" (Rejoinder I, para. 606, p. 1868 et seq.), could be construed as a request to enter into a license agreement—one to which an unconditional "yes" could be given—is not apparent. Nor would there be any discernible intention to enter into a contract. Furthermore, this statement was explicitly made in a subordinate clause regarding the excluded patent infringement ("We are happy that you don't infringe our patent, that means we work in a completely different direction, although you build more or less the same design."), which is why even a person acting in good faith cannot automatically assume that the phrase "we work in a completely different direction" extends beyond the patent law issue to also refer to the design. In the absence of a motion, it can therefore be left open whether the passive conduct of Plaintiff 2—which, according to his account, is not elaborated upon or explained in detail—could be regarded at all as a (tacit) expression of intent (see KREN KOSTKIEWICZ, in: OFK OR, 4th ed., Art. 1 N 34 f.), especially since Plaintiff 2 also made no statements regarding the (allegedly) "post-contractual" conduct. The actual "post-contractual" conduct (in particular, the defendant's warning letters) likewise does not indicate any intention to conclude a contract.

188. Furthermore, the email correspondence does not reveal any "conduct" on the part of the parties or any contractual purpose whatsoever, especially since no such purpose is even alleged. Plaintiff 1 and Plaintiff 2 are therefore unable to cite any circumstances beyond this email that would suggest a different assessment.

189. Furthermore, it is not apparent to what extent the defendants should have been "fully aware of Plaintiff 2's business (in the form of Plaintiff 1)" in 2018 (see Rejoinder I, para. 603, p. 1867 et seq.), when, according to Plaintiff 1's own statements, it was not founded until 2019 (K-I, para. 169, p. 97; Rejoinder I, para. 51, p. 1716; see also KB-I 12). That the defendants are therefore alleged to have been aware of the instruments that "Plaintiff 2 produced together with Plaintiff 1" (Rejoinder I, para. 605, p. 1868), is not plausible in light of the chronology, nor is it clear why any license granted to Plaintiff 1 would extend to Plaintiff 2, especially since Plaintiff 1 and Plaintiff 2 have not provided any substantiated statements on this point. There is therefore no basis for assuming that a license was granted.

190. Incidentally, the same conclusion would be reached if German law were applied for the assessment (as the parties assume):

191. Pursuant to § 31(1) of the German Copyright Act (UrhG), the author may grant another person the right to use the work in one or all types of use (right of use). The right of use may be granted as a simple or exclusive right, and may be limited in terms of territory, time, or content. The general provisions apply to contracts of use, in particular with regard to their formation (Sections 145 et seq. German Civil Code [BGB]) and the interpretation of declarations of intent (§§ 133, 157 BGB) (MANTz, in: Dreier/Schulze, 8th ed., § 31, margin no. 8).

192. Under German law as well, a contract is formed by two matching declarations of intent (see §§ 145 and 146 BGB). The subject matter and content of the contract must be specified in the offer in such a way—or be capable of being specified in such a way—that acceptance can be effected by a simple "yes" (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 145, margin note 1, with further references). The offer must also express an intention to be legally bound, whereby the interpretation in this regard is determined not by the offeror's inner intent but by the objective meaning of their conduct (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 145, margin note 2). In particular, the question is how the recipient must have understood a declaration (requiring acceptance) in good faith, taking into account customary business practices (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 133, margin no. 9, with further references).

193. As already explained under Swiss law, the objective meaning of the cited email exchange could not be understood to imply that a license should have been granted. Nor is it apparent that—or how—a legal intent to be bound could have been expressed. Furthermore, it has neither been substantiated nor is it apparent to what extent a conditionally worded statement containing parameters that cannot be precisely defined ("more or less the same design"; "[...] you become rich"; "some dollars") could be construed as an offer to enter into a license agreement to which one could respond with a "yes." Taking into account the surrounding circumstances based on the objective content of the statement, it would therefore not be unequivocally expressed that the declarant intended to dispose of his copyright in such a way as to grant a third party a specific right of use (see OLG Frankfurt, 11 W 5/14, judgment of August 15, 2014, para. 5a with further references [KB 346]).

194. This is not altered by the fact that (also) German law, in principle, does not tie the granting of a license to formal requirements, as the plaintiffs argue.

Objections (Rejoinder I, para. 616 et seq., p. 1871)

195. Insofar as the plaintiffs raise various objections, in particular an antitrust-based licensing objection (Section 19(1) GWB and Article 102 TFEU), these issues need not be addressed in the context of the present motion for a declaratory judgment; they are not the subject matter of the proceedings.

Overall Conclusion on German Law

It is hereby determined that:

a) **Plaintiff** 1 **and Plaintiff** 2 do not infringe the Defendant's copyrights in the "Hang" in **Germany** by manufacturing, offering for sale, selling, distributing, and making available the musical instruments described in **claims 2c, 2d, and 2f** of the complaint filed on October 27, 2020;

b) **Plaintiff** 5 **and Plaintiffs 6, 7,** 8, and 9, by offering for sale, selling, distributing, and making available to the public the musical instruments described in claims 4e, 4f, 4k, 4l, 4m, 4v, 4y, and 4aa of the complaint filed on October 27, 2020, do not infringe the defendant's copyrights in the "Hang" in Germany;

c) that **Plaintiff 10**, by offering, selling, distributing, and making available the musical instruments listed in claims 2a, 2b, 2c, 2d, 2f, 2g, 2h, 2i, 2j, 2k, 2l, 2m, 2n, 2o, 2p, 2q, 2r, 2s, 2y, 2z, 2aa, 2bb, 2cc, 2dd, 2ee, 2ff, 2gg, 2hh, 2nn, 2fff of the complaint filed on December 4, 2020, does not infringe the defendant's copyrights in the "Hang" in Germany.

In all other respects, the complaints filed on October 27, 2020, and December 4, 2020, are dismissed to the extent that they are admissible.

<u>Copyright Infringements Under Dutch Law</u> (K-I, para. 383 et seq.; Rejoinder I, para. 619 et seq.)

Scope of Protection

Positions of the Parties

196. According to the arguments of Plaintiffs 1 and 2, there is no protection of the concept under Dutch law either (Rejoinder I, para. 619, p. 1872, with reference to the discussions on German law). They argue that any scope of protection for the "Hang" would be very narrow and that, therefore, only identical copies would be considered infringing, such that even minor differences (such as a different design of the dome or the tone fields) would inevitably fall outside the scope of protection (Rejoinder I, para. 632, p. 1877).

197. From the defendants' perspective, each of the four elements on its own, as well as their combination, can be defined as copyright-protected features or elements within the meaning of the case law (Duplicate, para. 305, p. 1964). They argue that

none of the “handpans” under review creates an overall impression that differs from the work (Duplicate, para. 306, p. 1965) or constitutes a recognizable copying of a copyright-protected work (see minutes of the continued hearing, p. 18, p. 2069). The similarity is not based merely on the adoption of a style or a concept, but on the same combination of specific design features of the “Hang” and thus on the defendant’s free creative decisions (Duplik, para. 307, p. 1965). Due to its revolutionary design, the “Hang” is entitled to a broad scope of protection, which is why even the adoption of some, but not all, features constitutes an infringement (Duplik, para. 313, p. 1967). Differences in elements other than those giving rise to protection cannot remove the work from the scope of protection of the original (Duplik, para. 316, 4th Lemma, para. 318, p. 1971, 1972). The only discernible (minor) difference lies solely in the slightly offset dome of “Instrument 3,” which, however, does not alter the fact that the “Hang” remains clearly recognizable (Duplik, para. 318, p. 1972). The remaining instruments all feature all four elements, which is why the overall impressions are identical and an infringement clearly exists (Duplik, para. 318, p. 1972).

Legal Considerations

198. Reproduction, as defined in Article 13 of the Copyright Act, includes any complete or partial adaptation or imitation in a modified form that is not considered a new, original work (Article 13 of the Copyright Act: *“The reproduction of a literary, scientific, or artistic work also includes translation, musical arrangement, film adaptation, or stage adaptation, and, in general, any complete or partial adaptation or imitation in a modified form that is not to be regarded as a new, original work.”).* In this context, an object must incorporate so few copyright-protected features of another work that it is copyright-wise independent of that work (SPOOR/VERKADE, § 4.11 [KB 351]). Consequently, an adaptation or imitation exists when copyright-protected features of a work are recognizably reproduced in the infringing work (see SPOOR/VERKADE, § 4.11, p. 182 [KB 351]). According to established case law, the **overall impression** is relevant in this regard (Supreme Court, ECLI:NL:HR:1995:ZC1942, judgment of December 29, 1995, para. 3.3 [KAB 117] and Supreme Court, ECLI:NL:HR:2013:BY1529, judgment of February 22, 2013, para. 3.4e [KB 170]; cf. also Replik I, para. 622, p. 1872 et seq.; KA, para. 430).

Assessment

199. With regard to the plaintiff’s argument concerning **concept** or idea protection, reference may be made to the remarks made above (see E. 74). The **standards established** by **the ECJ** and the associated changes (in particular: guidelines for **the infringement analysis)** must also be observed under Dutch law. Consequently, the following infringement analysis must be based on the elements justifying protection as set forth in the decision of July 2, 2024, and E. 134 above (noting that even a collection or selection of unprotected elements may constitute a work,

provided that such a collection or selection reflects the author's personality or reveals the author's personal imprint (Supreme Court, E-CLI:NL:HR:2013:BY1529, judgment of February 22, 2013, para. 3.4 [KB 170, 170A]; Midden-Nederland District Court, ECLI:NL:RBMNE:2025:5837, judgment of November 12, 2025, para. 3.14; see also para. 3.29 [KAB 176, 176A], with further references; see also Court of Appeal of The Hague, ECLI:NL:GHDHA:2020:1620, judgment of September 1, 2020, in particular para. 4.3 [KB 181, 181A]). However, the test of **the overall impression** ("totaali-indruk") can no longer be applied (see also E. 143 above). Rather, the decisive factor is whether **creative elements—**i.e., those that are an expression of the decisions reflecting the personality of the work's author—have been **recognizably** incorporated into the object alleged to be infringing (ECJ, C-580/23 and C-795/23, judgment of December 4, 2025, para. 86 with further references, 92 [KB 361]). In this context, even the reproduction of an arrangement of pre-existing elements considered original may constitute an infringement (Opinion of Advocate General Szpunar, para. 72 [KB 333]). As already mentioned in E. 84 and 87 above, in the "Hang" case, protection was not granted on the basis of individual features; therefore, it does not extend to (merely) individual features, and the adoption of individual elements does not in itself constitute an infringement. A "handpan" without a dome is therefore not automatically a copyright-infringing "Hang" without a dome (as argued by the defendants in their rejoinder, para. 174, p. 1933 et seq.).

200. The instruments to be examined under **Dutch law** are the "handpans" of Plaintiff 1 and Plaintiff 2 (see K-I, RB para. 2; Rejoinder I, para. 511 et seq., p. 1848 et seq.). The reference work is the "Hang," as embodied in the version described in K-I, RB para. 1(ii)(a).

201. For the assessment, reference may therefore be made by analogy to E. 155 et seq. above, particularly since this assessment must also be conducted under Dutch law in accordance with the principles established by the ECJ.

Conclusion

202. In conclusion, it should be noted that 3 of the total of 6 "handpans" submitted by Plaintiffs 1 and 2 do not infringe upon the scope of protection of the "Hang."

Granting of Rights of Use (Rejoinder I, para. 634 et seq.)

203. Under Dutch law as well, Plaintiffs 1 and 2 assert that they were granted a non-exclusive license pursuant to Art. 2(2) Aw, especially since such a license may also be granted orally, tacitly, or by implication (Rejoinder I, para. 634, p. 1878). They base this claim on the email exchange that took place in 2018 (Rejoinder I, para. 634 and 602 et seq., p. 1878, 1867 et seq.; see above, E. 180 et seq.). The defendants dispute this. They claim they neither formed nor expressed such an intention, especially since Plaintiff 1 did not assume the existence of a license even as late as 2020 (Duplicate, para. 319 et seq., p. 1972 et seq.). Neither did

Plaintiff 1 exist in 2018, nor was there any interaction between the parties in the context of which a license agreement could have been concluded through offer and acceptance (Duplicate Answer, para. 323 et seq., pp. 1973 et seq.).

Assessment

204. In this regard, reference may be made to the assessment in E. 181 et seq. Moreover, the same conclusion would be reached if Dutch law were applied (as the parties assume):

205. Under Dutch law as well, a contract is formed through an offer ("aanbod") and acceptance ("aanvaarding") (Art. 6:217(1) *Burgerlijk Wetboek* [BW]), which is why implied conduct can also lead to an agreement on the essential terms of the contract and thus to the conclusion of a contract. In principle, there are no formal requirements (see Art. 3:37 BW). An offer exists when the offeror intends to be bound and this is sufficiently clear from the offeror's declaration of intent (SPIERINGS, Vragen over het aanbod, Rechtsgeleerd Magazijn Themis 174, 3 (2013), p. 107 et seq., 107). An acceptance, which may also be implied or expressed through conduct (Art. 3:37 BW), must comply with the terms of the offer; otherwise, it is deemed a counteroffer (Art. 6:225 (1) BW).

206. With regard to the exact wording and context of the email correspondence, reference may be made to E. 186 et seq. above. It is already apparent from this that the wording cited by the plaintiffs was partly conditional and so vague with respect to the subject matter that it cannot be classified as an offer. Nor is any intention to be legally bound discernible from it.

License defense under Art. 102 TFEU (Rejoinder I, para. 637)

207. Reference is made to the preceding section (para. 195).

Overall Conclusion on Dutch Law

It **is found** that:

a) **Plaintiff** 1 **and Plaintiff** 2, by manufacturing, offering for sale, selling, distributing, and making available the musical instruments described in **claims 2c, 2d, and 2f** of the complaint filed on October 27, 2020, in the **Netherlands**, do not infringe the Defendant's copyrights in the
"Hang";

In all other respects**,** the **complaint filed on October 27, 2020,** is **dismissed to the extent that it** is admissible.

208. **In summary**, it can be concluded that i) the “Hang” of Defendants 2 and 3 is eligible for **copyright protection** in **Switzerland, Germany**, and the **Netherlands** based on the considerations set forth above, and ii) the specific “handpans” of the Plaintiffs introduced in the present proceedings, with a few exceptions, **infringe** the **Defendants’ copyright.**

This **decision supplements the decision of July 2, 2024,** to which reference is made once again for the sake of completeness, both with regard to the operative part and the reasoning.

VI. Litigation Costs

209. The court generally rules on litigation costs in the final decision (Art. 105(1) ZPO). Litigation costs are imposed on the losing party. In the event of a dismissal without consideration of the merits, the plaintiff is deemed to have lost the case (Art. 106(1) ZPO). If no party has prevailed entirely, the costs of the proceedings are apportioned according to the outcome of the proceedings (Art. 106(2) ZPO). If several parties are involved in the proceedings as principal or secondary parties, the court determines their respective share of the costs of the proceedings. The court may rule that the parties are jointly and severally liable (Art. 106(3) aZPO (proceedings initiated before January 1, 2025; see Art. 407f ZPO a contrario)). Court costs are offset against the advance payments made by the parties, and any shortfall is recovered from the party liable for costs. The party liable for costs must reimburse the other party for the advances paid and pay the awarded litigation costs (Art. 111(1) and (2) aZPO; see also Art. 407f ZPO a contrario).

210. When claims are consolidated, the value in dispute of the individual claims is aggregated to determine jurisdiction and litigation costs, provided that the individual claims are not mutually exclusive (GsCHWEND, in: BSK ZPO, Art. 125 N 19 with further references; WEBER, in: KUKO ZPO, Art. 125 N 7).

Value of the Claim

210.1 The value in dispute is determined by the legal claim, and any alternative claims are not included (Art. 91(1) ZPO). At the outset of the proceedings, the parties agreed on a total value in dispute of CHF 430,000.00 (KA, para. 20, p. 280; decision of July 2, 2024, E. 135, p. 1512), which remains the applicable figure. In the course of the proceedings, it became apparent that the expenses incurred by the parties had led to an increasingly disproportionate relationship with the value in dispute: According to statements from their very extensive crowdfunding campaign, the plaintiffs spent at least **1.1 million euros** on these proceedings (see KAB 139), which had an impact not least on the number and scope of the submissions.

211. Of the original 25 plaintiffs, one—Plaintiff 24—withdrew from the proceedings after the (first-instance) decision of July 2, 2024, was issued. From a purely mathematical standpoint, this resulted in a reduction of the amount in dispute by CHF 22,500.00 (1/8 of a [partial] amount in dispute of CHF 180,000.00 for K-III (see K-III, margin note 23, p. 881 [NG 21 2]). For Plaintiff 24's withdrawal of the complaint, court costs of CHF 850.00 were imposed on him and offset against the advance payment of CHF 20'000.00 in the HG 21 2 proceedings (see order of October 2,
2024, para. 4, p. 1538). The party costs relating to the "Plaintiff 24 portion of the proceedings" were offset after all parties had been afforded the right to be heard. The discontinuation of this part of the proceedings does not alter either the **fee schedule** for court costs (see Art. 42(1)(c) of the Decree on Procedural Costs [VKD; BSG 161.12]) nor the framework for the reimbursement of parties' costs pursuant to the Parties' Costs Ordinance [PKV; BSG 168.811], see Art. 5(1) thereof).

212. The six other **plaintiffs—11, 13, 14, 15, 16, and 17—were dismissed from the proceedings** pursuant to the corresponding (in this regard, now final) decision to dismiss the case on
July 2, 2024. The court costs attributable to them in this regard were set at CHF 2,000.00 and imposed on them on a joint and several liability basis, and were offset against the advance payment of CHF 20,000 they had made (NG 20 133; see decision of July 2, 2024, E. 138, Operative Part, para. 2,
pp. 1513, 1517). Plaintiffs 11, 13, 14, 15, 16, and 17 were further ordered to pay the defendant, under joint and several liability, attorney's fees of CHF 9,429.15 (fees including expenses plus value-added tax). However, this does not result in the reduction in the amount in dispute claimed by the plaintiffs (see fee statement of February 20, 2026, pp. 2091 et seq. and the cost statement dated March 2, 2026, pp. 2101 et seq.), especially since the value of the claim is determined on the basis of **the principal claim** ([non-] existence of a copyright in "Hang"). Although this has reduced the number of plaintiffs involved in the proceedings from 25 to 19 (or, taking into account the plaintiff's withdrawal, from 24 to 18), it has not reduced the number of legal claims, the factual and legal issues to be addressed, or the "Handpans" to be examined: The respective primary claims in para. 1 were raised jointly by all plaintiffs (see also K-I, para. 18, p. 38; K-II, para. 23, p. 49 [NG 20 133]; K-III, para. 21, p. 880 [HG 21 2]) and did not relate to individual plaintiffs, but rather to the fundamental question of copyright protection for the "Hang." Accordingly, there was no

change with regard to the legal claims determining the amount in dispute. The exact number of plaintiffs—apart from the formal aspects—therefore also had no direct influence on the effort and scope of the proceedings. A look at the **alternative claims** also shows that the withdrawal of certain plaintiffs due to dismissal for lack of jurisdiction had little impact in this regard on the "handpans" to be examined, since all of the withdrawn plaintiffs acted as co-plaintiffs together with the plaintiffs who remained involved (see K-II, RB para. 2 for plaintiffs 10 and 11, p. 13 [HG 20 133]; RB para. 3 for Plaintiffs 12, 13, 14, and 15, p. 32 [NG 20 133]), or the "handpans" of the plaintiffs who withdrew still largely form part of the proceedings (see K-II, RB para. 2hhh in conjunction with RB paras. 4a through 4j for Plaintiffs 10, 16, and 17, p. 32 [HG 20 133]). A reduction in the value in dispute per person is therefore not warranted.

213. The fact that a portion of the court and party costs, as just explained, has already been determined and allocated must, of course, be taken into account below.

214. We shall briefly address here the weighting of the litigation efforts with regard to the principal and alternative claims, which, as is well known, also led to a limitation of the proceedings. With regard to the **principal claim—**the determination of the (non-)existence of a copyright in "Hang"—the court considered it only in part (only 1 out of 2, and in some cases 3, legal systems, and likewise with respect to 7 out of 10 works); otherwise, the claim was unsuccessful. The **alternative claims** now to be examined in this decision are largely dismissed, to the extent that they are admissible. It appears appropriate, within the framework of the assessment—which is based solely on the allocation of litigation costs—to assign a weight of 3/4 to the main claims and 1/4 to the alternative claims.

215. With regard to the primary claims, the plaintiffs remaining in this case were *not* successful in their claims in their entirety—in some cases due to a refusal to hear the case, and in others due to dismissal. With regard to the alternative claims, the plaintiffs were likewise unsuccessful for the most part (out of a total of over 250 "handpans" examined, only slightly more than 50 were classified as non-infringing [of which 29 were merely three models that looked identical but had different tunings [see K-II, RB paras. 2a–d, 2f–s, and 2y–hh, 2fff, pp. 13 ff., 15 ff., 21 ff., 32 [HG 20 133]]]), which corresponds to just over 20% of all alternative claims (excluding the sub-alternative claims).

Court Costs

216. For a value in dispute of CHF 100,000.00 to 500,000.00, the fee before the Commercial Court ranges from CHF 5,000 to 40,000 (Art. 42(1)(c) in conjunction with Art. 4(2) VKD). Within this range, procedural costs are determined based on the total time and effort expended, the significance of the case, and the financial capacity of the party liable for costs (Art. 5 VKD). In particularly extensive and time-consuming cases, in cases involving vexatious litigation, and in cases

where the amount in dispute is very high, a fee of up to twice the maximum rate may be imposed (Art. 6(1) VKD). In proceedings involving multiple parties, the maximum rates may be exceeded. However, the fee for any individual may not exceed twice the ordinary maximum fee (Art. 6(2) VKD).

217. In determining the court fee to be assessed, it must be taken into account that 25 plaintiffs, through 3 complaints, sought a negative declaration regarding copyright protection and copyright infringement under three legal systems, particularly since each plaintiff individually submitted 10 works to the court for review (see legal claims, items 1(i) and (ii)), which had a corresponding impact on the assessment of the interest in a declaratory judgment. For review, over two hundred "handpans" were submitted to the court as potentially infringing items for review. The proceedings proved to be very extensive and time-consuming (initiated by 3 lawsuits totaling 1,321 pages, a case file exceeding 2,100 pages [excluding attachments]), including two rounds of written submissions in the limited proceedings as well as a second round of written submissions in the unrestricted proceedings, various submissions (including new evidence), especially since the case proved to be correspondingly complex and labor-intensive due to its international nature and the large number of submitted attachments (>500). In addition to a half-day pretrial hearing (in 2021), a two-day main hearing (in 2023) and a half-day continuation of the main hearing (in 2026) were held. Even the withdrawal of certain plaintiffs following the decision of July 2, 2024, did not result in the proceedings becoming any less complex in factual or legal terms, nor did it significantly reduce the amount of work required (see also E. 212 above).

218. In view of the scope of the case and the significant time required by the court, the **court costs** are to be set at twice the maximum fee of CHF 40’000.00, i.e., in principle, at approximately CHF 80'000.00. Court costs already estimated and incurred in the amount of CHF 2,850.00 must be taken into account, resulting in a fee of **CHF 77,150.00**.

219. Based on the assessment of the principal claim at 3/4—in which the plaintiffs were entirely unsuccessful—and the 20% success rate on the alternative claims (equivalent to 1/4), which ultimately amounts to approximately 5%, the **plaintiffs** must bear total court costs of CHF 73,300.00, this under joint and several liability (Art. 106(3) aZPO in conjunction with Art. 407f ZPO; share of Plaintiffs 1, 2, 5–9, 18–23, and 25: total of CHF 57,010.00; share of Plaintiffs 3, 4, 10, and 12: total of CHF 16,290.00). **The defendants’** share of court costs amounts to CHF 3,850.00 and is still to be collected from them (under joint and several liability, Art. 106(3) aZPO). The plaintiffs’ share of court costs will be offset against the (remaining) advance payments they have made, totaling CHF 52,150.00 (originally CHF 55,000.00 [CHF 15,000.00 [HG 20 117], CHF 20,000.00 [HG 20 133] and CHF 20'000.00 [HG 21 2], less CHF 2’850.00 already offset) (Art. 111(1) aZPO). The remaining amount of CHF 21,150.00 is to be claimed from the plaintiffs on a pro rata basis and under joint and several liability (Art. 111, paras. 1 and 2; 106, para. 3 aZPO), specifically divided into CHF 1,175.00 per plaintiff, for a total of

CHF 4,700.00 in total from Plaintiffs 3, 4, 10, and 12, represented by Attorneys Volken and/or Spycher, and CHF 16,450.00 from Plaintiffs 1, 2, 5–9, 18–23, and 25—a total of CHF 16,450.00. The allocation on a per-plaintiff basis appears, in the present case—in which no plaintiff (not even with respect to the [sub-]contingent claims) has prevailed to any significant extent, but rather, on the contrary, the decisive primary claim has been dismissed with respect to all plaintiffs (to the extent it was considered)—to be somewhat simplistic, but appropriate.

Attorney's Fees

220. The party liable for costs must reimburse the other party for the advances made and pay the awarded party compensation (Art. 111(2) aZPO). Pursuant to Art. 95(3) ZPO, litigation costs include, in particular, reimbursement of necessary expenses (letter a) and the costs of professional representation (letter b). The court awards litigation costs in accordance with the cantonal fee schedules (Art. 105(2) ZPO).

221. In first-instance proceedings, where the value in dispute—which is the relevant factor here—exceeds CHF 300,000.00 but does not exceed CHF 600,000.00, the fee range extends from CHF 11,800.00 to CHF 49,200.00 (Art. 5(1) PKV). Within the fee range, the reimbursement of party costs is determined based on the time required for the case, the significance of the matter in dispute, and the complexity of the proceedings (Art. 41(3) of the Cantonal Attorney Act [KAG; BSG 168.11]). Finally, Art. 9 PKV provides for a surcharge of up to 100 percent on the fee for proceedings that require a particularly large amount of time and work, such as, in particular, the difficult and time-consuming collection or compilation of evidence, in cases involving a large volume of case files or extensive correspondence, where a substantial portion of the case files or correspondence is in a language other than the language of the court, or in cases involving particularly complex factual or legal circumstances. This surcharge applies only when the effort required for a proceeding cannot be accommodated within the standard fee schedule.

222. Apart from the amount in dispute, which falls within the middle range of the applicable fee schedule, the present proceeding must be assessed as far above average in every respect. It involved three consolidated proceedings with 28 parties, spanned three legal systems, and included extensive pleadings with two rounds of written submissions (and an additional second round of written submissions in the unlimited proceedings), various (new evidence) submissions, and multiple trial days (preliminary hearings, main hearings, and continued main hearings). The fee invoices of the plaintiffs' legal representatives (combined) as well as that of the defendant exceed the applicable fee cap (despite an alleged reduction in the amount in dispute) or fully exhaust it (doubled) (Plaintiff: CHF 118,200.00 [CHF 70,800.00 + CHF 47,400.00] plus expenses of CHF 123,559.00 [CHF 91,973.00 + CHF 31,586.00] [p. 2102 et seq. and KB 363];
claimed: CHF 98'400.00 plus expenses of CHF 174'051.84 [pag. 2084]). They attest

to the scope and complexity of the present proceedings. Against this background, a fee of CHF 49,200.00 plus a 100% surcharge appears appropriate, meaning that the attorney's fee—calculated purely on a mathematical basis and representing the maximum amount to be reimbursed—is to be set at CHF 98,400.00. This conclusion is not altered by the party compensation already awarded in the decision of July 2, 2024, or by the estimation of Plaintiff 24's withdrawal of the complaint—even excluding these initial expenses, the proceedings ultimately justify the full (double) maximum award. Based on the extent of the victory (95%, or CHF 93,480.00) and the corresponding set-off against the opposing 5% (CHF 4,920.00), this results in **legal costs of** CHF 88,560.00 *to* be paid by the plaintiffs to the defendants. This amount covers the additional expenses incurred due to the complexity of the dispute, including those arising from foreign legal systems and any language barriers.

Expenses

223. Pursuant to Art. 95(3)(a) of the Swiss Civil Procedure Code (ZPO), expenses are to be reimbursed if they were necessary. Necessary expenses may include, in particular, costs for the translation of documents, travel expenses, postage costs, telecommunications costs, or costs for copies (ZPO Message 2006, 7293). Expenses in this context are costs that are actually incurred, specifically in dealings with parties other than the court or the professional legal representative (SU-TER/VON HOLZEN, in: ZPO Commentary, 4th ed., Art. 95 N 31 with further references). **The translation costs** claimed by the defendants were incurred internally by the law firm (see Appendix 3 to the defendants' bill of costs dated November 20, 2023, and the second bill of costs dated January 27, 2026, item 3), so the question of whether they would be considered necessary at all can be left open. Furthermore, the substantial consultation costs (some of which exceed the attorneys' own fees) incurred by foreign attorneys or attorneys admitted to practice abroad are not reimbursable as expenses in any event, especially since the additional costs of legal representation arising from the international nature of the case were already covered by the surcharge granted pursuant to Art. 9 PKV.

224. However, an **expense** surcharge or **reimbursement** of 3% of the awarded fee—in accordance with standard practice—is granted, amounting to approximately CHF 2,656.00, or specifically CHF 2,655.55.

225. This results in a **party compensation of CHF 98,604.00** to be paid by the **plaintiffs to the defendants** (fees of CHF 88,560.00, expenses of CHF 2,655.55, plus 8.1% value-added tax on an amount of CHF 91,215.55, totaling CHF 7,388.45). The share payable by Plaintiffs 1, 2, 5–9, 18–23, and 25 totals CHF 76,692.00 [14/18 share], while the share of Plaintiffs 3, 4, 10, and 12 totals CHF 21,912.00 [4/18 share], amounting specifically to CHF 5,478.00 per plaintiff (this is subject to joint and several liability pursuant to Art. 106(3) aZPO).

The Commercial Court rules:

1. It is hereby determined that:

   a) **Plaintiff 18** and **Plaintiff 19** do not infringe the Defendant’s copyrights in the “Hang” in **Switzerland** by offering, selling, distributing, and making available the musical instruments described in **claims 2uu and** 2ww of the complaint filed on December 31, 2020;

   b) **Plaintiff 20**, by manufacturing, offering for sale, selling, distributing, and making available in Switzerland the musical instrument described in claim 3d of the complaint dated
   December 31, 2020, in **Switzerland**;

   c) the plaintiff 21 does not infringe the defendant’s copyrights in the “Hang” in Switzerland by manufacturing, offering for sale, selling, distributing, and making available the musical instruments described in **claims 4c, 4d, and 4f** of the complaint dated December 31, 2020;

   d) The plaintiff 25 did not infringe the defendant’s copyrights in the “Hang” by offering for sale, selling, distributing, and making available in **Switzerland** the musical instruments described in claims 7i, 7j, 7k, 71, 7m, and 7n of the complaint filed on December 31, 2020.

   In all other respects**,** the complaint **filed on December 31, 2020,** is **dismissed to the extent that** it is admissible.

2. It is hereby determined that:

   a) **Plaintiff** 1 and Plaintiff 2, through the manufacture, offering for sale, sale, distribution, and making available of the musical instruments listed in claims 2c, 2d, and 2f of the complaint filed on October 27, 2020,
   a) in Germany and b) in the **Netherlands,** do not infringe the defendant’s copyrights in the “Hang”;

   b) **Plaintiff** 5 and Plaintiffs 6, 7, 8, and 9, by offering, selling, distributing, and making available the musical **instruments described** in Claims **4e, 4f,** 4k, 41, 4m, 4v, 4y, 4aa of the complaint filed on October 27, 2020, do not infringe the defendant’s copyrights in the “Hang” in Germany.

   In all other respects**,** the complaint **filed on October 27, 2020,** is **dismissed to the extent that** it is admissible.

3. It **is hereby determined** that:

   a) **Plaintiff 10**, by offering for sale, selling, distributing, and making available the musical instruments listed in claims 2a, 2b, 2c, 2d, 2f, 2g, 2h, 2i, 2j, 2k, 21, 2m, 2n, 2o, 2p, 2q, 2r, 2s, 2y, 2z, 2aa, 2bb, 2cc, 2dd, 2ee, 2ff, 2gg, 2hh, 2nn, and 2fff of the complaint filed on December 4, 2020, does not infringe the defendant's copyrights in the "Hang" in Germany.

   In all other respects, the **complaint filed on December 4, 2020,** is **dismissed to the extent that** it is admissible.

4. The **court costs,** set at CHF 77,150.00, are to be borne by the plaintiffs in the total amount of CHF 73,300.00 (share of Plaintiffs 1, 2, 5–9, 18–23, and 25 totaling CHF 57,010.00;
   the share of Plaintiffs 3, 4, 10, and 12 totaling CHF 16,290.00), and the defendants are ordered to pay CHF 3,850.00.

   The partial amount of CHF 52,150.00 shall be deducted from the (remaining) court cost advances paid by the plaintiffs. The plaintiffs are ordered to pay an additional CHF 21,150.00 to the court treasury (CHF 1,175.00 per plaintiff), for which they are jointly and severally liable.

   The defendants are ordered to pay the amount of CHF 3,850.00 (CHF 1,283.33 per defendant) to the court treasury (under joint and several liability).

5 The plaintiffs are ordered to pay the defendants **legal fees** in the amount of CHF 98,604.00 (fees including expenses plus value-added tax), amounting to CHF 5,478.00 per plaintiff (joint and several liability).

6. To be served (by certified mail):
   - to the parties

Bern, June 16, 2026
(Issued on June 24, 2026)

On behalf of the Commercial

Court The Vice President:

Senior Judge Schlup
The Court Clerk

Blatter

For information on appeals, see the following page.

Instructions on Appeals

An appeal in civil matters may be filed against this decision within 30 days with the Federal Supreme Court, Av. du Tribunal fédéral 29, 1000 Lausanne 14, pursuant to Art. 39 et seq., 72 et seq., and 90 et seq. of the Federal Supreme Court Act (BGG; SR 173.110). The appeal must comply with the requirements of Art. 42 BGG. The amount in dispute exceeds CHF 30,000.00.