

FRENCH REPUBLIC  
IN THE NAME OF THE FRENCH PEOPLE  
**COLMAR COURT OF APPEAL**  
FIRST CIVIL CHAMBER - SECTION A  
**JUDGMENT OF DECEMBER 04, 2024**

Registration number in the general directory: 1 A N° RG 23/02710 - N° Portalis  
DBVW-V-B7H-IDVN

Decision referred to the Court: June 22, 2023 by the Civil Summary Judge of the  
STRASBOURG Judicial Court

**APPELLANT :**

**S.A. PANArt Hangbau AG, a company incorporated under Swiss law**

In the person of its legal representative

131, Rue Engehaldenstrasse

CH-3012 BERN (SWITZERLAND)

Represented by Karima MIMOUNI, attorney at law at the Court of Justice, Pleading Lawyer:  
DASSONVILLE, attorney at law at the PARIS Bar

**RESPONDENT :**

**S.A.S. BW ECOM**

In the person of its legal representative

1 rue des Soeurs

67400 ILLKIRCH-GRAFFENSTADEN

Not represented, delivered to the office of the Justice Commissioner on 6.10.2023

**COMPOSITION OF THE COURT :**

The case was debated in a public hearing on October 14, 2024, with a report on the case having  
been presented at the hearing, before the Court of Justice composed of:

Mr. WALGENWITZ, Chamber President

Mr. ROUBLLOT, Counsellor

Ms. RHODE, Counsellor

who have deliberated thereon.

**Clerk** during the proceedings: Ms. VELLAINÉ.

**JUDGMENT :**

- Delivered by default

- pronounced publicly by making the judgment available at the Court registry, with  
prior notice to the parties in accordance with the second paragraph of Article 450 of the  
Code of Civil Procedure.

- Signed by Mr. Franck WALGENWITZ, Chamber President, and Ms. Régine  
VELLAINÉ, Court Clerk, to whom the signed decision was handed over by the presiding  
magistrate.

Enforceable copy to  
- Attorney  
**Karima MIMOUNI**  
On 04.12.2024  
The Clerk

**FACTS OF THE CASE AND CONTENTIONS OF THE PARTIES :**

By a summons issued on February 14, 2023, PANArt Hangbau AG initiated proceedings against SAS BW Ecom before the civil summary judge of the Strasbourg Judicial Court.

By an order dated June 22, 2023, the civil summary judge of the Strasbourg Judicial Court ruled as follows:

"On the merits, refer the parties to pursue their claims, but reserve all rights and means of the parties;  
Reject the objection to territorial jurisdiction raised by SAS BW Ecom;  
Reject the plea of inadmissibility raised by SAS BW Ecom;  
Decide there is no need for summary judgment on the claims of PANArt Hangbau AG;  
Reject the claim for damages filed by SAS BW Ecom;  
Order PANArt Hangbau AG to pay the legal costs;  
Order PANArt Hangbau AG to pay SAS BW Ecom the sum of €1,500 under Article 700 of the French Code of Civil Procedure;  
Reject all other claims of the parties;  
Recall that the present decision is provisionally enforceable by right pursuant to Article 514 of the French Code of Civil Procedure."

PANArt Hangbau AG appealed this decision through a declaration filed on July 12, 2023. A second appeal declaration was filed to supplement the first.

The two proceedings were consolidated by order dated October 4, 2023.

In its ruling of May 15, 2024, the court ordered the reopening of the debates and invited PANArt Hangbau AG to present its observations regarding the applicable law to the dispute.

In its latest submissions dated September 23, 2024, accompanied by an uncontested schedule of evidence, PANArt Hangbau AG requested the court to:

"Receive the appeal,

Declare the appeal well-founded,

1) Concerning territorial jurisdiction

- Confirm the order of the Strasbourg Court of First Instance of June 22, 2023 insofar as it rejected BW ECOM's plea of lack of territorial jurisdiction ;

Consequently, and ruling again :

- Declare itself competent to order conservatory measures regarding acts of copyright infringement and parasitism committed by SAS BW Ecom against PANArt Hangbau AG.

- Admit the plaintiffs' claims and declare them well-founded ;

2) Concerning applicable law :

3) Concerning copyright infringement :

- Overturn the order of the Strasbourg Judicial Court insofar as it found the HANG musical instrument lacked originality;

- Confirm the June 22, 2023, order of the Strasbourg Judicial Court insofar as it:

\*Rejected the inadmissibility plea raised by BW ECOM on the grounds of lack of standing; and

\*Recognized PANArt Hangbau AG's copyright ownership of the HANG;

- Overturn the June 22, 2023, order of the Strasbourg Judicial Court insofar as it rejected PANArt Hangbau AG's claims for copyright infringement;

Consequently, and ruling again :

DECLARE and RULE that the law applicable to PANArt's claims based on infringement must be analyzed, in order of priority :

o As principal: under French law

o As a subsidiary :

\*In Germany, under German law

\*In Italy under Italian law

\*In Spain under Spanish law

\*In France under French law

\*In the Netherlands under Dutch law

For sites written in English, requests must be analysed in the light of all these rights, as well as Irish law.

DECLARE and RULE that the HANG is the fruit of aesthetic choices, reflecting the personality of its authors, and conferring on it an originality protectable under copyright in all the countries covered by the application (i.e. Germany, Italy, Spain, the Netherlands, France and English-speaking countries, and for which PANArt Hangbau AG has an interest and standing to defend itself ;

To declare and rule that the Handpan marketed by BW ECOM under its "Zenapan" trademark reproduces the original characteristics of the HANG, and that such conduct constitutes an infringement of the copyright of PANArt Hangbau AG and constitutes a manifestly unlawful disturbance.

Order BW ECOM to :

\*Cease directly or indirectly any marketing of the Handpan on the websites "zenapan.com", "zenapan.de", "zenadrum.it", "zenadrum.es", "zenapan.nl" and "zena-drum.com" as well as any other website published directly or indirectly by the company BW ECOM, within 48 hours of the notification of the order to intervene, under penalty of 10,000 € per day of delay ;

\*Delete all reproduction and reference with the HANG on :

- o The websites "zenapan.com", "zenapan.de", "zenadrurn.it", "zenadrurn.es", "zenapan.nl" and "zenadrurn.com" as well as any other website published directly or indirectly by BW ECOM; and
  - o All its social networks;
- within 48 hours of service of the order, subject to a penalty of €1,000 per day of delay.

4) Regarding parasitism :

- Overturn the order of the Strasbourg Judicial Court dated June 22, 2023, insofar as it rejected PANArt Hangbau AG's claims regarding acts of parasitism ;

Consequently, and ruling again :

- DECLARE and RULE that French law is applicable to the claims based on acts of parasitism committed by BW ECOM ;

- DECLARE and RULE that in :

\*Referring to the HANG on its websites ;

\*Representing Hang on its websites and on its products ;

BW ECOM is committing parasitic acts against PANArt Hangbau AG, constituting a manifestly unlawful disturbance.

- ORDER BW ECOM to :

\*Stop using logos on : <  > and <  > on :

- o The websites "zenadrurn.fr", "zenadrurn.de", "zenadrurn.it", "zenadrurn.es", "zenapan.com", "zenapan.de", "zenapan.nl" and "zenadrurn.com" as well as any website published directly or indirectly by BW ECOM ;

- o On all its social media platforms ; and

- o On products marketed directly or indirectly by BW ECOM

within 48 hours of notification of the order to be issued, under penalty of €10,000 per day of delay.

\*Cease all direct or indirect marketing of BW ECOM products reproducing the litigious logo within 48 hours of service of this order, subject to a fine of €10,000 per day of delay;

\*Delete any reproduction and any link with the HANG on

- o its websites "zenadrurn.fr", "zenadrurn.de", "zenadrurn.it", "zenadrurn.es", "zenapan.com", "zenapan.de", "zenapan.nl" and "zenadrurn.com" as well as any website published directly or indirectly by BW ECOM,

- o All its social networks,

within 48 hours of service of the order, subject to a fine of 1.000 € per day of delay.

5) Regarding BW ECOM's claim for damages for abuse of process

- Confirm the order of the Strasbourg Court of First Instance insofar as it dismissed BW ECOM's claims for damages for abuse of process.

6) IN ANY EVENT,

- Overturn the order of the Strasbourg District Court of June 22, 2023 insofar as it ordered PANArt Hangbau AG to pay BW ECOM the sum of 1,500 euros under article 700 of the French Code of Civil Procedure,

Consequently, and ruling again :

- Order BW ECOM to pay all the costs;

- Order BW ECOM to reimburse the costs incurred by PANArt Hangbau GmbH in carrying out the commissioner's report;

- Order BW ECOM to pay PANArt Hangbau AG the sum of 25.000 € under article 700 of the French Code of Civil Procedure;

- Order provisional enforcement of the forthcoming decision.”

By an act of a judicial officer dated October 6, 2023, PANArt Hangbau AG served SAS BW ECOM with the two appeal declarations dated July 12, 2023, the summary and notice of said appeals, the order of consolidation dated October 4, 2023, the notice of expedited scheduling, the order fixing the hearing date of March 11, 2024, the notice of summons for the conference on January 26, 2024, and the substantiated appeal submissions dated October 4, 2023.

By an act of a judicial officer dated October 9, 2024, PANArt Hangbau AG served SAS BW ECOM with the summary conclusions dated September 23, 2024.

For a more detailed presentation of the claims and arguments of the parties, reference should be made to their latest conclusions.

The case was adjourned to the hearing scheduled for October 14, 2024.

**REASONS :**

First, the court recalls that :

- Under Article 954, paragraph 3, of the Code of Civil Procedure, the court rules only on the claims stated in the final submission (dispositif) and examines the arguments supporting those claims only if they have been raised during the proceedings.

- Requests to “declare” or “find” do not constitute claims under Article 4 of the Code of Civil Procedure, as, unless provided by law, they do not produce legal consequences but are instead arguments or means of support. As such, the court will only address them if they support claims made in the final submission (dispositif) and, in any case, will address them in the reasoning (motifs) rather than in the dispositif. However, the court may rule on such requests when they constitute substantive and essential elements that qualify as claims (2nd Civil Chamber, April 13, 2023, appeal no. 21-21.463).

- Article 472 of the Code of Civil Procedure provides that if the defendant does not appear, the court still rules on the merits of the case. The judge will grant the request only if it is deemed lawful, admissible, and well-founded. Under the final paragraph of Article 954 of the same code, a party that does not file submissions is deemed to accept the judgment's reasoning.

Article 835, paragraph 1 of the same code states that the president of the judicial court may always, even in the presence of a serious dispute, order in summary proceedings the necessary conservatory or remedial measures, either to prevent imminent harm or to stop an evidently unlawful disturbance.

A serious dispute arises when one of the defenses to the claimant's allegations does not immediately appear to be futile, and leaves a doubt as to the meaning of the decision on the merits, which may subsequently be taken on this point. Conversely, a challenge that is clearly superficial or artificial will be dismissed, as the amount of the advance is limited only by the amount of the alleged claim, which cannot be seriously contested. Lastly, it is at the time of the court's ruling that it must assess the existence of a serious contestation, as the dispute is not frozen by the initial or previous positions of the parties in the articulation of this plea.

A manifestly unlawful disturbance is any disturbance resulting from a material or legal fact which, directly or indirectly, constitutes a clear violation of the rule of law.

Urgency is not a condition for implementing the provisions of article 835 paragraph 1 of the Code of Civil Procedure.

## **I – On copyright claims :**

### **1 – On applicable law :**

Article 5 of the Berne Convention states that :

1. Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin of the work, the rights which the respective laws now grant or may hereafter grant to nationals, together with the rights specially granted by this Convention.
2. The enjoyment and exercise of these rights are not subject to any formality; such enjoyment and exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of protection and the means of recourse guaranteed to the author to safeguard his rights are governed exclusively by the legislation of the country where protection is claimed.

Article 8 of the Rome II regulation states:

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

Copyright must be enforced according to the law of the country where protection is claimed (Cass. 1st civ., April 10, 2013, n°11-12.508, 11-12.509, 11-12.510; Cass. 1st civ., June 19, 2013, n°12-18.032).

In the present case, Mr. Félix Rohner and Ms. Sabina Schärer attest to having granted PANArt Hangbau an exclusive license for the economic rights, i.e. the rights of reproduction, adaptation and representation, relating to the Hang sound sculpture, for the legal duration of copyright in Switzerland.

PANArt Hangbau AG is asking the court to order BW Ecom to :

- Cease, directly or indirectly, any marketing of the Handpan on the websites "zenapan.com", "zenapan.de", "zenadrum.it", "zenadrum.es", "zenapan.nl" and "zena-drum.com" as well as any other website published directly or indirectly by the company BW Ecom, within 48 hours of service of the order to intervene, under a penalty of 10.000 € per day of delay;
- Delete all reproductions and all references to Hang on :
  - o The websites "zenapan.com", "zenapan.de", "zenadrum.it", "zenadrum.es", "zenapan.nl" and "zena-drum.com" as well as any other website published directly or indirectly by BW Ecom; and
  - o All its social networks;

within 48 hours of service of the order, subject to a penalty of €1,000 per day of delay.

There is nothing to suggest that the German, Italian, Spanish, Dutch or English websites are intended for the French public.

Furthermore, although PANArt Hangbau claims that BW Ecom imports the disputed items into France before exporting them to other European Union countries, it fails to demonstrate this.

Consequently, it is necessary to determine whether the Hang can be protected by copyright not only in France, but also in Germany, Italy, Spain, the Netherlands and Ireland.

However, these rights are to be interpreted in the light of EC Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society.

The notion of a work protected by copyright within the meaning of Directive EC 2001/29 is an autonomous concept of Union law, which must be interpreted and applied uniformly throughout the Union, and which presupposes the meeting of two cumulative elements. On the one hand, it implies the existence of an original object, in the sense that it is the author's own intellectual creation. On the other hand, the qualification of work is reserved for elements that are the expression of such a creation.

With regard to the first of these elements, it follows from the settled case law of the Court of Justice of the European Union that, for an object to be considered original, it is both necessary and sufficient for it to reflect the personality of its author, manifesting the latter's free and creative choices.

On the other hand, when the creation of an object has been determined by technical considerations, rules or other constraints, which have left no room for the exercise of creative freedom, the object cannot be considered as having the originality necessary to constitute a work.

As far as the second element is concerned, the concept of a work, as referred to in Directive 2001/29, necessarily implies the existence of an object that can be identified with sufficient precision and objectivity.

When an object has these characteristics, and therefore constitutes a work, it must, as such, benefit from copyright protection, in accordance with Directive 2001/29, it being noted that the extent of this protection does not depend on the degree of creative freedom enjoyed by its author, and is therefore no less than that enjoyed by any work covered by the said Directive.

Lastly, Article 4-1 of Directive EC 2001/29 states that Member States shall provide authors with the exclusive right to authorize or prohibit any form of distribution to the public, by sale or otherwise, of the original of their works or copies thereof.

- French law :

Under the terms of article L. 111-1 paragraphs 1 and 2 of the French Intellectual Property Code, the author of a work of the mind enjoys, by the sole fact of its creation, an exclusive intangible property right enforceable against all. This right comprises intellectual and moral attributes as well as economic attributes.

Article L122-1 of the French Intellectual Property Code specifies that the exploitation right belonging to the author includes the right of representation and the right of reproduction.

According to article L. 112-1 of the same code, the provisions of this code protect the rights of authors in all works of the mind, whatever their genre, form of expression, merit or purpose.

Under article L112-3 of the same code, works of art include drawings, paintings, architecture, sculpture, engravings, lithographs and works of applied art.

The protected work must be an original creation.

The originality of a work is the result of aesthetic biases and arbitrary choices made by its author, which characterize a creative effort bearing the imprint of his or her personality, and is not banal.

The work must have its own characteristics, not dictated by its function.



- Italian law :

The legal framework governing intellectual, artistic, and literary property in Italy, based on the system of copyright, is primarily contained in Law No. 633 of April 22, 1941, on the "protection of copyright and related rights."

Article 1 of this law stipulates that works of the mind having the character of creations, in the fields of literature, music, figurative arts, architecture, theater and cinematography, whatever the mode or form of expression, are protected within the meaning of this law.

Article 2 specifies that this protection includes in particular :

4. works of sculpture, painting, drawing, engraving and similar figurative arts, including works of scenic art, whether or not applied to industry, provided that their artistic value can be dissociated from the industrial character of the product with which they are associated;
10. industrial designs that have a creative character and artistic value in their own right.

To be protected, a work must be identifiable and recognizable as a creation of the author, being the result of the latter's specific choice in combining different elements. The work must be capable of being interpreted according to a clear "artistic key" (Italian Supreme Court, April 30, 2020, n°8433).

Under article 12 of this law, the author enjoys the exclusive right to publish his work. He also enjoys the exclusive right to exploit his work economically in any way and in any form, original or derived, within the limits set by this law, and in particular by exercising the exclusive rights set out in the following articles.

- Dutch law :

Works of literature, science or art within the meaning of Article 10 § 1 of the Dutch Copyright Act ("Auteurswet") include works of construction and sculpture as well as works of applied art and industrial designs.

To be protected, a work must have its own original character and bear the personal mark of its creator.

The designer's decisions must not simply serve a technical effect or be the result of a selection restricted by technical principles.

Article 28 of this law states that "1. copyright confers on the owner the right to claim as his property movable objects, other than those which are registered, which have been disclosed or which constitute an unauthorized reproduction in violation of this right, or which are materials or instruments principally used in creating or manufacture of these objects or to demand their withdrawal from circulation, their destruction or their rendering unfit for use (...). 6. Unless otherwise agreed, the licensee shall be entitled to exercise the powers deriving from paragraphs 1 to 5 insofar as they serve to protect the rights the exercise of which has been granted to him".

- Spanish law :

Article 1 of Royal Decree no. 1/1996 of April 12, 1996 stipulates that intellectual property in a literary, artistic or scientific work belongs to the author by the very fact of its creation.

Article 2 of this decree stipulates that intellectual property is made up of personal and economic rights which confer on the author full disposal of the work and the exclusive right to exploit it, with no other limitations than those established by law.

Article 17 of the decree states that the author has the exclusive right to exploit his work in any form whatsoever and, in particular, to reproduce, distribute, communicate to the public and transform it, acts which may only be carried out with his authorization, except in the cases provided for by the present law.

Under the terms of Article 10 of the aforementioned decree, the object of intellectual property is formed by all original literary, artistic or scientific creations expressed using any means or medium, tangible or intangible, currently known or to be invented in the future, and which include in particular:

e) sculptures, paintings, drawings, engravings and lithographs, illustrated books and comic strips, as well as their sketches and all other plastic works, whether or not they are applied.

- German law :

Under Section 2 of the UrhG (Urheberrechtsgesetz - German Copyright Act), authors of literary, scientific and artistic works are entitled to protection of their works.

Protected artistic works include works of fine art, including works of architecture and applied art, as well as projects for such works.

Works can only be personal intellectual creations. Free creative decisions are required.

It is therefore necessary to determine whether the object is artistically conceived beyond the form imposed by its function, and whether this conception reaches a level of creation that justifies copyright protection.

Under article 15 of the UrhG, the author has the exclusive right to reproduce the work, regardless of the process used or the number of copies made.

Article 16 of the UrhG stipulates that the author has the exclusive right to put copies of the work into circulation. By virtue of this right, it is forbidden to offer copies for sale or to put them on the market in a way that makes the work accessible to the public without the author's authorization.

- On Irish law :

Article 17 of law no. 28/2000 on copyright and related rights stipulates that :

1) Copyright is an exclusive right which entitles the owner of copyright in a work of any class whatsoever, subject to the provisions of this Act, to do or authorize others to do in Ireland certain acts in relation to that work which are designated under this Act as acts reserved as copyright in a work of that class.

2) Copyright applies, in accordance with this law, to the following categories of works:

- a) original literary, dramatic, musical or artistic works (...);
- 3) Ideas and principles underlying any element of a work, procedures, methods of operation or mathematical concepts and the contents of original databases are not protected by copyright; protection in this respect is without prejudice to any existing rights in such contents.
- 4) A work is protected by copyright only if the conditions set out in this Part for the application of copyright protection are met.
- 5) A work is not protected by copyright if, or to the extent that, it infringes copyright in another work.
- 6) A work is not protected by copyright if, or to the extent that, it is a copy of a work previously made available to the public.

Under the terms of article 37 of the aforementioned law:

- 1) Subject to the exceptions mentioned in Chapter 6 and to any provision of this Part relating to licensing, the owner of copyright in a work has the exclusive right to perform, or to authorize others to perform, the following acts:
  - a) reproduce or copy the work ;
  - b) make the work available to the public ;
  - c) make an adaptation of the work or perform one of the acts referred to in subparagraph a) or b) in relation to an adaptation ;

These acts are known as "reserved copyright acts" and are referred to as such in this law.

- 2) Copyright in a work is infringed by anyone who, without the authorization of the copyright owner, performs or authorizes others to perform an act reserved by copyright (...).

## 2 – On whether the work is protectable under the aforementioned legislation:

In this case, PANArt Hangbau claims originality in the combination of the following features:

- Two shells with an overall synclastic lenticular shape, a round shape seen from above, a flattened ovoid shape seen from the side;
- A flattened convex shell at the center of the pivot with several round and concave sound fields arranged in a circle around a central element, and a concave spherical central element integrated into the shell, called the Ding,

- A second concave support shell with a hole on the underside, called Gu,
- The hulls are joined in the middle by an outward-facing ring with a rim.



It recounts the creative process that led to the creation of the Hang, the result of five prototypes, and highlights the aesthetic choices made by the designers, whose aim was to give their new work a spatial and atypical dimension. For example, the central junction is reminiscent of Saturn's rings, and the Hang's shape evokes the appearance of a flying saucer.

In support of the aesthetic research carried out by Félix Rohner and Sabina Schärer, PANArt Hangbau points out that, although the Hang belongs to the idiophone family, it bears no aesthetic resemblance to any instrument known at the time of its creation.

To justify the originality of the work created, PANArt Hangbau relies on an opinion drawn up on June 4, 2020 by Dr Anthony Achong, former senior lecturer and former head of the West Indies Physics Department, in which he states that:

- the external shape of the resonance box is of minor importance for the specific sound of the instrument,
- the lower bowl has no significant influence on the sound,
- it's not essential for the upper bowl to curve outwards,
- the specific shape of the bowl has no effect on the sound produced,
- the note shapes could be placed anywhere on the upper bowl, or even on the lower bowl, just like the Ding.

He therefore concludes that the Hang's external shape is not essential to the sound it produces, and that it was chosen by the designers for aesthetic reasons.

PANArt Hangbau also refers to an opinion issued on June 7, 2020 by Dr. Michaël Steppat, lecturer at the Beuth Hochschule für Technik in Berlin and author of a thesis on the sound behavior of steel pans, in which he states that the concrete design of the sound body has no decisive influence on sound production, and that the concrete arrangement of the Hang depends primarily on the design.

PANArt Hangbau points out that the courts of Düsseldorf, Hamburg and Berlin (Germany) considered that the Hang should be protected under copyright as an applied work of art in their decisions of April 29, 2020, September 24, 2020, August 11 and August 20, 2020, holding in particular that:

- The combination of the various design features of the Hang sculpture clearly expresses the personal intellectual creation of its creators;
- The Hang's outstanding design features are not technical, but have been chosen for aesthetic reasons. In particular, the shape of the resonance box, the design and layout of the sound fields, and the surrounding gold-plated brass ring have no bearing on the Hang's sound qualities.

Finally, it refers to the decision handed down on July 2, 2024 by the Commercial Court of Berne (Switzerland), which ruled that there were no technical constraints that could have dominated Hang's design.

The evidence presented by the appellant allows the court to consider the Hang sound sculpture as a work of applied art. While the Hang, a musical instrument that differs from its precursors, has a utilitarian character, it is sufficiently established that its form is not exclusively dictated by its technical function, but is the result of creative choices made by its authors following a lengthy process that led to the creation of several prototypes.

The Hang's lens shape is not dictated by any technical imperative, since the opinions drawn up by the private experts called in by PANArt Hangbau show that only a concave or convex half-sphere was required for the object's use, not a combination of two shells.

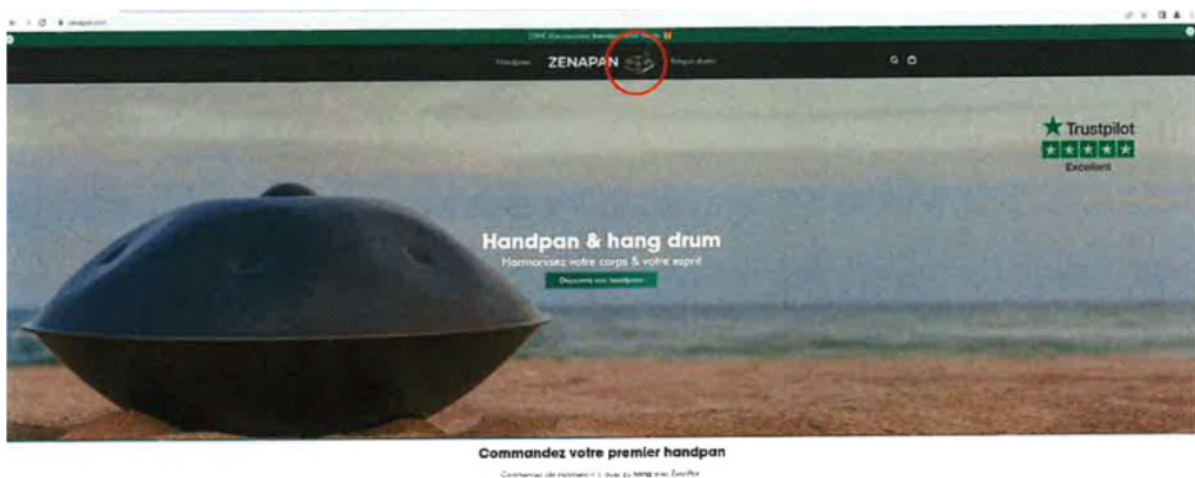
As a result, Hang sound sculptures are eligible for copyright protection in the countries mentioned above.

### 3 - On the existence of infringement and sanctions :

PANArt Hangbau found that the French website "zenapan.com", the Dutch website "zenapan.nl", the Italian website "zenadrum.it", the Spanish website "zenadrum.es", the German website "zenapan.de" and the English website "zena-drum.com", published by BW Ecom, offered for sale an infringement of the Hang, namely a sound instrument called Handpan, marketed under the Zenapan trademark and available in several colors.

It justifies this marketing by producing a report drawn up by a court commissioner on August 8, 2023.

The photographs below show the Handpan.





As such, it reproduces the characteristics of the Hang insofar as it presents :

- Two hulls with an overall lenticular shape, a round shape seen from above, a flattened ovoid shape seen from the side;
- A convex shell flattened at the center of the pivot, featuring several round and concave sound fields arranged in a circle around a central element, and a concave spherical central element integrated into the shell,
- A second concave support shell with a hole at the bottom,
- The hulls are joined in the middle by an outward-facing ring with an edge.

Given these important similarities in design features, the attacked sound sculpture produces the same overall impression, despite minor differences such as product color.

PANArt Hangbau proves that it has used its copyright in the countries where protection is claimed, by producing sales invoices in Germany, Spain, France and Italy, and by proving, via its websites for the Netherlands and English-speaking countries, that it has sold its product in the Netherlands and Ireland.

As a result, it has demonstrated that it is suffering from a manifestly unlawful disturbance, and BW Ecom will be ordered to cease, directly or indirectly, any marketing of the Handpan, as described and reproduced above, on its French "zenapan.com", Dutch "zenapan.nl", Italian "zenadrum.it", Spanish "zenadrum.es", German "zenapan.de" and English-speaking (for Ireland) "zena-drum.com" websites, as well as any other website published directly or indirectly by BW Ecom to these countries within one

month of the date of notification of this decision, and subject to a penalty of 500 € per day's delay thereafter, for a period of ten months.

On the other hand, there are no grounds for interlocutory injunction in respect of its request for the deletion of all reproductions of and references to the Hang on the "zenapan.com", "zenapan.de", "zenadrums.it", "zenadrums.es", "zenapan.nl" and "zena-drum.com", as well as on any other site published directly or indirectly by BW Ecom and all its social networks, in the absence of any explanation whatsoever regarding the disputed references which it intends to have removed.

## **II – On parasitism claims :**

### **1 – On applicable law :**

Article 4 of the Rome II Regulation states that :

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question

Article 6 of the Rome II regulation states:

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.
3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.  
  
(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.



4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

In this case, PANArt Hangbau claims that BW Ecom, a Strasbourg-based company, has committed acts of parasitism in France, Germany, Italy, Spain and the Netherlands.

In the light of article 6.3.b above, it is right to base its claim on French law.

## 2 – On parasitism and sanctions:

Unfair competition, based on the general principle of liability laid down in article 1240 of the French Civil Code, consists of acts which deviate from the general rules of loyalty and professional probity applicable in economic activities and governing business life, such as those creating a risk of confusion with the products or services offered by another operator, parasitic acts aimed at appropriating, unjustifiably and without consideration, economic value resulting from know-how, work or investment, or acts constituting denigration or disorganization of a company.

When the action is not brought on the merits but in summary proceedings, in application of article 873 of the French Code of Civil Procedure, in order to order precautionary measures to put an end to the manifestly unlawful disturbance resulting from these infringements of the rule of law, it is important to ascertain whether the evidence of manifestly unlawful acts of unfair competition and parasitism has been adduced with the obviousness required in summary proceedings.

An action for unfair competition is a civil liability action that differs from an action for the protection of a private right.

In this case, PANArt Hangbau has demonstrated that the Hang was designed between 1999 and 2001 by Sabina Schärer and Felix Rohner, following a lengthy creative process. Five prototypes were created before culminating in the version currently on sale by the company, which holds an exclusive operating license.

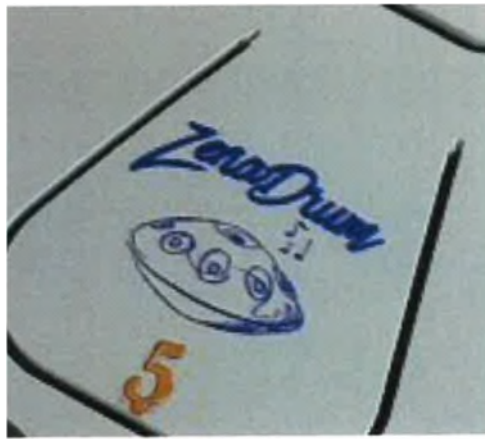
PANArt Hangbau also demonstrates that the Hang is a great success and has now acquired an international reputation (appendices 19, 20, 22 and 43).

According to the minutes drawn up by the court commissioner on August 8, 2023, BW Ecom uses a logo representing the Hang on its French (zenadrum.fr; zenapan.com), German (zenadrum.de; zenapan.de), Italian (zenadrum.it), Spanish (zenadrum.es), Dutch (zenapan.nl) and English (zenadrum.com) websites a Hang logo, which it also affixes to a musical instrument it offers for sale called "Tongue Drum".

The above-mentioned websites use the following logo:



This logo also appears on the Tongue Drum:



The logo used is a stylized representation of the Hang.

The consumer is thus led to make a link between the products sold by BW Ecom and the Hang sold by PANArt Hangbau.

This link is reinforced by the reproduction, on BW Ecom's websites, of the Hang :



as well as by the notices appearing on the BW Ecom websites ([zenadrum.fr](http://zenadrum.fr)", "[zenapan.com](http://zenapan.com)") which state that :

- "The ancestor of the Tongue Drum is the Hang Drum, also known as the Handpan (...). The Hang Drum (...) has two major disadvantages: price and maintenance. Handpans not made of steel can rust and go out of tune easily. As for the price, it's much less attractive, as you'll have to reckon with over €1,000 for a good-quality Handpan, i.e. 10 times more expensive than a ZenaDrum";

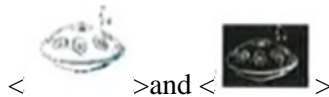
- "The Handpan is a musical instrument born in the workshops of PanArt, a Swiss company run by Felix Rohner and Sabina Schäre. The Handpan, then called Hang by its designers, in reference to "the hand" in German-speaking Switzerland, has its origins in the Ghatam. This is why the Handpan is also called Hang Drum. Today, it is available for sale from numerous companies such as ZenaPan, which offers the best handpans tuned in D minor".

As a result, BW Ecom is attempting to follow in PANArt Hangbau's footsteps in order to benefit from its efforts, reputation and investments without compensation.

For PANArt Hangbau, these acts of parasitism give rise to a manifestly unlawful disturbance

Consequently, BW Ecom should be ordered to pay :

- cease all use of the logos :



on the websites zenadrum.fr, zenapan.com, zenadrum.de, zenapan.de, zenadrum.it, zenadrum.es, zenapan.nl and zena-drum.com, "as well as any other website published directly or indirectly by BW Ecom, on its social networks and on products marketed directly or indirectly by BW Ecom;

- cease all direct or indirect marketing of BW Ecom products reproducing the litigious logo;

- delete any reproduction of Hang on the above-mentioned sites;

within one month of the date of notification of this decision, and subject to a penalty of 500 € per day's delay thereafter, for a period of ten months.

### **III - Costs and irreducible expenses :**

In view of the outcome of the dispute, the provisions of the aforementioned order concerning costs and irreducible expenses will be reversed.

BW Ecom will be ordered to pay the costs of the trial and appeal proceedings.

In addition, in the interests of fairness, BW Ecom should be ordered to pay PANArt Hangbau AG the sum of 7,000 under article 700 of the French Code of Civil Procedure.

**FOR THESE REASONS**

**The Court,**

**Overturms** the order handed down on June 22, 2023 by the civil interim relief judge of the Strasbourg judicial court, insofar as it :

- Declares that there are no grounds for interlocutory injunction in respect of PANart HANGbau AG's claims;
- Order PANart HANGbau AG to pay the costs;
- Ordered PANart HANGbau AG to pay Sas BW Ecom the sum of €1,500 under article 700 of the French Code of Civil Procedure,

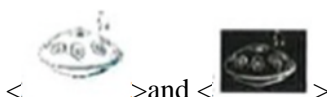
Ruling again and adding,

**Orders** SAS BW Ecom to cease, directly or indirectly, any marketing of the Handpan, as described and reproduced above, on its French "zenapan.com", Dutch "zenapan.nl", Italian "zenadrum.it", Spanish "zenadrum.es", German "zenapan.de" and English (for Ireland) "zena- drum.com", as well as any other website published directly or indirectly by SAS BW Ecom for these countries, within one month of the date of notification of this decision, and subject to a penalty of €500 per day's delay thereafter, for a period of ten months,

**Declares** that there are no grounds for an interlocutory injunction concerning the request to remove all reproduction and all references to the Hang from the "zenapan.com", "zenapan.de", "zenadrum.it", "zenadrum.es", "zenapan.nl" and "zena-drum.com" websites, as well as from any other site published directly or indirectly by SAS BW Ecom and all of its social networks,

**Order** SAS BW Ecom to :

- cease all use of the logos :



on the websites "zenadrum.fr, zenapan.com, zenadrum.de, zenapan.de, zenadrum.it, zenadrum.es, zenapan.nl and zena-drum.com", as well as any other website published directly or indirectly by SAS BW Ecom, on its social networks, as well as on products marketed directly or indirectly by SAS BW Ecom,

- cease all direct or indirect marketing of BW Ecom products reproducing the litigious logo,
- delete any reproduction of Hang on the above-mentioned sites,

within one month of notification of this decision and subject to a penalty of **500 €** per day of delay thereafter, for a period of ten months,

**Order** SAS BW Ecom to pay the costs of the proceedings at first instance and on appeal,

**Order** SAS BW Ecom to pay PANArt Hangbau AG the sum of €7,000 under article 700 of the French Code of Civil Procedure.

**The Clerk :**

**The President :**