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Decision

HG 20 117

Bern, 16 June 2026

Cast

Chief Judge Schlup (Vice President), Commercial Judge
Geelhaar-Beuret and Commercial Judge Emch-Fasnacht
Clerk Blatter

Parties to the proceedings

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

Plaintiff 1

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

Plaintiff 2

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

World of Handpan LLC, Schleissheimer Strasse 47, 80797 Munich,
Germany

Plaintiff 3

Eitle Emanuel, Schleissheimer Strasse 47, 80797 Munich, Germany

Plaintiff 4

Plaintiff 3 and Plaintiff 4 represented by Bernard Volken and/or
Pascal Spycher, attorneys, 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 Strasse 24, 79112 Freiburg, Germany
Plaintiff 9

Plaintiff 5 through to and including Plaintiff 9 represented by
Dr. Roger Staub, attorney, and/or Manuel Bigler, attorney, 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
Pommeisbrunn, Germany
Plaintiff 12

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

Würmli Thomas, Oberer Haselweg 5, 5727 Oberkulm,
Plaintiff 18

Würmli Sabine, Oberer Haselweg 5, 5727 Oberkulm
Plaintiff 19

Poux Jérémie, 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

Brönnimann Markus, Grubenweg 2, 3362 Niederönz
Plaintiff 25

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

v

PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern
Defendant 1

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

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

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

subject matter

Copyright

Claim HG 20 117 of 27 October 2020

Claim HG 20 133 of 4 December 2020

Claim HG 21 2 of 31 December 2020

Answer to the of 11 May 2021

Reply (in restricted proceedings) dated 11 May 2022

Rejoinder (in restricted proceedings) dated 18 October 2022

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

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

Rejoinder dated 20 November 2025

Considerations:

I. Background

1. The **group of Plaintiffs** originally comprised **25** (physical and legal entities) resident in Switzerland, Germany or the Netherlands who engage in the manufacturing and/or distribution of hand-played, lens-shaped metal percussion instruments known in the scene as 'Handpans'.

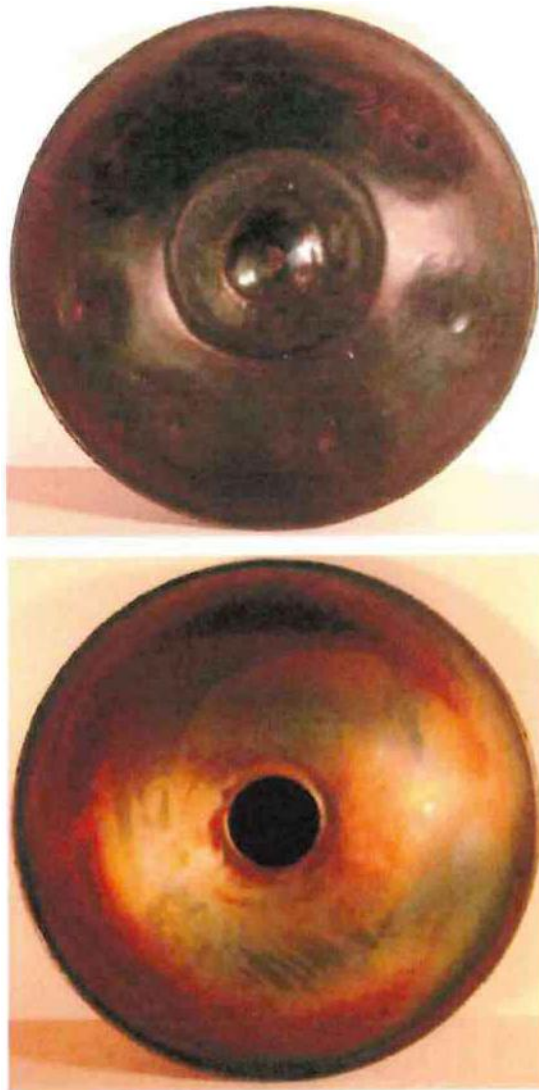
Defendants 2 and 3 are physical persons who, around the turn of the millennium, first created metal-sounding instruments in the form at issue here and gave them the name 'Hang' (a term in Bernese German meaning 'hand'). Defendants 2 and 3 jointly designed various versions of the 'Hang'. **Defendant 1** is the legal entity — managed by Defendants 2 and 3 — through which, amongst other things, the 'Hang' is distributed.

2. By claims filed on 27 October 2020 ('K-I'; case number HG 20 117), 4 December 2020 ('K-II'; former [pre-merger] case number HG 20 133) and by a claim dated 31 December 2020 (amended on 12 January 2021) ('K-III'; former case number HG 21 2), the Plaintiffs (hereinafter 'the Plaintiffs') sought, **as their principal claim**, a **declaration** from the Commercial Court of the Canton of Bern that certain works set out 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 investigating judge on 18 January 2021 at the request of the parties and were thereafter continued under case number HG 20 117 (p. 256 and p. 261 [unless otherwise stated, the page references below relate to case file HG 20 117]).
3. By agreement with the parties, the consolidated **proceedings** were initially **restricted** to the question of the copyrightability of 10 variants of 'Hang' in Switzerland, Germany and the Netherlands (decision of 24 January 2022, p. 486). By decision of 2 July 2024, the commercial court rejected claim no. 1 of the actions, in so far as it had been admitted (namely in so far as the Court recognised that the Plaintiffs had a legal interest in a declaratory judgment regarding the individual versions of the 'Hang' under the relevant legal systems). For further details, reference is made to the commercial court's **decision of 2 July 2024** (p. 1423 et seq.), 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 on the grounds of lack of legal interest (see decision of 2 July 2024, Operative No. 1, p. 1517), with costs apportioned on a pro rata basis.

5. On the merits, the court concluded in its decision of 2 July 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 legal system; the list and illustrations correspond to the Plaintiff’s prayers of relief, no. 1):

i. Prototypes of the ‘Hang’:

d. Prototype 4:



e. Prototype 5:
(*cf. following page*)



ii. 'Hang':

a. First generation of the 'Hang':





b. 'Low Hang':

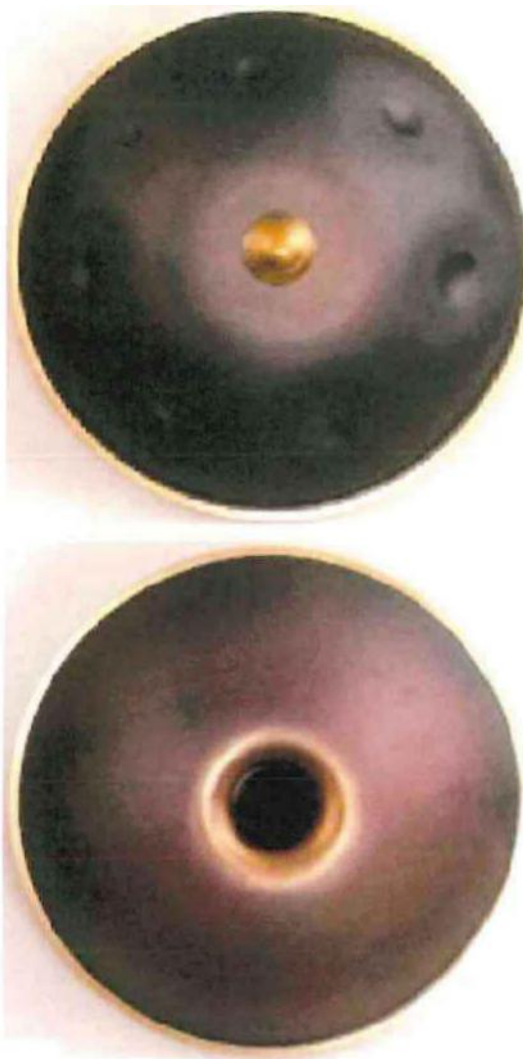


- c. Second generation of the 'Hang':



- d. 'Integrales Hang':





e. 'Freies Integrales Hang':



6. **Plaintiffs 1–23** lodged an objection to the decision of 2 July 2024 with the Federal Supreme Court. In its judgment of 18 February 2025, the Court rejected the objection in so far as it was admissible (BGer 4A_466/2024 of 18 February 2025, pp. 1551 et seq.). Consequently, the **decision not to admit** the appeal in respect of Plaintiffs 11, 13, 14, 15, 16 and 17, as well as in respect of certain legal systems concerning certain Plaintiffs, has now acquired **legal effect** (see decision of 2 July 2024, Operative Part, no. 1 and 5–7, p. 1517; cf. also BGer 4A_466/2024 of 18 February 2025, E. 1.3, p. 1558 et seq.).

However, the **Federal Supreme Court did not address** the substantive issue of copyright protection for the ‘Hang’ (the conditions for an independently contestable interim decision were not met; the objection was therefore inadmissible). No specific reproduction of the relevant operative sections 4 and 8 to 11 of the decision of 2 July 2024 is provided; instead, express reference is made to them (p. 1517).

7. In parallel with the appeal proceedings before the Federal Supreme Court, the Defendants and Plaintiff 24 (Plaintiff 7 in the proceedings with the former case number HG 21 2) reached an out-of-court settlement. Plaintiff 24 subsequently withdrew his claim (or, more precisely, the alternative claim set out at no. 6) in accordance with the agreement (p. 1523 et seq.), and the proceedings were subsequently struck out in this regard by decision of 2 October 2024 (p. 1535 et seq.).

II. **Subject matter of the present proceeding; claims**

8. Having clarified the question of the fundamental copyright protection of ‘Hang’ in its decision of 2 July 2024, i.e. affirmed it and accordingly rejected the negative 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) are infringing the Defendant’s copyright through certain acts, such as offering for sale, selling or manufacturing certain ‘Handpans’ (**alternative claim regarding the issue of infringement** — again in the form of a negative declaratory claim).
9. Furthermore, in the same claims, the Plaintiffs seek a (negative) declaration that their Claims do not infringe ‘any of the Defendants’ copyright’ (**auxiliary claim**) and that **the Defendants have ‘no claims’** against the Plaintiffs arising from such actions. In their Reply (dated 25 September 2025 in each case [hereinafter ‘Reply I’ for that of Plaintiffs 1–2, 5–9, 18–23 and 25, and ‘Reply II’ for that of Plaintiffs 3, 4, 10 and 12]), the Plaintiffs put forward an **additional (sub-)auxiliary claim** and seek a **declaration** that certain acts (such as the manufacturing, offering for sale, sale, distribution and making available of their ‘Handpans’) **do not infringe the Defendants’ copyright in those versions** of the ‘Hang’ in respect of which the commercial court had recognised their **right to a declaratory judgement** in its Decision of 2 July 2024, and that the Defendants have no claims against the Plaintiffs arising from such acts. Compared with the previous alternative claims, the new claims state that the Plaintiffs do not infringe **the Defendants’ copyright in the versions of the ‘Hang’ depicted in the claims** (as opposed to ‘do not infringe the Defendants’ copyright’). By way of example, the following is an **extract of the alternative and sub-auxiliary claims** put forward by Plaintiff 1 and Plaintiff 2 (and worded identically for the other Plaintiffs [with the exception of the naming of the Plaintiffs and the specific instruments]) from K-I, prayer of relief 2 and Rejoinder I, prayer of relief 2.1 (pp. 15 and 1697):

‘2. Auxiliary to legal claim no. 1: It should be declared that Plaintiff 1 and Plaintiff 2, by manufacturing, offering for sale, selling, distributing and making available the musical instruments reproduced below, do not infringe any copyright of the Defendant a) in Switzerland, b) in Germany and c) in the Netherlands, do not infringe the Defendants’ copyright, and that the Defendants have no claims against Plaintiff 1 or Plaintiff 2 arising from such acts: [followed under points (a) to (f) by images of six ‘Handpans’ of Plaintiff 1 and Plaintiff 2]”

‘2.1 In the alternative to the claim set out in prayer of relief 2: It should be held that, by manufacturing, offering for sale, selling, distributing and making available the musical instruments as set out in prayer of relief 2(a)–(f) in Germany and the Netherlands, Plaintiff 1 and Plaintiff 2 do not infringe any of the Defendants’ copyright in the musical instruments as set out in prayer of relief 1(ii) (a) and that the Defendants have 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 not to hear the case with legal effect dated 2 July 2024 and a withdrawal of the Claim by the Plaintiffs 11, 13, 14, 15, 16, 17 and 24, the ‘Handpans’ of Plaintiffs 11, 13, 14, 15, 16, 17 and 24 are **no longer relevant**. Excluded from this are ‘Handpans’ belonging to Plaintiffs who have withdrawn from the proceedings, which are (also) distributed by Plaintiffs still involved in the proceedings and which were included in the relevant 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 prayer of relief no. 2ggg and no. 2hhh, p. 32 [HG 20 133]).
12. For a **comprehensive presentation of the claims**, which comprise a large number of ‘Handpans’ and dozens of pages of illustrative material, reference is made to the presentation in the Claims K-I to K-III (p. 15 et seq. [HG 20 117]; p. 13 et seq. [HG 20 133]; pp. 771 et seq. [HG 21 2]) and in Replies I and II (both dated 25 September 2025, pp. 1659 et seq. and 1695 et seq.).

III. History of the proceedings

13. For the history of the proceedings **up to 2 July 2024**, reference is made to the remarks set out above and to the relevant considerations in the decision of 2 July 2024 (decision of 2 July 2024, E. 1 et seq., pp. 1427 et seq.).
14. By decision of 2 July 2024, the commercial court rejected the claims (or the respective principal claims) in so far as it had admissible jurisdiction (pp. 1423 et seq.).
15. Plaintiff 24’s withdrawal of the Claim is dated 10 September 2024 (p. 1523 et seq.). The corresponding order to strike the Claim from the register was issued on 2 October 2024 (p. 1535 et seq.).

16. By judgment of 18 February 2025, the Federal Supreme Court rejected the objection lodged against the decision of 2 July 2024, in so far as it was admissible (pp. 1551 et seq.).
17. On 9 April 2025, the Defendants submitted a supplementary submission. In it, they also requested that a second exchange of written pleadings be dispensed with, and that, in the alternative, a second exchange of written pleadings be conducted and — provided the Plaintiffs did not also waive their right to a main hearing — that this be scheduled as soon as possible (pp. 1569 et seq.).
18. By decision of 11 April 2025, the proceedings were resumed in light of the (reasoned) judgment of the Federal Supreme Court dated 18 February 2025 (4A_466/2024; dispatched on 7 April 2025), which had been received on 8 April 2025. The Plaintiffs were given the opportunity to comment on the new submission and on the further course of the proceedings (pp. 1602 et seq.).
19. The Plaintiffs' statement regarding the new submission of 9 April 2025 is dated 12 May 2025. It was handed over to the post office on 13 May 2025 (pp. 1606 et seq.) and was therefore submitted late (see pp. 1611 et seq., 1614 et seq.). From a procedural point of view, the Plaintiffs requested that a second exchange of written submissions take place.
20. In their submission of 26 May 2025, the Defendants declared a waiver of their right to a main hearing and, in amendment to the procedural application of 9 April 2025, requested that a provisional date be set for the second main hearing, that short deadlines be set for the parties to submit their Reply and Rejoinder, and that the date for the second main hearing be cancelled should the Plaintiffs waive their right to it (pp. 1622 et seq.).
21. By decision of 27 May 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 statements are dated 10 June and 17 June 2025 (p. 1628 et seq.; p. 1635 et seq.).
23. By decision of 24 June 2025, the Plaintiffs in the unrestricted proceeding were granted a deadline of 25 September 2025 to submit a Reply, and the Defendants were granted a deadline of 20 November 2025 to submit 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 decision of 12 August 2025, in the event that the Plaintiffs did not make a waiver, the main hearing to be held in such a case was scheduled for 27 January 2026 (pp. 1645 et seq.).
25. By decision of 13 August 2025, it was established that the four Plaintiffs 3, 4, 10 and 12 would now be represented by lawyers Volken and/or Spycher (p. 1656 et seq.).

26. Plaintiffs 1, 2, 5–9, 18–23 and 25 submitted their Reply on 25 September 2025 (hereinafter named ‘Reply I’; received by the commercial court on 29 September 2025; pp. 1695 et seq.).
27. Plaintiffs 3, 4, 10 and 12 submitted their reply on 25 September 2025 (hereinafter named ‘Reply II’; received by the commercial court on 26 September 2025; pp. 1659 et seq.).
28. By decision of 30 September 2025, the Defendants were granted a deadline of 20 November 2025 to submit a Rejoinder (pp. 1881 et seq.).
29. The Defendants submitted their Rejoinder on 20 November 2025 (received by the commercial court on 21 November 2025; pp. 1886 et seq.).
30. By decision of 21 November 2025, the Plaintiffs were given a deadline of 1 December 2025 to inform the court whether they (like the Defendants) wished to waive the right to a second main hearing (pp. 1987 et seq.).
31. In a submission dated 1 December 2025, the representatives of Plaintiffs 3, 4, 10 and 12 made the disclosure that they did *not* wish to make a waiver of their right to a second main hearing. At the same time, they filed an application for the proceedings to be suspended until the preliminary ruling requests Nos. C-580/23 and C-795/23, pending before the Court of Justice of the European Union (CJEU), had been resolved, the outcome of which was of significance to the present proceedings (pp. 1992 et seq.).
32. In a submission dated 1 December 2025, the representatives of the remaining Plaintiffs made a disclosure stating that the holding of the main hearing was indispensable for them and also commented on the Reply (pp. 2000 et seq.).
33. By decision of 4 December 2025, the submissions of 1 December 2025 were served on all parties, and it was determined that the second main hearing, provisionally scheduled for 27 January 2026, would take place (article 233 of the CPC, by implication). 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 application for a stay of proceedings submitted by Plaintiffs 3, 4, 10 and 12 (pp. 2008 et seq.).
34. By submission dated 9 December 2025, Plaintiffs 1, 2, 5–9, 18–23 and 25 commented on the application for a stay of proceedings and commented on the judgment of the ECJ of 4 December 2025, which had been handed down in the meantime in that case (pp. 2012 et seq.).
35. In a submission dated 9 December 2025, the Defendants also submitted the judgment of the ECJ of 4 December 2025 and applied for the application for stay to be struck out as having become devoid of purpose (p. 2022).
36. By decision of 15 December 2025, the application for stay of proceedings by Plaintiffs 3, 4, 10 and 12 was struck out as having become moot (pp. 2024 et seq.).

37. The summons to continue the main hearing is dated 6 January 2026 (p. 2028 et seq.).
38. By submission dated 16 January 2026, Plaintiffs 3, 4, 10 and 12 submitted their statements on the judgment of the ECJ of 4 December 2025 (p. 2034 et seq.).
39. By a submission dated 26 January 2026, Plaintiffs 1, 2, 5–9, 18–23 and 25 filed the article from the newspaper ‘Schweiz am Wochenende’ dated 24 January 2026 with the court files (p. 2048).
40. On 27 January 2026, the main hearing resumed before the commercial court in Bern (pp. 2052 et seq.).
41. The bill of costs drawn up by the Defendant’s legal representatives was handed over 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, together with the application for a correction to the minutes, was received by the commercial court on 23 February 2026 (p. 2091 et seq.).
43. The bill of costs from the legal representatives of Plaintiffs 3, 4, 10 and 12 is dated 2 March 2026 (pp. 2101 et seq.).
44. By decision of 5 March 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 ‘application for correction’ or ‘supplement’ to the minutes, and gave the Defendant and Plaintiffs 3, 4, 10 and 12 the opportunity to submit any comments (on a voluntary basis) (p. 2109 et seq.).
45. The Defendant’s waiver of the right to make a statement on the Plaintiffs’ cost statements and the application for correction of the minutes was received by the commercial court on 12 March 2026 (p. 2113).
46. The statement from Plaintiffs 3, 4, 10 and 12 to the Defendant’s bill of costs was received by the commercial court on 16 March 2026 (p. 2115 et seq.).
47. The statement from the remaining Plaintiffs to the Defendant’s bill of costs was received by the commercial court on 17 March 2026 (p. 2120).
48. By decision of 17 March 2026, the statements were served on both parties (p. 2123 et seq.).
49. By decision of 16 June 2026, the application for a correction to the minutes was rejected (p. 2127 et seq.).

IV. Procedural matters

50. The court examines ex officio whether the procedural requirements are met (see article 60 of the Swiss Code of Civil Procedure of 19 December 2008 [CPC; SR 272]). The national civil procedure law of the forum is decisive – even in international cases – (cf. BGE 141 III 294, E. 4 = Pra 106 [2017] No. 5; BGE 139 III 278, E. 4.2), in this case therefore the CPC.
- 50.1 The Commercial Court of Bern has both international and territorial jurisdiction. The Defendants have **accepted appearance** in the proceedings (see, inter alia, KA, para. 21, p. 280; cf. article 24 of the Lugano Convention of 30 October 2007 [LC; SR 0.275.12] and Article 18 of the CPC), particularly as jurisdiction would have been established in any event (Article 2 nr. 1 of the LC in conjunction with Article 109 para. 2 of the Swiss Federal Act on Private International Law of 18 December 1987 [PILA; SR 291] and article 10 para. 1 lit. a and b of the CPC. Territorial jurisdiction exists both in international matters (with regard to Plaintiffs 1–10 and 12, who, unlike the Defendants, have no registered office in Switzerland) and in domestic matters (with regard to Plaintiffs 18–23 and 25, who, like the Defendants, have no registered office in Switzerland).
- 50.2 **Subject-matter** jurisdiction for infringement claims arises from Article 5 para. 1 lit. a of the CPC in conjunction with Article 7 para. 1 of the Introductory Act to the CPC, the Criminal Procedure Code and the Juvenile Criminal Procedure Code [EG ZSJ; BSG 271.1].

Governing law

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

Interest in a declaratory judgement

52. The (sub-)conditional claims brought also constitute so-called actions for a declaratory judgement, which require the Plaintiffs to have a **specific interest in obtaining a declaratory judgement** (see Art. 59 para. 2(a), Art. 88 of the Swiss CPC and Art. 62 of the Copyright Act of 9 October 1992 [CopA; SR 231.1]; Decision of 2 July 2024, para. 25.1 et seq., pp. 1442 et seq.).

The question of copyright infringement

- 52.1 In their rejoinder, the Defendants argue that there is no interest in a declaratory judgment. They state that the (remaining) Plaintiffs have not demonstrated that they should **specifically** have anticipated an **infringement action** and disgorgement of profits, particularly as the Defendants have **not**, in the present proceedings, brought a **counterclaim** (Rejoinder, no. 29 et seq., p. 1896).
- 52.2 In these absolute terms, the Defendants' arguments cannot be accepted. The decision of 2 July 2024 set out, for all the remaining Plaintiffs in this case, why the **cease-and-desist letters** sent by the Defendants gave rise to a legally relevant dispute. This uncertainty relates primarily, though not exclusively, to the fundamental question of copyright protection, particularly as, in these warning letters, the Defendants either demanded that the Plaintiffs sign a declaration of cease and desist and/or threatened legal action. For details regarding these warning letters, reference is made to the reasoning set out in the decision of 2 July 2024. Even if, therefore, **higher requirements** may be imposed on the legitimate interest in legal protection in the case of negative infringement actions (as compared to negative actions for a declaratory judgment concerning the general existence of an alleged copyright) (cf., for example, MÜLLER, in: CopA, 2nd ed., article 61 N 14), these requirements are met in the present case. The remarks made in the decision of 2 July 2024 concerning the warning letters can therefore, in principle, (also) be applied to the **question of infringement raised** in the Plaintiffs' **(sub-)auxiliary claims**, particularly as it can be inferred from the warning letters which features the Defendants considered to justify protection and which 'Handpans', with which characteristics or features, they alleged to be infringing. Any requirements going beyond this (see Rejoinder, para. 29 et seq., p. 1896, citing BGer 4A_466/2024 of 18 February 2025, E. 3.5), such as, in particular, a counterclaim *actually* brought, are not necessary in the present case with regard to the question of (non-)infringement; otherwise, the interest in a declaratory judgement would be made dependent on the Defendants' conduct in the proceedings. 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 acts involving their 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** (auxiliary claims, identically worded also in the new sub-auxiliary claims submitted with Replies I and II) concerning the general **non-existence of claims** or the question of **the forfeiture** of any claims held by the Defendants: In this regard, 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 **letters of warning** relevant to the present case, from which an interest in a declaratory judgement could be inferred, 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 'breach of §§ 15 et seq. of the German Copyright Act (UrhG), which gives rise to our client's claims for an injunction, for

information and for the destruction of unauthorised copies' (Plaintiff 3 (and 4) [KB-I 81]) and Plaintiff 5 (and 6–9) [see KB-I 82], of '[infringement] of our client's copyright-related rights of use within the meaning of §§ 15 UrhG et seq. as well as her design rights within the meaning of Article 19 para. 1 of the Design Protection Act (GGV). Furthermore, you are [...] committing avoidable misrepresentation of origin within the meaning of § 4 nr. 3 a) of the UCA' and 'judicial enforcement of the existing claims' (Plaintiffs 10 [KB-II 83] and 12 [KB-II 85]) or of 'which is why, by conducting their distribution, you are infringing our client's copyright under Article 10 of the CopA, which, pursuant to Article 62 et seq. of the CopA, gives rise to claims for injunctive relief, disclosure, compensation for damages and the destruction of the unauthorised copies' (Plaintiffs 18–23 [KB-III 83, 84, 85, 86], virtually identical for Plaintiff 25 [KB-III 88]). This reflects the fact that copyright confers a **bundle of rights** upon the copyright holder (see, for example, articles 9 et seq. of CopA; §§ 12 et seq., 15 et seq. of the Act on Copyright and Related Rights ['UrhG']; articles 1, 12 of *the Auteurswet* ['Aw']) and — beyond copyright — further claims cannot be ruled out.

- 52.5 A declaratory judgment is intended to provide a definitive resolution of contentious legal issues; otherwise, the function of the action for a declaratory judgment as a means of legal protection would be called into question (see MARKUS, in: BK ZPO, 2nd ed., article 88 N 58). Through the negative declaratory claims they have brought, the Plaintiffs **are** in effect **seeking an all-encompassing clarification of the** legal position regarding the **claims to which** the Defendants **are** (possibly) **entitled and/or which may be asserted against the Plaintiffs**, which is not, and cannot be, covered by the purpose of the action for a declaratory judgment. In particular, it is not apparent either from the legal claim itself or from the accompanying statement of grounds which *specific* claims against the individual Plaintiffs are alleged not to exist. In their statement of grounds, the Plaintiffs essentially take the view 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 claims does not seek the forfeiture **of specific claims in individual cases**, but rather the blanket extinction of any claims relating to the design of 'Handpans'. However, taking into account the Defendants' interests – which must be considered in an action for a declaratory judgment (see WEBER, in: BSK ZPO, 4th ed., article 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** in this regard. This is because the court cannot anticipate **whether** and **which** rights the Defendants would actually assert against the individual Plaintiffs in respect of **which acts, during which period** and in relation to which 'Handpans', nor can it determine the nature of any such claims; this is a matter for the Defendants alone. In this respect, the Plaintiffs' case – despite the existence of a warning letter and/or individual concrete legal steps (in particular interim relief; see, for example, KB-I 92 and 93, 97 et seq., KB 193 and KAB 37A; see also the new submission of 9 April 2025, no. 15, p. 1572) – does not differ from that of the general public or from other traders and/or manufacturers of 'Handpans'. As regards the question of whether the Defendants are **generally** 'entitled to **no claims**', it has **not been demonstrated** that **the situation is unreasonable to the extent required** for a declaratory interest (in the commercial court's view, this conclusion 'all the more so' aligns with the conclusions set out in BGer 4A_466/2024 of 18 February 2025, E. 3).

- 52.6 The same conclusion is reached if this aspect is examined in the light of the requirement **for the legal claim to be specific**: in view of the arguments set out in the submissions, the relevant part of the legal claims – despite being couched in cumulative terms – is aimed at establishing that the Defendants are entitled to ‘no claims’ – even if a copyright infringement is found to have occurred. The wording ‘no claims’ clearly goes beyond copyright claims, particularly as – irrespective of whether copyright protection is recognised – it cannot be ruled out that claims based on other legal grounds *might* exist, which is, however, not a matter for the court to determine. If the court finds that infringements have occurred (and performs the rejection of the action for a declaratory judgment), it seems virtually impossible, given the legal status of a person recognised as an author, that the Defendants, as rightholders, would have ‘no claims’ at all. If the court finds that no infringement has taken place (and upholds the action for a declaratory judgment), this would indeed mean that, from a copyright perspective, no claims arising from copyright infringement exist (or can exist); however, even in this case – not least in view of the established copyrightability of ‘Hang’ – this would not justify the conclusion that there are (not even) ‘no claims’ exist.
- 52.7 Consequently, the relevant part of the claims is **not admissible**, which is why the issue of forfeiture or waiver of rights raised by the Plaintiffs can only be assessed in the context of claims that have actually been asserted.

Prototypes

- 52.8 Furthermore, in so far as **Plaintiffs 10 and 12** contend that, in their case, **prototypes 1–3** of the ‘Hang’ pursuant to K-II, prayer of relief 1 no. i) a–c (p. 4 et seq. [HG 20 133]) should be taken into account as ‘potentially infringed subject matters’ for the purposes of the infringement assessment (see Rejoinder II, para. 21, p. 1673, and the corresponding sub-auxiliary prayers of relief 2.1 and 3.1, pp. 1662 et seq.), their argument must be dismissed. It is true that, in principle, Plaintiffs 10 and 12 were granted a legal interest in a declaratory judgment regarding the question of protection by the decision of 2 July 2024 (see decision of 2 July 2024, E. 33.1 and 35, pp. 1452, 1453 et seq.). However, the legal claims relating to these prototypes were deemed to be in opposition (see decision of 2 July 2024, para. 49.1 et seq. and 52, p. 1459 et seq.). The decision of 2 July 2024 therefore does **not** address the question of copyright protection for these prototypes (see Operative Part, no. 4, refusal to hear the case). The question of infringement (alternative claim), however, only becomes relevant once copyright protection has been granted to a potentially infringed subject matter. For this reason, Plaintiffs 10 and 12 **cannot** be granted a **legal interest** in a declaratory judgment regarding the **question of infringement** in relation to prototypes 1–3, particularly as the action for a declaratory judgment does not serve to clarify merely theoretical legal questions. The relevant legal claims are **not to be considered to this extent** (see K-II prayer of relief 2 [Plaintiff 10] and 3 [Plaintiff 12]; Rejoinder II prayer of relief 2.1 [Plaintiff 10] and 3.1 [Plaintiff 12]).

New sub-auxiliary claims / amendment of the Claim

- 52.9 In support of the new claims (which are made in the same manner by all Plaintiffs), Plaintiffs 3, 4, 10 and 12 state that – in view of the rejection of the principal claim by the decision of 2 July 2024 – the question now arises as to ‘which’ of the Defendant’s copyright rights should be taken into account in the infringement assessment. These can only be rights in *specific* versions of ‘Hang’, as the sub-auxiliary claims now make clear (Rejoinder II, para. 4, p. 1664). The **sketch** featuring four design features should not be taken into account in this regard (see Rejoinder II, para. 13, p. 1667 et seq.).
53. The Defendants cast doubt on the **admissibility** of the new alternative claims, by which the Plaintiffs seek a declaration of non-infringement in respect of 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 asset embodied therein, **namely** the **work itself** (Rejoinder, no. 32, p. 1896).
- 53.1 An amendment of the Claim is admissible, inter alia, if the amended or new claim is to be assessed under the same type of proceedings and is substantively related to the previous claim (article 227 para. 1 a CPC). This condition is, in principle, met in the present case.
- 53.2 With regard to 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 copyright in the work ‘Hang’, which is embodied in various versions. In the context of these proceedings, it will (only) be necessary to examine whether, by engaging in manufacturing or distribution etc. of their ‘Handpans’, the Plaintiffs are infringing the Defendant’s **copyright in ‘Hang’** under the relevant legal systems. Contrary to the Plaintiffs’ assertion, this examination does not aim to determine ‘which’ copyright in ‘which’ version has been infringed. On the object, the sub-contingent claims clarify the contingent claims, each of which concerns the question of whether the described acts, in relation to the ‘Handpans’ submitted to the court, are to be regarded as involving copyright infringement under specific legal systems. In light of the explanations provided above and in E. 65 et seq. below, the relevant answer is the same for all (sub-)conditional claims, particularly as any copyright does not attach to the specific copies of the work. However, in view of the considerations regarding the interest in a declaratory judgement (including the corresponding decisions not to hear the case dated 2 July 2024), the Plaintiffs’ alternative claims are restricted solely to those issues in respect of which the individual Plaintiffs have a sufficient interest (in particular with regard to the relevant legal system).
- 53.3 The **remaining procedural requirements** have been **performed**, meaning that the claims may be admitted.

Burden of proof

- 53.4 The allocation of the burden of proof is governed by the *lex causae* (BGer 5A_723/2017 of 17 December 2018, E. 5.1; BGE 124 III 134, E. 2b/bb). In the matter, Swiss, German and Dutch law are therefore applicable, meaning that the allocation of the burden of proof is assessed in accordance with these legal systems. It is common to all of them that the question of the burden of proof does not depend on the party's role in the proceedings (see also the decision of 2 July 2024, E. 61 with further references, p. 1465 and ANDERS, in: Anders/Gehle, Zivilprozessordnung, 81st ed., § 256, para. 54), meaning that in copyright disputes, the party asserting a claim bears the burden of presentation and proof for all facts from which their claim derives, whilst the opposing party must present and provide evidence for the facts that negate, preclude or impede the claim (see WIMMERS, in: Schricker/Loewenheim, 6th ed., § 97, para. 349).
- 53.5 The issue of fact in the present case is whether a specific act (e.g. a reproduction) took place on the part of the Plaintiffs. The Plaintiffs do not dispute that they actually carry out (or have already carried out in the past) the acts mentioned in their claims in relation to 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 engage in the manufacturing of their 'Handpans' themselves (see also the sub-auxiliary prayers of relief 2.1 and 7.1, in which the term 'manufacturing' has been omitted compared with the alternative claims), particularly as no such statements can be found in the statement of claim K-III resp. the Reply I. The Plaintiffs dispute the existence of copyright infringements insofar as they assume that the 'Handpans' they manufacture and/or distribute do not fall within the scope of protection of the 'Hang'. Whether a particular act constitutes a copyright infringement within the meaning of the applicable legal systems (see, for example, Art. 62 CopA; § 97 UrhG; Art. 1, 27, 28 Aw) is a question of law to be assessed by the court; consequently, the Plaintiffs' arguments on this point miss the point (see minutes of the continued hearing, p. 22, p. 2073). This question can be answered, amongst other things, on the basis of the evidence taken and the detailed descriptions contained in the submissions regarding the appearance of the 'Handpans' alleged to be infringing, including photographic material.

V. On the merits

On the question of copyright infringement arising from acts involving individual 'Handpans' (alternative and further alternative claims)

Background / Decision of 2 July 2024

54. **Defendants 2 and 3** are physical persons who have been dedicated to the construction of sheet-metal musical instruments for decades. Originally coming from the field of steel pan construction (an idiophone originating in the Caribbean and typically played with mallets; see, for example, 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 gave them the name 'Hang' (a Bernese German term for 'hand'). The range of hand-played metal-sounding instruments available from the Defendants comprises, in addition to the 'Hang', several differently shaped idiophones, as illustrated below (see KA, para. 129, p. 312 [range as at May 2021], see also KAB 15–20 and 148; see also, most recently, the new idiophone 'Hang "Plexus"' depicted



in the statement of claim by Plaintiffs 1, 2, 5–9, 18–23 and 25 dated 1 December 2025, pag. 2004 [KB 360, pp. 1 and 2 et seq.; see also the minutes of the continued hearing, p. 15, p. 2066]):

55. **The basis** for determining **whether** acts involving the Plaintiffs' instruments/'handpans' (don't) infringe the Defendants' copyright (auxiliary claim) or the Defendants' copyright in certain versions of the 'Hang' (sub-auxiliary claim) is the decision of 2 July 2024, which has not yet achieved legal effect in this respect. **The origin** of the 'Hang', which came into being over 25 years ago, was a **task** set for 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 an

- Idiophone made of sheet metal;
- can be played by hand;

- producing various tones and
- equipped with a cavity, a Helmholtz-resonator or a resonance opening

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

56. In its decision of 2 July 2024, the commercial court found that the design of the ‘Hang’ was **not dictated by technical constraints** (Decision of 2 July 2024, E. 66.4–86.4, p. 1471 et seq.). For all three relevant legal systems (Switzerland, Germany, the Netherlands), the court further held that Defendants 2 and 3 had utilised the **creative freedom** available to them (and previously defined) in a **manner relevant to copyright law** and had created a **copyright-protected work** in the form of the ‘Hang’ (see also decision of 2 July 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 provided for by the **layout, the lines and the interplay of all four elements** – to be relevant (decision of 2 July 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 **spherical segments of equal size; a vertical axis** between the dome and the resonance opening; sound fields arranged **concentrically** around the dome **in a ring-like pattern**, situated in the centre of each segment and positioned at approximately equal distances from one another). The commercial court recognised the ‘Hang’ as an object with an unusual appearance, in which, in particular, the use of the seemingly very simple **lens shape (also) in combination** with the centrally positioned dome projecting outwards has a particularly influential effect. This is reinforced by the **contrast** between the simple lower half, with the resonance hole leading into the cavity which appears as a ‘throat’ and the upper half of the shell, fitted with clay panels and featuring a protruding dome. As the ‘Hang’ also differs from the previously known repertoire of forms, it would ultimately be assessed as **something new and unique** (decision of 2 July 2024, E. 104, p. 1494).

The parties’ positions as set out in the second exchange of submissions in the unrestricted proceeding (Reply I and II / Rejoinders)

58. The four **Plaintiffs 3, 4, 10 and 12** (see Reply II) represent the view that any copyright **protection** could only relate to **specific versions** of ‘Hang’. In particular, it **cannot** be concluded from the (mere) presence of the four disputed elements (or from the sketch set out below and contained in the Plaintiffs’ principal claims [see K-I, II and III, prayer of relief 1])



that a 'Handpan' possessing these four features would '**automatically**' constitute a copyright infringement, particularly as the **overall impression is not apparent** from such a sketch (Reply II, para. 10 et seq., 13 et seq., p. 1666 et seq.). Such an interpretation would amount to an inadmissible **protection of a concept** (see the minutes of the continued hearing, p. 12, p. 2063).

59. The four Plaintiffs in question argue (under German law) that their instruments give a **different overall impression** to the 'Hang', **in particular due to** different tone fields (proportions between 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 underside, differently coloured 'dimples' [indentations in individual tone fields]), different surface designs (colour schemes, logos, decorations), a more technical-looking overall impression, differently designed domes (oval, coloured, some concave, some absent altogether), different 'shoulders' [the area between the central sound panel and the other sound panels; see K-I, para. 35, p. 43], different sizes, shapes and proportions of the lens shape, and different designs of the resonance opening (in some cases none at all) (Reply II, para. 44, p. 1682 et seq.). Furthermore, they refer to the arguments set out in the respective Claims (i.e. K-I for Plaintiffs 3 and 4, and K-II for Plaintiffs 10 and 12). In these submissions, 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 colouring, engravings, etc.) and provide information on materials and dimensions (see K-I, para. 200 et seq., pp. 115 et seq. [Plaintiffs 3 and 4] and K-II, para. 181 et seq. [Plaintiff 10] and no. 313 et seq. [Plaintiff 12], pp. 109 et seq. and 229 et seq. [HG 20 133]). A similarity at the level of the 'concept' of four abstract features does not constitute an act of copying at the creative level relevant under copyright law, according to the Plaintiffs at the resumed main hearing on 27 January 2026 (see minutes of the resumed main hearing, pp. 11 et seq., 27, pp. 2062 et seq., 2078).
60. **The remaining Plaintiffs 1, 2, 5–9, 18–23 and 25** (see Reply I) argue that the 'Hang' has established a **new category of instrument** (Reply I, para. 82 et seq., p. 1728 et seq.) and that, **by definition**, a 'Handpan' must possess the four disputed features in order to be regarded as such; otherwise, it would constitute a **different** or **inferior instrument** (Reply I, para. 100 et seq., p. 1735 et seq.). The combination of these four features constitutes a **concept** (Minutes of the continued hearing, p. 9, p. 2060). If copyright protection were to apply (solely) to these very features, this would

amount to **protection of the concept** (see Rejoinder I, para. 150, para. 153, p. 1755 et seq., 1757).

61. These Plaintiffs, too, set out in detail which design elements, in their view, should each, taken individually, fall outside the **scope of protection** (Reply I, para. 161 et seq. [pp. 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 plates, the shape of the dome, the shape and number of tone plates, a description of the ‘shoulder’, colour scheme, any tone plates placed on the underside, etc.) and provide information on materials and dimensions (see, for example, 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; consequently, the assessment of infringement should be based not on the adoption of the design principle but on its specific implementation (Minutes of the continued hearing, p. 9, p. 2060).
 - 61.1 Under **Swiss copyright law**, the **Plaintiffs 18–23** and **25** argue that the ‘Handpans’ at the subject matter of the dispute clearly differ from the Defendant’s instruments in terms of **their overall impression** and that, therefore, there is **no infringement** of the **scope of protection** for copyright (Reply I, para. 135 et seq., p. 1750 et seq.).
 - 61.2 Under **German copyright law**, **Plaintiffs 1, 2** and **5–9** argue that, in light of the most recent case law of the Federal Court of Justice (‘BGH’) on the copyright protection of utility articles, the ‘Hang’ should not have been granted protection due to a lack of ‘artistic achievement’ (Reply I, para. 439 et seq., p. 1826 et seq.) and that its scope of protection was consequently ‘zero’ (Reply I, para. 478 et seq., p. 1840 et seq.). In any event, a very narrow scope of protection would have to be assumed, meaning that even minor deviations would fall outside the scope of protection or would not constitute a copyright infringement (Reply I, para. 482 et seq., p. 1840 et seq.). Furthermore, the Defendants had granted rights of use to Plaintiffs 1 and 2 (Reply I, para. 602 et seq., p. 1867 et seq.).
 - 61.3 Furthermore, under **Dutch copyright law**, **Plaintiffs 1 and 2** argue that the ‘Hang’ does not enjoy protection under the latest standards of harmonised European copyright law (Reply I, para. 620, p. 1872). Be that as it may, however, there is no encroachment on the scope of protection, and therefore no infringement has taken place (Reply I, para. 621 et seq., p. 1872 et seq.). For a detailed description of their six instruments, they refer to the comments on German law (Reply 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 (Reply I, para. 634 et seq., p. 1878).
62. The **Defendants** take the view that the ‘Hang’ constitutes a work and is neither a category of instrument nor a concept, particularly as the commercial court had already ruled on its eligibility for protection in its decision of 2 July 2024 (see Rejoinder, para. 12 et seq., 69 et seq., 182 et seq., p. 1892 et seq., 1906 et seq., 1935 et seq.). The scope of protection for the ‘Hang’ is said to be **exceptionally broad** due to the

distance it has from the pre-existing repertoire of designs (Rejoinder, para. 149 et seq. [Swiss law], 260 et seq. [German law] and no. 313 [Dutch law], p. 1928 et seq., 1955 et seq., 1967). Almost without exception, all the ‘Hangpans’ to be examined in the present proceeding exhibit the **four** disputed **design features** and are to be classified as infringing. Any deviations, such as slightly modified elements or additional elements, are deemed insignificant and would not result in the design of the ‘Hang’ no longer being recognisable (see, for example, the Rejoinder, para. 4, 70 and 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., pp. 1964 et seq. [NL]). Furthermore, licenses were granted to Plaintiffs 1 and 2 (Rejoinder, 273 et seq. [German law] and no. 319 et seq. [Dutch law], pp. 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’ reproduced in E. 58 above (or, as the Plaintiffs describe it, an ‘abstractly conceived intangible work’) cannot be **relevant** to the question of **copyright infringement**. Rather, the focus must be on **specific copies of the work** (see, for example, Reply II, para. 10 et seq., p. 1666 et seq. [German law] and Reply I, para. 143 et seq., p. 1752 et seq. [Swiss law]; see also the minutes of the continued hearing, p. 7, p. 2058), i.e. the specific versions of the ‘Hang’ set out in prayer of relief 1 and E. 5 above. It is not apparent from the commercial court’s reasoning of 2 July 2024 to what extent the decision affirms the eligibility for protection of the ‘Hang’ and what role the sketch plays alongside the copyright protection afforded to the specific models (Reply II, para. 12, p. 1667).
64. The **Defendants** respond to this by arguing 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 taken as **the point of reference** for the question of infringement. According to the commercial court’s decision, the four elements defined in the Prayer of relief 1 *and* the sketch are therefore decisive (Rejoinder, 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 literary and artistic works, i.e. **intellectual creations** (see Art. 1 para. 1 lit. a in conjunction with Art. 2 para. 1 CopA; §§ 1 and 2 para. 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. those physical objects that **embody** or materialise the **intellectual work** (ZECH/ANGER in: FS Sutter-Somm, p. 1155; see article 10 of the CopA; see also RAUE, in: Dreier/Schulze, 8th ed., § 2, no. 27 with further references).
66. Given that, for a work to be protected by copyright, the intellectual content must be expressed in a form that is perceptible to the senses (see

REHBINDER/HAAS/UHLIG, in: OFK URG, 4th ed., Art. 2 N 3), a work may take the form of a creative idea realised in a single copy of the work (ZECH/ANGER, in: FS Sutter-Somm, p. 1155, with reference to Art. 10 para. 2 lit. a and b CopA). Although a work does not necessarily have to be fixed on a medium (see Art. 29 para. 1 of the CopA; RAUE, in: Dreier/Schulze, 8th ed., § 2, no. 27), works of art, photographs or architectural works are inconceivable without a physical medium (BARRELET/EGLOFF, Das neue Urheberrecht, 4th ed., article 29 N 7). In the field of **idiophones** relevant here, these considerations can also be transferred to **subjects 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'.

67. In their principal claims (K-I, II and III, prayer of relief 1) the Plaintiffs sought a declaration from the commercial court that sheet-metal musical instruments with four verbally defined design features, as set out in the disputed sketch, 'namely' in certain 'actual embodiments' in the form of various versions of the 'Hang', are **not** protected by **copyright**. These claims were **rejected** by the commercial court in its decision of 2 July 2024. In paragraphs 106, 114 and 121 of the grounds, the commercial court held that 'the "Hang", in certain embodiments as set out 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 versions examined in detail**, constitutes **a work protected by copyright**, a point which is also expressed accordingly in paragraphs 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, prayer of relief 1 nr. i) d–e and nr. ii) a–e)) is a **specific manifestation of the same work**, particularly as the features justifying protection, as set out in the decision of 2 July 2024, are to be found in all these versions.
69. For this reason alone, it cannot be said that the sketch is insignificant, particularly as it forms part of the Plaintiff's legal claims. The **sketch** must therefore be taken into account **as a partial aspect**, although the extension of copyright protection applies only to the **work** actually embodied in a copy of the work (and not, for example, to a sketch). This also applies to **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 in principle take a specific copy of the work as the basis (and not 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 assessments would apply to various copies of the work exhibiting precisely these features, particularly as, according to the Plaintiff's prayer of relief 1, all versions are 'actual embodiments' of sheet-metal percussion instruments sharing the same four design features. Rather, the assessment made for one version or embodiment of the work 'Hang' will also apply to the other versions, particularly as the overall design deemed worthy of protection – which is the result of the selection, combination and arrangement decisions made by Defendants 2 and 3, are the same

in these versions. Consequently, no differing copyright protection could be derived from different versions of the 'Hang', particularly as they embody one and the same work, the 'Hang'.

70. Nor, therefore, would the new alternative claims 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 this might yield different results). In any event, for any copyright claims by the Defendant, it would suffice if just one version were to render the Plaintiffs' 'Handpans' inadmissible (see Bger 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, para. 7.2).

'Handpan' as a new category of instrument

71. The Plaintiffs further argue that the **instrument category** 'Handpan' **necessarily** exhibits the four disputed design features (Reply I, para. 100 et seq., p. 1735 et seq.). Any deviation from this would result in a **different instrument**. Accordingly, they seek to ensure that the discussion is confined to the *specific* design of the individual elements (e.g. proportions of the lens shape, oval dome, etc.) (see Reply I, para. 104, p. 1735 et seq.), rather than their very existence. To support their position, they have submitted a **survey** of 'the public and traders' to the files (see Reply I, para. 152, p. 1756 et seq.). They represent the view that the scope of protection cannot extend so far as to require third parties to engage in manufacturing of a **different instrument** (Reply 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 (Reply I, para. 155, pp. 1757 et seq.).
72. For their part, the **Defendants** argue that these issues had already been conclusively resolved in the commercial court's first decision. In their view, this is yet another veiled attempt to raise the issue of the technical constraints involved in creating the 'Hang' (see Reply, para. 71 et seq., p. 1907 et seq.). The Defendants cast doubt on the value of the survey, particularly as some of the Plaintiffs themselves were participants (see also Reply, 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 question of **the scope for design** available in the manufacturing of a 'Handpan' (see also Reply I, para. 14, p. 1705 et seq.: 'This means that the scope for design available to manufacturers of musical instruments of this type is very limited today.'), the Plaintiffs' submissions on this point need not be considered further; reference is made to the reasoning set out in the decision of 2 July 2024. In E. 65.3 of that decision, it was held that the Plaintiffs' argument, according to which the four disputed design features are to be found 'in all Handpans', does not hold water. Consequently, the four elements cannot be named as 'generally accepted features' of a 'Handpan', as the Plaintiffs do (see Reply II, para. 50, p. 1686). In order to avoid definitions motivated by procedural tactics, and given that the 'Hang' was novel in its appearance (and there was a corresponding lack of suitable reference objects), the 'Hang' would not be assessed on the basis of 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 2 July 2024, E. 66, p. 1469). The fact that the Defendants, moreover, named the instrument ‘Gubal’, which succeeded the ‘Hang’, as a ‘new instrument’ (see Reply I, para. 106, p. 1737) is irrelevant from a copyright perspective, particularly as this does not constitute a suitable (legally relevant) distinguishing criterion. Even if, moreover, the design at issue here were to have ‘become established’ as the standard amongst manufacturers, sellers and buyers, this would not constitute evidence of a generic term, but rather the consequence of long-standing copyright infringements (as will be explained below) and, as such, should not be diluted by a ‘generic term’. It is therefore unclear what the Plaintiffs could possibly infer from the surveys they submitted, conducted amongst ‘Handpan’ musicians and manufacturers (see KB 305 and 306), particularly as certain Plaintiffs, as representatives of the ‘scene’, were participants in them themselves. From a legal perspective, it would seem entirely conceivable that 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, might also be named as ‘Handpans’ (see the decision of 2 July 2024, E. 100, 76, pp. 1492 et seq., 1476 and E. 54 above).

On the ‘Hang’ as an alleged concept

74. The **Plaintiffs** then raise the question of whether a ‘Handpan’ exhibiting the four disputed characteristics (which, in their view, must necessarily be the case; see E. 71 above) can be regarded as involving copyright infringement at all (see, for example, Reply I, para. 150, p. 1755 and Reply 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 alien to copyright law (Reply 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 (Reply 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 (Reply I, para. 142 et seq., p. 1752 et seq.). Accordingly, one must not rely abstractly on the presence of the four features (Reply I, para. 148 et seq., p. 1754 et seq.). Anyone wishing to engage in ‘Handpan’ manufacturing is subject to a restriction that requires them to produce a lens-shaped instrument with a central dome, an opposing resonance hole and tone fields arranged in a circular pattern (Reply I, para. 152, p. 1756 et seq.). Plaintiffs 3, 4, 10 and 12 put forward a similar argument when they state that the decision of 2 July 2024 did not confirm that protectability is established merely by the presence of the four elements (Reply II, para. 10 et seq., in particular 14, p. 1666 et seq.).
75. During the main hearing, the Plaintiffs reiterated their position that, in the context of the infringement assessment, the **concept** of the ‘Hang’, as it were

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**, and not of the specific embodiment, could be affirmed (Minutes of the continued main hearing, p. 27, p. 2078), which is why the scope of protection of the ‘Hang’ must, at most, be restricted to virtually identical instruments (Minutes of the continued main hearing, p. 10, p. 2061). In their initial submissions, the parties 3, 4, 10 and 12 assume that the four features as such do not constitute ‘even 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 2 July 2024, the four features of the ‘Hang’ were recognised not as part of a concept, but as an expression of design choices (see Rejoinder, para. 182, p. 1935 [CH], no. 259, p. 1954 et seq. [DE]). According to the decision, the four features were recognised as being neither technically predetermined nor functionally provided (with reference to E. 66.4, 69 et seq. and 68 of the decision of 2 July 2024). The ‘Hang’ is therefore merely one of countless embodiments of a sheet-metal idiophone (Rejoinder, para. 259, p. 1954 et seq.). In any event, this is a question of law which is not subject to evidence. Ultimately, the Plaintiffs’ aim is to raise once again the issue of the technical constraints on the design (which were ruled against in the decision of 2 July 2024), although, pursuant to article 229 of the CPC, the Plaintiffs are in any case no longer permitted to comment on this issue (see Rejoinder, para. 72 et seq., p. 1907 et seq.).

Assessment

77. In the legal systems relevant here, **concepts** (just like **ideas**, rules or recipes) are **not protected** by copyright **in the absence of expression** (see, for example, REHBINDER/HAAS/UHLIG, in: OFK URG, 4th ed., article 2 N 4 with further references; ECJ, C-310/17, judgment of 13 November 2018, para. 39 et seq. [KB 327]; see also Hoge Raad der Nederlanden [HR], ECLI:NL:HR:2013:BY8661, judgment of 29 March 2013, para. 3.4 et seq. [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 article 2 CopA; § 2 UrhG; Art. 1, 10 Aw; see also ECJ, C-310/17, judgment of 13 November 2018, para. 39 [KB 327]). As a decision on this issue has already been handed down by the commercial court between the parties to the present proceedings, reference may in principle be made to that decision (decision of 2 July 2024), particularly as it is not apparent why the Plaintiffs are only raising this argument in the second exchange of pleadings in the full-scale proceedings. Be that as it may, the ‘Hang’ respectively rather the combination of its four features **cannot** be regarded as **a design for a musical instrument**, particularly as the ‘Hang’ cannot be said to lack expressiveness. The aforementioned decision held that, as a utility article, the ‘Hang’ is the concrete **result of an underlying task** (see decision of 2 July 2024, E. 66 et seq.,

pp. 1469 et seq. and E. 55 above), the solution to which makes use of the available scope in a manner relevant to copyright law. For this reason alone, it is clear that, in the case of the ‘Hang’, the work would move beyond the conceptual stage, which is not protectable under copyright law; consequently, the combination of features can no longer be regarded as an ‘idea’ or a ‘concept’ (incorrect therefore the submission of 16 January 2026, para. 21 [p. 2038], which refers to the protection of the ‘idea as such’). If anything, the **concept** underlying the ‘Hang’ (which still lacks the necessary expression) would consist of an **idiophone made of sheet metal**, playable by **hand**, producing **various tones** and equipped with a **cavity**, a **Helmholtz resonator** or a **resonance opening**. Subsequently, Defendants 2 and 3 did indeed create idiophones with the same intended use as the ‘Hang’, **without** featuring the combination at issue here [Decision of 2 July 2024, E. 76 and 100, p. 1476, 1492 et seq. ‘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 utility articles by abstracting their design features (and the four disputed features have the same name as the Plaintiff’s prayer of relief 1). Accordingly, a comparison with the ‘Weissbiertglas’ case is not appropriate: the subject matter of the dispute was a beer glass in which, for the first time, the design of a Weissbiertglas was combined with a football (see Reply I, para. 496 et seq., p. 1844 et seq. and Reply II, para. 50 et seq., p. 1686). In that case, the court hearing the appeal 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 football 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 14 October 2009, para. 1b, 2b [KB 344]). A similar line of reasoning may be applied with regard to the Dutch Flywheel/Ripracer case, in which the adoption of the features of the handle, pull cord and removable wheel was held not to constitute a copyright infringement (see Reply I, para. 627, p. 1874; Judgment of the District Court of The Hague of 9 November 2005 [KB 352, 352A]). The transfer of this conclusion to the present case merely implies that the adoption of the idea (which was new at the turn of the millennium and not eligible for protection) or the task of creating a hand-played ‘sheet-metal ghatam’ with various tones, a hollow chamber and a resonance opening does not constitute 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. However, it does not follow from all this that the assessment of infringement could be carried out solely on the basis of the sketch (see paragraph 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 Reply I, para. 109 et seq., p. 1738 et seq.). The **four** (abstractly defined) **features are, , functional**

components (Reply I, para. 109–126. 145, pp. 1738 et seq., 1753). Consequently, their adoption must be permitted, so that the discussion can focus solely on the **specific design of the elements** (Reply I, para. 145, p. 1753; see also Reply 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’ cannot constitute an infringement (Reply II, para. 50, p. 1686).

81. The **Defendants** contend that this (once again) raises the question of technical determination (rejoinder, no. 72, p. 1907), noting that the commercial court had already addressed issues relating to any technical constraints in its decision of 2 July 2024. In doing so, the commercial court had found that the four characteristics were not functionally provided for.

Assessment

82. In so far 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 very same expert reports that have been requested once again; see, for example, Reply I, para. 109 et seq., p. 1738 et seq. and the Reply of 11 May 2022, para. 199 et seq., 203 et seq., 230 et seq., 233 et seq., 242 et seq. [p. 627 et seq.]), this was — as the Defendants rightly point out — already the subject matter of the two exchanges of submissions in the summary proceeding. In its decision of 2 July 2024, the commercial court **ruled against this**, thereby creating sufficient scope for the creation of a work protected by copyright in the first place (see decision of 2 July 2024, para. 66.4 et seq., pp. 1471 et seq.).
83. Nor can the Plaintiffs’ argument be upheld in so far as they contend that each of the features at issue here (or, ultimately, their combination) may be ‘incorporated’ as **functional elements of a work** (see Reply I, para. 144, p. 1753; Reply II, para. 58 et seq., p. 1688 et seq.). The commercial court has held that each of the four elements, taken in isolation, **(also) fulfils a technical function**: in order to isolate sound fields, a sound-producing body is required; for the Helmholtz resonator, a resonance opening and an air-filled cavity are required. The dome serves to produce a ‘gong sound’. It was found that the decisions regarding arrangement, combination and selection made by Defendants 2 and 3 – in the absence of any reference object even remotely comparable – **influenced one another** (see decision of 2 July 2024, E. 69, pp. 1472 et seq.): Had Defendants 2 and 3 not conceived of complementing the ‘Hang’ with a dome (instead of leaving the upper section either open or equipping it with ‘ordinary’ sound panels), Defendants 2 and 3 would have made the decision not to arrange sound panels solely on the upper segment and/or not in a circular pattern; or had the Defendants not departed from the concave playing surface – familiar from steelpan construction – (or not turned the spherical segment upside down), their product would not resemble the ‘Hang’. Accordingly, it cannot be ruled out that a ‘Hang’ with different decisions might exhibit different tonal characteristics (e.g. through the isolation of tone fields in a different arrangement or shape, through the isolation of tone fields and/or domes in different locations, etc.). The extent to which Plaintiffs 3, 4, 10 and 12 infer from this a ‘de facto monopoly on a specific tone’ is not comprehensible

(Reply 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 its playability and may also embody a technical solution (see decision of 2 July 2024, E. 68 et seq., p. 1472 et seq.), particularly as the specific sound characteristics depend on approximately 30 parameters (decision of 2 July 2024, E. 68 et seq., 86.2, pp. 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 producing, with the 'Hang', an object that would serve 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, through some of their instruments, that an idiophone which performs **the same function** as the 'Hang' **does not** necessarily **rely** on the **combination** of the four design features (see, for example, the decision of 2 July 2024, E. 76, 100, pp. 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) possess the same elements in the same arrangement and, consequently, the same overall design. Consequently, in accordance with the decision of 2 July 2024, it is **not individual design features** at issue here or individual decisions taken in this regard **that would justify protection**, but rather the **result of the overall design** chosen by Defendants 2 and 3. Accordingly, it would not be held that **individual parts, viewed in isolation**, contribute to the originality of the work as a whole or, **as such**, express the intellectual creation (see ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 66 [KB 361]; ECJ, C-5/08, judgment of 16 July 2009, paras. 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 in **'breaking down'** the 'Hang' into **individual features** (see, for example, the submission of 16 January 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 subject matters, individual technical features are always tools that contribute to a product fit for purpose (ZENTEK/RITSCHER, Zusammenspiel von Urheberrecht, Designrecht und Lauterkeitsrecht beim Schutz funktionaler Produktgestaltungen gegen Nachmachung, GRUR 2024, 1153 et seq., fn. 45).
85. Following the Plaintiffs' line of argument, many a utility article – such as the 'Hang' – could **subsequently** be reduced to individual, (also) functional features considered in isolation: For instance, 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 1 September 2020, paras. 4.5.1–4.5.3 [KB 181, 181A]). Accordingly, the argument put forward by Plaintiffs 3, 4, 10 and 12, that a coincidence in ‘merely functional or generally customary features’ does not constitute an infringement, cannot be accepted (see Rejoinder II, no. 49 et seq., p. 1685 et seq.), particularly as it was already established in the decision of 2 July 2024 that, at the time of creation, there were precisely **no features ‘commonly used’** for a ‘Hang’ or a ‘Handpan’ (see decision of 2 July 2024, E. 65.3, p. 1468; ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 62 [KB 361] refers to ‘technical, ergonomic or safety-related constraints [...]’ or ‘standards or conventions of the sector concerned’). The services provided by Defendants 2 and 3 are therefore not comparable to those in the ‘Birkenstock’ case (as argued by the Plaintiffs in Reply I, para. 451, p. 1829 et seq.), since, unlike in the present case, there were clear guidelines or expectations in place at the time of their creation regarding the elements of which a sandal must consist (see the assessment of these sandals for the Netherlands by the Rechtbank Midden-Nederland, E-CLI:NL:RBMNE:2025:5837, judgment of 12 November 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 12 November 2025, para. 3.14, 3.21 [KAB 176, 176A]). Rather, it is clear from the most recent case law of the ECJ that a subject matter may be protected by copyright even if its creation was subject to technical provisions (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 63 [KB 361]; see also ECJ, C-833/18, judgment of 11 June 2020, para. 26 et seq., 33 [KAB 68]).
87. The **distinction** between ‘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 taken during the creation of the ‘Hang’ in its overall form and which influenced one another, especially as it is only in their **entirety** that they give rise to protection (decision of 2 July 2024, para. 91 et seq., 104, pp. 1485 et seq., 1494). For this reason alone, the objection raised by Plaintiffs 3, 4, 10 and 12, according to which copyright ‘does not protect features’, does not hold water (Minutes of the continued hearing, p. 12, p. 2063): Copyright protection extends solely to the (overall) design, particularly as it is clear from the decision of 2 July 2024 that **individual features do not contribute to the originality**, i.e. they would not **themselves** constitute **a work**. The protection would not, in some cases, extend so far as to mean that (merely) lens-shaped idiophones, (merely) a circular arrangement of sound fields, or (merely) idiophones with central domes would automatically be classified as engaging in copyright infringement. A ‘Handpan’

without a dome therefore does not necessarily constitute a copyright infringement 'hang without a dome' (as the Defendants, however, argue in their rejoinder, no. 174, p. 1933 et seq.).

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

Copyright infringements under Swiss law

89. Under Article 10 para. 1 CopA, the author has the exclusive right to make the provision regarding whether, when and how the work is used. The use of a work within the meaning of Article 10 of the CopA does not occur solely in the case of acts of use based on the work in its **original, identical** form. Depending on the circumstances, use in a **modified form** may also constitute an infringement (HILTY, Urheberrecht, 2nd ed., para. 373). This applies in particular to alterations in the new arrangement (e.g. omissions, additions, modifications to elements which constitute a mere non-creative reworking of the pre-existing work, which as such cannot establish the individual character of the alteration (see HILTY, Urheberrecht, 2nd ed., para. 242). The question arises as to how far the utilised subject matter must deviate from an underlying (protected) work in order to fall outside its sphere of protection, the so-called **scope of protection** (HILTY, Urheberrecht, 2nd ed., para. 374). This refers to **the reservation of the sphere** for the right holder's exclusive use of the protected work (THOUVENIN, Immaterialgüterrecht, para. 671). This **imaginary concept** is formed by the **sum of all conceivable infringing acts**. The boundary must be drawn in each specific case (see HILTY, Urheberrecht, 2nd ed., para. 375). The scope of protection encompasses the work in question itself and all similar works in which the individual characteristics of the protected work are recognisable (HILTY, Urheberrecht, 2nd ed., para. 375).
90. The starting point for determining the scope of protection is to establish **which elements of a work that give rise to protection interact** within the **context** chosen by the author, and **how they do so** (HILTY, Urheberrecht, 2nd ed., para. 376). What is essential are the characteristics which, either on their own or in combination, confer an individual character on the work (THOUVENIN, Immaterialgüterrecht, para. 674 with further references). As a general rule, the individual character of a work is not established by a single feature, but by the **interplay** of several (often many) features which, taken together, result in individuality (THOUVENIN, in: FS Hilty 2024, p. 43). In this context, it is necessary to disregard those elements incorporated during the creative process that are in the public domain, i.e. that would be drawn from the general stock of ideas without influencing the individual character of the work (article 2 para. 1 CopA). However, elements in the public domain are not insignificant insofar as they — either on their own or in combination with individual (creative) elements — are 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 is to be understood as the protected work does not involve an isolated examination of all elements and a distinction between pre-existing and new, creative elements; rather, what is required is a **contextual**

examination of the totality of all the essential characteristics of a work (HILTY, Urheberrecht, 2nd ed., para. 376).

91. The scope of protection for a utility article is all the more limited the less pronounced the individual character conferred on the work through the exercise of creative freedom is (BGer 4A_472/2021; 4A_482/2021 of 17 June 2022, E. 7.3; see also BGer 4A_145/2024 of 11 September 2024, E. 2.2). If a work consists essentially of **non-protectable features** which are only protectable in their combination, **even minor deviations from this combination** will fall outside the scope of protection (THOUVENIN, in: FS Hilty 2024, p. 43 with further references).

The parties' positions

92. The **Plaintiffs** argue that, in the case of the 'Hang', the scope of protection is narrow, and explain in detail, for each 'Handpan' individually, which alterations, in their view, would already fall outside the scope of protection (Reply 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** contend that the scope of protection is exceptionally broad, as the design of the 'Hang' differs significantly from the existing range of forms (see Rejoinder, para. 148 et seq., p. 1928; see also minutes of the continued hearing, pp. 18, p. 2069).

Assessment

- 93.1 Against the background of the considerations set out in the decision of 2 July 2024, a contextual analysis must take into account **the following essential features** of the work 'Hang' **that justify protection**, as embodied in its various versions in accordance with prayers of relief 1 no. i) d) – e) and no. ii) a) – e), which influence the distinctive combination of features and are the result of **creative decisions regarding selection, arrangement and combination made by Defendants 2 and 3**. These decisions have resulted in 'Hang' being perceived as something new and unique (see the decision of 2 July 2024, E. 91 et seq., para. 104, pp. 1485 et seq., 1494):

The starting point, or basis, is, on the one hand, the Defendants' choice of **the lens shape as the 'carrier medium'**, by which Defendants 2 and 3 have moved away from the concave playing surface familiar from steelpan construction. By joining two identical shell halves, the resulting cavity becomes a perfectly balanced, stable, quasi-floating resonating body (in line with the association with a 'singing UFO', see KB 275; KA, para. 161), which in turn is consistent with the sounds that can be described as 'spherical' or the special 'magic' of the 'Hang' (see minutes of the hearing of 21–22 September 2023, p. 21, para. 13 et seq., p. 28, para. 349 et seq., pp. 1244, 1251). The clear **lines** mentioned in the decision of 2 July 2024 are evident in two respects: **horizontally**, they result from the freely chosen **contrast** between the – played at the center – two halves of the shell. Defendants 2 and 3 have fitted the upper section with ceramic panels and a dome (not required by the brief), whilst leaving the lower section 'free of ceramic panels'

(and in some places empty); in doing so, they have designed the – in themselves identical – shell halves in contrasting ways and separated them from one another on a plane of symmetry. The polarity thus created is evident in a clear ‘top’ (featuring tone fields and an outward-facing dome) and a clear ‘bottom’ with a simple, smooth and inward-facing resonance opening; this is also reflected in the relationship between the tone fields (facing inwards) and the single dome (facing outwards). **Vertically**, the lines of design are defined by the resonance hole (‘throat’) leading into the interior or cavity of the instrument and by an opposing dome *protruding* from the interior of the instrument (vertical central axis), thereby achieving an association of 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 centre around which the sound 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 musical theory: rather, the equivalence of the individual tone fields created by the circular form is to be seen as a symbol of the infinite variety of playing possibilities for intuitive performance (see decision of 2 July 2024, E. 69, see also para. 96.3), whereby Defendants 2 and 3 again clearly distanced themselves from what was previously known, in particular from steel pan construction (decision of 2 July 2024, E. 96.3).

- 93.2 In this assessment, particular account would be taken in particular of the fact that Defendants 2 and 3 were operating in a completely **unexplored field with no significant precedents or reference objects**, and that they primarily had recourse to their **own** experiments with form (see, for example, extract from KA, para. 162 and 179, pp. 323, 329 et seq.; KAB 45; see also the decision of 2 July 2024, E. 90, 95.1 et seq., 96.2 et seq., 97.1):





- 93.3 The aforementioned characteristics, which give rise to protection and only take effect in their interplay (and thus giving rise to copyright protection) are the result of the creative choices, combinations and arrangements made by Defendants 2 and 3, which are set out in the decision of 2 July 2024 and form the basis of the design language and lines characteristic of the 'Hang'.

Guidelines for assessing infringement

94. It is then **necessary to assess a third party's design**, which is alleged to infringe copyright, **in the light of** this understanding of the protected work. Once again, the **aim** is **not** to identify, element by element, the similarities and differences with the protected work. Rather, the **third party's design** must also be subject to a **contextual overall assessment** in order to determine to what extent the **characteristic features** of the protected work are brought together in the third party's design in such a way that a comparable **overall impression** is created for the viewer (HILTY, Urheberrecht, 2nd ed., para. 377). The similarity in features which, neither on their own nor in their combination, possess individual character does not constitute an infringement of the scope of protection (THOUVENIN, Immaterialgüterrecht, para. 674). Minor deviations which do not appear decisive in the overall impression do not necessarily fall outside the scope of protection, even where the scope of protection is narrow (see BGer 4A_472/2021 of 17 June 2022, E. 7.3).

Elements which, taken on their own, are deemed to fall outside the scope of protection

95. This refutes the **argument** put forward by **certain Plaintiffs** that **the following elements, considered in isolation** (and under all legal systems (see Reply 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' when compared to the 'second-generation Hang', which results in a different design language (more solid, rounder, more

voluminous) (Reply I, para. 162 et seq., p. 1759 et seq.; KB 321; see also the first-generation ‘Hang’ instruments, the integral ‘Hang’ and ‘Instrument 1’ [from left to right], set up during the continued main hearing of 27 January 2026, ‘Hang’ of the first generation, ‘Integral Hang’ and ‘Instrument 1’ [from left to right], extract from the minutes of the continued main hearing, p. 6, p. 2057):



The **Defendants**, however, make the following defence: the exact proportions were not, in fact, decisive for copyright protection (Rejoinder, para. 157 et seq., p. 1930 et seq.).

- 95.2 The specific proportions of the lens shape would not be recognised as relevant for copyright purposes (see, for example, BGer 4A_472/2021 of 17 June 2022, in which, amongst other things, the differences between a spherical dome combined with a hollow cylinder [compared with a spherical dome] were deemed decisive). The Plaintiffs’ reference to this very case in Reply I, para. 158 (p. 1758) and Reply 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 ‘display cabinet lighting case’ mentioned in Reply I, para. 494 (p. 1844) and Reply II, para. 49 (p. 1685 et seq.), in which an infringement was ruled out on the grounds of altered proportions: in that case, the specific proportions chosen – unlike in the ‘Hang’ case – would be relevant to the question of the protection of the ‘display case lights’ (correctly stated in the Rejoinder, para. 159, p. 1930; see the judgment of the Higher Regional Court of Hamburg of 25 November 2021, 5 U 12/20, para. 57, 62 [KB 231]; see also BGH, I ZR 173/21, judgment of 15 December 2022, para. 12, 22, 26, 32 [KB 232]). Contrary to the Plaintiffs’ view, it is also undisputed that a ‘Handpan’ – albeit a ‘more voluminous’ or ‘more spherical’ one – consists of two identical spherical segments, resulting in a lens-like shape (see the wording of all the Plaintiffs’ submissions, no. 1, and the minutes of the continued main hearing, p. 25, pag. 2076: ‘The lens shape is proportioned differently in all the Plaintiffs’ instruments.’). Furthermore, it was already made clear at the first main hearing on 21 / 22 September 2023, it became clear that the protected ‘Hang’ did not, in fact, utilise any specific proportions of the lens shape, as is also evident from ‘Figure 1 of all 9 objects examined’ (Minutes of the main hearing of 21 / 22 September 2023, p. 48, pag. 1271).
- 95.3 A variation on the same basic ‘lens’ shape (still a lens, but taller, more bulbous, more spherical, etc.) does not therefore automatically fall outside the scope of protection, although it cannot be ruled out that a change in the lens shape might (also) lead to a different design language.

The shape or appearance of the individual sound fields or domes (see in this regard Reply I, para. 168 et seq. and 174 et seq., p. 1761; see, for example, minutes of the continued hearing, p. 22 et seq., p. 2073 et seq.)

- 95.4 In this regard, the Plaintiffs argue that the contours of the sound fields are designed to be ‘more distinctive’, which constitutes a clear difference from the ‘Hang’ (see, inter alia, Reply I, para. 168 et seq., p. 1761 et seq.; Reply II, para. 44, pp. 1682 et seq.; see also minutes of the continued hearing, p. 22 et seq., pp. 2073 et seq.).
- 95.5 With regard to the sound fields, it is their **circular arrangement** (on the upper half of the bowl) in particular that is considered relevant, not the specific design of individual sound fields (see decision of 2 July 2024, E. 96 et seq., in particular E. 96.4). Altering the contours of the individual sound fields (whilst retaining a circular shape) does not therefore automatically fall outside the scope of protection, although it cannot be ruled out that altering the shapes of the sound fields could (also) lead to a different design language.

Multiple sound fields (Reply 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’, particularly as the commercial court had taken the reduction in the number of tone fields into account as a key factor (Reply I, para. 173, p. 1762 et seq.; see also minutes of the continued hearing, p. 23, p. 2074).

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

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

- 95.7 Here, the Plaintiffs argue that certain domes of the Plaintiffs’ ‘Handpans’ are **oval**, whilst the dome of the ‘Hang’ is always **circular** (see, for example, Reply I, para. 176, p. 1763 et seq.; see also Reply II, para. 44, p. 1683 and minutes of the continued hearing, p. 23, p. 2074).
- 95.8 Whilst it is undisputed that oval domes do not (merely) retain circular shapes (correct Reply I, para. 177, p. 1764), an oval dome still retains a clear concentric symmetry with the dome as its centre (in the optical, rather than 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 Reply I, para. 178, p. 1764, Minutes of the continued hearing, p. 24, p. 2075)

- 95.9 It should also be noted in this regard that, in the decision of 2 July 2024, the question of whether ‘single or multiple domes’ were used was not decisive for the issue of protection. Furthermore, multiple domes are, or would be, used in certain versions of the ‘Hang’ (see minutes of the main hearing of 21–22 September 2023, pp. 62–64, pp. 1285–1287). The court considers it conceivable that the use of multiple domes may 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 ‘Höcker’, Plaintiff 20’s ‘Spinnennetz’) (Reply I, para. 182 et seq., p. 1765)

- 95.10 Here, too, the court can certainly envisage that other dome geometries might be suitable for falling outside the scope of protection, particularly as 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 sound field and the other sound fields, see K-I, para. 35, p. 43] (see Reply I, para. 188, p. 1767 et seq.):

- 95.11 In the decision of 2 July 2024, the question of the exact dimensions of the shoulder was not of decisive importance. Whilst 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 respect would automatically fall outside the scope of protection.

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

- 95.12 It should also be noted in this regard that, in the decision of 2 July 2024, it was the design that was decisive, not the question of the specific surface finish and/or colour scheme (see also BGE 113 II 190, E. I.2c; with regard to the colour scheme, see Regional Court of Düsseldorf, 14c O 64/25, judgment of 22 December 2025, para. 47). Viewed in isolation, a change in colour 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, pag. 2075).

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

- 95.13 In this regard, the Plaintiffs argue that certain of their instruments also feature tone fields (in some cases also domes) on the lower half of the shell. It should be recalled in this context that, according to the decision of 2 July 2024, E. 96.2 and 101 (p. 1489, 1493), account would be taken of the fact that Defendants 2 and 3 had arranged the sound fields *only* on the upper side (see the decision of 2 July 2024, E. 104, p. 1494), thereby clearly separating the shell halves from one another horizontally. In the context of a settlement, it is therefore not immaterial if certain instruments

additionally feature tone fields on the underside. It cannot be inferred from this that the addition of further tone fields automatically excludes them from the scope of protection.

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

- 95.14 These are domes placed not centrally but (usually slightly) offset on the upper spherical segment (Reply I, para. 184, p. 1766). According to the decision, one must take into account, amongst other things, the contrasting, i.e. polar, relationship between the upward-facing dome and the resonance opening directed inwards (and thus towards the dome) (decision of 2 July 2024, E. 101, p. 1493), and, at times, the vertical axis between the dome and the resonance opening (decision of 2 July 2024, E. 104). Furthermore, the positioning of the dome enables a ‘tuner’, amongst other things, to isolate additional sound fields, which in turn may influence the circular arrangement of the sound fields (see, for example, Reply I, para. 187, p. 1767; decision of 2 July 2024, E. 96.2, p. 1489). Such circumstances may influence the design and must therefore be taken into account, although it cannot be said that the scope of protection is automatically exceeded.

Interim conclusion

96. Overall, the court does not rule out the possibility that the differences cited by the Plaintiffs may be significant in the context of a **case-by-case assessment**. Just as such alterations do not automatically lead to a departure from the scope of protection, it cannot be stated across the board that they are entirely irrelevant. However, in order to establish a difference relevant under copyright law, there must (also) be differences, when considered as a whole, which lie within the elements justifying protection in the present case, particularly as the assessment of infringement must be carried out on the basis of a contextual overall assessment. This will need to be examined below. Taking the above considerations into account, **the following variations do not automatically** fall outside the scope of protection, but must **be examined in more detail** in this context:
- a dome positioned in a different place or an additional dome (see Reply I, para. 184 et seq., p. 1766 et seq.);
 - missing domes (see, for example, Reply II, para. 44, p. 1683);
 - additional (raised) tone fields (so-called ‘mutants’, see Reply I, para. 187, p. 1767 and minutes of the continued hearing, p. 24, p. 2075);
 - change in the ‘polarity’ of the upper and lower shells through the addition of further tone fields/domes on the underside (see Reply I, para. 164 et seq., pp. 1760 et seq.).

Infringement assessment

97. The instruments to be assessed under Swiss law are the ‘Handpans’ of Plaintiffs 18–23 and 25 (see prayers of relief in K-III; Reply I, para. 193 et seq.). The reference work is ‘Hang’, as embodied in the five versions set out in K-III, prayer of relief 1 no. ii a–e.

Instruments of Plaintiffs 18 and 19 (K-III, para. 182 et seq.; Reply I, para. 193–269)

98. In the instruments distributed by Plaintiffs 18 and 19 (see K-III, prayer of relief 2a – 2.ddd, pp. 771 et seq. [HG 21 2]), a contextual **overall assessment** 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 Reply I, para. 194–205, para. 209–214, para. 218–242, para. 246–251, para. 258–269 (p. 1769 et seq.). In their overall impression, these ‘Handpans’ take the form of a lens (a departure from the concave playing surface typical of steel pan construction towards a seemingly floating resonating body/‘UFO’), featuring a protruding centre point positioned at the top centre as a concentric focal point, around which the (visually equal and in equilibrium) tone fields, placed at roughly equal distances from one another, are arranged in a circular pattern. There is also a clear horizontal separation between the upper and lower shells (which are identical in themselves but nevertheless designed as polar opposites), with the upper part featuring tone fields and the dome as its centre, whilst the lower part is left empty. As with the ‘Hang’, a vertical axis is formed by the resonance opening, which leads into the instrument and protrudes from it on the opposite side in the form of the dome.
99. At the same time, the **differences** cited by the Plaintiffs lie in areas which, individually and/or collectively, do not result in any 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 are mere additions, or alterations that are not sufficiently significant, such as different colour schemes for the instrument or its parts (e.g. the shoulder, outer ring or dome), additional decorations on the surface, partly slightly oval rather than round shapes (e.g. of the central sound field, the dome and/or the shoulder), enlarged domes, slight differences in the size of the sound fields, ‘more strikingly’ designed sound fields, a surface with a different tactile quality, one additional sound field (whilst retaining the circular shape), etc., are not sufficient to alter the overall impression (see K-III, para. 183 et seq., p. 943 et seq. [HG 21 2], Reply I, para. 194 et seq., p. 1769 et seq.). Even a slightly oval shape – insofar as it is discernible at all, depending on the angle of view – is, in the present case, when **viewed as a whole**, still perceived as clearly concentric from a design perspective, as noted in E. 95.8. As regards the multiple domes (or indentations on the dome) (see e.g. K-III, para. 192, p. 951 [HG 21 2]), these too are not sufficient to alter the overall impression to any significant degree, particularly as multi-tiered domes (double and triple domes) would also be used in the ‘Hang’ design (see minutes of the main hearing of 21–22 September 2023, pp. 62 and 64 [“Integrales “Hang”” and “Freies Integrales “Hang””], pp. 1285, 1287). Overall, the alterations made amount merely to (non-creative) redesigns. The variations evident in the ‘Handpans’ illustrated below, in terms of colour scheme, exact dimensions, additional decorations/mandalas, or a slightly adapted shape of the

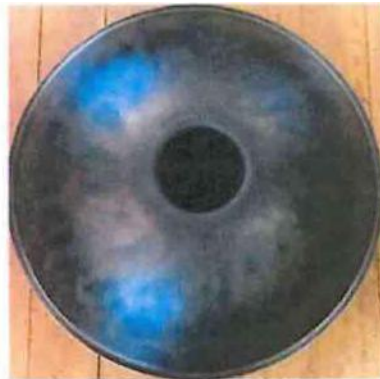
shoulder and/or dome, or more distinctive tone fields, therefore do not, either individually or in combination, fall outside the scope of protection, particularly as the characteristic features are otherwise retained. The **overall impression** created by these 'Handpans' **remains comparable to that of the 'Hang'**.

100. Consequently, acts relating to the following 'Handpans' constitute copyright infringement:

100.1 DB Handpan C# Ragadesh (K-III, prayer of relief 2a and para. 183 et seq.; Reply I, para. 194 et seq.).



100.2 DB Handpan C Amara and C# Celtic Minor (K-III, prayer of relief 2b and 2c and para. 185 et seq.; Reply I, para. 197 et seq.)



100.3 DB Handpan D Kurd (K-III, prayer of relief 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, prayer of relief 2e, 2g, 2i and 2x, and para. 191 et seq., 195 et seq., 199 et seq. and 229 et seq.; Reply I, para. 203 et seq.)

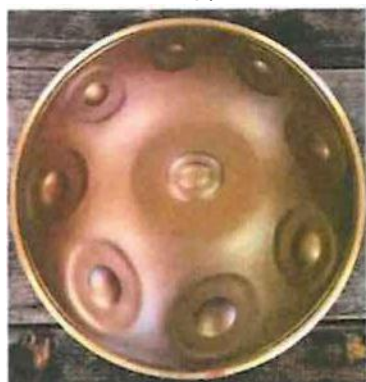


- 100.5 Prima Handpan C Ursa Minor, B Mystic, C Aegean, C Low Pygmy, A Celtic Minor, B Celtic Minor, C# Celtic Minor, D Celtic Minor, D Sabye, D Ysha Savita, D Kurd, F Magic Voyage, B Mystic at 432 Hz, C Amara at 432 Hz, C Aegean at 432 Hz, D Celtic Minor at 432 Hz and C# Celtic Minor at 432 Hz (K-III, prayer of relief. 2f, 2h, 2j, 2k, 2m, 2n, 2o, 2p, 2q, 2r, 2w, 2z, 2aa, 2bb, 2cc, 2dd and 2ee, as well as para. 193 et seq., 197 et seq., 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.; Reply I, para. 206 et seq.).

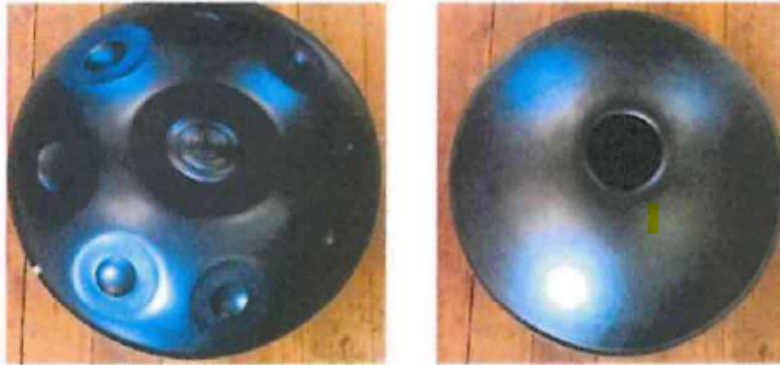


It should also be noted in relation to this Handpan that even an additional element such as a '**mandala**' in the central tone field (see the decorations around the central tone field, Reply I, para. 206 et seq., pp. 1772 et seq.) is not sufficient in this case to alter the overall impression (neither on its own nor in combination with the other alterations), particularly as all the characteristic features justifying protection would be retained at the same time. 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 may be made, by analogy, to E. 98 et seq.

- 100.6 Prima Handpan D Amara (K-III, prayer of relief 2l, para. 205 et seq.; Reply I, para. 209 et seq.)



100.7 Handpan von Nomade in C Amara (K-III, prayer of relief 2s, para. 219 et seq.; Reply I, para. 212 et seq.)



100.8 Handpan von Nomade in D Kurd and in D Aegean (stainless steel) (K-III, prayer of relief 2u and 2v, para. 223 et seq., 225 et seq.; Reply I, para. 218 et seq.)



100.9 Prima Handpan F Magic Voyage (K-III, prayer of relief 2y, para. 231 et seq.; Reply I, no. 221 et seq.)



100.10 Prima Handpan C# Celtic Minor at 432 Hz and D Celtic Minor at 432 Hz (K-III, prayer of relief 2ff, 2gg, no. 245 et seq., 247 f.; Reply I, para. 224 et seq.)



100.11 EchoSoundSculpture F Magic Voyage and G Harmonic Minor (K-III, prayer of relief 2hh and 2ii, para. 249 et seq., 251 et seq.; Reply I, para. 227 et seq.)



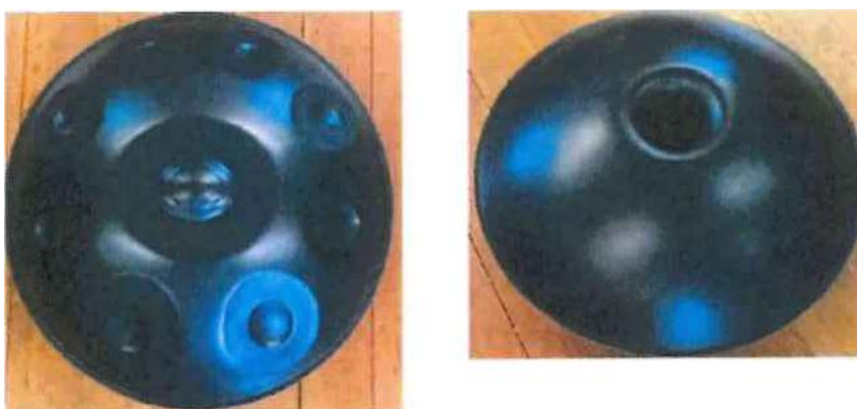
100.12 Arra Handpan in D major (K-III, prayer of relief 2jj, para. 253 et seq.; Reply I, para. 231 et seq.)



100.13 MAG Handpan B Amara and D Amara (K-III, prayer of relief. 2kk and 2ll, para. 255 et seq., 257 et seq.; Reply I, para. 234 et seq.).



100.14 MAG Handpan C# Annaziska (K-III, prayer of relief 2mm, no. 259 et seq.; Rejoinder I, para. 237 et seq.)



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



100.16 Mercury Handpan F Magic Voyage (K-III, prayer of relief 2qq, para. 267 et seq.; Reply I, para. 246 et seq.)



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





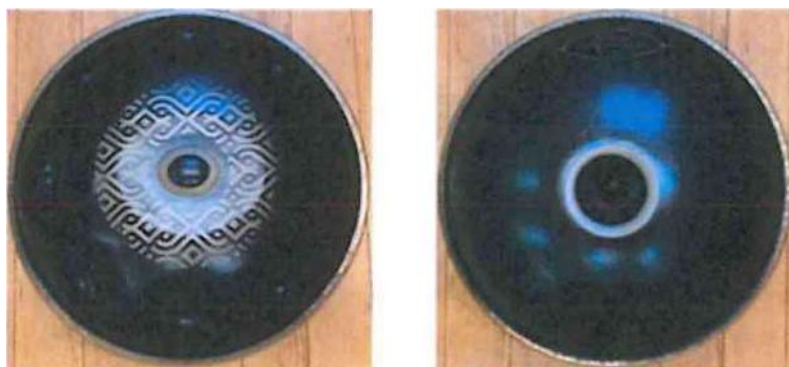
100.18 ShaktiPan D Moll (K-III, prayer of relief 2xx, para. 281 et seq.; Reply I, para. 258 et seq.)



100.19 Ugur Handpan D Kurd (K-III, prayer of relief 2yy, no. 283; Reply I, para. 261 et seq.)



100.20 PanAmor Handpan B Celtic Minor, C# Annaziska, D Sabye and C# Aeolien in 432 Hz (K-III, prayer of relief 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, prayer of relief 2bbb, para. 289 et seq.; Reply I, para. 267 et seq.)



100.22 Handpan von Nomade in D Kurd (K-III, prayer of relief 2t, para. 221 et seq.; Reply I, para. 215 et seq.)



100.23 Mercury Handpan in C# Annaziska (K-III, prayer of relief 263 et seq.; Reply 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 Reply I, para. 215, 243 et seq., pp. 1774, 1780; see also the minutes of the continued hearing, p. 22, p. 2073): as noted in E. 95.13 and 96 above, the ‘polarity’ of the two bowl halves is relevant when considered as a whole. However, in the present case, merely **adding** an additional feature (whilst retaining the other features or decisions giving rise to protection) does not (yet) alter the **overall impression** (contrary to the minutes of the continued hearing, p. 22, p. 2073), although the court considers additional tone fields to be a possible way of breaking with the ‘polarity’ of the two shell halves. Furthermore, the merely slight modifications made in the present case – such as more pronounced contours of the colour fields, an oval central colour 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 alteration, in particular through the addition of an extra feature. Reference may be made, by analogy, to E. 98 et seq.

101. **By contrast**, the ‘Handpans’ depicted in Reply I, 252 et seq. and 255 et seq. (p. 1783 f.), which look as follows, **no longer fall within the scope of protection**:

101.1 ShaktiPan C Medusa (K-III, prayer of relief 2uu, no. 275 et seq.; Reply I, para. 252 et seq.)



This 'Handpan' features two domes positioned on the upper segment. This results in axial symmetry when viewed from the centre, thereby clearly distinguishing this 'Handpan' from the orientation towards a single centre (concentric/point symmetry) that characterises the 'Hang'. A central dome, which still has the name 'opposite the resonance hole', is no longer present here (especially as the tone fields no longer revolve solely around a single dome). In addition, there are three further tone fields of varying sizes, attached to the lower half of the shell as '*bottom notes*', which are 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, in particular as this design also features visually prominent tone fields of varying sizes (in particular on the underside).

101.2 ShaktiPan G# Harmonic Minor 13 notes (K-III, prayer of relief 2ww, para. 279 et seq.; Reply I, para. 255 et seq.)



In this 'Handpan', the additional tone field raised above the circle (see the upper half of the bowl on the left-hand side) plays a role, when viewed as a whole, in relation to the 'circular shape' of the tone fields (see also the decision of 2 July 2024, 96.2, p. 1489). As a result, the slightly oval and offset dome is (barely) no longer recognised as a clear (point-symmetrical) centre, particularly as 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) sufficient to distinguish itself, in its overall impression, from

that of the 'Hang' to the extent that it no longer infringes upon the latter's scope of protection, particularly as oval shapes are 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 the scope of protection of the 'Hang'.

It is held that Plaintiffs 18 and 19 do not infringe the Defendant's copyright in the 'Hang' in Switzerland by offering, etc., the 'Handpans' in accordance with K-III, **prayer of relief 2uu and 2ww**.

Plaintiff 20's instruments

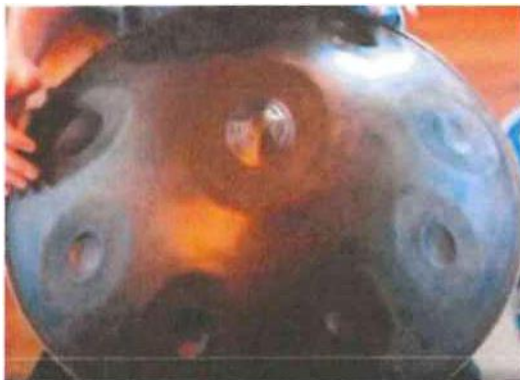
103. The 'Handpans' depicted in Rejoinder I, para. 282–326 (p. 1791 et seq.) adopt the characteristic features of the 'Hang' **almost without exception**. With regard to the **overall impression** this creates, reference may be made, by analogy, to E. 98 above. At the same time, the **differences** listed by Plaintiff 20 in various dimensions (including the height/diameter of the lens shape) amount to mere additions or insufficiently significant alterations, such as different colour schemes for the instrument or its parts, patina, ornaments on the surface, including their tactile properties, partly slightly oval rather than round shapes (e.g. central tone field, dome or shoulders), different shoulders (described as 'more striking' and 'larger' or 'significantly flatter'), larger domes, etc. (see, for example, K-III, para. 312 et seq., pp. 1064 et seq.; see also para. 304 et seq., pp. 1056 et seq. [HG 21 2]). However, a slightly oval shape is still perceived as concentric from a design perspective – as already noted in E. 95.8 – provided that no further significant alterations are made. The differences asserted by the Plaintiff 20 therefore do not fall outside the scope of protection of the 'Hang', either individually or in combination.
104. As regards the **dome geometry** of Plaintiff 20 in particular (see, for example, Reply I, para. 182, p. 1765, or the 'wave-shaped indentations of the dome' described, for instance, in K-III, para. 305 iv, p. 1057 [HG 21 2]), this is not, in the present case, when considered on its own (or in combination with the other modifications), sufficient to give rise to a different overall impression, particularly as multiple domes are in any event also used in the 'Hang' (see minutes of the main hearing of 21–22 September 2023, pp. 62 and 64, 'Integrales' and 'Freies Integrales' 'Hang', pp. 1285, 1287). The details of the 'spider's web-like' dome shape may be apparent in a close-up (see illustration in Reply I, no. 182, p. 1765), but not when viewed in the context of an overall assessment.
105. Overall, the alterations made amount to (non-creative) adaptations and do not fall outside the scope of protection of 'Hang', particularly as its characteristic features have, moreover, been retained.

The overall impression created by these 'Handpans' remains comparable to that of the 'Hang'. Consequently, the following acts in relation to the 'Handpans' constitute specific copyright infringements:

- 105.1 Djilhi D AMARA (K-III, prayer of relief 3e, para. 312; Reply I, para. 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, prayer of relief 3f, 3i, 3n and 3s, para. 313, 316, 321, 326; Reply I, para. 285 et seq.)





105.3 Djillhi Prototype G Oxalis 10/2017, C# Mystery and Djillhi C# Celtic minor triple C# (K-III, prayer of relief 3g, 3t, 3u, para. 314, 327, 328; Reply I, para. 288 et seq.)





105.4 Djillhi C harmonic minor 9 (K-III, prayer of relief 3h, para. 315; Reply I, para. 291 et seq.)



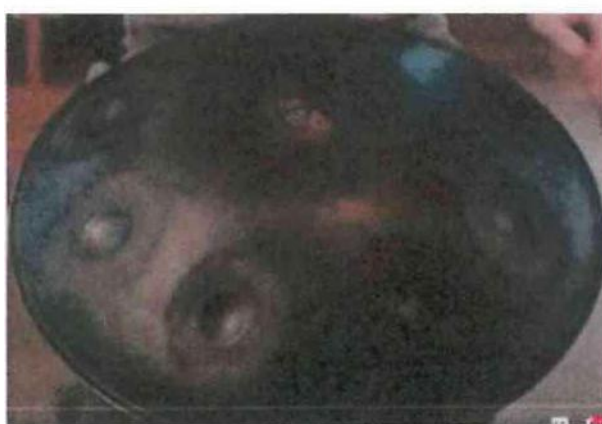
105.5 Djillhi F integral 12 (K-III, prayer of relief 3j, para. 317; Reply I, para. 294 et seq.)



105.6 Djillhi E Kurd 13 (K-III, prayer of relief 3k, para. 318; Reply I, para. 297 et seq.)



105.7 Djillhi E Romanian Hijaz and E Low shunko (K-III, prayer of relief 3l and 3m, para. 319 et seq.; Reply I, para. 300 et seq.)



105.8 Djillhi D Kurd 8 and D Jailoy 8 (K-III, prayer of relief 3o and 3p, para. 322 et seq.; Reply I, para. 303 et seq.)



105.9 Djillhi D Satie majeur extended (K-III, prayer of relief 3q, para. 324; Reply I, para. 306 et seq.)



105.10 Djillhi D Hijaz 9 (K-III, prayer of relief 3r, para. 325; Reply I, para. 309 et seq.)



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



105.12 Djillhi C Onoleo 2019 (K-III, prayer of relief 3w, para. 330; Reply I, para. 315 et seq.)



105.13 Djillhi C Celtic minor triple C (K-III, prayer of relief 3x, para 331; Reply I, para. 318 et seq.)



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



105.15 Djillhi Prototype First Stainless C# PYGMY (K-III, prayer of relief 3z, para. 333; Reply I, para. 324 et seq.)



105.16 Djillhi D Satie Majeur Lydian (K-III, prayer of relief 3a, para. 304 et seq.; Reply I, para. 270 et seq.)



105.17 Djillhi D Kurd Prhygien (K-III, prayer of relief 3b, para. 306 et seq.; Reply I, para. 273 et seq.)



105.18 Djillhi C# Pygmy (C#/F#) Pentatonic mineur (K-III, prayer of relief 3c, para. 308 et seq.; Reply I, para. 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 does not (yet) result in a different overall impression. Whilst this design does ‘border on’ the characteristic of the contrasting shell halves, the differences—both individually and taken as a whole—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 here by analogy. With regard to the insufficient remaining alterations, reference may be made by

analogy to E. 99 above: the changes relating to the dimensions of the lens (e.g. height or diameter), the size of the dome, the oval shape of the dome or the central clay panel, differences in colour or ornamentation, patina, tactile characteristics of the surface, the shape of the shoulder, differences in size between the individual clay panels or the presence of multiple clay panels (see no. 303 et seq., p. 1056 et seq. [HG 21 2]) are not, in the present case (neither individually nor in combination), capable of sufficiently influencing the overall impression when considered in context.

- 106 By contrast, the ‘Handpan’ depicted in Reply I, para. 279 et seq., p. 1790 (K-III, prayer of relief 3d, para. 310 et seq., p. 1062 et seq. [HG 21 2]) and reproduced below does **not fall within the scope of protection** of the ‘Hang’. Due to its two additional tone fields raised in a second row, the ‘Handpan’ does not feature a (solely) circular arrangement of the tone fields. The slightly oval dome is no longer recognised as a clear (point-symmetrical) centre, particularly as 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, in particular as oval shapes (in particular the central tone field and dome) and other dome geometries are also employed here:

- 106.1 Djilli D Kurd étendu (D/A) Prhygien (K-III, prayer of relief 3d, para. 310 et seq.; Reply I, para. 279 et seq.)



107. Conclusion

In conclusion, it must be noted that **1** of the Plaintiff’s 20 ‘Handpans’ submitted out of a total of **26** does **not** infringe the scope of protection of the ‘Hang’.

It is held that, by manufacturing etc. the ‘Handpans’ in Switzerland, the Plaintiff 20 does not infringe the Defendant’s copyright in the ‘Hang’ pursuant **to prayer of relief 3d**.

The Plaintiff’s instruments 21

108. The ‘Handpans’ depicted in Reply I, para. 327–332 and 339–341 (pp. 1799 et seq., 1803) **almost without exception** incorporate the essential characteristics of the ‘Hang’ (for the assessment, reference may be made by analogy to the arguments concerning the preceding Plaintiffs, in particular Plaintiff 20 above). At the same time,

the **differences** listed by Plaintiff 21 are occurring in different dimensions (e.g. height/diameter of the lens-shaped body or slightly larger domes), mere additions such as engravings, or alterations that are not sufficiently significant, such as a different colour 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 (whilst retaining the circular shape), slight differences in size between the tone fields, 'more prominent', significantly flatter or larger shoulders, a printed logo or a black rubber edge protector, etc. (see also K-III, para. 343 et seq., pp. 1078 et seq. [HG 21 2]). However, a slightly oval shape is still perceived as concentric from a design perspective – as already noted in E. 95.8 – provided no additional significant changes are made. The differences asserted by the Plaintiff in 21 therefore don't lead outside the scope of protection of the 'Hang', neither individually nor in combination.

108.1 All of Plaintiff 21's 'Handpans' (with the exception of a single one; see Reply I, para. 342, p. 1803) feature a **dome made up of 'Höcker'**; see also Reply I, para. 40, p. 1713 et seq.). With regard to this **dome geometry** of Plaintiff 21 in particular, reference may in principle be made to the comments on Plaintiff 20 in E. 104 above. The Court recognises in the 'Höcker' developed by Plaintiff 21 (considered in isolation) elements of original creativity. However, these are not yet sufficient to constitute a blanket departure from the scope of protection: on the one hand, because Plaintiff 21, when viewed in context, adopts the selection and arrangement decisions of Defendants 2 and 3 to place a dome at the centre of the upper half of the shell (including the associated symmetries and concentricity), thereby resulting in a comparable overall impression despite the 'Höcker'. Furthermore, the 'Höcker' designs also appear, or indeed only appear, 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 likewise insufficient to fall outside the scope of protection of the 'Hang', particularly as the dome in this case still appears as a superimposed centre around which the tone fields revolve in a circular pattern (concentricity). The Defendants' comments on the specific dome design of Plaintiff 21 are irrelevant to this question.

109. The following 'Handpans' fall **within the scope of protection** of the 'Hang':

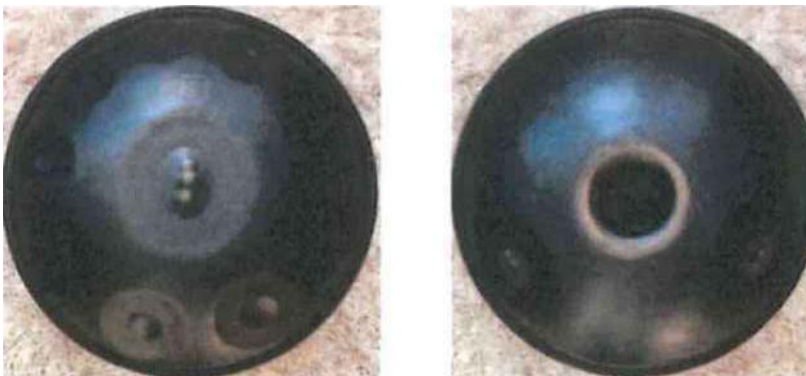
- 109.1 Soma Sound Sculptures Handpan (1+8) (K-III, prayer of relief 4a, para. 343 et seq., 829 et seq.; Reply I, para. 327 et seq.)



- 109.2 Soma Sound Sculptures Handpan (1+7 Tonfelder) (K-III, prayer of relief 4e, para. 351 et seq.; Reply I, para. 339 et seq.)



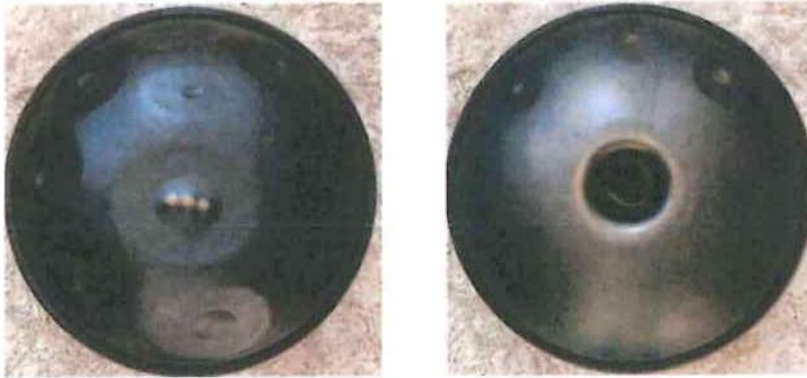
- 109.3 Soma Sound Sculptures Handpan (1+9) (K-III, prayer of relief 4b, para. 345 et seq.; Reply I, para. 330 et seq.)



Insofar as this 'Handpan' also features two tone fields (albeit with 'Höckers') (see K-III, para. 346 vi), p. 1081 [HG 21 2]); Reply I, para. 332, p. 1800 et seq.), reference may be made here to E. 105.16 et seq. above. When considered as a whole, this non-creative addition does not (yet) fall outside 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 et seq. [HG 21 2]) are **no longer covered by the scope of protection**:

110.1 Soma Sound Sculptures Handpan (1+9 mit versetztem Tonfeld und versetztem Bass) (K-III, prayer of relief 4c, para. 347 et seq.; Reply 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 recognised as a clear (point-symmetrical) centre, particularly as the tone fields no longer clearly circle around this dome. Added to this are additional tone fields arranged in a small arc on the lower shell. Overall, this constitutes a slight departure from key elements of the 'Hang' and, when viewed in context, differs sufficiently in its overall impression, in particular as the present design also incorporates oval shapes (in particular the central tone field and the dome) as well as a different dome geometry (three 'Höcker'). For further reference, see E. 101.2.

110.2 Soma Sound Sculptures Handpan (1+10 mit 2 versetzten Tonfeldern) (K-III, prayer of relief 4d, para. 349 et seq.; Reply I, para. 336 et seq.)



The same applies – albeit more clearly – to this 'Handpan'. Unlike the 'Handpan' referred to 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 Reply I, para. 338, p. 1802). Here, the slightly oval dome with its 'Höckern' clearly no longer functions as a point-symmetrical centre, particularly as the tone fields no longer circle solely around this dome.

Consequently, this 'Handpan' differs sufficiently in its overall impression, particularly as it also features oval shapes (in particular the central tone field and the dome) as well as a different dome geometry (three 'Höcker').

110.3 Soma Sound Sculptures Handpan (11 Tonfelder (ohne Bassnote)) (K-III, prayer of relief 4f, para. 353 et seq.; Reply I, para. 342 et seq.)



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 is reminiscent of that of a steel pan (see the adjacent illustration from Protocol IV of 11 October 2021 [revised, version of 24 January 2022], pp. 13 et seq. [Figure 1: Steel pan viewed from the front] (p. 501) or the figure 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 sound fields. Although a polarity of 'top' and 'bottom' remains discernible (a horizontal separation), the absence of the dome – replaced by three tone fields – carries greater weight in a contextual analysis, particularly as the tone fields no longer circle around a centre (which is entirely absent here). In terms of its overall impression, this 'Handpan' differs sufficiently from the 'Hang'.

111. Conclusion

In conclusion, it must be noted that **3** of the **6** 'Handpans' submitted by the Plaintiff **21 do not** infringe the scope of protection of the 'Hang'.

It is found that the Plaintiff 21 does not infringe the Defendant's copyright in the 'Hang' in Switzerland through the manufacturing etc. of the 'Handpans' **in accordance with** K-III prayers of relief **4c, 4d, 4f**.

Instruments of Plaintiffs 22 and 23

112. The 'Handpans' depicted in Reply I, para. 346–384 (p. 1804 et seq.) adopt, **almost without exception**, the essential characteristics of the 'Hang'. For the assessment, reference may be made, by analogy, to the comments 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 must, when viewed in context, still be regarded as a non-creative adaptation: The Plaintiffs are indeed correct in pointing out that the central tone field of, for example, the MAG-'Handpans' is oval and rather large in comparison to that of the 'Hang' (see, for example, Reply 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 making a contribution to a sufficient alteration. However, taken on its own or in combination with the other, merely slight alterations made here, it is not sufficient: differences that do not carry sufficient weight when considered as a whole include, for example, the dimensions (height/diameter), ornaments or engravings, indentations on the dome, the colour scheme of the instrument, dome and outer rings, the feel of the surface, the shape of the shoulder, the number of tone fields (whilst retaining the circular shape), more distinctive tone fields, etc. (see also K-III, para. 367 et seq., pp. 1093 et seq. [HG 21 2]). The same applies to the appearance of their instruments, described by the Plaintiffs as 'rather clunky, angular' (see minutes of the continued main hearing, p. 23, p. 2074). Furthermore, it was clearly evident during the on-site inspection at the first main hearing that certain versions of the 'Hang' – which are also covered by copyright protection – do indeed feature more distinctive central tone fields (see minutes of the main hearing of 21–22 September 2023, p. 55, p. 1278), particularly as this aspect, taken on its own, did not in itself constitute grounds for 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' therefore fall within the scope of protection of 'Hang':

114.1 MAG C Aegean (9+1) (K-III, prayer of relief 5a, para. 367 et seq., 833 et seq.; Reply I, para. 346 et seq.).



114.2 MAG A Amara (7+1) (K-III, prayer of relief 5b, para. 369 et seq.; Reply I, para. 349 et seq.).



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



114.4 MAG D Celtic minor (9+1) and D Kurd (9+1) (K-III, prayer of relief 5f, 5g, para. 377 et seq., 379 et seq.; Reply I, para. 355 et seq.)



114.5 Ugur D Celtic minor (8+1) (K-III, prayer of relief 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 Fis Kurd moll (8+1) (K-III, prayer of relief 5i, 5k, 5l, para. 383 et seq., 387 et seq., 389 et seq.; Reply I, para. 361 et seq.)



114.7 Ugur E Sabye (8+1) (K-III, prayer of relief 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, prayer of relief 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 (nitrierter Stahl), Cis Celtic minor (nitrierter Stahl), D Kurd (nitrierter Stahl) and D Celtic minor (nitrierter Stahl) (K-III, prayer of relief 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, prayer of relief 5 and 5.1, is to be rejected insofar as it is admissible.

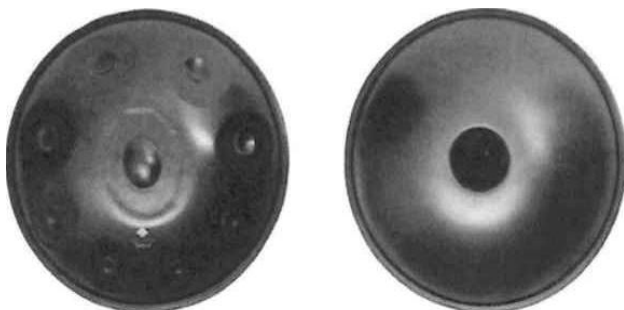
Plaintiff 25's instruments

116. The 'Handpans' depicted in Reply I, para. 373–384 (pp. 1810 et seq.) incorporate the characteristic features of the 'Hang', which is why reference is made, by analogy, to the arguments put forward by the preceding Plaintiffs.

117. At the same time, the **differences** listed relate to variations in different dimensions (height/diameter), mere additions, or alterations that are not sufficiently significant – such as different colour schemes for the instrument, dome or outer ring, 'more distinctive' contours, 'playful' decorations, engravings, smoother surfaces, partly oval rather than round shapes (e.g. the central tone field, other tone fields and the dome), oval shoulders, differences in the size of the individual tone fields, one or two additional tone fields, 'prominent' shoulders or a 'prominent light-coloured' logo, etc. (see K-III, para. 723 et seq., pp. 1429 et seq. [HG 21 2]; Reply I, para. 373 et seq., pp. 1810 et seq.). Furthermore, the oval shapes used here continue to be perceived as concentric from a design perspective – as already noted in E. 95.8 – provided that no further substantial changes are made. Although alterations to the dome receive recognition 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 Reply 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, prayer of relief 7a, para. 723 et seq., 841 et seq.; Reply I, para. 373 et seq.)



117.2 Handpan SELA Harmony – D Amara Gold (K-III, prayer of relief 7b, para. 725 et seq.; Reply I, para. 376 et seq.)



117.3 Handpan CONVEX – B Celtic minor (K-III, prayer of relief 7c, para. 727 et seq.; Reply I, para. 379 et seq.)



117.4 Handpan CHAYA B Celtic minor, B Kurd, C# Amara, D Celtic minor and D Kurd (K-III, prayer of relief 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 et seq.)



118. By contrast, the 'Handpans' depicted in Reply I, para. 385–391 (pp. 1813 et seq.), which look as follows, are **no longer covered by the scope of protection**:
- 118.1 Handpan MEINL – Dominant D – 8 Ton – White (K-III, prayer of relief 7i, para. 741 et seq.; Reply I, para. 385 et seq.)



- 118.2 Handpan MEINL – Natural D – 8 Ton – Black, Integral D – 8 Ton – Black, Raga Desya Todi D# – 8 Ton – Black, Equinox E – 8 Ton – Black and Akebono F – 8 Ton – Black (K-III, prayer of relief 7j, 7k, 7l, 7m, 7n, para. 743 et seq., 745 et seq., 747 et seq., 749 et seq., 751 et seq.; Reply I, para. 389 et seq.)



These 'Handpans' feature a **concave tone field** in the central area – i.e. one that curves inwards towards the interior of the instrument – rather than a dome (Reply I, para. 387 et seq. and 389 et seq., pp. 1813 et seq.; see also paras. 741 et seq., 743 et seq., pp. 1447 et seq., 1449 et seq. [HG 21 2]). Viewed in context, this means that there is no superimposed centre in the form of a dome, nor is there the typical vertical axis between the dome and the sound hole. Although a polarity between 'top' and 'bottom' remains discernible (a horizontal separation), 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 takes on the characteristics of the sound hole. The absence of the dome, replaced by an inward-facing tone field, consequently carries greater weight when viewed in context (there are no lines running in the same direction leading into the resonating body and out into a bulge on the upper side [dome]). In terms of their overall impression, these 'Handpans' differ sufficiently from the 'Hang', in particular as, in this case, oval shapes (in particular of the tone fields) are also utilised.

118.3 Insofar as the statement of grounds for the action refers to **prayer of relief 7o** (see K-III, para. 751 et seq., p. 1457 [HG 21 2]), this cannot be found in the legal claims (see prayer of relief 7, p. 872 [HG 21 2]), particularly as the corresponding sub-auxiliary prayer of relief, no. 7.1, from Reply I merely mentions prayers of relief a-n (p. 1699). The reason for this is that (only) in the statement of grounds from para. 739 et seq., p. 1445 et seq. [HG 21 2], a 'Handpan' is additionally listed, which was not included in the prayers of relief ('Handpan' MEINL – Dominant D – 8 Ton – Black, with reference to K-III, prayer of relief 7i), which resulted in a change to the numbering of the items. In terms of substance, there would be no differences with regard to this additional 'Handpan' compared with the instruments assessed above, particularly as it is the same model from a visual perspective. However, the court is prohibited from granting (in part) claims that have not been submitted to it in this form. Unlike the models referred to in K-III prayer of relief 7i–n (which are dealt with in the Claim under 7j–o), this is not merely an editorial oversight.

119. Conclusion

In conclusion, it should be noted that **6** of the **14** 'Handpans' submitted by the Plaintiff 25 **do not** infringe the scope of protection of the 'Hang'.

It is found that the Plaintiff 25, by offering etc. the 'Handpans' in accordance with **prayers of relief 7i, 7j, 7k, 7l, 7m, 7n** does not infringe the Defendant's copyright in the 'Hang' in Switzerland.

Antitrust licence defence (Reply I, para. 419 et seq.)

120. The **Plaintiffs** assert a licence defence under competition law in the event that 'the scope of protection is drawn so broadly that the entire category of "Handpans" falls within it' (Reply I, para. 134, para. 418 et seq., pp. 1750, 1820 et seq.). They assume that, were the scope of protection to be interpreted in this way, the Defendants would hold a monopoly or a dominant position in the product market for 'Handpans', or at the very least a position of relative market power within the meaning of article 4 para. 2^{bis} of the Cartel Act of 6 October 1995 (CartA; SR 251), because the Plaintiffs would be compelled to obtain a license in order to continue manufacturing 'Handpans'. The **Defendants** dispute this. They argue, on procedural grounds, that this issue is not the subject matter of the proceedings, particularly as the defence can only be raised in the context of the enforcement of specific claims (Rejoinder, para. 213, p. 1942 et seq.). On the merits, they argue that the rights of exclusivity in favour of an author arising from copyright protection do not constitute competitive effects falling within the scope of competition law (Rejoinder, para. 214 et seq., p. 1943) and that, consequently, no 'abuse' could be said to exist, particularly as the Plaintiffs had not indicated any willingness to grant a licence in the first place (Rejoinder, para. 223, p. 1945) and the other conditions for the defence were not met either (Rejoinder, para. 224, p. 1945 et seq.).

Assessment

121. Antitrust objections relating to licensing are **not the subject matter** of the present proceedings, which centre primarily on the question of eligibility for protection and, in the alternative, on the question of copyright infringement; consequently, there is no need to address this issue in further detail.

The fair use defence in relation to Plaintiffs 20 and 21 (Reply I, para. 432 et seq.)

122. According to the account given by **Plaintiffs 20 and 21**, they engage in the manufacturing of their ‘Handpans’ exclusively on order for their customers’ private use (Reply I, para. 435, p. 1824). Since, pursuant to Article 19 para. 1 CopA, customers are permitted to manufacture their own ‘Handpans’ (but lack the necessary technical skills to do so), the manufacturing of the ‘Handpans’ by Plaintiffs 20 and 21 also falls within the private use exception under Article 19 para. 2 CopA (‘having them manufactured by third parties’). The **Defendants** dispute this. An infringer cannot claim that its buyers use the product solely for private purposes, particularly as Plaintiffs 20 and 21 themselves carry out the reproduction of the products for the purpose of sale (Rejoinder, para. 228, p. 1946 et seq.). Plaintiffs 20 and 21 are also said to stock instruments (Rejoinder, para. 106 et seq., p. 1917), which the Plaintiffs in turn dispute (Submission of 1 December 2025, para. 13, p. 2004).

Legal considerations

123. The private use exception, as a statutory exception, precludes an act from constituting an infringement of copyright (see GASSER/OERTLI, in: SHK URG, 2nd ed., Introduction to articles 19–22, N 18), which is why this issue must be taken into account in the present proceeding.
124. The provision in article 19 CopA permits the user for private use to allow the manufacturing of reproductions of works by ‘third parties’, i.e. by outsiders, service providers and infrastructure providers, provided that these are intended for the right holder’s private use. In doing so, the service provider must not copy more or in a different manner than the rightholder would be permitted to do themselves under para. 1 (REHBINDER/HAAAS/UHLIG, in: OFK URG, 4th ed., article 19, N 32). The purpose of this provision is to enable persons entitled to private use who do not themselves possess the relevant equipment to avail themselves of the private use exception. However, the provision does not serve to enable third parties to engage in trade that would allow them to compete with the author in their business sphere (MARTI, Urheberrechtlicher Eigengebrauch unter Mitwirkung Dritter, p. 57 et seq., with further references). For ‘commissioning of production’ within the meaning of this provision to apply, the authorised person must place a specific mandate with the third party for reproduction, following which the reproduction then takes place (MARTI, Urheberrechtlicher Eigengebrauch unter Mitwirkung Dritter, p. 56 et seq., with further references), whereby the third party must be a specific, predetermined individual (MARTI, Urheberrechtlicher Eigengebrauch unter Mitwirkung Dritter, p. 58).

125. At this stage, there is no need to address the question of whether Article 19 CopA applies in principle to Plaintiffs 20 and 21 or not. Rather, the statements made by Plaintiffs 20 and 21, according to which they manufacture their 'Handpans' exclusively to order for private individuals, prove to be unsubstantiated. Neither from these statements (nor from the examinations of the parties offered for this purpose) would it be possible to ascertain which individuals ordered the 'Handpans' at issue here (if at all) and when, or whether the manufacturing took place following the order, which is why a waiver of further evidence could be considered (see, for example, Reply I, para. 26 and 33, para. 435, pp. 1709, 1711, 1824). The acts of infringements of the Defendant's copyright by Plaintiffs 20 and 21 therefore constitute a breach of the relevant statutory provisions.

Overall conclusion on Swiss law

It is **held** that:

- a) **Plaintiff 18** and **Plaintiff 19** do not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 2uu and 2ww** of the Claim dated 31 December 2020;
- b) the **Plaintiff 20** did not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by manufacturing, offering for sale, selling, distributing and making available the musical instrument described in **prayer of relief 3d** of the Claim dated 31 December 2020;
- c) the **Plaintiff 21** did not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by manufacturing, offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 4c, 4d and 4f** of the Claim dated 31 December 2020;
- d) the **Plaintiff 25** did not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 7i, 7j, 7k, 7l, 7m and 7n** of the Claim dated 31 December 2020.

In all other respects, the **Claim of 31 December 2020** is **rejected in so far as it is admissible**.

Recent developments

126. The **Plaintiffs** argue that the **criteria** for assessing copyright protection **have since changed**, i.e. since 2 July 2024. Accordingly, by the decision of 2 July 2024, the claims (or, more specifically, their prayer of relief 1) should have been upheld (see Reply I, para. 439 et seq. and 620, pp. 1826 et seq., 1872; see also the statement of 9 December 2025, pp. 2012 et seq.; Reply II, para. 56 et seq., p. 1688). In this regard, they refer – with regard to Germany – in particular to three judgments of the BGH in the ‘Birkenstock’ cases of 20 February 2025 and – with regard to harmonised EU law – to the Opinion of the European Advocate General Szpunar of 8 May 2025 (KB 328-330 and KB 333, see also KB 332; see also Reply II, para. 56, p. 1688). It is **now** held that free and creative decisions alone are not sufficient; rather, it must also be established that these decisions reflect the author’s personality and are discernible in the subject matter (Minutes of the continued plenary session, p. 9 et seq., p. 2060 et seq.).
127. Essentially, according to the recent case law of the BGH, protection of a work requires ‘**artistic**’ and not merely ‘creative’ decisions (Reply I, para. 441, p. 1826). Such decisions were precisely not found to have been made in the decision of 2 July 2024. Given this situation, the commercial court is free to reconsider its (interim) decision of 2 July 2024 (see also minutes of the continued hearing, p. 7, p. 2058).
128. The **Defendants**, however, make the defence that the findings of the first part of the proceedings (i.e. the decision of 2 July 2024) are binding for the further proceedings, particularly as there is no new legal situation in any event (Rejoinder, para. 235 and 7 et seq., p. 1948, 1891). The **Plaintiffs**, in turn, dispute this. It was precisely not possible to file an appeal against the decision of 2 July 2024 regarding the question of the registrability of the ‘Hang’ (see submission of 1 December 2025, para. 15 [p. 2005] against the background of the partial decision not to hear the case, BGer 4A_466/2024 of 18 February 2025; see also minutes of the continued hearing, p. 7 and 16, p. 2058, 2067).
129. In the submissions dated 9 December 2025, both the Plaintiffs 1, 2, 5–9, 18–23 and 25 (p. 2012 et seq.) and the Defendants (p. 2022) submitted the **judgment of the ECJ of 4 December 2025** in joined cases C-580/23 and C-795/23 (mio/konektra) to the files (see KB 361 and KAB 187). In their statement on this judgment, the Plaintiffs (submission of 9 December 2025, para. 14, pp. 2016 et seq.; see also Reply I, para. 457 et seq., p. 1832 et seq.; see also Submission of 16 January 2026, p. 2034 et seq.) that the commercial court, in its decision of 2 July 2024:

- had 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 individuality (see also Reply I, no. 439, 443, 460, pp. 1826 et seq., 1833; see also the submission of 16 January 2026, para. 16, p. 2037);
 - had derived ‘creative decisions’ solely from a deviation from the previously known repertoire of forms (see also the submission of 16 January 2026, para. 12, 17, p. 2036 et seq.); and
 - had regarded functional design decisions as not precluding copyright protection (see also the submission of 16 January 2026, para. 14 et seq., 5, p. 2037, 2035).
130. Accordingly, the Plaintiffs – referring to this very judgment of the ECJ – (once again) argue that, had the commercial court been able to take that judgment into account, it would ‘undoubtedly have denied’ copyright protection and that it is free to revisit this issue (submission of 9 December, 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 submission of 16 January 2026, para. 10, 18, p. 2036 et seq.).

Assessment

131. In the commercial court’s view, there is no reason to revisit the legally relevant questions to which it has already provided detailed answers in its decision of 2 July 2024 concerning the first part of the proceedings. The unity and consistency of the ongoing proceedings militate against this. In principle, the same issues should not be examined twice within the same proceeding 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 raised or the decision, this would not, from a substantive point of view – i.e. in light of the recent case-law mentioned above – have the effects on the present decision sought 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, derives from the established terminology of the BGH. **In the object**, there are no differences compared with the concept of a ‘work’ under EU law (see, for example, BGH, I ZR 18/24, judgment of 20 February 2025, para. 20 with further references [KB 332]; see also the decision of 2 July 2024, E. 109.1 et seq. with further references, pp. 1496 et seq.; regarding the continued use of the term ‘artistic’ in the light of the latest case law of the European Court of Justice (ECJ), see STIEPER,

jurisPR-WettbR 12/2025, note 1, D II.). An ‘artistic achievement’ means **nothing more and nothing less** than a creative, original work in the field of art that reflects the individual personality of the author (BGH, I ZR 18/24, judgment of 20 February 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 (Reply 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.

Repertoire of forms

133. Furthermore, in the case of ‘Hang’, the deviation from the previously known **repertoire of forms** did **not constitute the sole criterion** for acceptance 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 existing repertoire of forms may be taken into account in the assessment of originality (see ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 69 et seq. [KB 361]). If the creator of a subject matter 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, for example, in the case of the ‘Birkenstock’ sandal, for which ‘health sandals common at the time’ existed (see Higher Regional Court of Cologne, 6 U 89/23, judgment of 26 January 2024, para. 121 et seq., see also BGH, I ZR 18/24, judgment of 20 February 2025, para. 31 [KB 332]). Conversely, if 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 4 December 2025, no. 62 [KB 361]), this must be taken into account in the assessment, which would be done in the decision of 2 July 2024 — not least on the basis of **the history of the creation** (KAB 45). Furthermore, whilst novelty is admittedly not a criterion giving rise to protection, it may nevertheless be a factor to be taken into account in the case of utility articles (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, represents ‘something fundamentally new’ because it was not inherent in the existing repertoire of forms, may also be regarded as the result of free, creative decisions (see Regional Court of Düsseldorf, 14C O 64/25, judgment of 22 December 2025, para. 38). It is clear from the decision of 2 July 2024 that the ‘Hang’ also constitutes ‘something fundamentally new’ in the field of hand-played idiophones.

Creative decisions that reflect the creator’s personality

134. Subject matters 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 4 December 2025, para. 62 [KB 361]). Nevertheless, the ECJ expressly states that copyright protection is possible even where **the creation** of the

subject matter is **provided for by technical considerations**, provided that the author is nonetheless able to reflect their personality in that subject matter by expressing free and creative decisions (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 63 with further references [KB 361]).

135. What is therefore relevant is whether **free, creative decisions** were made. This criterion concerns the determination of whether **creative scope has been utilised in an inventive manner**, which is why terms such as ‘personal touch’, ‘creative abilities’ or ‘the creative spirit in an original way’ are also used (see RAUE, in: Dreier/Schulze, 8th ed., § 2, para. 7, with further references). Decisions that tend to be surprising or unusual (as opposed to trivial, insignificant or obvious decisions) are **creative** in this sense. Whilst the adoption of conventional or pre-existing designs is not creative, pre-existing elements can also be combined creatively, for example through the selection and arrangement of pre-existing components. Whilst it is creative to ignore existing trends, it is not creative to follow trends (BENTLY/DERCLAYE/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 distance from what is already known: it names 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 can, of course, also be expressed through a combination of these elements (contrary to the submission of 16 January 2026, para. 16, p. 2037; see also Düsseldorf Regional Court, 14C O 64/25, judgment of 22 December 2025, no. 43). Since, in the field of utility articles, 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 harmonise the essential requirement of copyright, in: The Journal of World Intellectual Property, 2024, 1–20, 9), and given that the ‘Hang’ would be 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 16 January 2026, no. 16, p. 2037) – is without merit. It is therefore not clear why the distinctiveness of a previously unknown combination of features should not be taken into account (submission of 16 January 2026, para. 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 making creative use of the design freedom available to them, as was already noted in the decision of 2 July 2024, in particular in E. 91 et seq. and 104. They made these decisions in relation to the hand-played idiophone to be created, **despite there being virtually no existing models** (see E. 93.1 et seq. above and the decision of 2 July 2024, in particular E. 64 et seq.). They worked with forms and specific choices and combinations which, in part, would be surprising and unusual for solving the **task** set before them (moving away from the concave playing surface found in steel pans towards a self-contained, seemingly floating resonating body [‘UFO’]), a reduction of the tone fields, compared to the steelpan, to a single circle (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), combining this with a dome not required by the task as a

distinct centre protruding upwards from the resonating body, aligned on the same axis as the opposite resonance hole). Consequently, although some of these (geometric) forms may have been previously known (lens, circle, dome, etc.), they have distanced themselves so far from pre-existing designs that the final form they have created appears 'strange' (decision of 2 July 2024, E. 104, p. 1494). The **decisions regarding selection, combination and arrangement** made by Defendants 2 and 3, and referred to 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, N 53; Decision of 2 July 2024, E. 104), they result in the characteristic appearance of the 'Hang', that is to say, the distinctive combination of features, whereby the 'Hang' is perceived as something **new and unique** (see Decision of 2 July 2024, E. 104; ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 55, 82 [KB 361]).

137. Accordingly, in the present case, the threshold of 'merely' free (but not additionally creative) decisions would also be clearly exceeded (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 82) [KB 361]; see submission of 9 December 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 appropriate', as claimed by Plaintiffs 3, 4, 10 and 12 (submission of 16 January 2026, para. 15, pp. 2037). The design of the 'Hang' cannot, therefore, be compared to the development of the 'Birkenstock' sandals, nor can the decisions taken by Defendants 2 and 3 be dismissed as mere choices between various technical options (see Reply I, para. 451, p. 1829 et seq.; see also the decision of 2 July 2024, E. 111.5, p. 1499). In contrast to the history of the development of the 'Birkenstock' sandals, in the case of the 'Hang' no 'common' elements of a hand-played idiophone could be put forward, particularly as it could not be said that the selection, combination and arrangement of the design elements followed 'functional considerations or customary methods or standards' (see STIEPER, jurisPR-WettbR 12/2025, note 1 D II.). The fact that the shape of the 'Hang' is still being manufactured (or copied) worldwide 25 years after its creation is, as a subsequent circumstance, not to be taken into account in the originality assessment; however, it does illustrate that the Plaintiff's argument is flawed.
138. Nor is there any merit to the Plaintiffs' argument that **clear lines** (e.g. using geometric shapes) are unsuitable for establishing copyright protection (see minutes of the continued hearing, p. 12, p. 2063; see also the submission of 16 January 2026, para. 15, p. 2037): copyright protection does **not**, in fact, depend on non-functional ornamentation (see LOEWENHEIM/LEISTNER, in: Schricker/Loewenheim, 6th ed., § 2, no. 187), particularly as even a collection of elements or a selection of elements which are not in themselves protected may also constitute a work, provided that this collection or selection reflects the author's personality or reveals the author's personal stamp (HR, ECLI:NL:HR:2013:BY1529, judgment of 22 February 2013, para. 3.4 [KB 170, 170A]; Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2025:5837, judgment of 12 November 2025, para. 3.14, see also para. 3.29 [KAB 176, 176A], with further references; see also the Court of Appeal in The Hague, ECLI:NL:GHDHA:2020:1620, judgment of 1 September 2020, in particular para. 4.3 [KB 181, 181A]; for German law, see only RAUE, in: Dreier/Schulze, 8th ed., § 2 no. 67). For even a subject matter

consisting of existing forms may be original if the creator has expressed his creative decisions in the arrangement of those forms (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, no. 78 [KB 361]).

139. Contrary to the Plaintiffs' assertion, the commercial court did not, in its decision of 2 July 2024, automatically infer the creativity of the decisions subsequently taken from the existence of a scope for design. Rather, the assessment would focus on whether, and to what extent, Defendants 2 and 3 had utilised the (previously defined) scope in the creation and arrangement of the four disputed features of the 'Hang'. In the words of **the ECJ**, the creativity of the decisions taken would therefore **not be presumed** (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, no. 65 [KB 361]; see decision of 2 July 2024, E. 87 et seq., in particular 91 et seq., pp. 1482 et seq., 1485 et seq.). It should be noted that copyright protection — contrary to the Plaintiffs' contention (see, for example, the statement of 16 January 2026, no. 14, 16, p. 2037)—is **not** to be assessed (solely) on the basis of **individual components whilst omitting an overall assessment** (see BGH, I ZR 18/24, judgment of 20 February 2025, no. 38 [KB 332]; see RAUE, in: Dreier/Schulze, 8th ed., § 2 N 53), particularly as individual technical features are tools that lead to a product fit for purpose (ZENTEK/RITSCHER, *Zusammenspiel von Urheberrecht, Designrecht und Lauterkeitsrecht beim Schutz funktionaler Produktgestaltungen Gegen Nachmachung*, GRUR 2024, 1153 et seq., fn. 45).
140. It should also be noted that the ECJ had already held in its previous case-law that 'a subject matter must reflect the **personality** of its author **by expressing his or her free and creative decisions** in order to be regarded as an original subject matter.' (see, for example, the further references in ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 49 [KB 361]), which is why it is not apparent to what extent this criterion is intended to relate to the more recent case-law (see Minutes of the continued hearing, p. 9 et seq., pp. 2060 et seq.). In this respect, the Plaintiffs' argument that the Defendants failed to put forward 'decisions which reveal this personality of Defendants 2 and 3' or that these were not established in the judgment is also unfounded (Minutes of the continued hearing, p. 10, p. 2061). For an **additional** assessment as to whether these decisions reveal the '**author's personality**' (however that may be determined) (see submission of 9 December 2025, para. 9, p. 2015; see also Statement of 16 January 2026, no. 16, p. 2037), does **not** constitute a **separate criterion** (see also ZENTEK/RITSCHER, *Zusammenspiel von Urheberrecht, Designrecht und Lauterkeitsrecht beim Schutz funktionaler Produktgestaltungen Gegen Nachmachung*, GRUR 2024, 1153 et seq., 1156 and fn. 46). And even if it were assumed that it did constitute a separate criterion, this too would have been satisfied and established in the 'Hang' case: the expression of personality is lacking — in particular in the case of subject matters of applied art — where other manufacturers have engaged in manufacturing, or are likely to engage in manufacturing, essentially the same form (BENTLY/DERCLAYE/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. 49). In the case of the 'Hang', however, the decision of 2 July 2024 ruled out the possibility that a third party had

created the same or essentially the same work when faced with the same task (see decision of 2 July 2024, E. 90, p. 1484 et seq.). Through their decisions, Defendants 2 and 3 personalised the hand-played idiophone to be created in a unique manner — not least due to the virtual absence of precedents (see E. 93.2 above and the decision of 2 July 2024, in particular E. 64 et seq.) — (see closing submissions by GA Szpunar, no. 67 [KB 333]) and thereby created a unique work imbued with their personality (ECJ, C-580/23 and C-795/23, judgment of 4 December 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 the subject matter.

No rule-exception-relationship

- 140.1 Furthermore, the ECJ has now 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 Reply I, para. 450, 471, 476, pp. 1829, 1836, 1838 et seq.; see ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 57 et seq. [KB 361]; by contrast, the interpretation of the Higher Regional Court of Düsseldorf, 20 U 259/20, judgment of 2 June 2022, para. 138, in denying copyright protection for USM furniture).

On Dutch law

141. The arguments put forward in relation to EU law also apply to Dutch law. The ‘recently clarified standards of harmonised copyright law’ set out above (see Reply I, para. 620, p. 1872) do not suggest, in this case either, that copyright protection for the ‘Hang’ should be denied. It should also be emphasised at this point that copyright protection for the Birkenstock sandals (Madrid, Arizona and Florida) put forward by the Plaintiffs has recently been affirmed in the Netherlands, with explicit reference to the contrary judgment of the BGH of 20 February 2025 (see Rechtbank Midden-Nederland, E-CLI:NL:RBMNE:2025:5837, judgment of 12 November 2025, para. 3.29 [KAB 176, 176A]).

Conclusions

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

Clarifications by the ECJ regarding the assessment of infringement

143. The CJEU has subsequently clarified the **criteria** relating to the infringement assessment. The **infringement assessment** must **not** be carried out on the basis of a settlement of the **overall impression** of the designs (contrary to the previous position of the BGH, judgment of 15 December 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 4 December 2025, no. 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 which are an expression of the decisions reflecting the personality of the author of the work – have been **recognisably incorporated** into the subject matter alleged to be infringing (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 86 with further references, 92 [KB 361]). In this context, even the reproduction of an **arrangement** of pre-existing elements considered to be original may constitute an infringement (Opinion of Advocate General Szpunar, para. 72 [KB 333]).
144. It must also be borne in mind that – where creative elements are reproduced – a finding of imitation cannot be **avoided** by making alterations 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 degrees of individuality** (ECJ, C-580/23 and C-795/23, judgment of 4 December 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 paragraph 134 et seq. and taken by Defendants 2 and 3. Accordingly, a **copyright infringement** occurs if the subject matter in question – in this case the ‘Handpans’ – **recognisably incorporates** the decisions on combination, arrangement and selection made in this way by Defendants 2 and 3, or **‘these elements**, i.e. those which are an expression of the decisions reflecting the personality of the author of that work’ (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, no. 86 [KB 361]). Contrary to the Plaintiffs’ assertion (see minutes of the continued hearing, p. 10, p. 2061), it is not necessary to demonstrate further *to what extent* ‘the personality’ of the authors is to be found in a contested subject matter.
146. **The ‘creative elements’** of ‘Hang’ that are relevant to the subsequent **infringement assessment** are therefore not, for example, any of the four design elements at issue here (e.g. ‘lens shape’ or ‘circular arrangement of tone fields’), particularly as these very elements would not, in themselves, be sufficient to justify protection (see decision of 2 July 2024, E. 104, p. 1494).

Copyright infringements under German law

Scope of protection

Positions of the parties

147. The **Plaintiffs** argue that – assuming an ‘artistic’ work is involved – the **scope of protection is limited** (Reply I, para. 482 et seq. [p. 1840 et seq.]; also Reply II, para. 52, 60 [p. 1687, 1689]). In the case of the ‘Hang’, even relatively minor deviations would suffice to rule out an infringement (Reply I, para. 489 et seq., p. 1843 et seq.), including, in particular, altered proportions (determined purely by calculation) (Reply I, para. 494, p. 1844, with reference to KB 231 [‘Leuchtvitrinen’]; see also Reply II, para. 49 [p. 1685, line 1]). Given the low level of design originality, protection of the ‘Hang’ is subject to a restriction that limits it to **identical copies** (see also minutes of the continued hearing, pp. 10, 11, p. 2061 et seq.), otherwise **protection of the concept or idea** would be introduced (Reply I, para. 505 et seq., p. 1847 et seq.).
148. For their part, the **Defendants** represent the view that the features of the ‘Hang’ giving rise to protection consist of the four design features (lens shape, central dome, opposing resonance hole and circularly arranged tone panels) (Rejoinder, para. 257, p. 1954). When compared with the ‘Handpans’ under consideration, 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 recognisable in the Plaintiffs’ ‘Handpans’ (Rejoinder, para. 258, p. 1954). The **adoption of old or almost old elements constitutes an infringement** (see also minutes of the continued hearing, p. 18 et seq., p. 2069 et seq.; see also Rejoinder, para. 268, p. 1956 et seq.). To attribute a ‘zero scope of protection’ to a copyright-protected subject matter prevents the practical exercise of the right granted, which amounts to a circumvention of legal protection (see Rejoinder, para. 250, p. 1952 et seq.). Overall, the Defendants assume a very broad scope of protection, in particular due to the distance from the prior art (see Rejoinder, para. 260 et seq., p. 1955 et seq.). Only minor processing changes to ‘Handpans’ – for example, slightly offset domes – are practically imperceptible, which is why the ‘Hang’ remains recognisable in all copies (Rejoinder, para. 265, p. 1956). A subject matter exhibiting all the elements must always fall within the scope of protection (see Rejoinder, para. 268, p. 1956), particularly as the addition of further elements, such as extra sound panels or different shoulders, did not affect the four characteristics giving rise to protection (Rejoinder, no. 269, p. 1957).

Legal considerations

149. A copyright infringement under § 97 UrhG is not limited to the unlawful reproduction of a work in its entirety. It follows from the provision in § 23 para 1 sentence 1 UrhG, according to which processing or other alterations of a work may only be published or realised with the author’s consent, that the scope of protection of the right of publication within the meaning of § 12 of the UrhG and the rights of realisation under § 15 of the UrhG extend – up to a certain limit – also includes **versions that differ from the original** (BGH, I ZR 173/21, judgment of 15 December 2022, para. 27 with further references [KB 232]). When conducting an examination to determine whether an alteration to a work falls within the scope of protection for copyright, it must be taken into account that any processing or other alteration within the meaning of § 23 para. 1

sentence 1 UrhG in so far as it is physically fixed, also constitutes a reproduction within the meaning of § 16 UrhG. Copies include not only reproductions that are identical to the original; rather, the author's right of reproduction also encompasses adaptations of the work – even those that are further away from the original (see BGH, I ZR 173/21, judgment of 15 December 2022, para. 28 [KB 232]). If, by contrast, the newly created work maintains a **sufficient distance** from the work used, it does not constitute processing or reworking within the meaning of Section 23(1), first sentence (see § 23 para. 1 sentence 1 UrhG).

150. In its case law, the BGH focuses on the objective characteristics that determine the creative individuality of the work used and then determines, by comparing the two works in question, whether (and to what extent) the new work incorporates the original creative features of the earlier work, resulting in a substantially similar overall impression, or whether the elements justifying copyright protection of the earlier work fade into the background in the new work when viewed as a whole, and are therefore no longer recognisable. In this regard, the BGH emphasises that a comparison of the respective overall impression of the designs is decisive for the infringement assessment, within the framework of which all creative features that have been incorporated must be taken into account in an overall assessment (see BGH, I ZR 173/21, judgment of 15 December 2022, para. 29 [KB 232]).
151. The **terminology** of the traditional infringement assessment, which is sometimes based on an examination of **the overall impression** (see as set out in the Rejoinder, para. 254 et seq., p. 1953 et seq.), should not be retained in light of the latest case law of the ECJ (see judgment of the ECJ of 4 December 2025, para. 87 [KB 361]; see also STIEPER, jurisPR-WettbR 12/2025, note 1, C at the end and D III.; LG Düsseldorf, 14C O 64/25, judgment of 22 December 2025, para. 43). It must be borne in mind that 'a subject matter which would qualify as a work [...] must enjoy protection in that capacity, the scope of which **does not depend on the degree of creative freedom** exercised by its author and is therefore no less than that afforded to other works (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 88 [KB 361]). Since 'free and creative decisions' – as is also the case here – 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 circumstances, the **overall assessment of these elements**, on which the BGH has hitherto based its determination of the overall impression, is likely to retain its significance (LG Düsseldorf, 14C O 64/25, judgment of 22 December 2025, para. 43). According to another view, against the background of the latest case law of the European Court of Justice, the following assessment framework is represented in legal scholarship (STIEPER, jurisPR-WettbR 12/2025, note 1, D III and IV):

The distinction between derivative works under § 23 para. 1 sentence 1 UrhG and free use under § 23 para. 1 sentence 2 UrhG lies in the absence of any recognisable incorporation of elements of the work that are eligible for protection. Similarities or differences in the overall impression are not decisive in this regard.

A sufficient degree of external distance within the meaning of § 23 para. 1 sentence 2 UrhG is already deemed to exist, in accordance with the Directive-compliant interpretation of the provision, but only if **the elements taken from the original work are restricted to** those which, neither in themselves 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 carried out 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 adapt is infringed pursuant to § 23 para. 1 sentence 1 UrhG.

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

Assessment

153. The eligibility for protection of the 'Hang' would be determined by an **overall assessment** of the elements eligible for protection (RAUE, in: Dreier/Schulze, 8th ed., § 2, no. 53 with further references; see, for example, BGH, I ZR 173/21, judgment of 15 December 2022, para. 19 [KB 232]; also the decision of 2 July 2024, E. 104, p. 1494). Accordingly, the design of the 'Hang' in the present case was eligible for protection, as it was the **result of decisions regarding selection, combination and arrangement within** the framework of an **overall design without any significant precedents**, particularly as 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 individuality is reflected (LG Düsseldorf, 14C O 64/25, judgment of 22 December 2025, para. 43). For **further details**, reference may be made to E. 93.1 et seq. and E. 134 et seq. above. As demonstrated 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, i.e. it is not itself a 'work' (see also E. 84, 87 above).
154. With regard to the Plaintiffs' argument concerning the protection of **concepts** or ideas, reference may be made to the considerations set out above (see E. 74 et seq.). Whether an infringement – as the Plaintiffs contend – can be ruled out where, although all the features are present, they are 'implemented differently in form' (see minutes of the continued hearing, p. 26, pag. 2077), will have to be examined on a case-by-case basis.

Instruments to be assessed under German law:

155. The instruments to be examined under German law are the ‘Handpans’ of **Plaintiffs 1–10 and 12** (see K-I, prayer of relief and K-I prayers of relief 2, 3, 4; K-II, prayer of relief 2, 3, pp. 13 et seq., 32 et seq. [HG 20 133]; Reply 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, prayer of relief 1 no. ii a–e; with regard to Plaintiffs 10 and 12, additionally in accordance with K-II, prayer of relief 1 no. i d–e, although this will not be relevant to the outcome of the assessment.

Instruments of Plaintiffs 1–2

156. The ‘Handpans’ depicted in Reply I, para. 511 et seq., 514 et seq. and 523 et seq. (pp. 1848 et seq., 1849, 1851) adopt, in a recognisable manner, all **the decisions regarding arrangement, combination and selection** made by Defendants 2 and 3 as set out in E. 153 (or, rather, the results thereof in the form of an overall shape of the ‘Hang’ comprising several elements). This is evident from the use of the **lens shape** as the starting point (a shift from a concave playing surface to a resonance chamber that appears to float, an ‘UFO’), combined with a **dome** positioned centrally at the top as a clear focal point (an element of central importance not required by the brief), around which circularly arranged tone fields **are distributed** at roughly equal distances (concentric; representing the freedom of the playing possibilities opened up). The fitted upper half and the left-empty lower half of the shell create a polarity (a clear ‘top’ and ‘bottom’ and, consequently, a horizontal separation of the – in themselves identical – shell halves). The interplay between the dome and the sound hole is also adopted in the sense of a vertical, co-directional axis: along this axis, the sound hole leads into the instrument from below, whilst opposite it, another hemispherical segment protrudes from the instrument in the form of the dome. As these elements express the creative individuality of the original authors, the right to adapt the work under § 23 para. 1, sentence 1 UrhG has been infringed in this case, particularly as 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 recognisable.
157. In view of these similarities, even the specific **alterations** claimed – such as **changes** to dimensions, differences in the choice of materials, a different colour scheme, oval shoulders, domes or central tone fields, double domes, etc. (see Reply I, para. 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 (whilst retaining the circular shape), more pronounced tone fields or shoulders, or the feel of the surface (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 give a different impression. Instrument 1 does indeed appear slightly ‘more bloated’ in comparison to the ‘Hang’ (see also illustrations in the minutes of the continued hearing, p. 5 ff., et seq. p. 2056 et seq.). The fact that, for example, the shoulder of Instrument 1 extends ‘significantly further down’, and that the tone fields

are consequently situated on the lower part of the upper shell half (see minutes of the continued hearing, p. 24, pag. 2075), does not outweigh the recognisable adoption of the relevant elements here, meaning that these alterations have hardly any effect. The alterations 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 recognisable (which is why the threshold of 'mere' inspiration has been exceeded) nor could it be concluded that, when viewed as a whole, the elements giving rise to protection are overshadowed in the new design and are therefore no longer recognisable.

158. Specifically, the 'Handpans' in question are as follows:

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



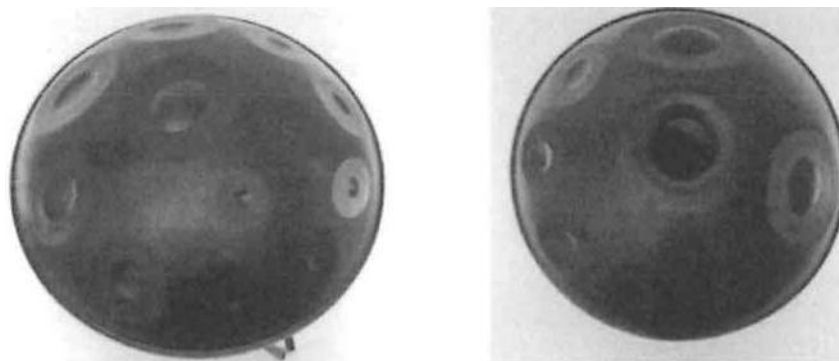
158.2 Instrument 5 (K-I, prayer of relief 2e, para. 183 et seq.; Reply I, para. 523 et seq.)



158.3 Instrument 2 (K-I, prayer of relief 2b, para. 177 et seq.; Reply I, para. 514 et seq.)



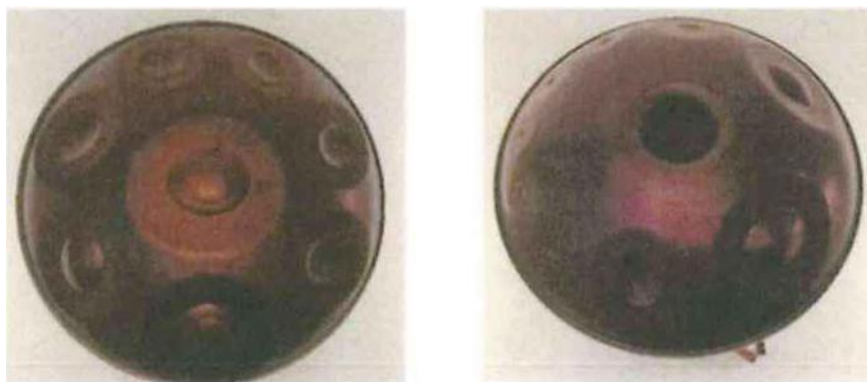
159. The same assessment applies to Instrument 2, depicted above, and reference is therefore made to the comments set out above. The two ‘additional domes in two circular tone fields’ mentioned by the Plaintiffs (see K-I, para. 177 et seq., p. 101 et seq. and Reply I, para. 516, p. 1849) are, on their own and in conjunction with the other modifications (barely) insufficient 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 shell are still retained. Contrary to the Plaintiffs’ argument, the additional domes do not, in particular, break with the contrast between the dome and the sound hole, especially as there remains a clear separation between ‘top’ and ‘bottom’. Despite the two additional domes, the central dome at the top continues to be perceived as a superimposed centre (and is thus aligned vertically with the sound hole).
160. The ‘Handpans’ depicted in Reply I, para. 517–522 (p. 1850 et seq.) and para. 526 et seq. (p. 1852), which look as follows, **no longer fall within the scope of protection**:
- 160.1 Instrument 3 (K-I, prayer of relief 2c, para. 179 et seq.; Reply I, para. 517 et seq.)



This instrument recognisably incorporates the lens shape and the central resonance hole on the lower half of the bowl. The underside of Instrument 3 is additionally fitted with tone fields or domes, arranged in the shape of a large circular arc. Furthermore, Instrument 3 features two additional raised sound fields positioned on the upper half of the bowl. This breaks with the ‘circular form’ (see the decision of 2 July 2024, E. 96.2, p. 1489). At the same time, the slightly oval-shaped and offset sound field at the top, with its dome, does not constitute a clear centre surrounded by a ring of sound fields. Consequently, essential elements that influence the ‘Hang’ are no longer recognisable, but have, at most, been adopted as inspiration. In the elements that have been incorporated (either alone or in combination), the creative individuality of the original authors is no longer expressed; rather, the elements justifying 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 recognisable.

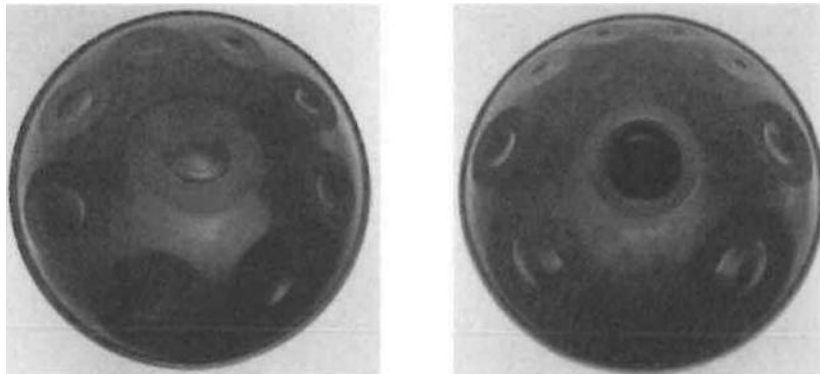
The same applies, albeit to a lesser extent, to ‘Instrument 4’ and ‘Instrument 6’:

160.2 Instrument 4 (K-I, prayer of relief 2d, para. 181 et seq.; Reply I, para. 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 recognisably retained. In contrast, the horizontal line pattern is broken by the fact that Instrument 4 features two additional semicircles on the lower half of the shell, consisting of tone fields and domes of varying sizes. On the upper half of the shell, there are also two further domes in place of the usual sound fields (arranged in a circular pattern overall). In this way, Instrument 4 breaks, on the one hand, with the clear distinction between ‘top’ and ‘bottom’ characteristic of the ‘Hang’. Due to the four additional domes (placed at the top *and* bottom), the central dome no longer has the function of a clear centre (which results in a change to the concentricity and a break with the vertical axis of the dome and the resonance hole). Not least due to the four additional domes extending transversely downwards and upwards from the resonance chamber and pointing in different directions, a line pattern is created that differs from that of the ‘Hang’. Furthermore, oval shapes are also employed here (in particular in the central dome). As a result, key elements that influence the ‘Hang’ are barely recognisable any longer, but are at most incorporated as inspiration. In the elements that have been incorporated (either 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 into the background in the new design and are therefore unrecognisable. The addition of further domes in the upper circle of tone fields, as well as the incorporation of two semicircles into the lower half of the bowl—consisting of tone fields and domes of varying sizes—combined with the use of oval shapes, is (in contrast to the ‘Handpan’ described in E. 168.9 below) sufficient to take the design outside the scope of protection afforded to the ‘Hang’.

160.3 'Instrument 6' (K-I, prayer of relief 2f, para. 185 et seq.; Reply I, para. 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 any additional domes within the upper circle of tone fields. 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 centre 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 from the comparison in KB 322 [comparison of the second-generation Hang and the instrument with bottom notes] (see also the illustration in Reply I, para. 165, p. 1760). Furthermore, oval shapes are also employed here (in particular in the area of the central dome). Overall, it can be assumed that there is (just) sufficient distance, especially as the elements giving rise to copyright protection are barely discernible in the new design when viewed as a whole. Incidentally, apart from Instrument 4 discussed above, the configuration is comparable to the 'Handpans' assessed in E. 169.1 and 169.2 below (albeit less so, not least because of the double dome on the underside and the resulting more pronounced displacement of the dome's central function).

Conclusion

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

It is held that Plaintiffs 1 and 2 do not infringe the Defendant's copyright in the 'Hang' by manufacturing, etc., the 'Hand-pans' in Germany in accordance with K-I, **prayers of relief 2c, 2d, 2f**.

Instruments of Plaintiffs 3 and 4

162. The 'handpans' depicted in K-I, para. 201 et seq. (p. 115 et seq.) and Reply II, para. 25 et seq. (p. 1675) incorporate, in a recognisable manner, the relevant elements of the 'Hang' which resulted from the decisions regarding arrangement, combination and selection made by Defendants 2 and 3. 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 subsequent instruments.

163. The alterations/differences put forward (see for example, regarding the instrument 'The Economic Ones' in the minutes of the continued hearing, p. 26, p. 2077), such as different height-to-width ratios of the lens shape with less dramatic transitions (see also Reply II, para. 44, p. 1682 et seq., a dome embedded differently into the flat surfaces, or differences in the (circularly arranged) sound fields regarding number, size, depth and distance with a different 'visual rhythm' (see also Reply II, para. 44); nor do oval rather than round or unpolished domes, one fewer tone field (whilst retaining the circular shape), smoother surfaces (see also Reply II, para. 44), colour scheme, flattened areas around the resonance opening, coloured outer rings, colour-contrasting sections within the sound fields, oval rather than round shoulders or smaller or larger shoulders, indentations on the dome, more distinctive sound fields or shoulders, engravings or sound fields of varying sizes (see also K-I, para. 201 et seq., pp. 116 et seq. or elements appearing more 'technical' (Reply II, para. 44). The alterations put forward therefore do not, in the present case, either individually or in combination, result in the adaptation no longer being recognizable (which is why the threshold of 'mere' inspiration has been exceeded), particularly as an overall assessment of the elements justifying copyright protection of the 'Hang' would not lead to the conclusion that these elements fade into the background in the new design, i.e. are no longer recognizable.
164. Specifically, the following 'Handpans' therefore fall within the scope of protection of the 'Hang':

164.1 The Economic Ones (K-I, prayer of relief 3a, para. 201; Reply II, para. 25, p. 1675)



164.2 Unique Artworks (K-I, prayer of relief 3b, para. 202; Reply II, para. 26, p. 1675)



164.3 Healing Frequency (K-I, prayer of relief 3c, para. 203 et seq.; Reply II, para. 27, p. 1675)



164.4 El Clasico (K-I, prayer of relief 3d, para. 205; Reply II, para. 28, p. 1676)



164.5 Mystic Ones (K-I, prayer of relief 3e, para. 206; Reply II, para. 29, p. 1676)



164.6 Sonorous Union (K-I, prayer of relief 3f, para. 207; Reply II, para. 30, p. 1676)



164.7 Modern Simplicity (K-I, prayer of relief 3g, para. 208; Reply II, para. 31, p. 1677)



164.8 Spirit Waves (K-I, prayer of relief 3h, para. 209 et seq.; Reply II, para. 32, p. 1677)



164.9 Windharps (K-I, prayer of relief 3i, para. 211 et seq.; Reply II, para. 33, p. 1677)



The same applies (to a limited extent) to this 'Handpan' as well. Unlike the 'Hang', this instrument does, however, feature 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 to be theoretically capable of breaking with the circular shape or polarity (see also E. 95.13, 95.14, 96 above), in the present instrument, despite these adaptations, the circular arrangement and the contrast between the (single) dome and the opposite resonance hole remain just barely recognisable alongside the lens shape, and have not merely been adopted as mere inspiration, especially as an examination of the elements forming the basis of

the copyright protection of the 'Hang', considered as a whole, does not allow the conclusion that these elements fade into the background in the new design, i.e. that they are unrecognisable. The addition of just a single, visually subordinate-looking extra tone field does not, even with a slight displacement of the (single) central dome, mean that this 'Handpan' falls outside the scope of protection of the 'Hang', particularly as the relationship between the two halves of the shell ('top' and 'bottom') would remain unchanged. Even when combined with the other alterations put forward – such as, in particular, the oval dome or shoulder, indentations, more distinctive tone fields in the colour 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 in nitriertem Stahl (K-I, prayer of relief 3j, para. 213; Reply II, para. 34, p. 1678)



164.11 Instrument 7 in Edelmetall (K-I, prayer of relief 3k, para. 214; Reply II, para. 34, p. 1678)



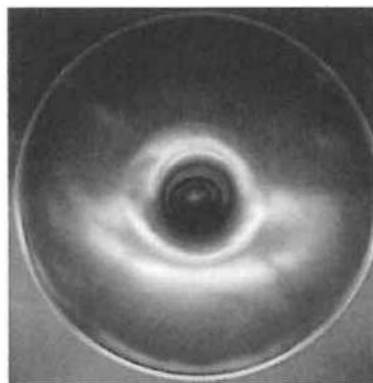
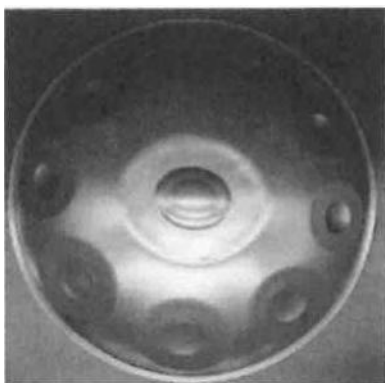
Conclusion

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 claim, i.e. K-I, prayer of relief 3 and 3.1, is to be rejected insofar as it is admissible.

Instruments of Plaintiffs 5–9

166. The 'Handpans' depicted below, taken from K-I, para. 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, **in a recognisable manner**, the relevant elements resulting from the arrangements, combinations and selections made by Defendants 2 and 3. For the assessment, reference may be made to E. 156 above, which applies by analogy to the instruments set out below.
167. The **changes** claimed (see K-I, para. 221 et seq., p. 130 et seq.; Reply I, para. 529 et seq., p. 1853 et seq.) – such as oval and larger and/or unpolished domes, indentations on the dome, an additional clay panel (whilst retaining the circular shape), differently sized or 'more distinctive' clay panels, different colour schemes, decorations/engravings, undersides of a different colour, smoother surfaces, different dimensions (e.g. diameter/height), oval and/or 'prominent' shoulders, differences in the size of the clay panels, a steam valve in the resonance hole, etc., do not alter this conclusion in the light of these similarities. These alterations therefore do not, in the present case, either individually or in combination, result in the design no longer being recognisable (which is why the threshold of 'mere' inspiration has been exceeded), particularly as an overall assessment of the elements forming the basis of the copyright protection of the 'Hang' would not lead to the conclusion that these elements fade into the background in the new design, i.e. that they are unrecognisable.
168. Specifically, the works in question are as follows:
- 168.1 Ayasa Annaziska 9+1 and D Kurd 9+1 (K-I, prayer of relief 4a, 4c, para. 222 et seq., 225 et seq.; Reply I, para. 529 et seq.)



168.2 Ayasa Ashakiran 9+1 (K-I, prayer of relief section 4b, para. 224; Reply I, para. 532)

As, according to the Plaintiffs, this concerns 'Instrument 1' of Plaintiffs 1 and 2, reference may be made to the above, in particular to E. 156 et seq.

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



168.4 Gio D Amara 8+1 (K-I, prayer of relief 4g, no. 233 et seq.; Reply I, para. 542 et seq.)



168.5 Gio C Avebury 8+1 (K-I, prayer of relief 4h, para. 235 et seq., 372 et seq.; Reply I, para. 545 et seq.)



168.6 Gio C# Pygmy 9+1 (K-I, prayer of relief 4i, para. 237 et seq.; Reply I, para. 548 et seq.)



168.7 Gio E Pygmy 9+1 (K-I, prayer of relief 4j, para. 239 et seq.; Reply I, para. 551 et seq.)



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



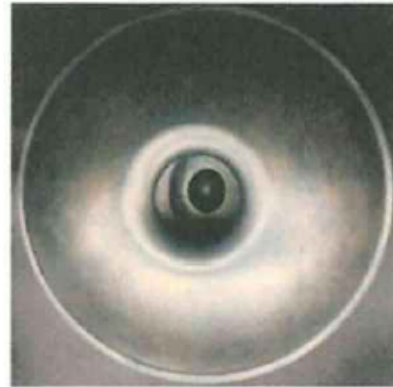


The same assessment applies – albeit only just – to this ‘Handpan’ as well: here, too, the lens shape is recognisably adopted as the starting point, featuring a central dome attached to the instrument and protruding from it, as well as an opposing resonance hole and circular tone fields arranged in a 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 incorporate the element of contrast between the two halves of the bowl (the upper half fitted with tone fields, the lower half empty and smooth), which is an element that was taken into account as a mitigating factor in the assessment (decision of 2 July 2024, E. 96.2, 101, 104) would be 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 markedly different sizes on the underside) are used in the present case. Nevertheless, and although changes in this regard may be relevant in order to break 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 as an examination of the elements forming the basis of the ‘Hang’s’ copyright protection, viewed as a whole, would fall just short of allowing the conclusion that these elements fade into the background in the new design, i.e. that they are unrecognisable. Consequently, the addition of further tone fields in the form of a (further) circle on the lower half of the shell does not, therefore, mean that this ‘Handpan’ falls outside the scope of protection of the ‘Hang’ (even taking into account the other alterations claimed), particularly as, 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 to influence the design particularly strongly (see decision of 2 July 2024, E. 104) – is not ‘reinforced’ by the differently designed bowl halves in this case, but nor is it sufficiently weakened. Reference is made to E. 166.

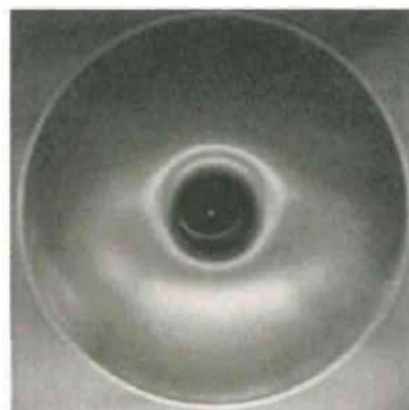
168.10 Leaf Mini B La Sirnea 8+1 (K-I, prayer of relief 4q, para. 253 et seq.; Reply I, para. 569 et seq.)



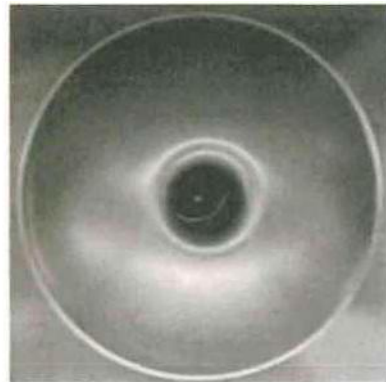
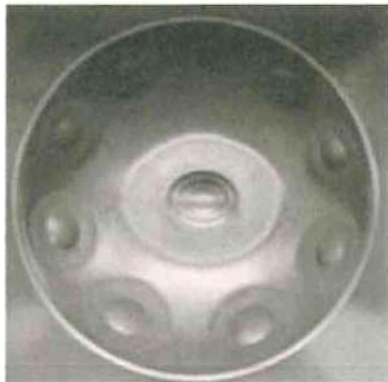
168.11 Leaf Mini Avalon 8+1 (K-I, prayer of relief 4r, para 255 et seq.; Reply I, para. 572 et seq.)



168.12 MAG 8+1 Amara und Annaziska (K-I, prayer of relief 4s and 4t, para. 257 et seq., 259 et seq.; Reply I, para. 575 et seq.)



168.13 MAG 9+1 D Kurd (K-I, prayer of relief 4u, para. 261 et seq.; Reply I, para. 578 et seq.)



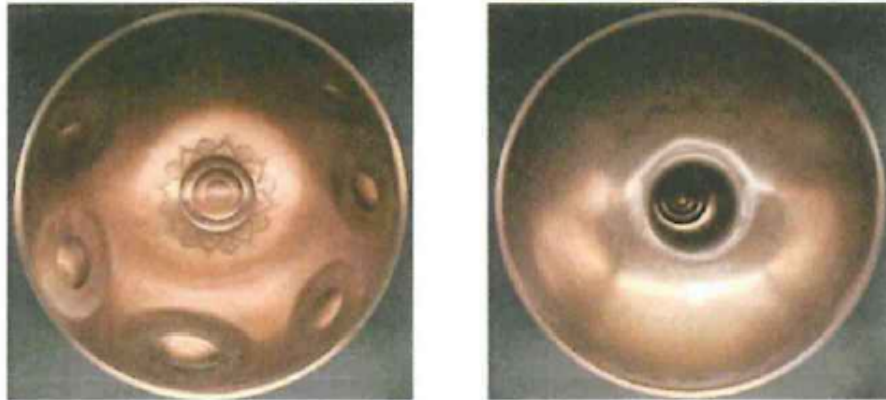
168.14 Manik Asha 8+1 (K-I, prayer of relief 4w, para. 265 et seq.; Reply I, para. 584 et seq.)



168.15 Manik D Kurd 9+1 (K-I, prayer of relief 4x, para. 267 et seq.; Reply I, para. 587 et seq.)



168.16 Taopan 8+1 (K-I, prayer of relief 4z, para. 271 et seq.; Reply I, para. 593 et seq.)



With regard to the additional dome in the circle of tone fields (see illustration bottom left), reference may be made to E. 159 by analogy as above.

168.17 Karumi D Celtic 12+1 (K-I, prayer of relief 4bb, para. 275 et seq.; Reply I, para. 599 et seq.)



In this regard, reference can be made (*a fortiori*) to the 'Handpan' 'Soulshine 14+1' in E. 168.9, mentioned above. Unlike the 'Handpan' referred to, 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 – or the clear distinction between 'top' and 'bottom' – is even less significant. The addition of just three 'ordinary' tone fields on the lower half of the bowl cannot therefore result in this 'Handpan' falling outside the scope of protection of the 'Hang' (even taking into account the other alterations claimed). Reference is made to E. 166.

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

169.1 Ayasa Ashakiran 15+1 rostfreier Edelstahl (K-I, prayer of relief 4e, para. 229 et seq.; Reply I, para. 536 et seq.)

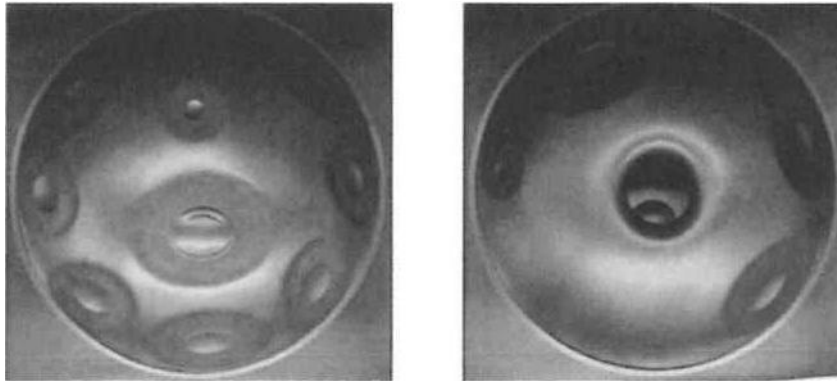


Individual elements, such as the lens shape and the circularly arranged tone fields, are recognizably adopted. In this instrument, the horizontal line pattern is broken by the addition of a semicircle on the lower half of the bowl, consisting of tone fields *and* domes of varying sizes. In contrast to the 'Soulshine 14+1' model mentioned above (E. 168.9), this element, in particular due to the additional dome, shifts the focus away from the central dome at the top towards the lower half of the bowl. Consequently, due to the dome placed on the lower half of the shell and extending transversely downwards from the resonating body, there is no longer a clear vertical axis between the central dome and the resonance hole. Consequently, due to the additional tone fields, including a dome, this 'Handpan' sufficiently departs from the clear distinction between 'top' and 'bottom' characteristic of the 'Hang', in particular as the underside features an additional (horizontally downward-facing) dome and, in this instance, distinctly oval shapes have also been employed (in particular the central tone field including the dome). In this instance, therefore – in contrast to E. 168.9 above – it can be assumed that this is merely a case of inspiration. Although a certain degree of concentricity remains due to the use of a central oval dome and the sound fields circling around it, the creative individuality of the authors is (only) very marginally absent in the recognizably adopted elements; or rather, when viewed as a whole, the elements justifying copyright protection are very marginally obscured in the new design and are therefore not recognizable. Reference is also made to E. 160.3 above.

169.2 Ayasa Ashakiran 15+1 nitrierter Stahl (K-I, prayer of relief 4f, para. 231 et seq.; Reply I, para. 539 et seq.)

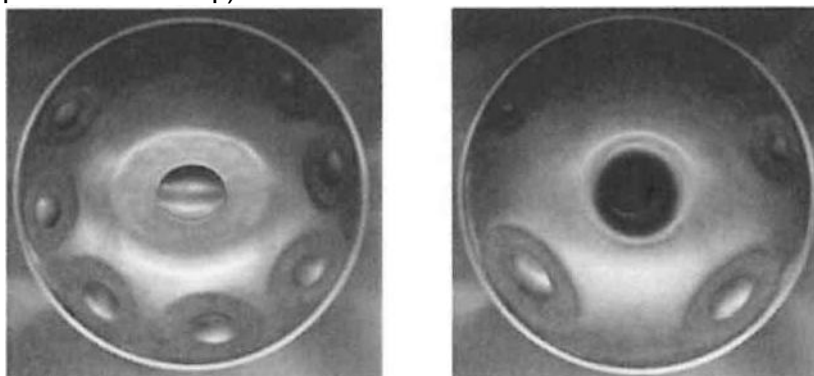
Reference may be made in this regard to E. 169.1 above, particularly as this 'Handpan', apart from its colour scheme, corresponds visually to the model made of stainless steel.

169.3 Gio Equinox 14+1 (K-I, prayer of relief 4k, para. 241 et seq.; Reply I, para. 554 et seq.)



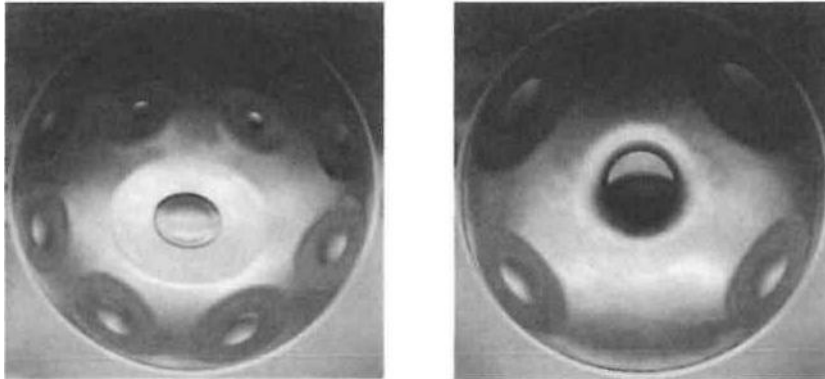
This 'Handpan' recognisably incorporates the lens-shaped element. The upper half of the bowl features an additional, raised tone field and an offset dome. In combination with the distinct offset of the dome, this instrument plays upon the elements of the (solely) circular arrangement of the tone fields (see the decision of 2 July 2024, 96.2, p. 1489) as well as the dome as a clear centre, particularly as 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 upon 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 are also used (in particular 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 creation and are therefore not recognisable.

169.4 Gio Ashakiran 15+1 (K-I, prayer of relief section 41, para. 243 et seq.; Reply I, para. 557 et seq.)



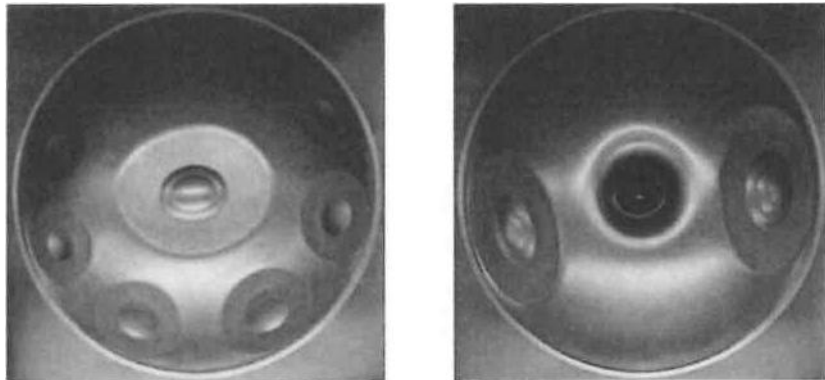
Reference may be made in this regard to E. 169.1 above. These remarks apply mutatis mutandis.

169.5 Gio E Kurd 15+1 (K-I prayer of relief 4m, para. 245 et seq.; Reply I, para. 560 et seq.)



Reference may 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' on the lower half of the bowl. Consequently, this 'Handpan' departs more significantly from the circular arrangement of tone fields than the 'Gio Equinox 14+1' mentioned above, particularly as a 'new' geometric element is incorporated on the underside and oval shapes are also utilised (central tone field including dome). This widens the gap between it and the 'Hang' even further, which is why the latter's scope of protection is clearly no longer affected.

169.6 MAG 11+1 E Pygmy (K-I prayer of relief 4v, para. 263 et seq.; Reply I, para. 581 et seq.)



Reference can be made here, by analogy, to E. 169.1 above. In contrast to the instrument referred to, this 'Handpan' features two additional domes on the lower spherical segment above, thereby sufficiently disrupting the clear horizontal separation (distinct 'top' and 'bottom') found in the 'Hang'. The ratio of the dome to the resonance hole is also altered due to the two additional domes on the underside (change in the vertical axis). Furthermore, in the present case, oval shapes are also used (in particular in the area of the central tone field and the dome), and the domes attached to the underside have an extension over large parts of the segment, thereby standing out clearly visually. In the elements that have been incorporated (either alone or in combination), the creative individuality of the original authors is not quite expressed; or, when viewed as a whole, the elements justifying copyright protection are barely discernible in the new design and are therefore not recognisable.

169.7 Manik F Low Pygmy 15 (K-I, prayer of relief 4y, para. 269 et seq.; Reply I, para. 590 et seq.)



In this regard, reference may be made to E. 169.3 and E. 169.5 above. Unlike the 'Handpans' referred to, this model features four domes on the underside, which, as with the instrument in 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, prayer of relief 4aa, para. 273 et seq.; Reply I, para. 596 et seq.)



For the assessment, reference may be made by analogy 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 the scope of protection of the 'Hang'.

It is found that, by offering etc. the 'Handpans' as described in K-I, **prayer of relief 4e, 4f, 4k, 4l, 4m, 4v, 4y, 4aa** in Germany, Plaintiffs 5–9 do not infringe the Defendant's right in the 'Hang'.

Instruments of Plaintiff 10

171. The 'Handpans' depicted below, from K-II, para. 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 selection decisions made by Defendants 2 and 3 in a recognisable manner. For the assessment, reference may be made to the remarks set out above, in particular E. 156.
172. **The alterations** put forward in relation 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, sound fields of varying sizes, plastic rings around the resonance opening, more angular shoulders, the colour scheme of the instrument or the outer ring, different colours for the upper and lower shells, or a patina (see also K-II, para. 250 et seq., p. 178 et seq. [HG 20 133]; see also the minutes of the continued hearing, p. 26 et seq., p. 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 regard to the shape, size and depth of the sound fields, etc., do not alter this. These alterations therefore do not, in the present case, either individually or in combination, result in the adaptation no longer being recognisable (which is why this goes beyond 'mere' inspiration); nor do the elements giving rise to copyright protection fade into the background when viewed as a whole in the new design, and are thus recognisable.

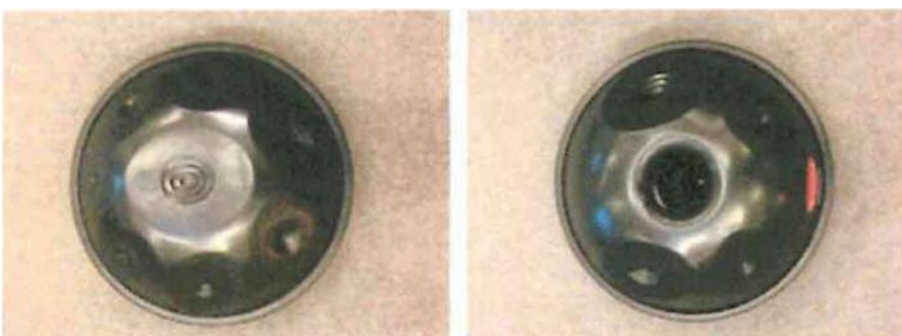
173. The following instruments fall within the scope of protection of the 'Hang'. They look as follows:

173.1 Harmonic Art HC15 / HM15 (K-II, prayer of relief 2e, 2x, para. 190 et seq., 228 et seq.; Reply 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., 228 et seq., pp. 118 et seq., 156 et seq. [HG 20 133]). This case is to be assessed in the same way 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, p. 119, 157 [HG 20 133]). Consequently, these 'Handpans' do not (by a narrow margin) fall outside the scope of protection of the 'Hang'.

173.2 Harmonic Art HM12 Amara C#, Kurd D, Mystic C#, Ursa Minor D, (K-II, prayer of relief 2t, 2u, 2v, 2w, para. 220–227)



The 'Handpans' illustrated in K-II, para. 220–227, pp. 148–155 (HG 20 133) are described in almost identical terms and can be dealt with together. The 'Handpans' illustrated here feature a large circular arc comprising four tone fields on the lower half of the bowl, which creates an element of contrast (albeit to a lesser extent than in the 'Handpan' HC15 / HM15 discussed previously). Otherwise, this model corresponds to the 'Handpan' discussed previously (cf. E. 173.1). For the remainder of the assessment, reference may be made to E. 168.17. The addition of four 'standard' tone fields on the lower half of the bowl therefore does not result in this 'Handpan' falling outside the scope of protection of the 'Hang' (even taking into account the other alleged modifications).

173.3 RAV Vast RAV Pan D Celtic Minor, D Hijaz, D Major, F Pygmy (K-II, prayer of relief 2ii, 2jj, 2kk, 2ll, para. 250–257; Reply II, para. 39, p. 1680)



The 'Handpans' depicted in K-II, para. 250–255, pp. 178–183 (HG 20 133) are described in virtually identical terms – apart from differences in colour – which is why a mere difference in colour does not lead to a different conclusion. The modifications put forward for these 'Handpans', including the colour 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, by analogy, alter the recognisable adoption of the elements justifying protection as set out in E. 171 et seq. The fact that the instrument 'RAV Vast RAV Pan F Pygmy' from K-II, para. 211 (see illustration below) also features two **additional** tone fields on the lower half of the bowl does not alter this either. For the assessment, reference is also made by analogy to E. 168.9, 168.17, 173.2.



173.4 Metal Sounds Spacedrum Hitzazkiar (K-II, prayer of relief 2mm, para. 258 et seq.)



173.5 Metal Sounds Spacedrum Nitro Amara D, Celtic minor D, Equinox F, Sonoro D (K-II, prayer of relief 2oo, 2pp, 2qq, 2rr, para. 262–269)



The 'Handpans' illustrated in K-II, para. 262–269 (pp. 190–197 [HG 20 133]) are described in virtually identical terms, apart from differences in colour. This does not give rise to any differing assessment.

173.6 Metal Sounds Spacedrum Ragadesh (K-II, prayer of relief 2 et seq., para. 270 et seq.)



173.7 SEW Handpan Basic Line / Professional Line (K-II, prayer of relief 2tt, 2uu, 2vv, 2ww, 2xx, 2yy, 2zz, 2aaa, 2bbb, 2ccc, 2ddd, 2eee, para. 272–295)

The ‘Handpans’ illustrated in K-II, para. 272–295 (pp. 200–223 [HG 20 133]) are described in virtually identical terms – apart from variations in colour – and there is no reason to treat them differently.



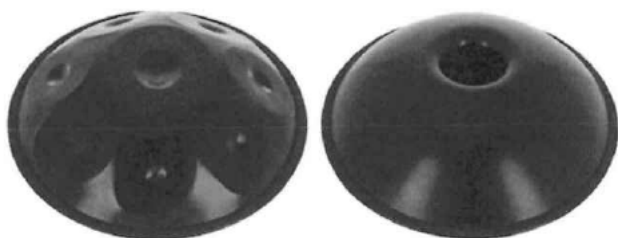
174. By contrast, the following instruments **no longer** fall **within the scope of protection** of the ‘Hang’:

174.1 Harmonic Art. HB1/2/3/4 HuBass (K-II, prayer of relief 2a, 2b, 2c, 2d, para. 182–189; Reply II, para. 35, p. 1678)



The ‘Handpans’ depicted in K-II, para. 182–189 (p. 110 et seq. [HG 20 133]) and Reply II, para. 35 (p. 1678) are described in almost identical terms. The lens shape and a resonance hole, situated centrally on the lower half of the bowl, are recognisably reproduced. These ‘Handpans’ do not have a dome on top. Consequently, on the one hand, the element of the vertical axis leading to the resonance hole is missing; 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 2 July 2024, E. 96.2, p. 1489). The tone fields extend over a large part of the upper half of the bowl. The flat areas in between form a symmetrical ‘Y’. The creative individuality of the original authors is not expressed in the elements that have been incorporated (either alone or in combination), particularly as an overall assessment of the elements justifying the copyright protection of the ‘Hang’ leads to the conclusion that these elements fade into the background in the new design and are therefore no longer recognisable. The scope of protection of the ‘Hang’ is clearly no longer affected.

174.2 Harmonic Art HD (K-II, prayer of relief 2f, 2g, 2h, 2i, 2j, 2k, 2l, 2m, 2n, 2o, 2p, 2q, 2r, 2s, para. 192–219; Reply II, para. 37)



The ‘Handpans’ depicted in K-II, para. 192–219 (p. 120 et seq. [HG 20 133]) and Reply II, para. 37 (p. 1679) are described in the same way and can be dealt with together. They do not feature a dome positioned centrally at the top, but rather a **recess** in the centre of the upper surface (see K-II, para. 193 i, ii, p. 121 [HG 20 133]).

This ‘Handpan’ retains the lens shape, circularly arranged tone fields on the top surface and a resonance hole at the centre of the base. The separation between the upper half of the bowl, with tone fields, and the lower half, without tone fields, is also recognisable. 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 recess at the top and the resonance hole at the bottom) lead inwards and towards one another, which is why no vertical, converging axis is recognisably incorporated here either. Added to this is the use of oval shapes (in particular in the area of the central tone field, including the recess). In the elements that have been adopted (either alone or in combination), the creative individuality of the original creators is (barely) expressed; moreover, an examination of the elements forming the basis of the ‘Hang’s’ copyright protection, viewed as a whole, leads to the conclusion that these elements fade into the background in the new design and are therefore unrecognisable.

174.3 Meinl Handpan HD3 Raga Desya Todi (K-II, prayer of Relief. 2fff, para. 296 et seq.)



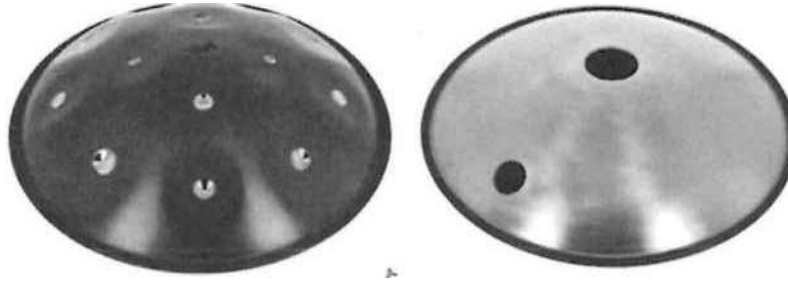
The comments just made apply mutatis mutandis to this ‘Handpan’ as well (see K-II, no. 296 et seq., pp. 224 et seq. [HG 20 133]).

174.4 Harmonic Art HR (K-II, prayer of relief 2y, 2z, 2aa, 2bb, 2cc, 2dd, 2ee, 2ff, 2gg, 2hh; para. 230-249; Reply II, para. 38, p. 1680)



The ‘Handpans’ illustrated in K-II, para. 230–249 (p. 158 et seq. [HG 20 133]) are described below and can be dealt with together. The lens shape and the circular arrangement of the tone fields on the upper half of the shell have been recognisably retained. This ‘Handpan’ has no dome at the top (but a resonance hole) and, furthermore, a smooth underside (without a resonance hole). Although a horizontal separation between the upper and lower shells is also discernible here, the resonance opening leads into the instrument from above, particularly as the resonance opening would be positioned on the side fitted with tone fields. Compared to the ‘Hang’, there is therefore, as it were, a (partial) reversal. The creative individuality of the original creators is not expressed in the elements that have been adopted (either alone or in combination), particularly as an examination of the elements forming the basis of the ‘Hang’s’ copyright protection, viewed as a whole, leads to the conclusion that these elements fade into the background in the new design and are therefore unrecognisable. The scope of protection of ‘Hang’ is clearly no longer affected.

174.5 Metal Sounds Spacedrum Chromatic (K-II, prayer of relief 2nn, para. 260 et seq., p. 188 et seq. [HG 20 133]; Reply II, para. 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 positioned in place of a central tone field (with a dome). As a result, the arrangement of the tone fields no longer appears circular, but is reminiscent of that of a steel pan (see the illustrations from Minutes IV of 11 October 2021 [revised, version of 24 January 2022], p. 13 et seq. [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 incorporated 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 elements that have been adopted (either alone or in combination), particularly as an overall assessment of the elements forming the basis of the 'Hang's' copyright protection does not lead to the conclusion that these elements are obscured in the new design, i.e. that they are unrecognisable.

175. According to its submission, Plaintiff 10 also distributes instruments manufactured by **Plaintiff 12**, see K-II, prayer of relief 2ggg, para. 298, as well as those manufactured by **Plaintiffs 16 and 17**, who have since withdrawn from the proceedings (K-II, prayer of relief 2hhh, para. 299) and, in its claims, submitted precisely these instruments to the court for further examination.

Since **Plaintiff 12's** instruments are to be examined in this context, the result for Plaintiff 10 corresponds to that of Plaintiff 12 (K-II, prayer of relief 2ggg in conjunction with 3a to 3l). Reference is made to the explanations set out 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 may be made, by analogy, to E. 156. In view of the elements that have been adopted, the alleged 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, bumps on the underside, the colouring 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. [HG 20 133]) do not alter this assessment.

The 'Handpans' in question are as follows:

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



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



- 175.3 Moon D minor (K-II, no. 2hhh in conjunction with 4c, no. 349 et seq.)



- 175.4 Moon F Akebono (K-II, prayer of relief 2hhh in conjunction with 4d, para. 351 et seq.)



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



175.6 Moon Low Pygmy C (K-II, prayer of relief 2hhh in conjunction with 4f, para. 355 et seq.)



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



175.8 Shamanic D Hijaz (K-II, prayer of relief 2hhh in conjunction with 4h, para. 359 et seq.)



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



175.10 Shamanic F Akebono (K-II, prayer of relief 2hhh in conjunction with 4j, para. 363 et seq.)



Conclusion

176. In conclusion, it is to 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 the scope of protection of the ‘Hang’.

It is found that the Plaintiff 10, by offering etc. the ‘Handpans’ in accordance with K-II, **prayer of relief 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**, has not infringed the Defendant’s copyright in the ‘Hang’ in Germany.

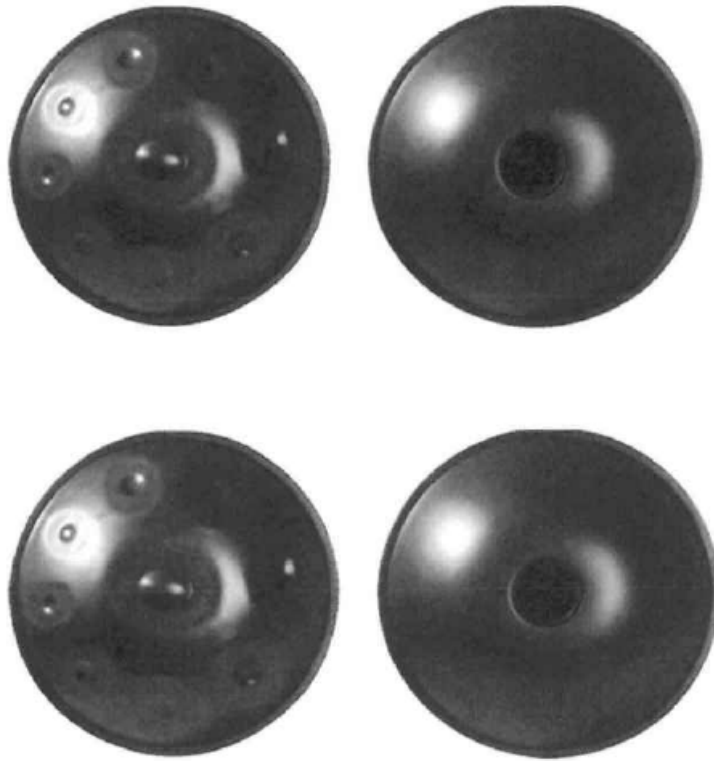
The Plaintiff's instruments 12

177. All the '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 colouring 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 adoption no longer recognisable (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' design of the dome with different diameters, a different number of tone fields (whilst retaining the circular shape), and different depths and distances between them (see minutes of the continued hearing, p. 27, p. 2078). In the present case, these alterations therefore do not, either individually or in combination, result in the adaptation no longer being recognisable (and thus the threshold of 'mere' inspiration has not been exceeded); nor do the elements giving rise to copyright protection fade into the background when viewed as a whole within the new design, and are therefore recognisable.
178. Specifically, the 'Handpans' in question are as follows:
- 178.1 Sela Harmony / Sela Melody Handpan (K-II, prayer of relief 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3l, para. 314–337; Reply II, para. 41 et seq., p. 1681 et seq.)









Conclusion

179. In conclusion, it must be noted that **none** of the **12** 'Handpans' submitted by the Plaintiff falls outside the scope of protection of the 'Hang'.

K-II, prayer of relief 3 and 3.1 are to be rejected, insofar as they are admissible.

Rights of use

Positions of the parties

180. **Plaintiffs 1 and 2** then argue that the Defendants granted them a free, simple **right of use**, unlimited in terms of territory and duration, **within the meaning of** § 31 para. 1 sentence 1 UrhG which may be granted informally, including orally, tacitly or by implication (Reply I, para. 602 et seq., p. 1867 et seq.). The Defendants had indicated to Plaintiff 2 'at any rate by implication' that they would permit him to manufacture 'Handpans' in the same form or had granted him a non-exclusive right of use that was unlimited in terms of territory and duration (Reply I, para. 606, p. 1868 et seq.). The **Defendants** deny having granted licences to anyone (Rejoinder, para. 273, p. 1957 et seq.) and argue that high standards must be applied to declarations of intent regarding

the grant of licences (Rejoinder, para. 274 et seq., p. 1958 f.). Plaintiff 1 had, as recently as 2020, feared legal action by the Defendants, which is why he was aware that no license existed at that time (Rejoinder, para. 281, p. 1960, with reference to KAB 157). Furthermore, it is not apparent how Plaintiff 1 could have been granted rights of use, particularly as it did not even exist in 2018 (Rejoinder, para. 283 and 117, p. 1960, 1921).

Legal aspects

181. An infringement of copyright arises from the benefit of a work without the consent of its author (see ECJ, C-580/23 and C-795/23, judgment of 4 December 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 licence in an international context** (email between the Defendants, whose registered offices are in Switzerland, and Plaintiff 1, who has a domicile in the Netherlands). Pursuant to Article 110 para. 3 of the PILA, agreements relating to intellectual property rights are subject to the provisions governing the law applicable to agreements under the Code of Obligations and thus to the law of the state in which the person who transfers the intellectual property right or grants the right to use it has their habitual residence (Article 122 para. 1 PILA). This so-called 'contractual statute' governs, amongst other things, the conclusion, terms and interpretation of the agreement (see MÖCKLIN-DOSS/SCHNYER, in: CHK IPRG, 4th ed., article 122 N 5; VISCHER/MOSIMANN, in: ZK IPRG, 3rd ed., article 122 N 12, with further references; JEGHER/KUNZ, in: BSK IPRG, article 122 N 13). As the transfer of rights belonging to the Defendant, which is domiciled in Bern, is at issue, Swiss law alone is applicable to the question of the granting of a licence. The fact that the parties represent different views on this matter (application of German or Dutch law) is irrelevant, particularly as 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 copyright is agreed in an agreement is determined primarily by subjective interpretation, that is, in accordance with the actual, mutually agreed intention of the parties (article 18 para. 1 CO). If this remains unproven, the statements of the parties must be interpreted, in accordance with the principle of good faith, in such a way as to ascertain their presumed intention, based on their wording, context and the circumstances as a whole. In the absence of an ascertainable, actual and mutually agreed intention of the parties, specific rules must be applied in addition to the principle of good faith to determine the content of agreements relating to the transfer of copyright. In particular, in cases of doubt, it must be assumed that the author has not transferred any powers beyond those required by the purpose of the contract (theory of transfer for a specific purpose) (see BGer 4A_104/2008 of 8 May 2008, E. 4.2 with further references).

184. An offer is a binding declaration of intent to reach the conclusion of a specific agreement. It includes the intention to be contractually bound (ZELLWEGER/GUTKNECHT, in: BSK OR I, article 3 N 1). An offer must sufficiently provide the content of the contract, in particular it must contain the so-called ‘essentialia negotii’, especially as the subsequent acceptance by the other party must, in principle, consist of an unconditional ‘yes’ in order to bring about the formation of the contract (see ZELLWEGER/GUTKNECHT, in: BSK OR I, article 3 N 11). In the case of a license agreement as an innominate contract, the objectively essential element of the contract comprises the subject-matter of the licence, i.e. the licensed intellectual property (see VOGLER, Prinzipien des Vertragsrechts, § 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) must be taken as a basis, taking into account rules of interpretation such as, for example, interpretation in good faith (see, on this subject as a whole BÖTSCHI, Bestimmung der Art und des Umfanges der Rechtseinräumung im Urheberrechtsvertrag, pp. 112 et seq.; see also BGE 133 III 406, E. 2.2 regarding the wording).
- 185.1 Whether, on the basis of the principle of good faith, an agreement between the Defendants and the Plaintiffs 1 and 2 is to be presumed is a question of law (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 under the principle of good faith rests with the Plaintiffs.

Assessment

186. The passage of text from 2018, to which Plaintiffs 1 and 2 appeal, was part of an email exchange concerning an analysis of the Plaintiffs’ ‘Handpan’ material, with a view to investigating an infringement of a Defendant’s patent. It was drafted 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 happy that you don't infringe our patent; that means we are working in a completely different direction although you build more or less the same design. Our work is based on a composite 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 are take profit from our raw form. To build the lense with Ding and Gu was not so easy! Be careful not to support 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 that the agreement was concluded, particularly as neither the Plaintiffs’ statements, the correspondence submitted, nor the (sparsely set out) circumstances or similar would allow the conclusion that the parties had expressed themselves in unison, understood one another and reached agreement on this understanding. In view of the Defendants’ denials and the fact that the Plaintiffs’ claims essentially amount to nothing more than a mere reproduction of the text passage set out above, neither an actual nor a presumed intention on the part of the parties to grant of licences can be inferred from this. The Plaintiffs’ submissions are subject to a

restriction that the Defendants would allow Plaintiff 1 to engage in ‘more or less the same manufacturing process’. They do not explain what is (or could be) meant by this. Rather, it is clear from this that the statement already lacks a sufficiently definable subject matter of the licence (‘more or less the same design’), which is why no application could have been made in the first place. Furthermore, to what extent does the conditionally worded wording with parameters that cannot be specified in detail (‘more or less the same design’; ‘[...] you become rich’; ‘some dollars’), which, according to the Plaintiffs, are still intended to be ‘ironic’ (Reply I, para. 606, p. 1868 et seq.), could be construed as a request for the conclusion of a license agreement to which one could respond with an unconditional ‘yes’, is not apparent. Nor would any intention to enter into an agreement be apparent. Furthermore, this statement was made explicitly in a subordinate clause relating to the excluded patent infringement (‘We are happy that you do not 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 readily assume that the phrase ‘we work in a completely different direction’ refers not only to the patent law issue but also, in addition, to the design. In the absence of a claim, 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 any detail – could be regarded at all as a (tacit) expression of intent (see KREN KOSTKIEWICZ, in: OFK OR, 4th ed., article 1 N 34 et seq.), especially as Plaintiff 2 made no comments regarding the (allegedly) ‘post-contractual’ conduct. The actual ‘post-contractual’ conduct (in particular, the warning letters from the Defendant’s side) likewise does not indicate any intention to conclude a contract.

188. Furthermore, it is not apparent from the email correspondence that the parties engaged in any ‘conduct’ or that there was any contractual purpose whatsoever, particularly as no such purpose is alleged. Apart from this email, Plaintiff 1 and Plaintiff 2 are therefore unable to cite any further circumstances that would suggest a different assessment.
189. Also it would not be able to see to what extent the Defendants should have been ‘fully aware of the business of Plaintiff 2 (in the form of Plaintiff 1)’ in 2018 (see Reply I, para. 603, p. 1867 et seq.), given that the Plaintiff’s own information indicates that it was not established until 2019 (K-I, para. 169, p. 97; Reply I, para. 51, p. 1716; see also KB-I 12). The claim that the Defendants must therefore have been aware of the instruments which ‘Plaintiff 2 produced with Plaintiff 1’ (Reply I, para. 605, p. 1868) is not plausible in light of the chronology; nor is it clear why any license granted to Plaintiff 1 should also include an extension to Plaintiff 2, particularly as Plaintiff 1 and Plaintiff 2 have not provided any substantiated comments on this point either. There is therefore no basis for accepting that a license was granted.
190. Incidentally, the same conclusion would be reached if German law were applied for the purposes of this assessment (as the parties assume):

191. Pursuant to § 31 para. 1 UrhG, the author may grant another person the right to use the work in respect of some or all types of use (right of use). The right of use may be granted as a simple or exclusive right, and may be restricted in terms of geographical area, time or terms. The general provisions apply to licences, in particular as regards their formation (§§ 145 et seq. of the German Civil Code [BGB]) and the interpretation of declarations of intent (§§ 133, 157 BGB) (MANTZ, in: Dreier/Schulze, 8th ed., § 31, N 8).
192. Under German law, too, an agreement is concluded by two matching declarations of intent (see §§ 145 and 146 BGB). The subject matter and terms of the agreement must be provided in the offer in such a way, or be capable of being provided in such a way, that acceptance can be effected by a simple ‘yes’ (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 145, N 1, with further references). The intention to be legally bound must also be expressed in the offer, whereby the interpretation in this regard is determined not by the internal intention of the offeror, but by the objective meaning of their conduct (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 145, N. 2). In particular, the question is how the recipient would be required to understand a declaration (requiring acceptance) in good faith, taking into account customary practice (GRÜNEBERG/ELLENBERGER, BGB, 85th ed., § 133, N 9, with further references).
193. As already explained in relation to Swiss law, the objective meaning of the cited email correspondence cannot be interpreted as implying that a license should have been granted. Nor is it apparent that, or how, a legal intention to be bound could have been expressed. Furthermore, it has neither been substantiated nor is it apparent to what extent a proposal for the conclusion of a license agreement – to which one could reply ‘yes’ – could be discerned in wording formulated in conditional terms with parameters that cannot be specified in detail (‘more or less the same design’; ‘[...] you become rich’; ‘some dollars’). Taking into account the accompanying circumstances and the objective content of the statement, it would therefore not be unequivocally expressed that the declarant intended to make a decision regarding 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 15 August 2014, para. 5a with further references. [KB 346]).
194. Nor does it alter this fact that (also) under German law, the granting of a license is, in principle, not subject to formal requirements, as the Plaintiffs argue.

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

195. In so far as the Plaintiffs raise various objections, in particular an objection relating to competition law (§ 19 para. 1 of the German Act against Restraints of Competition (GWB) and article 102 of the Treaty on the Functioning of the European Union (TFEU)), these issues need not be addressed in the context of the present application for a negative declaration; they are not the subject matter of the proceedings.

Overall conclusion on German law

It is held that:

- a) **Plaintiff 1 and Plaintiff 2** do not infringe the Defendant's copyright in the 'Hang' in **Germany** by manufacturing, offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 2c, 2d and 2f** of the Claim dated 27 October 2020;
- b) **Plaintiff 5 and Plaintiffs 6, 7, 8 and 9**, by offering for sale, selling, distributing and making available in Germany the musical instruments set out in **prayers of relief 4e, 4f, 4k, 4l, 4m, 4v, 4y, 4aa** of the Claim dated 27 October 2020 do not infringe the Defendant's copyright in the 'Hang' in **Germany**;
- c) the **Plaintiff 10**, by offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 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 Claim dated 4 December 2020, does not infringe the Defendant's copyright in the 'Hang' in **Germany**.

In all other respects, the **Claims of 27 October 2020** and **4 December 2020** are **dismissed, in so far as they are admissible**.

Copyright infringements under Dutch law (K-I, para. 383 et seq.; Reply I, para. 619 et seq.)

Scope of protection

The parties' positions

- 196. According to the arguments put forward by **Plaintiffs 1 and 2**, there is no protection of the concept under Dutch law either (Reply I, para. 619, p. 1872, with reference to the comments on German law). They argue that any scope of protection for the 'Hang' would be very narrow and that, consequently, only identical copies would be regarded as infringing, such that even minor differences (such as a different design of the dome or the tone panels) would inevitably fall outside the scope of protection (Reply I, para. 632, p. 1877).
- 197. From the **Defendants'** perspective, each of the four elements individually, as well as their combination, can be defined as copyright-protected features or elements within the meaning of the case law (Rejoinder, para. 305, p. 1964). They argue that none of the 'Handpans' under consideration creates an overall impression that differs from the work (Rejoinder, para. 306, p. 1965) or that there is a

recognisable 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 (Rejoinder, para. 307, p. 1965). Owing to its revolutionary design, the ‘Hang’ enjoys a broad scope of protection, which is why the adoption of some, but not all, features already constitutes an infringement (Rejoinder, 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 (Rejoinder, 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 recognisable (Rejoinder, para. 318, p. 1972). The remaining instruments all feature all four elements, which is why the overall impressions are identical and there is clearly an infringement (Rejoinder, para. 318, p. 1972).

Legal

198. A reproduction within the meaning of article 13 of the Copyright Act (Aw) encompasses any complete or partial processing or imitation in a modified form which cannot be regarded as a new, original work (article 13 Aw: *‘The reproduction of a literary, scientific or artistic work shall also be understood to include translation, musical arrangement, film adaptation or stage adaptation and, in general, any complete or partial adaptation or imitation in a modified form which is not to be regarded as a new, original work.’*). In this context, a subject matter must incorporate so few copyright-protected features of another work that it is, for copyright purposes, independent of that work (SPOOR/VERKADE, § 4.11 [KB 351]). Consequently, processing or imitation exists where copyright-protected features of a work are recognisably reproduced in the infringing work (see SPOOR/VERKADE, § 4.11, p. 182 [KB 351]). According to established case law, what is relevant here is the **overall impression** (HR, ECLI:NL:HR:1995:ZC1942, judgment of 29 December 1995, no. 3.3 [KAB 117] and HR, ECLI:NL:HR:2013:BY1529, judgment of 22 February 2013, no. 3.4e [KB 170]; see also Reply I, para. 622, p. 1872 et seq.; KA, no. 430).

Assessment

199. With regard to the Plaintiff’s argument concerning the protection **of concepts** or ideas, reference may be made to the comments made above (see E. 74). The **criteria established by the ECJ** and the associated changes (in particular: guidelines on **the assessment of infringement**) must also be observed under Dutch law. For the subsequent assessment of infringement, it must therefore be assumed that the elements justifying protection set out in the decision of 2 July 2024 and E. 134 above (it should be noted that even a collection or selection of unprotected elements may also constitute a work, provided that such collection or selection reflects the author’s personality or reveals the author’s personal stamp (HR, ECLI:NL:HR:2013:BY1529, judgment of 22 February 2013, para. 3.4 [KB 170, 170A]; Rechtbank Midden-Nederland, ECLI:NL:RBMNE:2025:5837, judgment of 12 November 2025, no. 3.14, see also para. 3.29 [KAB 176, 176A], with further references; see also Gerechtshof

Den Haag, ECLI:NL:GHDHA:2020:1620, judgment of 1 September 2020, in particular para. 4.3 [KB 181, 181A]). However, the assessment of **the overall impression** ('totaaliindruk') will no longer be applicable (see also E. 143 above). What is decisive, rather, is whether **creative elements** – that is, those which are an expression of the decisions reflecting the personality of the author of the work – have been **recognisably incorporated** into the subject matter alleged to constitute an infringement (ECJ, C-580/23 and C-795/23, judgment of 4 December 2025, para. 86 with further references, 92 [KB 361]). In this context, even the reproduction of an arrangement of pre-existing elements regarded as original may constitute an infringement (Opinion of Advocate General Szpunar, para. 72 [KB 333]). As already mentioned in paragraphs 84 and 87 above, in the case of the 'Hang', protection would not be granted on the basis of individual features; consequently, its extension does not include (only) 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, no. 174, p. 1933 et seq.).

200. The instruments to be assessed under **Dutch law** are the 'Handpans' of Plaintiff 1 and Plaintiff 2 (see K-I, para. 2; Reply I, para. 511 et seq., p. 1848 et seq. The reference work is the 'Hang', as embodied in the version set out in K-I, prayer of relief 1 no. ii a.
201. For the assessment, reference may therefore be made by analogy to E. 155 et seq. above, particularly as this assessment must also be carried out under Dutch law on the basis of 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 the scope of protection of 'Hang'.

Granting of rights of use (Reply I, para. 634 et seq.)

203. Under Dutch law, too, Plaintiffs 1 and 2 contend that they were granted a non-exclusive license under article 2 para. 2 Aw, particularly as such a license may also be granted orally, tacitly or by implication (Reply I, no. 634, p. 1878). They base this on the email exchange that took place in 2018 (Reply I, para. 634 and 602 et seq., p. 1878, 1867 et seq.; see E. 180 et seq. above). The Defendants dispute this. They claim that they neither formed nor expressed any such intention, particularly as Plaintiff 1 had not assumed the existence of a license even as late as 2020 (Rejoinder, para. 319 et seq., p. 1972 et seq.). Plaintiff 1 did not exist in 2018, nor was there any interaction between the parties in the course of which a license agreement could have come into being through offer and acceptance (Rejoinder, para. 323 et seq., pp. 1973 et seq.).

Assessment

204. Reference may be made in this regard to the assessment in E. 181 et seq. Moreover, the same conclusion would be reached if Dutch law were applied to the assessment (as the parties assume):
205. Under Dutch law, too, an agreement is concluded by means of an offer ('aanbod') and acceptance ('aanvaarding') (Article 6:217 (1) of *the Burgerlijk Wetboek* [BW]), which is why implied conduct may also lead to agreement on the essential terms of the agreement and thus to the conclusion of an agreement. In principle, there are no formal requirements (see article 3:37 BW). An offer exists where the supplier intends to be bound and this is sufficiently clear from their 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 effected by conduct (article 3:37 BW), must comply with the conditions of the offer; otherwise, it is deemed a counter-offer (article 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, with regard to its subject matter, so vaguely formulated that it cannot be classified as an offer. Nor is any intention to be legally bound discernible from it.

Licence defence under article 102 TFEU (Reply I, para. 637)

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

Overall conclusion on Dutch law

It is held that:

- a) **Plaintiff 1 and Plaintiff 2** do not infringe the Defendant's copyright in the 'Hang' in the **Netherlands** by manufacturing, offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 2c, 2d and 2f** of the claim of 27 October 2020;

In all other respects, the **Claim of 27 October 2020** is **rejected in so far as it is admissible**.

208. **In summary**, it can be held that **(i)** the ‘Hang’ of Defendants 2 and 3 is eligible for **copyright protection** in **Switzerland, Germany** and the **Netherlands** on the basis of the considerations set out above, and **(ii)** the specific ‘Handpans’ of the Plaintiffs brought before this proceeding **infringe** the **Defendants’ copyright**, with a few exceptions.

This **decision supplements that of 2 July 2024**, to which reference is made once again in its entirety, both with regard to the operative part and the grounds.

VI. Procedural costs

209. The court usually makes a decision on the procedural costs in its final decision (article 105 para. 1) CPC). The procedural costs are borne by the unsuccessful party. Where the court declines to hear the case, the Plaintiff is deemed to have lost (article 106 para. 1 CPC). If neither party has prevailed entirely, the distribution of procedural costs is made according to the outcome of the proceeding (article 106(2) CPC). Where several parties are involved in the proceeding as principal or incidental parties, the court determines their respective share of the procedural costs. The court may order joint and several liability (article 106 para. 3) aCPC (proceedings commenced before 1 January 2025; see article 407f CPC a contrario)). Court costs are set off against the advances of costs made by the parties, with any shortfall being claimed from the party liable for costs. The party liable for costs must reimburse the other party for the advances paid and pay the awarded party costs (article 111 para. 1 and (2) of the new CPC (aCPC); see also, here, article 407f of the CPC a contrario).
210. Where claims are joined, the value in dispute for each individual claim is aggregated for the purposes of determining jurisdiction and procedural costs, provided that the individual claims are not mutually exclusive (GSCHWEND, in: BSK ZPO, article 125 N 19 with further references; WEBER, in: KUKO ZPO, article 125 N 7).

Value in dispute

- 210.1 The value in dispute is determined by the legal claim, whereby any alternative claims are not included (article 91 para. 1 of the CPC). At the outset of the proceeding, the parties agreed on a value in dispute of **CHF 430,000.00** (KA, para. 20, p. 280; decision of 2 July 2024, E. 135, p. 1512), which remains the relevant figure. In the course of the proceedings, it became apparent that the expenditure incurred by the parties had led to an increasingly disproportionate relationship with the value in dispute: according to statements made in 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 – made a withdrawal of the action following the (first-instance) decision of 2 July 2024. In purely mathematical terms, this resulted in a reduction of CHF 22,500.00 in the value in dispute (1/8 of a [partial] value of CHF 180,000.00 for K-III (see K-III, para. 23, p. 881 [HG 21 2]). In respect of Plaintiff 24's withdrawal of the action, court costs of CHF 850.00 were imposed on him and set off against the advance payment of CHF 20,000.00 in the proceedings HG 21 2 (see decision of 2 October 2024, E. 4, p. 1538). The party costs relating to the 'Plaintiff 24 part of the proceedings' would be set off against all parties following prior granting of the right to be heard. The discontinuation of this part of the proceedings does not alter the **fee scale** for court costs (see article 42 para. 1 lit. c of the Decree on Procedural Costs [VKD; BSG 161.12]) nor the framework for the reimbursement of parties' costs under the Parties' Costs Ordinance [PKV; BSG 168.811], see article 5 para. 1 thereof.
212. The six other **Plaintiffs – 11, 13, 14, 15, 16 and 17 – were excluded from** the proceeding pursuant to the relevant decision of 2 July 2024 (which has since acquired legal effect) refusing to hear the case. The court costs attributable to them in this regard were provided for at CHF 2,000.00 and imposed on them on a joint and several liability basis, to be set off against the advance of costs of CHF 20,000 they had paid (HG 20 133; see decision of 2 July 2024, E. 138, operative part nr. 2, pp. 1513, 1517). Plaintiffs 11, 13, 14, 15, 16 and 17 are further ordered to pay the Defendant, on a joint and several liability basis, party costs of CHF 9,429.15 (fees including expenses plus VAT). However, this does not lead to the reduction in the value in dispute claimed by the Plaintiffs (see fee invoice of 20 February 2026, pp. 2091 et seq. and the statement of costs dated 2 March 2026, pp. 2101 et seq.), particularly as this is provided for in the **principal claim** ([non-] existence of a copyright in 'Hang'). Although this has reduced the number of Plaintiffs involved in the proceeding from 25 to 19 (or, following the withdrawal of one Plaintiff, from 24 to 18), it has not reduced the number of prayers of relief, the factual and legal issues to be addressed, or the 'Handpans' to be examined: The respective main prayer of relief 1 were raised jointly by all Plaintiffs (see also K-I, para. 18, p. 38; K-II, para. 23, p. 49 [HG 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 value in dispute. The exact number of Plaintiffs therefore had – apart of the formal aspects – no direct influence on the effort and scope of the proceeding. Furthermore, a review of the **alternative claims** shows that the

withdrawal of certain Plaintiffs by way of a decision not to hear the case had little impact in this respect on the 'Handpans' under consideration, as all of the withdrawn Plaintiffs were acting as co-Plaintiffs alongside Plaintiffs who remained involved (see K-II, prayer of relief 2 for Plaintiffs **10** and 11, p. 13 [HG 20 133]; prayer of relief 3 for Plaintiffs **12**, 13, 14 and 15, p. 32 [HG 20 133]; or else the 'Handpans' of the Plaintiffs who have withdrawn still form a significant part of the proceeding (see K-II, prayer of relief 2hhh in conjunction with prayer of relief 4a to 4j for Plaintiffs **10**, 16 and 17, p. 32 [HG 20 133]). A reduction in the value in dispute per person is therefore not appropriate.

213. The fact that part of the court costs and party costs, as just explained, has already been provided for and allocated must, of course, be taken into account below.
214. We shall briefly address here the weighting of the costs of the proceedings with regard to the principal and alternative claims, which, as is well known, also resulted in a limitation of the proceedings. With regard to the **principal claim** – the determination of the (non-)existence of a copyright in 'Hang' – the court only partially considered it (only 1 out of 2, and in some cases 3, legal systems, and likewise with regard to 7 out of 10 works); otherwise, the claim was unsuccessful. The **alternative claims** now to be examined in this decision are largely rejected, insofar as they are admissible. It appears appropriate, within the framework of the purely arithmetic assessment carried out for the purposes of apportioning the procedural costs, to assign a weighting of 3/4 to the main claim and 1/4 to the alternative claims.
215. With regard to the principal claims, the Plaintiffs remaining in the proceedings were unsuccessful across the board, in some cases due to the court declining to hear the case and in others due to rejection. With regard to the alternative claims, the Plaintiffs have likewise been unsuccessful for the most part (out of a total of over **250** 'Handpans' examined, only just over **50** were classified as non-infringing [of which **29** were merely three models of identical appearance but in different tunings [see K-II, prayer of relief. 2a-d, 2f-s and 2y-hh, 2fff, pp. 13 et seq., 15 et seq., 21 et seq., 32 [HG 20 133]]]), which corresponds to just over 20% of the original alternative claims (excluding the sub-alternative claims).

Court costs

216. Where the value in dispute is between CHF 100,000.00 and 500,000.00, the fee before the commercial court amounts to CHF 5,000 to 40,000 (article 42 para. 1 letter c in conjunction with article 4 para. 2 VKD). Within this range, the costs of the proceedings are assessed on the basis of the total time and effort involved, the significance of the case and the financial capacity of the party liable for costs (article 5 VKD). In particularly extensive and time-consuming cases, in cases involving vexatious litigation, or in cases involving a very high value in dispute, a fee of up to twice the maximum amount may be charged (article 6 para. 1 VKD). In proceedings involving several parties, the maximum rates may be exceeded. However, the fee for an individual must not exceed twice the standard maximum fee (article 6 para. 2 VKD).

217. When determining the court fee to be imposed, it must be taken into account that 25 Plaintiffs, through 3 claims, sought a negative declaration regarding copyright protection and copyright infringement under three legal systems, particularly as each Plaintiff individually submitted 10 items to the court for examination (see prayers of relief 1 i) and ii), which had a corresponding impact on the examination of the interest in a declaratory judgement. Over two hundred 'Handpans' were submitted to the court for evaluation as potentially infringing subject matters. The proceeding proved to be very extensive and time-consuming (initiated by 3 claims totalling 1,321 pages, a case file volume of >2,100 pages [excluding annexes]), including two rounds of written submissions in the restricted proceedings and a second round in the unrestricted proceedings, as well as various (new evidence) submissions; the case proved particularly complex and labour-intensive, not least due to its international nature and the large number of annexes submitted (>500). In addition to a half-day preparatory hearing (in 2021), a two-day main hearing (in 2023) and a half-day continuation of the main hearing (in 2026) were held. Nor did the withdrawal of certain parties following the decision of 2 July 2024 result in the proceedings becoming any less complex in factual or legal terms, or in a significant reduction in the amount of further work required (see also E. 212 above).
218. In view of the scope of the case and the particular time and effort required of the court, the **court costs** are to be set at twice the maximum fee of CHF 40'000.00, i.e. in principle at around CHF 80'000.00. Account must be taken of court costs already estimated and incurred in the amount of CHF 2,850.00, meaning that the fee is to be set at **CHF 77,150.00**.
219. Given that the main claim was assessed at 3/4 – on which the Plaintiffs were wholly unsuccessful – and that they were successful to the extent of 20% of 1/4 in relation to the alternative claims, which ultimately amounts to around 5%, the **Plaintiffs** are to bear court costs totalling **CHF 73,300.00**, this being on a joint and several liability basis (Art. 106 para. 3 lit. aCPC in conjunction with Art. 407f CPC; share of Plaintiffs 1, 2, 5–9, 18–23 and 25 totalling CHF 57,010.00; The share for Plaintiffs 3, 4, 10 and 12 amounts to CHF 16,290.00). The **Defendants'** share of the court costs amounts to **CHF 3,850.00** and is still to be recovered from them (on a joint and several basis, article 106 para. 3 aCPC). The Plaintiffs' share of the court costs will be set off against the (remaining) advances of costs they have made, totalling 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 set-off) (Article 111 para. 1 aCPC). The remaining amount of CHF 21,150.00 is to be claimed from the Plaintiffs on a pro rata basis and on a joint and several liability basis (article 111 para. 1 and 2); 106 para. 3 aCPC), specifically divided into CHF 1,175.00 per Plaintiff, totalling CHF 4,700.00 from Plaintiffs 3, who are represented by Rechtsanwalt Volken and/or Spycher, 4, 10 and 12, totalling CHF 4,700.00, and from the Plaintiffs 1, 2, 5–9, 18–23 and 25, with representation provided by Mr Staub and/or Mr Bigler, amounting to CHF 16,450.00. The allocation on a per-Plaintiff basis appears, in the present circumstances – where no Plaintiff (not even in relation to the [sub-]conditional claims) has succeeded to a significant extent, but rather, on the contrary, the decisive principal claim would be

subject to rejection in respect of all Plaintiffs (insofar as it was admissible) – to be somewhat simplistic, yet appropriate.

Lawyers' fees

220. The party liable for costs must reimburse the other party for any advances made and pay the awarded party costs (article 111 para. 2 aCPC). Under Article 95 para. 3 of the CPC, party costs include, in particular, reimbursement of necessary expenses (lit. a) and the costs of professional representation (lit. b). The court awards these costs in accordance with the cantonal scales (Article 105 para. 2 CPC).
221. In first-instance proceedings, where the value in dispute is between CHF 300,000.00 and CHF 600,000.00, the fee scale experiences an extension from CHF 11,800.00 to CHF 49,200.00 (article 5 para. 1 PKV). Within the framework tariff, the reimbursement of a party's legal costs is determined on the basis of the time required for the case, the significance of the matter in dispute and the complexity of the proceedings (article 41 para. 3 of the CISA [BSG 168.11]). Finally, article 9 PKV provides for a surcharge of up to 100 % on the fee in proceedings that require a particularly large amount of time and work, such as, in particular, where the collection or compilation of evidence is difficult and time-consuming, where there is a large volume of case files or extensive correspondence, where a substantial part of the case files or correspondence is in a language other than the language of the court, or where the factual or legal circumstances are particularly complex. This surcharge only applies if the effort involved in a proceeding cannot be accommodated within the standard framework tariff.
222. Apart from the value in dispute, which falls within the middle range of the relevant fee scale, the present proceeding must be regarded as well above average in every respect. It involved three consolidated proceedings with 28 parties, spanned three legal systems and had extensive written submissions with two rounds of written exchanges (and an additional second round of written exchanges in the unrestricted proceedings), various submissions (including new evidence), and several days of hearings (preliminary, main and continued main hearings). The fee invoices from the Plaintiffs' legal representatives (combined) and that of the Defendant exceed the applicable fee framework (despite an alleged reduction in the value in dispute) or, respectively, 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]; Defendant: CHF 98,400.00 plus expenses of CHF 174,051.84 [p. 2084]). These figures attest to the scope and complexity of the present proceeding. Against this background, a fee of CHF 49,200.00 plus a 100% acceptance 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 in principle. This is not altered by the party costs already awarded in the decision of 2 July 2024 or the estimation of the Plaintiff's withdrawal of the action – even if these initial costs are disregarded, the proceedings ultimately justify the full (double) maximum compensation. Given the extent of the success (95

%, or CHF 93,480.00) and the corresponding set-off against the opposing 5 % (CHF 4,920.00), this results in **party costs of CHF 88,560.00** to be paid by the Plaintiffs to the Defendants. This covers the additional costs incurred due to the complexity of the case, including those arising from foreign legal systems and any language barriers.

Expenses

223. Pursuant to Article 95 para. 3 lit. a CPC, expenses are to be reimbursed if they were necessary. Necessary expenses may include, in particular, costs for the translation of deeds, travel expenses, postage costs, telecommunications costs or the cost of copies (Explanatory Memorandum to the CPC 2006, 7293). Expenses in this context are costs actually incurred in dealings with parties other than the court or the professional representation (SUTER/VON HOLZEN, in: ZPO Kommentar, 4th ed., article 95 N 31 with further references). **The translation costs** claimed by the Defendants were, on the one hand, incurred internally by the law firm (see Annex 3 to the Defendants' bill of costs dated 20 November 2023 and the second bill of costs dated 27 January 2026, no. 3), meaning that it need not be determined whether they would be regarded as necessary at all. Furthermore, the substantial consultancy costs (some of which exceed the firm's own fees) incurred by foreign lawyers or lawyers admitted to practise abroad are in any event not recoverable as expenses, particularly as the additional costs of legal representation arising from the international nature of the case are already covered by the acceptance granted in accordance with article 9 PKV.
224. However, an **expense** allowance of 3 % of the awarded fee – in line with standard practice – is granted, amounting to approximately CHF 2,656.00 or, to be precise, **CHF 2,655.55**.
225. This results in **party costs 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 VAT at 8.1% on an amount of CHF 91,215.55, amounting to 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], whilst 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 being subject to joint and several liability pursuant to Article 106 para. 3 aCPC).

The commercial court makes the decision:

1. It is hereby found that:

- a) **Plaintiff 18** and **Plaintiff 19** do not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by offering for sale, selling, distributing and making available the musical instruments described in **prayers of relief 2uu and 2ww** of the Claim dated 31 December 2020;
- b) the **Plaintiff 20** does not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by manufacturing, offering for sale, selling, distributing and making available the musical instrument described in **prayers of relief 3d** of the Claim dated 31 December 2020;
- c) the **Plaintiff 21** does not infringe the Defendant's copyright in the 'Hang' in **Switzerland** by manufacturing, offering for sale, selling, distributing and making available the musical instruments described in **prayers of relief 4c, 4d and 4f** of the Claim dated 31 December 2020;
- d) the **Plaintiff 25** has not infringed the Defendant's copyright in the 'Hang' in **Switzerland** by offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 7i, 7j, 7k, 7l, 7m and 7n** of Claim dated 31 December 2020.

In all other respects, the **Claim of 31 December 2020** is **rejected in so far as it is admissible**.

2. It is hereby held that:

- a) **Plaintiff 1** and **Plaintiff 2**, by manufacturing, offering for sale, selling, distributing and making available the musical instruments described in **prayers of relief 2c, 2d, 2f** of the Claim of 27 October 2020, a) in **Germany** and b) in the **Netherlands**, do not infringe the Defendant's copyright in the 'Hang';
- b) **Plaintiff 5** and **Plaintiffs 6, 7, 8 and 9**, by offering for sale, selling, distributing and making available the musical instruments set out in **prayers of relief 4e, 4f, 4k, 4l, 4m, 4v, 4y, 4aa** of the Claim dated 27 October 2020 do not infringe the Defendant's copyright in the 'Hang' in **Germany**.

In all other respects, the **Claim of 27 October 2020** is **rejected in so far as it is admissible**.

3. It is hereby held that:

(a) the **Plaintiff 10**, by offering, selling, distributing and making available the works referred to in **prayers of relief 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 Claim dated 4 December 2020, has not infringed the Defendant's copyright in the 'Hang' in **Germany**.

In all other respects, the **Claim of 4 December 2020** is **rejected in so far as it is admissible**.

4. The **court costs**, provided for at **CHF 77,150.00**, are to be borne by the Plaintiffs to the extent of a total of CHF 73,300.00 (share of Plaintiffs 1, 2, 5–9, 18–23 and 25 totalling CHF 57,010.00; the share of Plaintiffs 3, 4, 10 and 12 totalling 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 costs advances paid by the Plaintiffs. The **Plaintiffs** are ordered to pay a further **CHF 21'150.00** into 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 party) to the court cashier's office (jointly and severally liable).

5. The Plaintiffs are ordered to pay the Defendants **party costs** of **CHF 98,604.00** (fees including expenses plus VAT), amounting to CHF 5,478.00 per Plaintiff (joint and several liability).

6. To be served (by registered post):

- to the parties

Bern, 16 June 2026
(drawn up on 24 June 2026)

On behalf of the commercial court
The Vice President:

[Signature]
Chief Judge Schlup

The Clerk of the Court

[Signature]
Blatter

Information on appeals

An objection in civil matters may be lodged against this decision within 30 days with the Federal Supreme Court, Av. du Tribunal fédéral 29, 1000 Lausanne 14, in accordance with articles 39 et seq., 72 et seq. and 90 et seq. of the Federal Supreme Court Act (BGG; SR 173.110). The objection must comply with the requirements of article 42 BGG. The value in dispute amounts to more than CHF 30,000.00.