

Supreme Court of
the Canton of Bern
Commercial Court

Translation by MLL Legal

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Decision

HG20117

Bern, 2 July 2024

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, The Netherlands
	Plaintiff 1
	van den Bor Ralf , Noordmark 72, 1351 GG Almere, Netherlands
	Plaintiff 2
	World of Handpan GmbH , Zieblandstrasse 45, 80798 Munich, Germany
	Plaintiff 3
	Eitle Emanuel , Zieblandstrasse 45, 80798 Munich, Germany
	Plaintiff 4
	Kammen Marten Marten Mercks GbR , Talstrasse 61, 79102 Freiburg, Germany
	Plaintiff 5
	Kammen Stephan , Talstrasse 61, 79102 Freiburg, Germany
	Plaintiffs 6
	Marten Malte , Dahlemer Weg 210a, 14167 Berlin, Germany
	Plaintiff 7
	Marten Sebastian , 64 Route du Polygone, 67100 Strasbourg, France
	Plaintiff 8

Mercks Alexander, Freiburger Strasse 24, 79112 Freiburg,
Germany

Plaintiff 9

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

Plaintiff 10

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

Plaintiff 11

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

Plaintiff 12

Hage Verwaltungs GmbH, Eschenbach 542, 91224 Pommels-
brunn, Germany

Plaintiff 13

Cascha GmbH, Eschenbach 542, 91224 Pommelsbrunn,
Germany

Plaintiff 14

Hage Helmut, Eschenbach 542, 91224 Pommelsbrunn, Germany

Plaintiff 15

Terré GmbH, Hans-Sachs-Strasse 55, 08525 Plauen, Germany

Plaintiff 16

Riederer Günter, Unterloaserstrasse 26, 08606 Oelsnitz OT Taltitz,
Germany

Plaintiff 17

Würmli Thomas, Mülimatt 17, 8915 Hausen am Albis

Plaintiff 18

Würmli Sabine, Mülimatt 17, 8915 Hausen am Albis Plaintiff

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Poux Jérémie, Impasse Devant-la-Ville 3, 1772 Ponthaux

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, Stosswaldweg 1290, 9062 Lustmühle

Plaintiff 23

Meier Josef, Oberwilerstrasse 8, 6062 Wilen (Sarnen)

Plaintiff 24

Brönnimann Markus, Bürenstrasse 83, 4500 Solothurn

Plaintiff 25

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

against

PANArt Hangbau AG, Engehaldenstrasse 131, 3012 Bern (UID:
CHE-107.470.755)

Defendant 1

Rohner Felix, do PANArt Hangbau AG Engehaldenstrasse 131, 3012
Bern

Defendant 2

Schärer Sabina, do PANArt Hangbau AG Engehaldenstrasse 131,
3012 Bern

Defendant 3

all represented by lawyer Dr Michael Ritscher and/or lawyer Dr Stefan
Schröter, Meyerlustenberger Lachenal Froriep AG, Schiffbaustrasse 2,
P.O. Box 1765, 8031 Zurich

Object

Copyright

Complaints from 27 October 2020, 4 December 2020 and 31 December 2020

Proceedings limited to the question of copyrightability of the "Hang"

Considerations:

I. History of the Proceedings

1. The plaintiffs consist of 25 (natural and legal) persons domiciled in Switzerland, Germany or the Netherlands who sell musical instruments known in the scene as "Hang" (Bernese German term for "hand") or "Handpan". The plaintiffs (hereinafter referred to simply as "plaintiffs") seek a declaration from the court that the objects in dispute, which can be summarised under the general term "Hang" and exist in various prototypes and variants, do not enjoy copyright protection under Swiss law, German law and Dutch law. In the alternative, they seek a declaration that the manufacture, offering for sale, sale, distribution and making perceptible of their musical instruments do not constitute copyright infringements under Swiss law, German law and Dutch law. Finally, the plaintiffs seek a declaration that the defendants are not entitled to any claims against them for such acts. Defendants 2 and 3 are the two natural persons who jointly created the different versions of the "Hang" and the 10 objects in dispute. Defendant 1 is the legal entity - managed by Defendants 2 and 3 - through which the objects in dispute are distributed. By agreement of the parties, the proceedings were limited to the question of copyright protection or copyrightability in Switzerland, Germany and the Netherlands with regard to 10 different variants of the "Hang", which is why the present decision will deal exclusively with this issue. It is disputed between the parties whether the objects in dispute or individual versions thereof constitute a musical instrument or a so-called "sound sculpture" and whether they can be labelled as a "handpan". The exact terminology is not decisive in the present case. For the sake of clarity, the court uses the term "Hang" in this decision exclusively for the objects manufactured by the defendants and the term "Handpan" for the objects manufactured by the plaintiffs.
2. With the action of 27 October 2020 (HG 20 117), the action of 4 December 2020 (HG 20 133) and the action of 31 December 2020 (HG 21 2), the legal representatives of the plaintiffs filed three separate actions, each of which was brought by a part of the plaintiffs. The legal claims of the actions are identical with regard to the determination of the lack of copyrightability of the "Hang" including its prototypes and variants. The legal claims no. 1 of the (second) action of 4 December 2020 [K-II] and the (third) action of 31 December 2020 [K-III] only differ from the legal claim no. 1 of the (first) action of 27 October 2020 [K-I] in that they request a negative declaration (only) under Swiss law and German law, but not also under Dutch law. The legal claims no. 2 of all three actions (which, however, are not relevant in the present limited proceedings) differ only with regard to the determination of the lack of copyright infringements with regard to the musical instruments or "handpans" distributed by the plaintiffs and individually depicted in the aforementioned legal claims.

On 18 January 2021, at the request of the parties, the then instructing judge merged the three proceedings and continued the proceedings under the number HG 20 117 (pag. 256 and pag. 261). With a view to the consolidation and the limitation of proceedings, the legal request no. 1 of the action of 27 October 2020 can be taken as a simplified basis - taking into account the above-mentioned deviation with regard to the applicable legal system (Dutch law, lit. c of legal request no. 1 of the action of 27 October 2020). This reads as follows:

1. It should be declared that (a) in Switzerland, (b) in Germany and (c) in the Netherlands there is no copyright protection for brass sound instruments with the design features (i) lenticular basic shape consisting of two synclastic spherical segments, (ii) central dome, (iii) opposite resonance hole and (iv) circular tone fields arranged on the upper spherical segment according to the following sketch:



in particular in the following actual configurations:

- ii. prototypes of the "Hang":

- a. Prototype 1:





b. Prototype 2:





c. Prototype 3:





d. Prototype 4:



e. Prototype 5:



iii. "Hang":

a. First generation of the "Hang":



b. "Low Hang":



c. Second generation of the "Hang":





d. "Integral Hang":





e. "Freies Integrales Hang":



3. The defendants filed their response on 11 May 2021 (received by the Commercial Court on 12 May 2021). They made the following legal claims (pag. 270):
 1. The action should be dismissed in its entirety insofar as it is to be upheld.
 2. All under cost and compensation consequences under joint and several liability at the expense of the plaintiffs.
4. On 11 October 2021, an instruction hearing (pag. 418 ff.) was held before the then instructing judge, at which the legal representatives made informal "*summaries*" of the subject matter of the dispute, the parties present were briefly questioned and the court attempted to reach an agreement between the parties. The court also took evidence in the context of those objects that the plaintiffs had already submitted to the court with their lawsuits ("Hang" first generation as depicted in legal request no. 1 ii) letter a of the lawsuit of 27 October 2020, the "Integral Hang" as depicted in legal request no. 1 ii) letter d of the lawsuit of 27 October 2020 and instrument 1 of the plaintiffs as depicted in legal request no. 1 ii) letter a of the lawsuit of 27 October 2020). October 2020 and instrument 1 of plaintiff 1 and plaintiff 2 as depicted in legal claim no. 2 let. a of the action of 27 October 2020) and in the context of those objects that the defendants had brought to the instruction hearing (steel pan, cube, Hang sculpture from the defendant's current production; all depicted on pag. 431, cf. correction of the minutes on pag. 484 f.).
5. By order of 24 January 2022, para. 3, the proceedings were limited with the consent of the parties to the question of copyright protection of the prototypes depicted in the statement of claim of 27 October 2020 in legal claim no. 1 i), the first-generation "Hang" depicted in legal claim no. 1 ii) a), the second-generation "Hang" depicted in legal claim no. 1 ii) b), the second-generation "Hang" depicted in legal claim no. 1 ii) d), the "Hang" depicted in legal claim no. 1 ii) c), the "Hang" depicted in legal claim no. 1 ii) d), the "Hang" depicted in legal claim no. 1 ii) b), the second generation "Hang" depicted in legal claim no. 1 ii) c), the "Integral Hang" depicted in legal claim no. 1 ii) d) and the "Free Integral Hang" depicted in legal claim no. 1 ii) e) in Switzerland, Germany and the Netherlands (no. 3, pag. 486). The instructing judge at the time stated in the corresponding reasoning that a further restriction to a single type of "Hang" was not justified. The question of copyright protection could be answered for all types insofar as there was an interest in legal protection. The proceedings would therefore lead either to an interim decision or a final decision, whereby the latter could also consist (in part) of a decision not to intervene (pag. 486).
6. On 11 May 2022 (received by the Commercial Court on 13 May 2022), the plaintiffs submitted their reply in the limited proceedings (pag. 535 et seq.). In it, they fully upheld their legal claims in the actions of 27 October 2020 (HG 20 117), 4 December 2020 (HG 20 133) and 31 December 2020 (HG 21 2) (pag. 537).
7. The defendants submitted their rejoinder in the limited proceedings on 22 September 2022 (received by the Commercial Court on 26 September 2022) (pag. 717 et seq.).

They also maintained the legal claims made in the statement of defence (pag. 717). On 18 October 2022, the defendants submitted a corrected version of the statement of defence with regard to the duplicate enclosures and references to the duplicate enclosures (pag. 865 et seq.).

8. In a submission dated 4 November 2022, the plaintiffs commented on the Rejoinder and submitted new facts (pag. 101 (pag. 1011 et seq.)).
9. By order of 16 November 2022, para. 2, the plaintiffs were given the opportunity to comment in writing on the defendant's statements on German and Dutch law and to submit further documents to prove these rights up to four weeks before the main hearing (pag. 1053 et seq.).
10. By submission dated 30 November 2022, the defendants in turn submitted a statement on the plaintiffs' position (pag. 1055 f.).
11. The plaintiffs filed a new allegation on 22 May 2023 (pag. 1083 ff.).
12. On 25 May 2023, the defendants submitted their comments on the allegation of 22 May 2023 (pag. 1102 f.).
13. On 25 July 2023, the plaintiffs then submitted a further amendment (pag. 1122 et seq.).
14. On 22 August 2023, the defendants submitted their comments on the amendment of 25 July 2023 (pag. 1150 f.).
15. In a submission dated 24 August 2023, the plaintiffs submitted their comments on the statements in the duplicate regarding the legal situation in Germany and the Netherlands (pag. 1168 et seq.).
16. On 21/22 September 2023, the main hearing took place in restricted proceedings (pag. 1224 ff.). At this hearing, in addition to questioning the parties, an inspection of 9 of the 10 objects in dispute was carried out (pag. 1271 ff.).
17. By submission dated 20 November 2023 (received by the Commercial Court on 22 November 2023, pag. 1355 et seq.), the defendants submitted their written closing submissions.
18. By submission dated 24 November 2023 (received by the Commercial Court on 28 November 2023, pag. 1369 et seq.), the plaintiffs submitted their written closing submissions.
19. By order dated 28 November 2023, the Commercial Court sent the written closing submissions to both parties and announced that the written decision (in proceedings limited to the question of copyright protection) would be issued in due course (pag. 1395 ff.).
20. By submission dated 8 December 2023, the plaintiffs submitted a statement on the expenses claimed in the defendant's closing submission and submitted their own bill of costs and expenses, in case the court should assume that these expenses are eligible for reimbursement (pag. 1399 et seq.). costs relating to expenses for legal and translation services (pag. 1399 et seq.).

21. By order of 11 December 2023, the Commercial Court served the plaintiffs' submission of 8 December 2023 on the defendants for information (pag. 1403 et seq.) and, by order of 15 December 2023, set the defendants a (non-triggerable) deadline of 15 January 2024 to submit any comments on the plaintiffs' submission of 8 December 2023 (pag. 1409 et seq.).
22. By submission dated 15 January 2024, the defendants submitted their comments on the plaintiffs' statement on the defendants' bill of costs (pag. 1413 et seq.).

II Formalities

23. The court examines ex officio whether the procedural requirements are met (see Art. 60 of the Swiss Code of Civil Procedure [ZPO; SR 272]). If a procedural requirement is not met, the action is not admitted (Art. 59 para. 1 ZPO e contrario). Pursuant to Art. 59 para. 2 let. b ZPO, the procedural requirements include, in particular, the factual jurisdiction of the court seised and the certainty of the legal claims (BGE 137 III 617, E. 4.3; BGE 142 III 102, E. 5.3.1). The procedure for examining jurisdiction and the other procedural requirements is governed by the national civil procedural law of the forum - even in international relationships (BGE 141 III 294, E. 4 = Pra 106 [2017] No. 5; BGE 139 III 278, E. 4.2). Consequently, the Swiss Code of Civil Procedure applies.
24. Firstly, the **jurisdiction of** the court seised must be examined.
 - 24.1 In terms of **local jurisdiction**, the internationality of the facts of the case must first be examined. This must be affirmed for those plaintiffs who have their registered office abroad because the defendants have their registered office or domicile in Switzerland (see BGE 131 III 76, E. 2.3 f.). Since the **plaintiffs 1-17 are** undisputedly domiciled **abroad** (complaint of 27 October 2020, para. 10; complaint of 4 December 2020, para. 10; KA, para. 21), there is an international situation with regard to them. The **plaintiffs 18-25** are undisputedly domiciled in **Switzerland** (see complaint of 31 December 2020, para. 10; KA, para. 21). These plaintiffs also demand, among other things, a negative determination of the copyrightability of the objects under German copyright law. According to Art. 110 para. 1 of the Federal Act on Private International Law (IPRG; SR 291), the connecting factor in intellectual property law is the law invoked (*lex loci protectionis*; country of protection principle). The plaintiff assigns the intellectual property to the legal system whose protection he invokes (see BGer 4A_295/2014, judgment of 28 November 2014, E. 2). Thus, a foreign connection exists as soon as foreign intellectual property rights are claimed (see WALTER/DOMEJ, Internationales Zivilprozessrecht der Schweiz, 5th ed. 2012, p. 48). Consequently, an **international situation** also exists with regard to the plaintiffs 18-25, **insofar as** they assert a negative determination under German law.

With regard to the action for a negative declaratory judgement under Swiss law, which the plaintiffs 18-25 assert, however, a **national situation** exists.

- 24.2 In **international relations, jurisdiction is** determined in accordance with the IPRG, subject to international treaties (Art. 1 para. 2 IPRG). In the present case, the Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (Lugano Convention [LugÜ; SR 0.275.12]) applies to all 25 plaintiffs. This is a civil and commercial matter and there is no excluded area of law (Art. 1 Lugano Convention). The defendants have **entered an appearance** before the commercial court seised (KA, para. 21, pag. 280), which is why the territorial and personal scope of application is determined in accordance with Art. 24 Lugano Convention. This is the case if a party is domiciled in a contracting state (see BERGER, in: BSK LugÜ, 3rd ed., Art. 24 N 17). These requirements are easily met in the present case, as the action was brought before the Commercial Court of Bern and all parties have their (domicile) seat in a contracting state, whereby - in addition - the defendants are sued at their (domicile) seat. The Lugano Convention is also applicable in terms of time.
- 24.3 As there is no exclusive jurisdiction pursuant to Art. 22 Lugano Convention, the Commercial Court of Bern has international and local jurisdiction pursuant to Art. 24 Lugano Convention for Plaintiffs 1-17 for all claims asserted. The same applies to plaintiffs 18-25, insofar as an international situation exists (action for a negative declaratory judgement under German law). The matter is also not pending in another Lugano Convention state, especially since precautionary measures do not constitute "actions" within the meaning of these provisions (see DASSER in: SHK LugÜ, 3rd ed., Art. 28 N 3 with further references).
- 24.4 For Plaintiffs 18-25, the Commercial Court of Bern has local jurisdiction for the action for a negative declaratory judgement under Swiss law based on the Defendant's submission (see KA, para. 21, pag. 280) pursuant to Art. 18 ZPO. There is no other mandatory place of jurisdiction.
- 24.5 Furthermore, the Commercial Court of Bern also has **subject-matter** jurisdiction, as the existence of intellectual property rights is in dispute here. The law provides for a single place of jurisdiction at the Commercial Court (Art. 5 para. 1 let. a ZPO i.V.m. Art. 7 para. 1 of the Introductory Act to the Code of Civil Procedure, the Code of Criminal Procedure and the Code of Juvenile Criminal Procedure [EG ZSJ; BSG 271.1]).
25. In their response, the defendants dispute the plaintiffs' **interest in a declaratory judgement** in various respects (see only p. 281 et seq.). In the rejoinder, para. 32, pag. 878, the defendants only assume that the interest in a declaratory judgement only needs to be examined more closely if individual forms of the "Hang" are not protected in individual legal systems. This view cannot be followed, as the examination of an interest in a declaratory judgement as a prerequisite for proceedings cannot be made dependent on the outcome of the substantive legal assessment. If there is no interest in a declaratory judgement, the action will not be accepted (Art. 59 ZPO). Accordingly, this must now be dealt with in the necessary depth.

- 25.1 In **international relationships**, the domestic or foreign law (*lex causae*) applicable under conflict of laws rules determines whether an action for declaratory judgement is admissible or not. All legal systems relevant here (Switzerland, Germany, the Netherlands) recognise the institution of the (negative) declaratory action, which has not been denied by any party. However, the requirement and prerequisites for an **interest in a declaratory judgement** as an **institution of procedural law** are determined by the *lex fori* (WEBER, in: BSK ZPO, 3rd ed., Art. 88 N 29 with further references). The existence of an interest in a declaratory judgement (as a procedural requirement) is therefore of a procedural nature, which means that Swiss law and thus the Swiss Code of Civil Procedure is applicable as the *lex fori* (BGE 144 III 175, E. 4.3). The (non-Swiss) **plaintiffs 1-17** assert an action for a negative declaratory judgement under Swiss law and German law. The (Swiss) **plaintiffs 18-25 assert an action for a negative declaratory judgement under German law**. In addition, (only) **plaintiffs 1-9** additionally assert an action for a negative declaratory judgement under Dutch law. Pursuant to Art. 110 para. 1 IPRG, the *lex causae* is Swiss law for the action for a negative declaratory judgement under Swiss copyright law, German law for the action for a negative declaratory judgement under German copyright law and Dutch law for the action for a negative declaratory judgement under Dutch copyright law.
- 25.1.1 **Swiss copyright law** contains a special declaratory action in Art. 61 of the Copyright Act (URG; SR 231.1). However, this has no independent significance in relation to Art. 88 ZPO (see OBERHAMMER/WE-BER, in: KUKO ZPO, 3rd ed., Art. 88 N 21; EGLOFF/HEINZMANN, in: Das neue Urheberrecht, Kommentar zum URG, 4th ed., Art. 61 N 1 and 5).
- 25.1.2 Case law requires **four prerequisites** for an interest in a declaratory judgement under Art. 88 ZPO (BGer 4A_638/2009, judgement of 1 April 2010, E. 3.2 [E. 4 published]). There must be a) a cumulative difference of opinion between the parties regarding a right or legal relationship (considerable **uncertainty**), which b) requires immediate clarification in court (**timeliness**), c) the existence of the difference of opinion must be unreasonable for the plaintiff seeking a declaratory judgement (**unreasonableness**) and d) no other type of action must be available (**subsidiarity**). In essence, the same requirements for an interest in a declaratory judgement also apply to actions for a negative declaratory judgement in **international relations**, whereby the Federal Supreme Court stated that the requirements under a) and b) are regularly fulfilled, especially as the question of subsidiarity is hardly ever relevant. In international relations, subject to abuse of rights, the interest of the plaintiff seeking a declaratory judgement in securing a court of jurisdiction that is convenient to him in the event of imminent legal proceedings can be qualified as a sufficient interest in legal protection, whereby the question of the unreasonable continuation of uncertainty is of particular importance (see BGE 144 III 175, E. 5.2.1.).
- 25.1.3 **German** copyright law, which is the *lex causae* pursuant to Art. 110 para. 1 IPRG, **does not**, as far as can be seen, provide for a **separate special declaratory action** (see Sections 97 et seq. of the German Copyright and Related Rights Act [hereinafter: "UrhG"]; in contrast, the institution is anchored in Section 256 DE-ZPO). The parties have also not argued that such an action would exist under German law.

Thus, according to the *lex fori*, the general declaratory action **pursuant to Art. 88 ZPO** is applicable as a procedural action, which contains the prerequisite of an interest in a declaratory judgement (OBERHAMMER/WEBER, in: KUKO ZPO, 3rd ed., Art. 88 N. 2 f., N 9).

- 25.1.4 **Dutch copyright law**, which is the *lex causae* with regard to plaintiffs 1-9 pursuant to Art. 110 para. 1 IFRG, does not - as far as can be seen - provide a separate special declaratory action whose regulatory content would go beyond that of Art. 88 ZPO, especially since the parties have not argued that such a regulatory content would exist. Dutch civil law contains two provisions in connection with the declaratory action in Art. 3:302 f. of the Dutch *Civil Code* ("*3:302: Op vordering van een bij een rechtsverhouding onmiddellijk betrokken persoon spreekt de rechter omtrent die rechtsverhouding een verklaring van recht uit. [At the request of a person directly involved in a legal relationship, the court shall make a declaration of rights in relation to that legal relationship]*"; "*3:303: Zonder voldoende belang komt niemand een rechtsvordering toe*" [*A person has no right of action without sufficient interest*], see also KA, para. 228, pag. 347 and KAB 121). The aforementioned provisions, in particular the requirement of a "sufficient interest", do not contain any regulatory content that goes beyond Art. 88 ZPO (see also Hoge Raad der Nederlanden [Supreme Court of the Netherlands, hereinafter: "Hoge Raad"], judgement of 12 April 2019, E-CLI:NL:2019, p. 1). April 2019, E-CLI:NL:HR:2019:590, E. 4.1.2: "*In dit vereiste van voldoende belang ligt besloten dat het belang bij het instellen van een vordering evenredig moet zijn aan het belang van de wederpartij en dat van een behoorlijke rechtspleging. Dat voldoende belang bestaat bij een vordering mag in beginsel worden verondersteld. If that interest is established or if the right-hand side of the defence is not over that interest, the duty of care and the burden of proof shall be transferred in the beginning to the person who is in charge of the front. [The requirement of a sufficient interest means that the interest in bringing an action must be proportionate to the interest of the other party and the interest in due process. The existence of a sufficient interest in a claim can generally be presumed. If this interest is disputed or if the court demands clarification of this interest ex officio, the burden of proof generally lies with the plaintiff.]*") Thus, according to the *lex fori*, the general declaratory action **pursuant to Art. 88 ZPO** is also applicable here as a procedural action, which contains the prerequisite of a sufficient interest in a declaratory judgement (OBERHAMMER/WEBER, in: KUKO ZPO, 3rd ed., Art. 88 N 2 f., N 9).
- 25.2 Insofar as the (Swiss) plaintiffs 18-25 assert a negative declaratory action under German law, reference can be made to recital 25.1.3.
- 25.3 With regard to Claimants 18-25, there are no international facts for the action for a negative declaratory judgement under Swiss law (see para. 24.1). In this regard, reference can be made to para. 25.1.1 f.
- 25.4 **To summarise**, it must be examined for plaintiffs 1-17 under Swiss law and under German law whether the procedural requirement of an **interest in protection** under Art. 59 para. 2 let. a ZPO and Art. 88 ZPO is met. For claimants 1-9, the same question must also be answered with regard to Dutch law.

For the plaintiffs 18-25, it must be examined under Swiss law and German law whether there is an interest in legal protection (see para. 25.1.1 f. and 25.1.3), especially since - insofar as the plaintiffs 18-25 only invoke Swiss law in the internal relationship - Art. 61 CopA has no independent regulatory content in relation to Art. 88 ZPO (see also para. 25.1.1).

- 25.5 For **internal relationships**, the requirements of para. 25.1.2 can be examined. An uncertain legal situation can be assumed if the defendant claims to be the **holder of rights**. This is particularly the case when it comes to continuing obligations, such as the alleged infringement of intellectual property rights (MARKUS, in: BK ZPO, Art. 88 N 18 and 20). In this case, an unreasonable situation for the plaintiff must also be assumed, because if it continues its activities, it must expect the intervention of the alleged rights holder and is thus restricted in its freedom of movement (see also BGer 4A_516/2010, judgement of 2 December 2010, E. 5.3). Since in such cases the plaintiff cannot seek redress with an action other than an action for a negative declaratory judgement, the interest in a declaratory judgement must be affirmed if the difference of opinion is current.
- 25.6 However, a distinction must also be made in **intellectual property disputes as to which rights** the defendant is actually claiming and which act of infringement it is alleging. In intellectual property law, the **principle of territoriality** applies, so that the existence of rights and the rights flowing from them are determined according to the **law of the respective territory** where the right or infringement is alleged (see TROLLER, Immaterialgüterrecht, Vol. I, 3rd ed., p. 134 et seq.). The plaintiff, who is warned by the defendant for an act on Swiss territory concerning a copyright infringement under Swiss law, cannot and must not assume that a difference of opinion can be derived from this without further ado with regard to other territories or other legal systems. Nothing else follows from BGE 129 III 295, E. 2.4, which dealt with negative declaratory judgements in patent law. The defendant in that case had warned the plaintiff and demanded that the plaintiff sign a declaration to cease and desist from doing business with the allegedly infringing product in all countries in which the defendant could claim patent protection. Consequently, there was a difference of opinion between the parties regarding the patent rights in relation to these same countries.
- 26 The plaintiffs first argue that an interest in a declaratory judgement for all plaintiffs is already justified by the fact that **the defendants** publicly state **on the website** "www.panart.ch" that the "Hang" is protected by copyright and that they will take legal action against dealers who refuse to stop distributing copies. The defendants would also explicitly refer to the injunctions already obtained in Germany. They would state that they are convinced that the "Hang" is also protected in other countries and that they would initially focus their fight against counterfeiting on **Europe**. This "threat" - as described by the plaintiffs - already as such gives rise to an interest in a declaratory judgement for all suppliers of "Handpans" in the EU and in Switzerland, namely with regard to the prototypes, the "Hang" and all variants thereof (Reply, para. 15 et seq., pag. 544 et seq.).

- 26.1 These claims of the plaintiffs are contradictory in themselves. According to their own factual allegations, the alleged threat is only directed against providers who refuse to find a solution with the defendants. The defendant's presentation on its website "www.panart.ch" is therefore - even if one assumes that every plaintiff would have taken note of it, which the plaintiffs also do not substantiate - a **one-sided statement** by the defendant, which in itself **cannot** justify a **difference of opinion**. Due to the number of legal systems that exist in Europe and probably also due to the number of providers who (could) produce an imitation of the "Hang" in this area, it is also not to be seriously expected that the defendants would expend resources (in terms of time and money) to **actually** take action against **all providers under all legal systems**. Rather, it can be assumed that the defendants will take exemplary action against some - from their perception - known and/or successful providers in selected legal systems and at the same time hope for a deterrent effect in the "scene". For this reason, however, there is no current difference of opinion between the plaintiffs and the defendants. Finally, the statements are too unspecific to be considered to be an avowal of rights against the plaintiffs. The statements can be found on the website under the title "Copyright: Questions and Answers". In the introduction, the defendants accordingly also explain that they would like to use questions to explain what copyright protection means from their point of view. This indicates an explanatory reference and not a specific accusation or claim. After all, the defendants' main aim with their statement is probably to ensure that no more imitations of the "Hang" are distributed. Even if this were to be understood as a demand, this accusation would presuppose that a certain object is a copy of the "Hang". However, this would also mean that the injunctive relief sought would be lacking because it is different for each object and could not be described in the same abstract way for all providers. The statements cited by the plaintiffs on the defendant's website "www.panart.ch" (al leine) therefore **do not** justify a **general interest in a declaratory judgement** for all plaintiffs.
- 26.2 Furthermore, the cease-and-desist declarations attached to the individual warning letters do not allow the conclusion that the plaintiffs "had to expect legal action at least in those countries in which they distribute "Handpans" (see Reply, para. 31, pag. 551 f.). The territory or the legal system for which legal action was threatened can be seen in particular from the associated warning letters. For this reason alone, the cease-and-desist declarations as such cannot be considered separately from the warning letters. In addition, the exact distribution channels and structures of the plaintiffs are likely to be unknown to the defendants. Even if a warning letter may have raised the question for the plaintiffs as to whether copyright issues arise in all of their distribution countries, such circumstances cannot justify a difference of opinion **between the parties** (see OBERHAMMER/WEBER, in: KUKO ZPO, 3rd ed. Art. 88 N 13).

In this respect, the plaintiffs' interest in having an existing uncertainty clarified in court themselves with their action for a declaratory judgement (see BGE 144 III 175, E. 5.2.1.) cannot go any further than the fact that the defendants have effectively threatened legal action against them.

- 26.3 It must therefore be examined individually for each plaintiff whether the conditions of the offence set out in para. 25.1.1 et seq. can be affirmed in each case between them as individual plaintiffs and the defendants. Accordingly, it must be examined below whether the procedural requirement of an interest in legal protection pursuant to Art. 59 para. 2 let. a ZPO or Art. 88 ZPO is met in the individual case.

Interest in a declaratory judgement

27. Defendant 1 sent **Plaintiff 1** a warning letter dated 21 September 2020 (KB-I 83). In this letter, Defendant 1 [freely translated by the court] claims that it is the owner of "worldwide copyrights" to the Hang sculpture, which was designed by Defendants 2 and 3 in 2000. Immediately below, defendant 1 reproduced a photograph of the object "Hang first generation". In terms of design, the shape of the "Hang" is characterised by the features i) lens-shaped, consisting of two spherical segments, ii) central dome [also called "Ding" dome], iii) opposite resonance hole [also called "Gu"] and iv) sound fields arranged in a circle on the upper spherical segment. Defendant 1 further states that before the "Hang" was created, there was neither a sculpture nor an instrument that was even similar to the "Hang". There were no technical requirements for the above four features. Defendant 1 supplemented its arguments with citations of case law on the European concept of a work (in particular with reference to the "Brompton" case). At the same time, Defendant 1 referred to the judgements and decisions of the Regional Courts of Berlin, Düsseldorf and Hamburg enclosed with the letter and pointed out that all courts seised to date (namely the Regional Courts of Berlin, Düsseldorf and Hamburg) had assumed copyright protection for the "Hang". In view of the harmonised definition of a work by the Court of Justice of the European Union [hereinafter: "CJEU"], these findings were transferable to **all EU Member States, including the Netherlands**. Defendant 1 complains that Plaintiff 1 advertises on its website the worldwide shipping of various products that have the characteristic elements of the "Hang", which constitutes an infringement of copyright. Defendant 1 will not hesitate to enforce its copyrights **in the Netherlands as well, and** corresponding steps have already been discussed with Dutch lawyers. Should plaintiff 1 fundamentally question the copyright protection of the "Hang", defendant 1 would take "immediate legal action before a Dutch court". Against this background, Plaintiff 1 had to and was entitled to expect that Defendant 1 would take legal action against it in the Netherlands or that it would be prosecuted at its registered office, which is what happened a good six months later (see KAB 37 and Rechtbank Den Haag, judgment of 9 February 2022, ECLI:NL:RBDHA:2022:1033, E. 2.2.3, KB 193).

- 27.1 With this warning letter, there is a difference of opinion between Plaintiff 1 and Defendant 1, including Defendants 2 and 3, whose authorship is in question and who significantly influence the interests of Defendant 1 (see para. 55.2), regarding the copyrightability of the object "**First Generation of the Hang**" under the **European concept of work as** it is also applied in the national legal systems, namely in Germany and the Netherlands. It is true that the defendant 1 referred territorially only to the Netherlands and states that it is considering legal action before a Dutch court. Due to the explicit reference to the European definition of a work and the indication that this assessment applies to all EU Member States, Plaintiff 1 was also entitled to assume that it was threatened with legal action under German law. In the present case, the reference to the European concept of work cannot be understood as a mere exemplary reference to a comparable legal situation in another state (see para. 41). Thus, an interest in a declaratory judgement pursuant to Art. 88 ZPO must be affirmed for **Dutch and German copyright law**. The requirements according to para. 25.1.2 are fulfilled.
- 27.2 However, the interest in a declaratory judgement must be denied. The prototypes and the other variants of the object "First Generation of the Hang" are **not** mentioned in the warning letter. Nor can it be assumed from the mere mention of the four disputed features of the "Hang" (cf. KB-I 83, p. 2) that any further developments, i.e. all versions of the "Hang" that have these four features, should be covered by the warning letter, especially since such further developments are not mentioned either (in contrast, for example, to the warning letter as described in para. 29). It is also not apparent from the attached judgements or orders of the Regional Courts of Berlin, Düsseldorf and Hamburg that Defendant 1 had taken legal action with regard to the prototypes in dispute here. Furthermore, Defendant 1 did not assert any infringement of Swiss copyright. In particular, neither the assertion that Defendant 2 and Defendant 3 are holders of worldwide copyrights nor the assertion that Plaintiff 1 distributes its musical instruments worldwide indicates that Defendant 1 would have wanted to warn Plaintiff 1 under all copyrights in the world. The requirements for copyrightability and copyright infringement are territorially regulated and differ depending on the legal system, so that such assertions cannot seriously be understood to mean that the defendant had already checked all legal systems in detail on this issue or even knew whether in these countries the offer on a foreign website was sufficient as a copyright infringement. The e-mail in KB-I 89 also makes no reference to Swiss copyright law. In this e-mail, reference is again made to the European concept of a work and it is pointed out that the legal situation for copyright protection of works of applied art is not clarified in the other legal systems of the world. This rather speaks against fame under Swiss law.

- 27.3 As an interim conclusion, it should be noted that Plaintiff 1 has an interest in a declaratory judgement with regard to the copyrightability of the object "First Generation of the Hang" under German and Dutch law.
28. **Plaintiff 2** is the managing director of plaintiff 1 (Reply, para. 38, pag. 554). The warning letter of 21 September 2020 was also sent to his **personal** email address (KB-I 83). The plaintiffs assert that defendant 1 therefore also wanted to issue a warning to plaintiff 2 personally (Reply, para. 38, pag. 554).
- 28.1 With regard to Swiss law, the warning letter does not give rise to any difference of opinion from the outset. Reference can be made to recital 27.2.
- 28.2 For German and Dutch law, Art. 88 ZPO requires an examination of whether there is a difference of opinion between plaintiff 2 and the defendants. For this, the defendants would have to assert a personal copyright claim against plaintiff 2, for example by acting as an organ for plaintiff 1. The consideration of whether or at which place of jurisdiction and based on which legal system Defendant 1 would possibly take action against Plaintiff 2 personally is speculative in nature. As long as there are no concrete indications of such action, this cannot justify a sufficient interest. However, since the warning letter was (also) addressed directly to plaintiff 2 in the address (address and e-mail address), plaintiff 2 was entitled to understand it in such a way that defendant 1, including defendants 2 and 3, whose authorship is in question and who significantly influence the interests of defendant 1 (see para. 55.2), also accuse him of personal misconduct. Plaintiff 2 therefore also had to expect that proceedings could be brought against him personally. An interest in a declaratory judgement pursuant to Art. 88 ZPO must therefore be affirmed for the same reasons as for plaintiff 1 for **German and Dutch law** (see para. 27 f.). The requirements set out in para. 25.1.2 are met. However, the interest is again limited to the object "**First Generation of the Hang**". Reference can be made to the explanations in recital 27.2.
- 28.3 As an **interim conclusion**, it should be noted that Plaintiff 2 has an interest in a declaratory judgement with regard to the copyrightability of the object "First Generation of the Hang" under German and Dutch law.
29. Defendant 1 sent **Plaintiff 3** a warning letter dated 15 May 2020 (KB-I 81). In this letter, Defendant 1 asserts that it is the owner of the "worldwide copyright utilisation rights" to the sound sculptures known as "Hang", which have been designed by Defendants 2 and 3 since the 1990s. In the **meantime, several types and different designs** of these sculptures existed, which are still produced by hand, signed and distributed worldwide by Defendant 1. Immediately below, Defendant 1 reproduced a photograph of the object "**Hang first generation**" and stated that a "Hang" sound sculpture had been presented to the public "for the first time at the Exempla trade fair in Munich in 2001", which showed the "**original form**" of the "Hang". Defendant 1 then stated that Defendants 2 and 3 had continuously developed the shape of the "Hang", whereby the so-called **Integral Hang** was created in 2008.

Defendant 1 asserts that both the "**original form**" and the further developments are "works of applied art within the meaning of Section 2 (1) no. 4 UrhG protected by copyright", which the Berlin Regional Court ("LG") recently confirmed (enclosing the corresponding decision of the LG Berlin). The overall impression of all "Hang" sound sculptures was characterised by the design features i) lens-shaped, consisting of two spherical segments, ii) central dome, iii) opposite resonance hole and iv) circular sound fields arranged on the upper spherical segment. Defendant 1 argues that plaintiff 3's offer infringes §§ 15 UrhG et seq. Furthermore, a cease-and-desist declaration was enclosed with the warning letter of 15 May 2020, which Plaintiff 3 was requested to sign.

- 29.1 With this warning letter, there is a difference of opinion between Plaintiff 3 and Defendant 1, including Defendants 2 and 3, whose authorship is in question and who significantly influence the interests of Defendant 1 (see para. 55.2), regarding the copyrightability of the object "**First Generation of the Hang**" and its further developments, namely also the **Integral Hang**. It can therefore be assumed that there is a difference of opinion regarding the **5 versions** of the "Hang" mentioned in legal claim no. 1 ii). Defendant 1 expressly (and only) refers to Germany and **German copyright law**. The subsequent proceedings initiated against Plaintiff 3 and Plaintiff 4 before the Hamburg Regional Court were (only) initiated in Germany and (only) based on German copyright law (cf. only CAB 2). Thus, an interest in a declaratory judgement for German copyright law must be affirmed in principle. The requirements according to para. 25.1.2 are fulfilled. Beyond that, it must be denied. In particular, the prototypes are not mentioned in the letter of amortisation and cannot be understood as "further developed embodiments" compared to the "original form", i.e. the first generation of the "Hang". In particular, it cannot be inferred from the enclosures that legal action under Dutch and/or Swiss law has been threatened, which is why there can be no difference of opinion in this regard.
- 29.2 As an **interim conclusion, it should** be noted that Plaintiff 3 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under German law.
30. With regard to **Plaintiff 4, there is no warning letter** from the defendant addressed to him personally. However, it is clear from KAB 2, p. 35 f. and KB 100, p. 7 f. that the applicant there [i.e. the present defendant 1] subsequently also directed its applications "in the course of the [...] preliminary injunction proceedings against defendant 2 [i.e. the present Plaintiff 4]". It has thus at least expressed that it is also prepared to take action against plaintiff 4 personally or as a natural person. With regard to the interest in a declaratory judgement, reference can therefore be made to the statements on plaintiff 3 in para. 29 f. above. The reason for such an extension is irrelevant in the present case. Accordingly, it can be left open whether Plaintiff 4 should be brought to justice as a private individual or sole proprietor or in his capacity as a representative of Plaintiff 3.

- 30.1 As an **interim conclusion**, it should be noted that Plaintiff 4 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under German law.
31. Defendant 1 sent **Plaintiff 5** a warning letter dated 8 September 2020 (KB-I 82). In this letter, Defendant 1 asserts that it is the owner of the "worldwide copyright utilisation rights" to the sound sculpture designed by Defendants 2 and 3 in 2000, which they have **since further developed in various forms** and largely produced, signed and distributed worldwide by hand. Immediately below this, Defendant 1 reproduced a photograph of the object "**Hang first generation**" and stated that the "Hang" had been presented to the public for the first time at the Exempla trade fair in Munich in 2001, making it the "**original form**" of the "Hang". Defendant 1 then asserted that the "Hang" sculpture was "protected by copyright as a work of applied art within the meaning of § 2 para. 1 no. 4 UrhG". The form of the "Hang" found after intensive studies is characterised by the features i) lenticular, consisting of two spherical segments, ii) central dome, iii) opposite resonance hole and iv) circular tone fields arranged on the upper spherical segment. Defendant 1 cited the recent case law of the European Court of Justice ("Brompton" case), but did not comment in more detail on the European concept of a work or whether or to what extent this assessment could also be transferred to other EU member states (unlike in the case of Plaintiff 1 and Plaintiff 2, see para. 27.1). Copyright protection had also been confirmed by all courts that had been called upon in this regard to date, namely the Regional Courts of Berlin, Düsseldorf and Hamburg. Accordingly, Defendant 1 referred to the enclosures. Defendant 1 states that Plaintiff 5's offer would violate §§ 15 UrhG et seq. and that Defendant 1 would also enforce its rights in court in the present case if necessary. Furthermore, the warning letter of 8 September 2020 was accompanied by a declaration to cease and desist, which Plaintiff 5 (as well as its shareholders personally, i.e. Plaintiffs 6-9, cf. para. 32) were requested to sign.
- 31.1 With this warning letter, there is a difference of opinion between Plaintiff 5 and Defendant 1, including Defendants 2 and 3, whose authorship is in question and who significantly influence the interests of Defendant 1 (see para. 55.2), regarding the copyrightability of the object "**First Generation of the Hang and its further developments** under **German copyright law**. Due to the reference to further developed embodiments compared to the "original form" (first generation of the "Hang"), a difference of opinion can be assumed with regard to the **5 versions** of the "Hang" mentioned in RB No. 1 ii). Plaintiff 5 must expect that the defendant would also initiate proceedings against it in Germany based on German law, especially since it is also domiciled there.

This is also confirmed by the interim injunction proceedings actually initiated against the plaintiff 5 before the Düsseldorf Regional Court (cf. only KAB 7). Thus, an interest in a declaratory judgement pursuant to Art. 88 ZPO for German copyright law must be affirmed. The requirements according to para. 25.1.2 are fulfilled.

- 31.2 However, this must be denied. In particular, the prototypes are not mentioned in the letter of amortisation and could not be understood as "further developed designs" compared to the first generation of the "Hang". Furthermore, the defendants do not claim any infringement of Dutch or Swiss copyright. The mere reference to the case law of the ECJ cannot change this. In particular, neither the assertion that Defendant 2 and Defendant 3 are holders of worldwide copyrights nor the assertion that Plaintiff 5 also sends its musical instruments to customers in Switzerland (Reply, para. 49, pag. 557) shows that the Defendants wanted to warn Plaintiff 5 about all copyrights in the world. Reference can also be made to para. 27.2.
- 31.3 As an **interim conclusion, it should** be noted that Plaintiff 5 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation Hang", "Low Hang", "Second Generation Hang", "Integral Hang" and "Free Integral Hang" under German law.
32. **Plaintiffs 6-9** are the shareholders and managing directors of Plaintiff 5 (Reply, para. 51, pag. 557 f.). The warning letter that Plaintiff 5 received contains a declaration to cease and desist in the appendix, by means of which the managing directors were also to undertake personally (KB-I 82).
- 32.1 With regard to Swiss law, no difference of opinion arises from the warning letter. The same applies to Dutch law. Reference can be made to recital 31.2.
- 32.2 In contrast, a difference of opinion under German law pursuant to Art. 88 ZPO between plaintiffs 6-9 and defendant 1, including defendants 2 and 3, whose authorship is in question and which significantly influence the interests of defendant 1 (see para. 55.2), must be affirmed. It is true that the consideration of whether or at which place of jurisdiction and based on which legal system Defendant 1 would possibly take personal action against Plaintiffs 6-9 for their actions in their function as shareholders or managing directors of Plaintiff 5 is speculative in nature. As long as there are no concrete indications of such an action, this cannot justify a sufficient interest. However, an interest arises from the fact that the plaintiffs 6-9 would have committed themselves personally by signing the cease-and-desist declaration and could therefore also understand the warning to be addressed to them personally. Based on this, it does not appear impossible that the plaintiffs 6-9 would be personally prosecuted. An interest in a declaratory judgement pursuant to Art. 88 ZPO must be affirmed for **German law**. Please refer to the explanations in para. 31.1 f. for the reasons and scope.
- 32.3 As an **interim conclusion**, it should be noted that Plaintiffs 6-9 have an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang",

"Low Hang", "Second Generation of Hang", "Integral Hang" and "Free Integral Hang" under German law.

33. Defendant 1 sent **plaintiff 10** a warning letter dated 21 February 2020 (KB-II 83). In this letter, Defendant 1 asserted that it was the owner of the "worldwide copyright utilisation rights" to the sound sculpture "Hang", which had been designed by Defendants 2 and 3 in 1999. Immediately below it, it reproduced a photograph of the object "**Prototype 1**". Defendant 1 states in the warning letter that the form of this sound sculpture has been continuously **developed further**, whereby in addition to the "**original form**", all further developments would also be protected by copyright **in Germany** in accordance with § 2 para. 1 no. 4 UrhG (with reference to the case law of the ECJ on originality). Various variants of the original work are also protected under design law in Switzerland and the EU. Further down in the text, Defendant 1 then describes by means of a pictorial comparison that the objects distributed by Plaintiff 10 have a "practically identical overall impression" to the design of Defendant 1, which constitutes an infringement of both German design law and copyright law. Defendant 1 also issued a warning to Plaintiff 10 for misrepresentation of origin within the meaning of the DE-UWG. Plaintiff 10 was requested to sign a declaration to cease and desist; in the event of failure to do so, the existing claims would be enforced in court.
- 33.1 With this warning letter, there is a difference of opinion between Plaintiff 10 and Defendant 1, including Defendants 2 and 3, whose authorship is in question and who significantly influence the interests of Defendant 1 (see para. 55.2), a difference of opinion regarding the copyrightability of the object "**Prototype 1**" as well as in relation to further "**further developments**" (although not specified and/or depicted) under **German copyright law**, whereby all objects sued for here are covered in accordance with legal claim no. 1 i) and ii). Plaintiff 10 must expect that legal action based on German copyright law would be brought against it, especially since it is also domiciled in Germany. An interest in a declaratory judgement pursuant to Art. 88 ZPO for **German copyright law must** therefore be affirmed. The requirements according to para. 25.1.2 are fulfilled.
- 33.2 Beyond this, however, it must be denied. In particular, Defendant 1 did not claim any infringement of Swiss copyright. Nor does it follow from the assertion that Defendant 2 and Defendant 3 are holders of worldwide copyrights that the Defendants wanted to warn the Plaintiff under all copyrights in the world. Even a simple reference to the case law of the CJEU does not change this.
- 33.3 The fact that Defendant 1 contacted Claimant 10 (or its legal representative) again in a letter dated 6 November 2020 (KB-II 84) does not lead to a different conclusion. In this letter, Defendant 1 asserts that it has now obtained "some court judgements" regarding the scope of copyright protection for works by Defendant 1. The Regional Courts of Berlin, Düsseldorf and Hamburg had confirmed copyright protection on the "Hang" (enclosing the decisions or judgements of the aforementioned Regional Courts).

Defendant 1 requested Plaintiff 10 to issue a cease and desist declaration relating to the characteristic and copyright-establishing features of the "Hang", namely: i) two spherical elements in the form of a lens, ii) central dome on the upper side, iii) hole in the centre of the underside, iv) indentations arranged in a circle around the dome. Without an agreement, Defendant 1 will enforce its claims for injunctive relief and damages in court. Therefore, even if Defendant 1 (subsequently) specified to Plaintiff 10 that it considers the four features mentioned to be copyrightable, this does not change the fact that Plaintiff 10 had to expect, based on the warning letter of 21 February 2020, that Defendant 1 could (also) assert any claims based on Prototype 1 and its "further developments".

- 33.4 As an **interim conclusion, it should** be noted that the Plaintiff 10 has an interest in a declaratory judgement with regard to the copyrightability of the objects "Prototype 1", "Prototype 2", "Prototype 3", "Prototype 4", "Prototype 5", "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under German law.
34. **Plaintiff 11** is the managing director of Plaintiff 10 (see Reply, para. 54 f., pag. 559). The plaintiffs argue that in this capacity, plaintiff 11 would have passive legitimacy in any infringement proceedings (Reply, para. 55, pag. 559). In principle, it seems conceivable that plaintiff 11 could be sued as a legal representative in the context of directors' and officers' liability. However, the consideration of whether or at which place of jurisdiction and based on which legal system Defendant 1 would possibly take action against Plaintiff 11 personally is speculative in nature. As long as there are no concrete indications of such an action, this cannot justify a sufficient interest. It is not apparent that or to what extent Plaintiff 11 would have been personally approached and/or personally addressed. The merely legally theoretical possibility of being (also) personally prosecuted **cannot justify an interest in a declaratory judgement**. In the relationship between Defendant 1 and Plaintiff 11, there is therefore no interest in a declaratory judgement pursuant to Art. 88 ZPO. Insofar as plaintiff 11 is concerned, the **action** must be **dismissed**.
- 34.1 As an **interim conclusion**, it should be noted that the Plaintiff 11 has no interest in a declaratory judgement regarding the copyrightability of the disputed objects under the legal systems in question.
35. Defendant 1 sent **Plaintiff 12** a warning letter dated 11 February 2020 (KB-II 85). The content of the letter is largely identical to the letter to **Plaintiff 10**. Accordingly, reference can be made to these statements (para. 33 et seq.).
- 35.1 As an **interim conclusion, it should** be noted that the Plaintiff 12 has an interest in a declaratory judgement with regard to the copyrightability of the objects "Prototype 1", "Prototype 2", "Prototype 3", "Prototype 4", "Prototype 5", "First Generation of the Hang", "Low Hang",

"Second generation of the Hang", "Integral Hang" and "Free integral Hang" under German law.

36. Plaintiff 12 is a GmbH & Co. KG, sometimes a limited partnership under German law. **Plaintiff 13** is the **general partner** of Plaintiff 12 (K-II, para. 18, pag. 48 and para. 385, pag. 286). There are **no warning letters** concerning Plaintiff 13. The consideration of whether or at which place of jurisdiction and based on which legal system Defendant 1 would possibly take action against Plaintiff 13 personally is speculative in nature. As long as there are no concrete indications of such an action, this cannot justify a sufficient interest. The letter or the (penalised) declaration to cease and desist from KB-II 85 was directed exclusively at plaintiff 12 as the debtor. Even if it appeared legally possible in theory, there are no indications that the plaintiff 13 would be held liable as the general partner. In the relationship between defendant 1 and plaintiff 13, there is therefore no interest in a declaratory judgement pursuant to Art. 88 ZPO. Insofar as Plaintiff 13 is concerned, the **action** must be **dismissed**.
- 36.1 As an **interim conclusion**, it should be noted that the Plaintiff 13 has no interest in a declaratory judgement with regard to the copyrightability of the disputed objects under the legal systems in question.
37. There are also **no warning letters** regarding **Plaintiff 14**. Accordingly, the plaintiffs also state in K-II, para. 16, pag. 47, that Plaintiff 14 has "not yet been directly approached" by the defendants or "has not itself been warned" (cf. K-II, para. 386, pag. 286). However, since it belongs to the **corporate group** of plaintiff 12, there is no doubt that the defendants would also take it to court if they decide to take action against plaintiff 12.
- 37.1 The consideration of whether Defendant 1 would take action against Plaintiff 14 at all or at which place of jurisdiction and based on which legal system is speculative in nature. As long as there are no concrete indications of action against Plaintiff 14, this cannot constitute sufficient interest. In the relationship between Defendant 1 and Plaintiff 14, there is therefore no interest in a declaratory judgement pursuant to Art. 88 ZPO. Insofar as Plaintiff 14 is concerned, the **action** must be **dismissed**.
- 37.2 As an **interim conclusion**, it should be noted that the Plaintiff 14 has no interest in a declaratory judgement with regard to the copyrightability of the disputed objects under the legal systems in question.
38. As the defendant correctly states (KA, para. 58 f., pag. 286), there are also **no warning letters** with regard to the **Plaintiff 15** personally. Since the plaintiff is the managing director of the Plaintiffs 12 and 14, he must - according to the plaintiffs - "assume that the defendants will also take him to court for alleged copyright infringements as a potentially passively legitimised party" (Reply, para. 64, pag. 562). The comparisons drawn by the plaintiffs miss the point. In contrast to the case of Plaintiff 15, in the case of Plaintiff 5 and Plaintiffs 6-9, defendant 1 expressly demanded that the declaration of discontinuance be signed personally by the shareholders of Plaintiff 5, i.e. Plaintiffs 6-9 (see Reply, para. 64, 51 in conjunction with para. 19, pag. 562, 557 and 546).

Even if this were to be attributed to liability rules specific to the company form, Plaintiff 15 cannot derive anything from this in his favour. Furthermore, the case of Plaintiff 15 differs from that of Plaintiff 2: the warning was sent to the latter's personal e-mail address (see para. 28.2). Nor can any conclusions be drawn from the case of Plaintiff 4 or Plaintiff 3 to the situation of Plaintiff 15 (Reply, para. 19 in conjunction with 41, pag. 546 and 555). In that case, Plaintiff 4 was recognised personally or as a natural person, which is not the case for Plaintiff 15 (see para. 30). Plaintiff 15 cannot derive anything in his favour from this.

- 38.1 Even if it were therefore conceivable in principle that Plaintiff 15 could be sued as managing director of plaintiffs 12 and 14 (cf. Reply, para. 64, pag. 562), this in itself cannot justify an interest in a declaratory judgement. The consideration of whether or at which place of jurisdiction and based on which legal system Defendant 1 would possibly take action against Plaintiff 15 personally is speculative in nature. As long as there are no concrete indications of such an action, this cannot justify a sufficient interest. It is not apparent that or to what extent Plaintiff 15 would have been personally approached. The merely legally theoretical possibility of being (also) personally prosecuted **does not justify an interest in a declaratory judgement**. In the relationship between Defendant 1 and Plaintiff 15, there is therefore no interest in a declaratory judgement pursuant to Art. 88 WO. Insofar as Plaintiff 15 is concerned, the **action** must be **dismissed**.
- 38.2 As an **interim conclusion**, it should be noted that the Plaintiff 15 has no interest in a declaratory judgement with regard to the copyrightability of the disputed objects under the legal systems in question.
39. With regard to **plaintiff 16**, there are also **no warning letters** (see also K-II, para. 388, pag. 287). Plaintiff 16 bases its alleged interest in declaratory judgement on the fact that one of its **customers**, Plaintiff 12, **was warned**. Such warnings are likely to cause the warned company to cease purchasing "Handpans" from Plaintiff 16, which ultimately restricts Plaintiff 16's economic freedom of movement (Reply, para. 66, pag. 563). This view cannot be accepted. The literature cited by the plaintiffs is not relevant in the present case (namely with regard to the comparison between the negative declaratory judgement action and the nullity action in patent law) or is too far-reaching. In particular it would be tantamount to a popular action if a plaintiff were to be granted an interest in a declaratory judgement based on the mere fact that the right holder or licensee has asserted the existence of a copyright infringement vis-à-vis third parties. Accordingly, the consideration of whether Defendant 1 would take action against Plaintiff 16 at all or at which place of jurisdiction and based on which legal system is of a speculative nature. As long as there are no concrete indications of action against plaintiff 16, this cannot constitute a sufficient interest.

In the relationship between defendant 1 and plaintiff 16, there is therefore no interest in a declaratory judgement pursuant to Art. 88 ZPO. Insofar as Plaintiff 16 is concerned, the **action** must be **dismissed**.

- 39.1 As an **interim conclusion**, it should be noted that the Plaintiff 16 has no interest in a declaratory judgement with regard to the copyrightability of the disputed objects under the legal systems in question.
40. **Plaintiff 17** is the managing director of Plaintiff 16. Apart from the fact that plaintiff 16 already has no interest in a declaratory judgement, it cannot be assumed that its managing director has an interest in a declaratory judgement. Reference can be made to the comments on Plaintiff 11 (para. 34). In the relationship between Defendant 1 and Plaintiff 17, there is therefore no interest in a declaratory judgement pursuant to Art. 88 ZPO. As far as Plaintiff 17 is concerned, the **action** is **not admitted**.
- 40.1 As an **interim conclusion**, it should be noted that the Plaintiff 17 has no interest in a declaratory judgement with regard to the copyrightability of the disputed objects under the legal systems in question.
41. Defendant 1 sent **Plaintiff 18** a warning letter dated 15 December 2020 (KB-III 83). The letter was addressed to the Raven-Spirit Weltmusikladen, for which Plaintiff 18 has individual signing authority (KB-III 11). In this letter, Defendant 1 asserts that it is the owner of the "worldwide copyright utilisation rights" to the "Hang" sound sculpture, which was designed by Defendants 2 and 3 in 2000. This sculpture has since been **further developed** in **various forms** and is still produced by hand, signed and distributed worldwide by Defendant 1. Immediately below, Defendant 1 reproduced a photograph of the object "**Hang first generation**" and stated that this "**original form** of the Hang sound sculpture" was "first presented at the Exempla trade fair in Munich in 2001" according to the illustration. Defendant 1 further states that the "Hang" sound sculpture is "protected by copyright as an individual work of applied art within the meaning of Art. 2 para. 2 let. f CopA". In terms of design, the shape of the "Hang" is characterised by the features i) lenticular, consisting of two spherical segments, ii) central dome, iii) opposite resonance hole and iv) sound fields arranged in a circle on the upper spherical segment. Defendant 1 supplements its submissions with various citations from (mainly Federal Supreme Court) case law and literature concerning the **Swiss legal situation**. At the same time, Defendant 1 attached the judgment of the Regional Court of Hamburg of 20 August 2020 "as an example" and pointed out that all courts seized to date, namely the Regional Courts of Berlin, Düsseldorf and Hamburg, had assumed copyright protection of the "Hang", whereby the requirements for copyright protection in the EU **are comparable** to those in Switzerland. Furthermore, the warning letter of 15 December 2020 was accompanied by a declaration to cease and desist, which the Plaintiff 18 (and the Plaintiff 19) were requested to sign.

- 41.1 With this warning letter, there is a difference of opinion between Plaintiff 18 and Defendant 1, including Defendants 2 and 3, whose authorship is in question and who significantly influence the interests of Defendant 1 (see para. 55.2), regarding the copyrightability of the object "**Hang first generation**" and its further developments under **Swiss copyright law**. Due to the reference to further developed embodiments compared to the "original form" (first generation of the "Hang"), a difference of opinion can be assumed with regard to the **5 versions** of the "Hang" mentioned in legal claim no. 1 ii). Plaintiff 18 had to expect that legal action would be taken against him in Switzerland based on Swiss copyright law, especially since he is domiciled in Switzerland. An interest in a declaratory judgement under Art. 88 ZPO for **Swiss copyright law must** therefore be affirmed. The requirements according to para. 25.1.1 f. are fulfilled.
- 41.2 Beyond this, however, this must be denied. In particular, the prototypes are not mentioned in the amortisation letter and cannot be understood as "further developed versions" compared to the first generation of the "Hang". In particular, Defendant 1 did not claim any infringement of German copyright. In particular, this does not result from the assertion that Defendant 2 and Defendant 3 are holders of "worldwide copyright utilisation rights", nor from the plaintiff's representation that distribution "in particular also in Germany" should be prevented (Reply, para. 70, pag. 564). Nor can the (expressly "exemplary") enclosure of the judgement of the Hamburg Regional Court justify a warning under German law: in particular, it was merely pointed out that the protection requirements in the EU are (merely) **comparable** to those in Switzerland, which is to be understood solely as meaning that the content of the enclosed judgement of the Hamburg Regional Court is also transferable to Switzerland. It therefore does not appear to be correct that the defendants should have asserted rights under Section 31 of the Copyright Act (Kill, para. 766, pag. 702).
- 41.3 As an **interim conclusion**, it should be noted that the Plaintiff 18 has an interest in a declaratory judgement regarding the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
42. There is no warning letter addressed to the **Plaintiff 19**. However, the warning letter of 15 December 2020 contained in KB-III 83 was addressed to the Raven-Spirit Weltmusikladen. The plaintiff has sole signing authority for this sole proprietorship (KB-III 11). The cease-and-desist declaration enclosed with the warning letter was also explicitly addressed to Plaintiff 19 in addition to Plaintiff 18. For Plaintiff 19, reference can therefore be made to the above statements on Plaintiff 18 (cf. para. 41).
- 42.1 As an **interim conclusion**, it should be noted that the Plaintiff 19 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang",

"Low Hang", "Second Generation of Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.

43. The warning letter of 15 December 2020 (KB-II 184) addressed to **Plaintiff 20** is largely identical (especially in the essential parts) to the letter addressed to plaintiff 18. For plaintiff 20, reference can be made to the above statements on Plaintiff 18 (see para. 41).
- 43.1 As an **interim conclusion**, it should be noted that the Plaintiff 20 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
44. The warning letter addressed to **Plaintiff 21** dated 15 December 2020 (KB-II 185) is largely identical (especially in the essential parts) to the letter addressed to Plaintiff 18. For Plaintiff 21, reference can be made to the above statements on Plaintiff 18 (see para. 41).
- 44.1 As an **interim conclusion**, it should be noted that the Plaintiff 21 has an interest in a declaratory judgement regarding the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
45. The warning letter of 15 December 2020 (KB-III 86) addressed personally to **Plaintiff 23** is largely (especially in the essential parts) identical to that addressed to Plaintiff 18. For Plaintiff 23, reference can be made to the above statements on Plaintiff 18 (see para. 41).
- 45.1 As an **interim conclusion**, it should be noted that the Plaintiff 21 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
46. **Plaintiff 22** was **not warned**. However, it is questionable whether or not the warning letter of 15 December 2020 (KB-III 86) addressed to Plaintiff 23 (also refers to Plaintiff 23's GmbH (which was only entered in the daily register on 10 December 2020, see KB-III 12) - Plaintiff 22 (see Reply, para. 72, pag. 565 f.; KA, para. 63, pag. 287). This is to be affirmed (solely) due to the special nature of the immediate temporal proximity between the new registration of the company and the warning. The warning referred to the instruments sold on the website of the plaintiff 23 or the plaintiff 22, which means that from the defendant's point of view it was probably second-ranking who exactly operated this website. The defendants only created uncertainty for both plaintiff 22 and plaintiff 23 due to the warning issued shortly after the new registration. For plaintiff 22, reference can therefore be made to the above comments on plaintiff 23 (see para. 45).
- 46.1 As an **interim conclusion, it should** be noted that the Plaintiff 22 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang",

"Low Hang", "Second Generation of Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.

- 47 The warning letter of 15 December 2020 (KB-III 87) addressed to **Plaintiff 24** (or his sole proprietorship, see KB-III 13) is largely identical (especially in the essential parts) to that addressed to Plaintiff 18. For Plaintiff 24, reference can be made to the above comments on Plaintiff 18 (see para. 41).
- 47.1 As an **interim conclusion**, it should be noted that the Plaintiff 24 has an interest in a declaratory judgement regarding the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
- 48 The warning letter of 15 December 2020 (KB-III 88) addressed to **Plaintiff 25** is largely (especially in the essential parts) identical to that addressed to plaintiff 18. For Plaintiff 25, reference can be made to the above statements on Plaintiff 18 (cf. para. 41).
- 48.1 As an **interim conclusion**, it should be noted that the Plaintiff 25 has an interest in a declaratory judgement with regard to the copyrightability of the objects "First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang" under Swiss law.
- 49 A summarised **overview** of the extent to which the action of the individual plaintiffs is upheld follows in para. 52 below.

Certainty of the legal claims

- 49.1 A legal claim must, according to doctrine and case law, be formulated in such a way that it can be raised unchanged in the judgement if the claim is upheld (BGE 137 III 617, E. 4.3; BGE 142 III 102, E. 5.3.1). The formulation of a correct legal claim is a prerequisite for the proceedings. If there is no such claim or if it is vague, **contradictory** or unclear, the claim must be rejected (see para. 23).
- 49.2 According to the above, only Plaintiffs 10 and 12 are able to demonstrate any interest in a declaratory judgement at all with regard to **prototypes 1-3**. In their legal claim no. 1, the plaintiffs demand a (negative) declaration that, according to three different legal systems, there is no copyright protection for brass instruments **with four specific (cumulatively formulated) design features** (lens shape, central dome, opposite resonance hole and circularly arranged tone fields). They refer to a sketch on which **these four design features** are depicted or recognisable (see para. 2 above). This description of the features, including the sketch, originally came from the defendants themselves (see only KB-I 89). In their legal claim no. 1, the plaintiffs then refer to 10 versions of the "Hang" depicted in photographs, which, according to the legal claim, represent "actual designs" of the "brass sound instruments" described above, i.e. with the four design features.

It is noticeable that the **prototypes 1, 2 and 3** depicted in the legal request (see K I, legal request no. 1 i) letters a) - c), **each individually do not have this (cumulatively formulated) combination of features**, which was confirmed during the court's inspection at the main hearing: **Prototype 1 does not contain a dome**, but a "tonefield at the top centre", which appears as a "slight indentation" (see minutes HV, p. 49 f., pag. 1272 f.). **Prototype 2** contains neither a dome nor an **opposite resonance hole (cf. protocol HV, p. 51 f., pag. 1274 f.)**. **Prototype 3** then contains **no dome**, but a screwed-on "knob" protruding from the object (cf. protocol HV, p. 53 f., pag. 1276 f.), whereby the opening on the side of the knob appears as a second resonance hole. Between the formulated legal request incl. between, on the one hand, the formulated legal claim including the associated sketch, which clearly contain these four (cumulative) features individually, and, on the other hand, the "actual embodiments" shown below in the form of prototypes 1-3, which do not (yet) contain these four (cumulative) features, an **irresolvable contradiction** arises: If the court approves the (negative declaratory) action with regard to these three prototypes and denies copyright protection to these objects, this would be contrary to the clearly formulated conditions of the legal claim in para. 1, according to which these four cumulative design elements could justify copyright protection or must be present. If, on the other hand, it rejects the (negative declaratory) action with regard to these three prototypes, it would possibly grant copyright protection to these objects, even though they do not completely fulfil the cumulatively formulated design features of the legal claim. Therefore, the legal claims under **no. 1 i) letters a) - c)** are **not recognised** due to their contradictory nature.

50. Furthermore, taking into account the above statements regarding the interest in a declaratory judgement, the action must be upheld.
51. If rights and obligations are to be assessed that are based on similar facts or legal grounds, several persons may sue or be sued together (Art. 71 para. 1 ZPO). The plaintiff may combine several claims against the same party in one action, provided that the same court has subject-matter jurisdiction and the same type of proceedings is applicable (Art. 90 ZPO). These requirements are met in the present case.
52. **To summarise:**
 1. With regard to **plaintiffs 11, 13, 14, 15, 16 and 17**, the action must **be dismissed**.
 2. With regard to **prototypes 1, 2 and 3**, the action must be **dismissed**.
 3. With regard to the question of **Swiss copyright law**, the Court must intervene with respect to **Plaintiffs 18-25**.
 4. With regard to the question of **German copyright law**, the Court must intervene with respect to **Plaintiffs 1-10 and 12**.

5. With regard to the question of **Dutch copyright law**, the Court must intervene with respect to **Plaintiffs 1 and 2**.
6. With regard to **prototypes 4 and 5**, the Court should be authorised with regard to **plaintiffs 10 and 12**.
7. With regard to the **"first generation Hang"**, **plaintiffs 1-10, 12 and 18-25** must be admitted.
8. With regard to the **further developments**, i.e. "Low Hang", "Second Generation of the Hang", "Integral Hang", "Free Integral Hang", the following should be entered in relation to **Claimants 3-10, 12 and 18-25**.

III. Late submissions

53. During the proceedings, several late submissions were received by the court (see above, para. 8 et seq.).
 - 53.1 In the main hearing, new facts and evidence shall only be taken into account if they are presented without delay and a) only arose after the exchange of documents was concluded or after the last instruction hearing (genuine novenas) or b) were already available before the exchange of documents was concluded or before the last instruction hearing but could not be presented beforehand despite reasonable care (non-genuine nova) (Art. 229 para. 1 ZPO).
 - 53.2 The admissibility of the late submissions, insofar as they are considered relevant to the decision or not submitted in good time, will be addressed in the respective passages below. However, it can already be stated at this point - in anticipatory assessment of the evidence - that the following submissions by the plaintiffs and the new allegations contained therein are deemed irrelevant for the present proceedings and will therefore be disregarded:
 1. Amendment of 22 May 2023, with which a warning was submitted by Defendant 1 to a third party not involved in the present proceedings (see KB 217). What the defendants assert against a third party not involved in the present proceedings is not relevant to the decision.
 2. Amendment of 25 July 2023, with which the decision of the Tribunal Judiciaire de Strasbourg of 22 June 2023 was submitted (see KB 219). This concerned French copyright law and must therefore be regarded as irrelevant for the present proceedings (the defendants are therefore correct in their statement of 22 August 2023, para. 2, pag. 1150).

IV On the merits

Material legitimacy of the parties

54. The plaintiffs

54.1 Intellectual property rights are subject to the law of the country for which protection of the intellectual property is claimed (Art. 110 para. 1 IPRG). In the present case, the plaintiffs are seeking a declaration of non-existence of copyright protection under Swiss, German and Dutch law (see para. 1 f.). In principle, these legal systems are therefore individually applicable. In international relations, the substantive legitimisation is determined by the law applicable to the case (see BGE 136 III 23, E. 5). Within the scope of application of Art. 88 ZPO, the substantive legitimisation of the parties is to be derived from **civil procedural law**: Those parties **between whom there is a sufficient interest in a declaratory judgement** have material legitimacy (OBERHAMMER/WEBER, in: KUKO-ZPO, 3rd ed., Art. 88 N 3; WEBER, in: BSK ZPO, 3rd ed., Art. 88 N 3). Consequently, those plaintiffs who have an interest in a declaratory judgement under these legal systems are entitled to bring an action under Swiss, German and/or Dutch copyright law (cf. para. 27 et seq.). Nothing else would result even if Dutch law were based on Art. 3:302 et seq. of the *Burgerlijk Wetboek*, which in turn (only) requires the existence of a sufficient interest (cf. para. 25.1.4). The same conclusion would be reached if German civil procedural law, namely Section 256 DE-ZPO, were to be applied as the law applicable to the case, especially since it also (only) requires the plaintiff to have a legal interest in the determination. For **domestic matters**, the only requirement for the right to bring an action pursuant to Art. 61 CopA is proof of a legal interest in the determination. This also applies to third parties, whereby it should be emphasised that the declaratory action is not a popular action (MÜLLER, in: SHK URG, 2nd ed., Art. 61 N 15). Anyone who has an interest in claiming that the copyright does not exist is entitled to bring an action, which means that there are no differences in comparison to Art. 88 ZPO.

54.2 Accordingly, all plaintiffs who have a sufficient interest in a declaratory judgement have **the right to sue** (cf. para. 27 et seq.).

55. The defendants

55.1 In their statement of defence, the **defendants** dispute the **passive legitimacy** of defendants 2 and 3 (cf. KA, para. 23, pag. 280).

55.2 Within the scope of application of **Art. 88 ZPO**, the person against whom the plaintiff has an interest in a declaratory judgement has the right to be sued. As the "holder of copyright utilisation rights", Defendant 1, on whose behalf and in whose name the warning letters discussed above were written, has the right to be sued. In the course of the proceedings, the defendants have not submitted any information on the content, scope and form of the contractual relationships between defendants 2 and 3 and defendant 1 with regard to copyright matters. It remains unclear whether and to what extent Defendant 1 is actually the owner of rights.

Defendants 2 and 3 have a decisive influence on the interests of Defendant 1 (see KA, para. 74, pag. 288), which is also reflected in the individual signatory authorisation of Defendants 2 and 3 in the commercial register entry (KB-I 14). In addition, certain (personal) copyright claims in the event of existing copyright protection would in any case lie exclusively with the authors (natural persons), i.e. Defendants 2 and 3 in the present case (cf. only Art. 9 and 11 para. 2 CopA; Art. 12 et seq. CopA and Art. 25 *Copyright Act*). It should also be noted that Defendants 2 and 3 would be jointly entitled to the copyright by law (see Art. 7 para. 2 CopA and Art. 26 *Auteurswet*). A decision regarding copyright protection for the "Hang" must therefore be made with regard to all three defendants, especially since - due to the unclear contractual relationships on the part of the defendants - it cannot be ruled out that defendants 2 and 3 could continue to have property rights claims. For these reasons, the defendants 2 and 3, as - possible - authors, also have the right to be sued in addition to defendant 1.

- 55.3 Within the scope of application of Art. 61 CopA, the **passive legitimation** lies with the owner of the copyright and - via Art. 62 para. 2 CopA analogously - also with the licensee (see HEINZMANN, in: Das neue Urheberrecht, Kommentar zum URG, 4th edition, preliminary remarks on Art. 61-66a N 16). Defendant 1, in whose name all warnings were written, is thus passively legitimised as the possible or alleged owner of copyright usage rights, provided that a corresponding agreement exists, which is, however, open. The passive legitimisation of defendants 2 and 3 follows from their position as alleged authors. In the case of co-authors, as would be the case with defendants 2 and 3, it is obvious, not least on the basis of Art. 7 para. 3 CopA, that both should be brought to justice, especially since they would be jointly entitled to the copyright (cf. Art. 7 para. 1 CopA). The passive legitimisation of defendants 1-3 is therefore given.

Burden of proof

56. According to Art. 8 CC, unless otherwise stipulated by law, the burden of proving the existence of an alleged fact lies with the person who derives rights from it. Under Swiss law, the allocation of the burden of proof under Art. 8 CC is a substantive legal institution. In principle, Art. 8 CC does not apply if reference is made to foreign substantive law (Art. 13 IPRG).
57. According to German law, the claimant bears the burden of presentation and proof for the existence of the conditions of the asserted claim (see Federal Court of Justice [BGH], judgement of 19 October 2011, I ZR 140/10, para. 24).
58. Under Dutch law, the party asserting the legal effects of the facts or rights it claims generally bears the burden of proof for these facts or rights. (*"De partij die zich beroept op rechtsgevolgen van door haar gestelde feiten of rechten, draagt de bewijslast van die feiten of rechten, tenzij uit enige bijzondere regel of uit de eisen van redelijkheid en billijkheid een andere verdeling van de bewijslast voortvloeit.*

(The party relying on the legal consequences of the facts or rights it asserts bears the burden of proving those facts or rights, unless a special rule or the requirements of reasonableness and fairness dictate a different allocation of the burden of proof)". (cf. Section 150 NL-ZPO).

59. According to all relevant legal systems, the **burden of proof** for the facts giving rise to protection is therefore on the party asserting copyright protection. In this case, that is the **defendants**. They must demonstrate which aspects of the work are based on an artistic design or that Defendants 2 and 3 have exploited a creative leeway available to them through free, creative decisions (for CH law: Art. 8 ZGB; for DE law: see BGH, judgment of 12 May 2011, I ZR 53/10, para. 24, KAB 64; for NL law: see SPOORNERKADENISSER, Auteursrecht, 4th ed, § 3.18, p. 101 f. m.w.w.H. [KAB 96]: "*J...*] *zowel in geval van gemotiveerde betwisting, als wanneer het werk-karakter niet direct duidelijk is, zal hij ook moeten stellen welke aspecten van het werk berusten op vrije creatieve keuzes en mitsdien zorgen voor het persoonlijk stempel. [both in cases of dispute and in cases where the work character of the object is not immediately clear, [the author] must indicate which aspects of the work are based on free creative choices and give it the personal stamp]*"; see also KA, para. 288, p. 360).
60. In contrast, under Swiss and Dutch law, the **plaintiffs** must set out **any technical requirements that** limit the scope of design (see BGer 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, E. 6.3.2 [E. 5 published]; see also SPOOR/VERKADENISSER, Auteursrecht, 4th ed, § 3.18, p. 102 f. [KAB 96]: "*Een gedaagde die aanvoert dat einer geen recht op zijn werk kan doen gelden omdat deze zijn werk aan een ander, ouder werk heeft ont/eend, zal die ontlening moeten stellen en zo nodig bewijzen. Also, the disclosure of the fact that his work bears little or no personal stamp, if the preliminary draft was only made for him and was therefore available to the hand, or if the technical elements did not allow for much variation, is to be proved and it may also be required that sufficient concrete and relevant facts be provided. [A defendant who argues that the plaintiff cannot assert a right in his work because the plaintiff has derived his work from another, earlier work, will have to assert and, if necessary, prove this derivation. The justification of the defence that the plaintiff's work has no or only a slight personal imprint because the design was common and therefore obvious before it was created or because the technical requirements do not permit major deviations is also subject to proof, and it may also be required that sufficiently specific and relevant facts are stated for this purpose.]*"). Under German copyright law, on the other hand, it is up to the **defendant to** demonstrate that the disputed object has individual design features that **go beyond the realisation of a technical solution** and can therefore justify copyright protection (BGH, judgment of 12 May 2011, I ZR 53/10, para. 23, KAB 64). As a result, however, these differences will not be relevant to the decision.

61. The **negative declaratory action** is intended to establish the non-existence of a right or a legal relationship. The reversal of the party roles does not change the distribution of the burden of proof (see only WEBER, in: BSK ZPO, 3rd ed., Art. 88 N 25; WALTER, in: BK, Art. 1-9 ZGB, 2012, Art. 8 N 487). As the plaintiffs rightly point out (see Reply, para. 292, pag. 643 f.), this also applies under German law. The reversal of party roles has no influence on the allocation of the burden of presentation and proof in negative declaratory actions (see only BGH, judgment of 17 July 2012, XI ZR 198/11, para. 35a; OLG Hamburg, judgment of 23 July 2020, 5 U 18/14, para. 51 bb, KB 164). The same applies under Dutch law, as it is not at the discretion of the parties to reverse the burden of proof by requesting a declaratory judgement (see Hof's-Hertogenbosch, judgement of 10 July 2018, ECLI:NL:GHSHE:2018:2999, E. 6.17). Accordingly, it is irrelevant for the allocation of the burden of proof whether a creditor claims damages and brings an action itself or the debtor demands a declaration that there is no obligation to pay damages: in both cases, the creditor's claim is disputed in court (see Hoge Raad, judgment of 12 April 2019, E-CLI:NL:HR:2019:590, E. 4.5.3 and E. 4.2.1 f.). Against this background, the defendant's assertion that the burden of proof for the lack of copyright protection lies with the plaintiffs (cf. Rejoinder, para. 511, pag. 984) cannot be followed in this sweeping manner.

On the question of work quality

62. In the present (limited) proceedings, the question at issue is whether copyright protection exists a) in **Switzerland**, b) in **Germany** and [only insofar as it concerns plaintiffs 1-9] c) in the **Netherlands** for brass instruments with the design features i) lenticular basic shape, consisting of two synclastic spherical segments, ii) central dome, iii) opposite resonance hole and iv) circular tone fields arranged on the upper spherical segment (cf. legal claim no. 1). Based on this legal request, the quality of the work is examined below in the order specified in the legal request in accordance with the relevant legal systems:

Swiss law

63. **Principles**

- 63.1 **Works** within the meaning of the CopA are intellectual creations of literature and art that have an **individual character** (Art. 2 para. 1 CopA). This also includes works of applied art (Art. 2 para. 2 let. f CopA). In addition to their aesthetic value, these works have a utility value (REHBINDER/HAAS/UHLIG, in: OFK URG, 4th ed. 2022, Art. 2 N 26). Works of applied art are produced commercially or industrially and serve a practical application. They are therefore objects of utility that have an additional **form component that is not determined by the intended use** (VON BÜREN/MARBACH, Immaterialgüter- und Wettbewerbsrecht, 4th ed., para. 272 with further references).

- 63.2 The decisive criterion lies in the so-called **individuality** of the work. This is to be assessed with regard to the **scope available** for individual design, because the creative achievement can only unfold within this scope. In the case of **utilitarian objects**, this room for manoeuvre - in contrast to non-utilitarian works of art - is limited by the **purpose of use** (BGE 148 III 305, E. 5.3). What is protected is what **stands out** as an individual or original creation from the **actual or natural preconditions** within the scope of the **intended purpose** (BGE 143 III 373, E. 2.1 with further references). In other words, the artistic **design within the scope of this purpose** must stand out so clearly from the **previously known forms** that it appears to be unique (see BGE 143 III 373, E. 2.6.2). Banal and everyday creations are not sufficiently individualised. Rather, the work design must stand out from the usual, so that it seems unlikely that the same or essentially the same work would be created by a third party given the same task (so-called statistical uniqueness; see BGE 134 III 166, E. 2.3.1).
- 63.3 Against this background, it makes sense - irrespective of an evidentiary approach - to examine below the restrictions preventing copyright protection before subsequently addressing the question of artistic design or (possibly) design decisions made (para. 87 et seq.).

Restrictions on the scope: vocabulary of shapes / pre-known shapes

- 64 The defendants assume that in 1999 the relevant "mould treasure of sound objects" (Rejoinder, para. 20, pag. 870) consisted of the steelpan, the ghatam [a hand-playable idiophone from India, made of fired tone with a resonance opening, cf. KB-II 39], the gong, the calabash and the water drum (cf. also KA, para. 126, pag. 309 f. and para. 128, pag. 310 f.). The plaintiffs did not assert in the second exchange of written submissions that the **relevant set of moulds** could be composed in any other way. Nor do they comment on the relevant set of forms in their statement on the Rejoinder or in the new submission of 4 November 2022, para. 36, pag. 1021 (although even in this case, the corresponding submissions in connection with the relevant set of forms would no longer have to be taken into account anyway pursuant to Art. 229 ZPO). The relevant set of forms in the present case are all (percussion) idiophones. Idiophones (self-sounding instruments) are musical instruments that vibrate as a whole and become a sound- or tone-producing medium or contain vibrating parts that are not tensioned parts or membranes. Impact idiophones are struck with the hand or a non-sounding object. Examples: Gong, cymbal, "hang", steel pan, water drum, ghatam (cf. KB 148). This can be taken as a basis, especially since in BGER 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, E. 6.2.2.2 [E. 5 published], the "fire ring" in dispute there (a steel bowl with a horizontal steel ring attached to the edge, in the centre of which a wood fire can be lit and on whose steel ring food can be cooked) was subjected to a comparison (only) with other "grills".

64.1 The following elements can be recognised in the above-mentioned sound objects from the previously known set of forms:

- circular, (concave) curved sheet metal surface (steelpan) (see K-I, margin no. 49, pag. 48)
- concentrically arranged sound fields (steelpan) (cf. K-I, margin no. 309, pag. 193)
- central dome (gong) (cf. K-I, margin no. 95, pag. 71 f.)
- resonance chamber (Ghatam)
- circular opening of the resonance chamber (ghatam) (cf. K-I, margin no. 308, pag. 193)
- rounded shape (ghatam, calabash, water drum)
- convex playing surface (calabash, water drum) (see K-I, margin no. 93, pag. 71)
- two composite segments (water drum) (see K-I, margin no. 94, pag. 71)

64.2 With regard to the previously known set of shapes, it is noticeable that **none** of the objects depicted in the duplicate, para. 20 (pag. 870) has a **comparable shape** to the "Hang". It follows from this that the "Hang" **differs in design** from its predecessors or **from the known set of shapes at the time**. It is true that the **elements** of a "Hang" that are in dispute (and considered by the defendants to be copyrightable), i.e. i) lens shape ii) central dome, iii) opposite resonance hole (Helmholtz resonator) and iv) circularly arranged sound fields **could** each be recognised in their own right (e.g. the dome of the gong, the resonance hole in the ghatam etc., in this respect K-I, para. 89 et seq. [pag. 70 ff.]). However, even this would **not categorically exclude** the possibility of **copyright protection**: the previously known **set of forms** according to para. 64 above may **not** be broken down **into individual elements** and then compared with each other (so-called inadmissible **"mosaic-like" view**; cf. BGE 143 III 373, E. 2.4). Conversely, a deviation from the previously known set of shapes, i.e. the novelty of a shape, **cannot automatically lead to the conclusion that the "Hang" is individual**, which the plaintiffs rightly emphasise (see plaintiffs' closing submission, para. 6, pag. 1371). In this respect, the defendant's statement that the development of the "Hang" represents a "leap" (cf. minutes of the General Meeting, 1st party submission of the defendant, p. 9, pag. 1232) is correct from the court's point of view, but as such is not (alone) decisive. It only follows from this finding (but at least) that the **ground for exclusion of protection of the previously known set of forms** (see SENN, Die Zweckänderung bei einer Grundform als Individualitätskriterium?, sic! 2023, p. 213) **does not apply** in the present case or **does not categorically preclude** any copyright protection. This conclusion would be all the more true if the set of shapes were drawn more narrowly, namely (only) reduced to the objects that fully correspond to the purpose of the "Hang" (see below): in this case, there would be no comparable object at all that could be assigned to the previously known set of shapes.

Restrictions on the scope: Intended use

65. The individual artistic design must result from the part that allows free design. If the **purpose of use** dictates the design through **pre-recognised forms** in such a way that there is **practically no room** for **individual or original features**, the product is a purely handcrafted product that must be excluded from copyright protection (BGE 125 III 328, E. 4b; BGE 117 II 466, E. 2a; BGE 113 II 190, E. I.2a; each with references).
- 65.1 Due to the interplay between the purpose of use and the creative freedom of design (see para. 63.2 above), the question of the purpose of use must be addressed below: In their reply, para. 177 et seq. (pag. 618 et seq.), the **plaintiffs** assume that the **purpose of use** of the "Hang" consists of i) a brass sound instrument, ii) which can be played by hand on the lap and iii) has various tones and iv) a Helmholtz resonator. In contrast, the **defendants** define the intended use of the "Hang" much more openly, namely as an object for producing sounds, in short as a **sound object** (Rejoinder, para. 79 f., pag. 886).
- 65.2 In all three **private expert reports** submitted by the parties (cf. also para. 71 et seq.), the "Hang" is qualified as an **idiophone** (cf. KB 150, p. 1; KAB 12, p. 3; KAB 13, p. 1; cf. also K-I, para. 89, pag. 70; KA, para. 151, pag. 320, Replik, para. 198, pag. 626), i.e. as a so-called self-sounding instrument, which becomes a sound- or tone-producing medium by vibrating as a whole when struck (e.g. by hand) (cf. KB 148). This can be assumed without further ado. It is indisputable that sounds can be produced with the Hang by striking it with the hands. The "Hang" as an idiophone can therefore (in particular) also be used as a (brass sound) instrument, especially as the original "dedication" of the "Hang" points to that of an instrument in view of the task at hand (para. 66 ff.). According to which (more detailed) classification a possible categorisation should be made (cf. e.g. Reply, para. 75 ff., pag. 567 f.; duplicate, para. 60 ff., pag. 882) is not relevant to the decision and can be left open.
- 65.3 If a design is reduced to the non-interchangeable components that are already characteristic of the object of use, copyright protection does not apply (HILTY, Urheberrecht, 2nd ed., para. 192). In contrast to, for example, "bar stools", "seating and reclining furniture" or "barbecues" (see BGE 143 III 373, E. 2.8.1; BGE 113 I 1190, E. I.2a; BGer 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, E. 6.2.2.2 [E. 5 published]), the objects at issue in the present case are undisputedly to be classified as **novel** in their appearance. There is a lack of corresponding **reference objects** on the basis of which it could be determined how a "Hang" is "normally" or "usually" designed or what the characteristic components are, without the design decisions of Defendants 2 and 3 (possibly existing and to be examined in the present proceedings) being **ascribed to the public domain** or considered as "**given**". The plaintiffs use such a **circular** argumentation with their argument that the **four features at issue in this case can be found "in all Handpans"** (see K-I, para. 300, pag. 191). This does not hold water.

At the same time, the purpose must not be defined so broadly that the novelty of an object (here: the previously unknown idiophone) as such would already justify copyright protection; it is not novelty but a specific individual design that can justify copyright protection (on the irrelevance of "novelty", see para. 88 below).

Task definition

66 In the absence of existing reference objects, the **purpose of use** of the "Hang" can and must be derived from an (at least intellectual) "**task**" underlying the creation process of the "Hang". Copyright works regularly represent an answer to a specific problem or a specific basic need (STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, GRUR Int. 2001, p. 5; see also BGE 134 III 166, E. 2.3.1 f.). This applies all the more in the area of objects of applied art, as these always have a utility value (cf. para. 63.1 above) and therefore always serve to satisfy a certain basic need. The defendant's objection that artists do not set themselves any tasks in their work is understandable (cf. minutes of the General Meeting, 1st party submission of the defendant, p. 9, pag. 1232). However, at least in the area of articles of daily use, which *per definitionem* should or will serve a basic need, the objection cannot be heard. The questioning of the witness Reto Weber, percussionist, (minutes of the AGM, p. 17, para. 18 et seq, pag. 1240) revealed that he harboured the wish to have an instrument (previously missing from his repertoire), a "ghatam made of sheet metal" (cf. also KA, para. 109, pag. 303 ["[...] to make a comparable percussion instrument from sheet metal and to provide it with sounds."] and KB-I 38, min. 26:00-26:17: "Ghatam with sounds"). The starting point for the (further) development of this novel instrument was thus - at least for conceptual purposes - the **task** given to defendants 2 and 3 to create a "**ghatam made of sheet metal**" or a "**ghatam with sounds**" for Reto Weber. This (general) task or this basic need in itself **does not** yet contain any concrete **solution approaches** or creative decisions (see THOUVENIN, Irrtum: Je kleiner der Gestaltungsspielraum, desto eher sind die Schutzvoraussetzungen erfüllt, in: FS für Reto M. Hilty, 2008, p. p. 66 f.). This also means that the **joining of two shells** and a "reach under the workbench" (cf. Reply, para. 89, pag. 574) - as "simple" as this may appear *ex post* - in the course of the creation of prototype 1 by defendants 2 and 3 must no longer be part of the abstract task, but must already be part of a concrete solution. Contrary to the plaintiffs' view, the **task** could therefore **not** have consisted of "**making** prototype 1 **playable and improving its sound**" (cf. Reply, para. 92, pag. 577), even if defendants 2 and 3 may have subsequently (also) devoted themselves to this goal. The - in the present case relevant - task already arose at the **time of Reto Weber's visit**, i.e. at the time when Reto Weber expressed the wish for a "Ghatam made of sheet metal". From a legal point of view, this must be taken into account. It is therefore irrelevant that Defendant 2 himself seemed to assume at a subsequent point in time that there was another "task" or question to be clarified (see Reply, para. 93, pag. 577 f.).

- 66.1 Mr Reto Weber's request for a "ghatam made of sheet metal with tones" was accompanied by the following characteristics: i) **idiophone made of sheet metal**, ii) **playable by hand**, iii) **with different tones** and iv) equipped **with a cavity or a Helmholtz resonator or a resonance opening**. However, the intended purpose does not necessarily include the criterion "playable on the lap[...]" (cf. Reply, para. 182, pag. 619 f.), especially since the plaintiffs themselves state that a ghatam can also be played standing up (K-I, para. 57, pag. 51) and that Reto Weber set up several ghatams in a semicircle in front of him so that he could play them simultaneously in order to produce different sounds (KI, para. 58, pag. 52). Thus, the parties assume that the "Hang" can (also) be played on a stand (cf. Rejoinder, para. 263, pag. 936; opinion on Rejoinder novena and novelty submission of 4 November 2022, para. 110, pag. 1040). If so, then the additional feature would merely be that the "ghatam made of tin" to be created should (also) be able to be played on the lap (but by no means *only* playable on the lap). This also means that the purpose of use put forward by the defendants as a (completely arbitrary) "**sound object**" (Rejoinder, para. 79 f., pag. 885 f.) is **clearly too broad**. From this point of view, the plaintiffs are correct when they state that the purpose of a bar stool cannot be extended to any other seating furniture, e.g. chairs with shorter legs/beams (see plaintiffs' closing submission, para. 40, pag. 1383). In this sense, the Federal Supreme Court examined the design of a bar stool (only) on the basis of the intended use of a bar stool (and not other seating furniture or chairs; see BGE 143 III 373, E. 2.8.1). Following these explanations, certain of the alternative forms cited by the defendants must also be ruled out for comparison purposes (cf. rejoinder, para. 255, pag. 933 f.): this applies in particular to the "Pangsaiten" (as a string and not a self-striker) and the "Tongue Drum", which is likely to be played (primarily) with mallets as intended (cf. rejoinder, para. 192, pag. 624). It can therefore - with the reservation of playing on the lap - in principle be based on the intended purpose of the plaintiffs (cf. Reply, para. 178, pag. 618).
- 66.2 The creative leeway available to Defendants 2 and 3 can be determined from this very purpose of use (as well as the underlying task). This was limited from the outset insofar as the idiophone to be created - unlike steelpans, for example - was to be played **with bare hands**. This means, on the one hand, that the dimensions of the idiophone itself had to remain limited in order to remain "**manageable**" enough (see ReplyReply, para. 224, pag. 635). On the other hand, its tone fields had to be dimensioned in such a way that they could still be struck "well" or with sufficient **precision by hand**. This is linked to the requirement that the individual tone fields must be at a sufficient distance from each other so that they can be played with sufficient precision (using fingers and/or hand(s)) or struck separately without causing neighbouring tone fields to vibrate unintentionally. According to the above explanations, the scope for design is limited by those **detailed specifications** which result from the **(general) task** and thus the purpose of use (cf. STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, GRUR Int. 2001, p. 5), such as in particular:

1. a self-contained hollow body (like a ghatam);
 2. can be played with the hands (like a ghatam);
 3. with a resonance opening (like a ghatam);
 4. made of sheet metal (in contrast to the ghatam);
 5. with different sounds (in contrast to the ghatam) and
 6. can also (but not only) be played on the lap.
- 66.3 However, the exact design of these features is **not dictated by** the intended use or other detailed specifications, especially as there was **no comparable idiophone at the time**. In particular, the four features in dispute here (lens shape, central dome, opposite resonance hole, circular tone fields) do not necessarily or approximately follow from the above explanations. The **purpose of use** according to the above explanations therefore did **not dictate** the shape of the "Hang" **in such a way that there was practically no room** for individual decisions.

Limitations of the room for manoeuvre: technical requirements

- 66.4 Apart from the intended purpose, **restrictions** on artistic freedom can also result from **technical requirements**. Thus, the Federal Supreme Court held in BGE 105 II 297 E. 3a: "*La combinaison de lignes, de formes et de couleurs qui caractérise le modèle ne doit donc pas être entièrement dictée par des exigences techniques ou par la destination de l'objet [...]*" (similarly: BGE 113 11 190 E. 1.2b: "technical or purpose-related solutions"; see also BGer 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, E. 6.3.2. [E. 5 published] and BGE 143 III 373, E. 2.8.3.). It should be noted that even **expedient** solutions are **not easily** equated **with technical or functional solutions** (see BGE 113 11 190, E. 1.2. b). The objections of plaintiff 2, according to which the lens shape is "perfect" (cf. minutes of the AGM, p. 31, para. 82 et seq., pag. 1254) or of plaintiff 21, according to which the placement of the resonance hole in the centre makes "the most sense" (cf. minutes of the AGM, p. 27, para. 285 et seq., pag. 1250), cannot therefore in themselves lead to the assumption of a technical constraint that would fundamentally restrict artistic freedom. The same applies to the plaintiffs' argument regarding the lens shape that is comfortable to play on the lap (see K-I, para. 104, pag. 74). If the plaintiffs argue that considerations of practicality are not creative, this is not convincing in view of the above statements (see Reply, para. 221, pag. 634 f.).

Technicality of the individual elements

- 67 The plaintiffs argue that each of the four features of the "Hang" (individually and collectively) is **exclusively functional**, sometimes resulting from **technical requirements** (cf. only the plaintiffs' closing submission, para. 38 et seq., pag. 1382 f.). In this context, the plaintiffs differentiate between the effects of the individual features on the **playability** of the "Hang" on the one hand and their effects on the **sound** of the "Hang" on the other.

The countless requests requested by the plaintiffs to obtain **expert opinions** on these issues (cf. only Reply, para. 198 et seq., pag. 626 et seq.) were considered by the court in **anticipatory assessment of the evidence as** not expedient and/or not necessary for the reasons discussed below and the corresponding requests for evidence were rejected at the main hearing (cf. minutes HV, p. 66, pag. 1289).

68. It follows from the **purpose of** the "Hang" (see para. 65 et seq.) that the four elements described by the defendants as justifying copyright protection each individually fulfil **certain technical functions**. Thus, it seems absolutely necessary that individual sound fields must be isolated in order to produce different sounds on a sheet metal sound body without moving parts, namely a "Hang" (cf. only the plaintiffs' private expert in KB 150, p. 2 [see para. 71]: *"Every object has vibration resonances (or "modes") when it is struck. Usually, each mode involves the whole of the structure (i.e. of the idiophone). The first special thing about a steelpan or handpan is that certain of these vibration modes are confined to small regions, which the player perceives as the separate notes of the instrument."*). It also seems impossible that the effect of a so-called Helmholtz resonator can occur without the existence of an air-filled cavity or a corresponding resonance opening (cf. KB-II 24 ["In the Hang, the air volume in the body together with the air mass in the Gu neck forms a Helmholtz resonator. If the body is excited at any point, this impulse is transmitted to the air inside the Hang and causes the Helmholtz resonator to vibrate. This is perceptible as a breathy bass tone."] and KB-II 25 ["A Helmholtz resonator consists of an air volume V_0 of any shape, which has a cylindrical, narrower, short neck with an opening to the outside."]). The defendant's assertion that the "Hang" is not a musical instrument at all, but an "aesthetically designed object with which sounds can also be produced, as one only learns upon closer examination of the object" (cf. Rejoinder, para. 65, pag. 882), cannot change this. The ability of the "Hang" to "also" produce sounds and thus fulfil its intended purpose depends to a large extent on precisely these four elements. However, the fact that the four disputed elements of the "Hang" each (can) fulfil a specific (technical) function does not exclude the possibility that they were designed in an artistic manner. Ultimately, only **technical requirements** that lead to a **restriction of artistic freedom during their creation** or would have dictated the design can be decisive. This would certainly be the case if the individual elements or their specific design (including their placement) had been predetermined at the time of their initial design or combination.
69. In a certain sense, all four disputed features of the "Hang" are ultimately "technically predetermined" in the sense that, through their **combination**, which the defendants 2 and 3 have put forward for the first time in this form, they each individually have or can have a decisive influence on the concrete sound behaviour and/or on the concrete "playability" of each individual object. Thus, it seems only comprehensible that a "Hang" with differently designed and/or combined design features could and/or should also sound differently in terms of sound or be played in a different way.

It also appears to have been established that the omission of a feature (e.g. the central dome, which would be easily conceivable due to the task, cf. para. 66 et seq.) would have opened up (new) possibilities with regard to the arrangement of the remaining sound fields, e.g. by using this space for "ordinary" sound fields. According to the (undisputed) and comprehensible testimony of the defendant's two expert witnesses (cf. para. 71), a total of **around 30 different parameters** influence **the specific sound of a "Hang"** (cf. KA, para. 157, pag. 321). Accordingly, it can be assumed that each of the four disputed design features (also) exerts an influence on the specific sound, i.e. (also) embodies a technical solution. However, it **does not follow** from such a form of "condition" or "technicality" that the specific design of the "Hang" **would have been** predetermined or **dominated by technical considerations at the** time of its creation: Accordingly, it should be noted - both with regard to the sound and the "playability" - that there was - within the framework of the task - **no** predetermined **sound** or **sound to be achieved** which the defendants 2 and 3 would have had to achieve, especially since this would raise the question of how exactly such a "sound to be achieved" would be determined at all. Similar considerations can be applied to the question of "playability": The concrete manner of a "playability" (or the advantages of a certain design with regard to this), which may have emerged in the last 20 years, cannot be understood *ex post* as having predetermined the design of the "Hang" in advance or as merely embodying a technical playing solution. At the time the "Hang" was created, there was **no comparable object that** could have been used to derive a "typical" or "mandatory" way of playing. In addition, according to the statements of both parties, the "Hang" differs from conventional instruments in that it can be played intuitively or without prior (music theory) lessons (see Rejoinder, para. 67, pag. 883 and Minutes HV, p. 30, para. 19 ff., pag. 1253), which also speaks against the existence of "rigid" guidelines for playing. All this is supported by the fact that the "original form" (in the form of prototype 1) was indisputably created within a rather short period of time, which also speaks against the existence of such constraints.

70. The individual four elements of the "Hang" are examined below with regard to the question of whether and to what extent they have been dictated by technical constraints/requirements. Insofar as certain features appear merely practical or expedient, this does not automatically constitute a technical constraint (see also para. 66.4). Moreover, the view of the defendants, who seem to assume that the question of technicality should only be assessed on the basis of an overall impression and not individual elements (cf. 1st party submission of the defendants, minutes HV, p. 10, pag. 1233 and final submission of the defendants, para. 18, pag. 1357) is not convincing. This view was rightly objected to by the plaintiffs (cf. plaintiffs' reply to the defendant's 1st party submission, HV minutes, p. 13, pag. 1236).

Expert opinions

71. With regard to technical questions concerning the sound and the technical functions of the individual disputed features of the "Hang", both parties have obtained their own expert opinions:
- 71.1 The **plaintiffs** obtained an expert opinion from **Prof Jim Woodhouse**, Emeritus Professor of *Structural Dynamics* at the Department of Engineering at the University of Cambridge (KB 150). Prof Woodhouse's research focus was and is mainly in the field of vibrations, with the investigation of musical instruments forming an essential part of this. He also published in particular on questions relating to the acoustic properties of instruments. The plaintiffs submitted to their private expert the question of whether the four design elements of the "Hang" are predetermined by technical or other constraints so that an instrument whose playing and sound properties are comparable to the "Hang" can be produced.
- 71.2 The **defendants**, for their part, commissioned an expert opinion from **Dr Anthony Achong**, former *Head of Department* at the Department of Physics at the University of the West Indies, who has apparently since died. Prof Achong spent decades studying the sound of metal sheets and bowls, published articles on this topic in specialist journals and published a book on the subject in 2013 ("Secrets of the Steelpan"). Prof Achong was asked whether two different percussion instruments (percussion idiophones in the bowl category), even if they have a different geometric shape, can have similar sound characteristics (KAB 12).
- 71.3 The defendants also submitted a similar question (namely, "whether two sound bodies can have approximately the same sound characteristics despite their different geometric structure") to **Dr Michael Steppat**, lecturer at the Beuth University of Applied Sciences Berlin in the Department of Programming and Technical Foundations of Computer Science (KAB 13). As part of his dissertation, Dr Steppat dealt with the sound behaviour of steelpan.
- 71.4 It should be noted in advance that these are (party) expert opinions whose authors were **not** asked the **same questions**. If necessary, the different questions will be addressed in the following considerations. However, this initial situation does not detract from the findings to be drawn from the expert reports. The court considers both questions to be relevant for answering the questions in dispute here. In addition to the question of creative (design) decisions, the present proceedings are also concerned with whether (technical) constraints existed in the design of the "Hang". All of the expert reports contain informative statements in this regard. The fact that the private experts have the necessary expertise to assess the relationships between sound production and the shape of a sound body is clear to the court on the basis of their (fundamentally undisputed) specialist qualifications. This is not altered by the fact that the plaintiff's expert did not primarily deal with brass sound bodies (the defendants in the duplicate, para. 234, pag. 927, are correct, but not decisive).

As part of the free assessment of evidence by the court (Art. 157 ZPO), all expert opinions can therefore be relied upon.

Lens shape

72. According to the **plaintiffs**, a lens shape is created automatically by forcing a surface out of the sheet metal. A more curved shape, on the other hand, would run the risk of damaging and tearing the material (K-I, para. 101, pag. 74). Furthermore, from the plaintiffs' point of view, the shape of the lens is able to optimally absorb the blows acting on the instrument during playing and has an influence on the propagation of sound waves and thus also on the sound (K-I, para. 105 f., pag. 75 f.).
73. The fact that the lens shape - as well as all other features in dispute here - can have an influence on the sound is probably undisputed, especially since, according to the defendant's expert opinion, there are over **30 parameters** that influence the sound characteristics (see KAB 12, p. 2 and KAB 13, p. 2). However, it cannot be concluded from this that the lens shape is mandatory. Furthermore, the plaintiffs' argumentation does not mainly refer to the (whole) lens, but to a (semi-)spherical segment; only the joining of two such segments results in the relevant lens shape in the present case (and - as can be seen in prototype 1 - initially in a rather spherical, not yet perfectly symmetrical and merely *lens-like* shape). Even if one shell is therefore particularly advantageous (in the words of the plaintiff's expert, an *"ideal neutral canvas"*, cf. KB 150, p. 3 [which seems quite possible, but can be left open in the result]), it **cannot** be **concluded** from this that the **combination of two shells was in fact predetermined**.
74. From the plaintiffs' point of view, the lens shape is also particularly advantageous in terms of **playing technique** (comfortable shape for playing on the lap, possibility of closing the resonance hole with the legs, hemisphere more comfortable than a flat "plexus holder" [as a "lower" segment]) (cf. Reply, para. 199 f., pag. 627 f.). Apart from the fact that the play on the lap is merely optional (cf. para. 66.1 above), the following applies: For what reason, for example, an idiophone (merely half-lenticular) with a completely flat lower segment could not be played comfortably on the lap or would not provide the same support (cf. Reply, para. 200, pag. 627 f.) is not apparent to the court (therefore convincingly KA, paras. 167, 324 f.) Furthermore, even if the lens shape were considered particularly practical, this (possibly) particularly advantageous element would not fundamentally limit artistic freedom, i.e. in the sense of a technical constraint.
75. In addition to arguments relating to playing technique, the shape of the lens also has an effect on the **sound** from the plaintiffs' point of view (Reply, para. 203, pag. 628 f.). In particular, according to the plaintiffs, a curved surface is ideal for processing the sound fields, because only such a spherical segment guarantees uniform curvature in all directions (Reply, para. 206 f., pag. 630).

The combination of two spherical segments makes the circular connection point very rigid and reduces interference noise (Reply, para. 210 et seq., pag. 631 f.).

76. These objections **do not indicate** that the design possibilities were limited to a (perfect) lens shape, or that there was any technical constraint. On the one hand, the objections relate primarily to the spherical segment with the tone fields ("upper" half). The plaintiffs' expert, Prof. Woodhouse, also qualifies his own statement regarding dynamic rigidity and states that the stiffening of the upper shell (which he considers necessary) can **also be achieved with a shape other than a shell**, but considers this to be *"not suitable"* due to the play on the lap (cf. KB 150, p. 3). However, this mixes considerations of practicality with technical constraints. In addition, even playing on the lap would not be dependent on a lens shape (cf. para. 74 above). Prof Woodhouse's statement thus coincides with that of the defendant's experts, who state that the shape of the lower part is of secondary importance in terms of sound (KAB 12, p. 2, KAB 13, p. 3). With regard to the lower half - apart from the **mere possibility of the** emergence of any interfering noises (cf. KB 150, p. 3: *"If the bottom shell were not curved, or were less curved, it could create junk notes."*) - there are **no** apparent **reasons** why a second (and mirror-inverted) hemisphere should be absolutely necessary. The fact that artistic freedom is also not technically limited to perfect lens shapes is shown in particular by the "Hang Gubal" created by the defendants in the meantime: this easily fulfils the intended purpose of the "Hang" mentioned in para. 66 et seq. Nevertheless, it does not consist of two identical hemispherical segments and obviously no longer has a (perfect) lens shape (cf. Rejoinder, para. 255, pag. 933).
77. Against this background, the court, in anticipatory assessment of the evidence, considers it established that **there were no technical constraints/imperatives that would** have made design decisions impossible.

Circularly arranged tone fields

78. From the plaintiffs' point of view, the circularly arranged tone fields are merely a widespread element in steelpans (K-1, para. 123, pag. 81). The arrangement facilitates playing on the lap and represents the most advantageous and simplest arrangement **in terms of playing technique** (Reply, para. 219 f., pag. 634). The plaintiffs conclude from this that a design that follows technical playing considerations is (technically) or ergonomically conditioned (Reply, para. 221, pag. 634 f.). They further state that a circular arrangement is necessary **in terms of sound technology in order to avoid** unwanted vibrations between the different tone fields (see Reply, para. 227, pag. 637).
79. The plaintiffs' arguments are not convincing. It is not apparent to what extent an almost perfect circular shape for the game with the "Hang" would be so predetermined that no other arrangements would be possible, i.e. that there would be a constraint.

In any case, this would be a matter of practicability considerations (cf. para. 66.4). It is undisputed that the tone fields of Steelpans were or are predominantly arranged **concentrically** (cf. only K-I, para. 45, pag. 46; KA, para. 87, pag. 291 and para. 183, pag. 331 f.). The illustrations of steelpans submitted to the court (as well as the model presented for inspection at the instruction hearing, see Protocol IV, p. 521) regularly show concentric arrangements of tone fields, sometimes consisting of several "tone field circles" (see KA, para. 183, pag. 331 f.; K-I, para. 45, pag. 46; para. 51, pag. 49). In contrast, a merely "single-circuit" arrangement does not appear to be typical for steelpans (cf. KA, para. 183, pag. 331; Rejoinder, para. 300, pag. 943). The arguments of the plaintiffs (cf. Comments on Rejoinder and new facts of 4 November 2022, para. 12 et seq, pag. 1014 ff.), according to which the circular shape (and thus the reduced tone fields) is merely due to the **key/tuning of the bowl** (higher-tuned bowls therefore have more tone fields than lower-tuned bowls), prove to be unfounded pursuant to Art. 229 ZPO for the following reasons: The question of the "deliberate reduction" of the number of tone fields by Defendants 2 and 3 had already been expressly addressed in the statement of defence (see KA, para. 184, pag. 332: "In contrast, Defendants 2 and 3 deliberately reduced the number of tone fields in the plexus [as the "upper" segment] of the "Hang" [...]"). This statement was dealt with (and disputed) by the plaintiffs in the course of the second exchange of written submissions, but was described as merely "motivated by procedural tactics" (Reply, para. 223, pag. 635). In addition, during the second exchange of written submissions, the plaintiffs expressly addressed KB 127, which was (re)submitted with their comments on the Rejoinder and with their submission of new facts of 4 November 2022, **in the context of the pitch and arrangement of the tone fields**, but **did not associate the circular arrangement of the tone fields** (and thus also their number) **with their tuning** (Reply, para. 151, pag. 605). Contrary to the inaccurate representation according to which the submission of 4 November 2022 was prompted by new allegations in the Rejoinder (comments on Rejoinder and submission of new facts of 4 November 2022, para. 19, pag. 1016), the new allegations of the plaintiffs in their comments on the Rejoinder in their submission of new facts of 4 November 2022, para. 12 et seq., pag. 1014 et seq. are **no longer to be considered** in this context. However, even if they were taken into account, they would not be relevant: With regard to the **restrictions** resulting from the **task** (cf. para. 66 et seq.), it should be noted that the **dimensions** of the instrument to be created were limited (both in terms of playing technique and sound), which could or must have had an influence on the possible number and placement of the tone fields (cf. Reply, para. 224, pag. 635). However, these specifications **do not result in any (technical) constraints** that would have virtually limited artistic freedom: According to the plaintiffs, "handpans" with **up to 20 tone fields** exist (K-I, para. 41, pag. 45; the defendants dispute this only to the extent that they assume that theoretically even more tone fields could be isolated, cf. KA, para. 185, pag. 333).

It follows from this statement that in such "handpans" either i) considerably more tone fields can be isolated on a comparable surface (while retaining the circular arrangement), or ii) the tone fields are not (only) arranged in a circle (as can be seen, for example, on "handpans" with "raised" tone fields, cf. KB-I 75, KB-II 77, KB-III 72, slide 6, 9, 15, 27, 46, 63, 74, 95, 111, 133 and 191, cf. also K-I, before para. 179, Instrument 3, pag. 103, before para. 202, Unique Artworks, pag. 117, before para. 211, Windharps, pag. 124, before para. 211) or iii) (also) tone fields are incorporated in the lower half of the bowl. The last variant [iii]) can be seen, for example, on the submitted video, on which the plaintiff 7's playing on the *Ayasa C#Pygmy 17- Ember Steel* model can be seen (KB-I 18, sec. 00:18 to 00:24; see also K-I, before para. 179, Instrument 3, pag. 103, before para. 181, Instrument 4, pag. 105, before para. 185, Instrument 6, pag. 109, before para. 229, Instrument *Ayasa Ashakiran 15+1*, pag. 137). All these reasons indicate that from a technical point of view there were **no** compelling requirements to choose an arrangement of **(only) a perfect circle**. Accordingly, it is also clear from Prof Achong's expert opinion that tone fields could in principle be isolated at any point on the "Hang" (cf. KB 12, p. 2: "*When looking at the Hang, the note shapes could be placed anywhere on the upper bowl or even on the lower bowl with no difference to the sound that they create.*"). Against this background, the court considers it to be established that certain specifications or constraints prevail in the arrangement of the tone fields (e.g. with regard to the maximum number of tone fields and/or their size [possibly also with regard to their pitch], understandable in this respect the plaintiffs in their reply, para. 224, pag. 635, cf. also para. 66.2). However, the applicable choices do **not** appear to **have been so limited that artistic decisions were no longer possible**.

Dome

80. According to the plaintiffs, the central dome contains the frequently played fundamental note and thus contributes to easier playability (see K-I, para. 109 f., pag. 77). The central placement ensures that the **base tone** can be reached or played with the fingers of either hand (Reply, para. 230, pag. 638). The (convexly curved) dome in the central tone field is ergonomic (Reply, para. 234, pag. 639 f.). The fact that the central tone field does not have a concave indentation like the other tone fields, but a convex dome, is due to playing technique, since a dome can be played better than an indentation (Reply, para. 231, pag. 638 f.; cf. also para. 234, pag. 639 f.). In any case, a centred arrangement is already known from the Gong or the Gong Wong (K-I, para. 111, pag. 77).
81. The defendants dispute the plaintiffs' statements, especially since even "technical" or "ergonomic" advantages cannot be used to infer a technical necessity (cf. Rejoinder, para. 315, pag. 946). Defendants 2 and 3 had decided in favour of the central dome because of the visually appealing polarity of the dome ("Ding") and the resonance hole ("Gu") (KA, para. 188, pag. 334). The expert opinion of Dr Steppat proves that a sound field comparable to the "Ding" (dome) could be placed at almost any other point of the "Hang", in particular also on the upper spherical segment (KA, para. 189, pag. 334 with reference to KAB 13 [the same statement can also be found in the expert opinion of Dr Achong, cf. KAB 12, p. 2]).

In addition, neither the existence nor the design or positioning was due to technical or ergonomic reasons (duplicate, para. 317, pag. 946), the design as a convex dome and its positioning was freely chosen (duplicate, para. 319, pag. 946 f.).

82. As already explained (see para. 69), the court does not consider any considerations regarding **playability** to be a technical constraint. At the time relevant here, there were **no comparable idiophones** and/or technical specifications on the basis of which the defendants 2 and 3 should (or could) have orientated themselves. In addition, if Defendants 2 and 3 had, for example, opted for a dome slightly tilted forwards (i.e. facing towards or away from the person playing, which according to the defendants' expert opinion would have been possible without further ado, cf. KAB 12, p. 2 and 13, p. 2 and according to KB-I 75, KB-II 77, KB-III 72, Slide 80, 133 and 191 apparently already existed), such a positioning could just as well be described as "ideal" at the present time. After the inspections (see minutes HV, p. 48 ff., pag. 1271 ff. and minutes IV, pag. 516 ff.), such a positioning appears to be no less achievable with all fingers crossed. The argument regarding the "prior knowledge" of a central arrangement of the dome would also have to be examined, if at all, not as a technical constraint, but with regard to the scope of any design decisions made.
83. With regard to the effects of the central dome on the **sound**, the plaintiffs conclude that a strong curvature (whether concave or convex) in the centre of a tone field serves to stiffen it and helps to stabilise the tones (Reply, para. 234, pag. 639 f.). Placing the largest tone field in the centre is a means of preventing unwanted excitation from neighbouring tone fields (see Reply, para. 229, pag. 637 f.).
84. The defendants dispute this (see rejoinder, para. 323, pag. 947). An indentation is no worse to play on than a dome (rebuttal, para. 319, pag. 946 f.).
85. It can be noted in advance that the plaintiffs themselves asserted in the Reply that the choice between concave and convex in the dome is only important for technical reasons (see Reply, para. 231, pag. 638 f.). This statement can also be inferred from the plaintiff's expert opinion (cf. KB 150, p. 3: "*a dome (vs dip) is used for ergonomic reasons at the apex note: to enable it to be struck more easily in this apex position [...]*" and p. 5: "*making the dimple of the central tone field convex (instead of concave)*"). From a technical point of view, it can therefore be assumed that there was a choice between concave and convex, especially since the defendants do not dispute this (cf. Rejoinder, para. 319, pag. 946 f.). In addition, "hand pans" with inwardly directed "domes" apparently also exist (cf. KB-I 75, KB-II 77, KB-III 72, slide 52, 161). Why the plaintiffs in their comment on the Rejoinder and submission of new facts of 4 November 2022 dispute the defendant's statement that the Ding dome can be designed both as a dome and as a navel (cf. statement on Rejoinder novena and novelty submission of 4 November 2022, para. 135, pag. 1047) is not clear but is not relevant in the result.

In the court's view, the question of the (central) positioning of a dome (or the distance to the other sound fields) depends **essentially on the arrangement of the other sound** fields, which means that the arrangement of the sound fields and that of the dome are likely to have **influenced each other**: The defendant's experts do not comment on the spatial relationship between the different tone fields, namely the dome and the other tone fields, but this is harmless: the plaintiffs' (or their experts') argument is based on the **assumption** that, apart from the upper half of the sphere in the centre, there was - necessarily - no other place at all on the sphere segment where the dome could have been placed. This is - not least in view of the fact that there were also no constraints for a circular arrangement of the other tone fields (para. 78 f.) - incorrect (cf. also the statements of the defendant's experts, who confirm that tone fields (including the dome) could be isolated at almost any point, KB 12, p. 2 and KAB 13, p. 2; cf. also KB-1 75, slide 80 and 173, which show that "hand pans" exist on whose upper sphere segment several domes were isolated). The - in and of themselves conclusive - statements of the plaintiff's expert Prof Woodhouse are not able to change this. According to him, the centred placement of the dome in particular reduces so-called "crosstalk" under the sound fields; this could, among other things This can be prevented by ensuring that neighbouring tone fields have as different frequencies as possible; since the dome is (physically) closest to the other tone fields, it is best - with a view to reducing "crosstalk" - if this central tone field has the lowest frequency, the largest area and the fundamental tone of the scale, since this is the furthest away in frequency from the other tone fields (KB 150, p. 4). This argument is also based on a **false premise**, in that both the position of the dome and that of the tone fields are considered to be "set". However, this is precisely not the case. Overall, the plaintiffs' arguments cannot lead to the conclusion that the design options with regard to the (centrally positioned and convexly curved) dome **were so limited** that no more design decisions were possible. This is all the more the case as it was **not** clear from the brief (see para. 66) **that a dome** would be required **at all**. This applies all the more to the question of **where** it should be placed on the spherical segment and whether it should be concave or convex.

Resonance opening

- 86 The last of the four disputed elements of a "Hang" is the resonance opening (opposite the central dome) (cf. KA, para. 127, pag. 310). It appears undisputed that a resonance opening as such is a technical prerequisite for the acoustic effect of the so-called "Helmholtz resonator" to occur (cf. K-1, para. 322, pag. 197 and KA, para. 196, pag. 336, in which the defendants assume that the central opening produces a low tone which functions "analogue to a Helmholtz resonator"). The fact *that* a (sound) object which was created in the course of the relevant task ("Ghatam made of sheet metal" or "Ghatam with tones", cf. para. 66 et seq.) has a resonance opening cannot be taken into account from the point of view of copyright protection (in contrast to the dome, the existence of which was not predetermined, cf. para. 66 et seq., 85).

However, its positioning and/or design may contribute to any copyright protection and may sometimes have an influence on the overall impression (see para. 102 et seq.).

- 86.1 The plaintiffs argue that the resonance opening follows **technical tuning** considerations and must therefore be at least the width of a hand. The plaintiffs' expert, Prof. Woodhouse, does not comment on whether the opening must be positioned centrally for technical sound reasons (in particular to generate the Helmholtz resonance). However, he assumes that a "*substantially non-central*" resonance opening would mean that the tone fields placed on the upper segment could no longer be reached from below through the opening and thus could not be (re-)tuned (cf. KB 150, p. 4). At the same time, from the point of view of the plaintiffs, a central opening would also ensure that the opening would not be (unintentionally) covered by the body of the person playing but could instead be deliberately closed by movements of the thighs (K-I, para. 322, pag. 197).
- 86.2 In their expert reports, the two experts of the defendant do not comment in detail on the question of the exact positioning of the resonance opening (cf. KAB 12 and 13). Rather, they confirm that a resonance opening is considered necessary (cf. KAB 13, p. 3: "Accordingly, only the opening has an influence on the sound behaviour for the lower part of the sound body. However, whether this opening is worked into a round bowl, an oval or a pyramid shape or is achieved by a bottle-like taper is also not a technical requirement for the specific sound behaviour."). Moreover, the defendants do not dispute that the resonance opening can be useful for any tuning work. The fact that there may be situations in which a "Hang" is or must be retuned was not denied by the defendants (cf. KA, para. 210, pag. 342; cf. also minutes of the AGM, party interview with defendant 2, p. 38, para. 214 ff., pag. 1261). However, the defendants argue that the technical necessity of a solution cannot simply be inferred from its expediency (cf. Rejoinder, para. 337 f., pag. 949). This is fundamentally correct. It is also true that "the final vote is not relevant for the copyright protection of the shape of the Hang" (Rejoinder, para. 339, pag. 949). However, the defendants fail to recognise that the final tuning or retuning through the resonance opening can have an influence on copyright protection insofar as the **exact position** of the opening as well as its size can be significantly (co-)determined or dictated by external constraints. The court is convinced that the resonance opening must be positioned in such a way that - if it is reached into - the inside of the opposite bowl, namely the sound fields, remains **easily accessible** for any (re-)tuning work (cf. also minutes of the hearing, party interview with plaintiff 2, p. 32, para. 105 et seq, pag. 1255). The argument put forward by the defendants, according to which the tuning work can also be carried out with separated (i.e. still unglued) shells (cf. KA, para. 200, pag. 340), cannot be heard:

In view of the statements of its own expert witnesses, according to which the actual sound depends on approximately **30 parameters** (cf. KAB 12, p. 2; KAB 13, p. 2), it seems almost impossible that a final (re-)tuning can be carried out if and as long as the upper part has not been definitively clamped into the lower part, especially since both of the defendant's expert witnesses also emphasise the relevance of the clamping of the upper segment for the sound characteristics (cf. KAB 12, p. 2: "*Consequently, the whole instrument could show basically any form as far as the bowl is clamped by a fixing frame*" and KAB 13, p. 3) (therefore correct Reply, para. 249, pag. 645 f.). The same would also apply to the size of the resonance opening, through which at least a human hand or arm would have to fit, if this were claimed for copyright protection, which is not the case. It is thus established by anticipatory assessment of evidence that **certain technical constraints/imperatives** existed with regard to the positioning of the resonance opening. However, these do not mean that **no design decisions** were possible from the outset, as the plaintiffs' expert himself writes (see KB 150, p. 4, "*substantially non-central*").

86.3 Moreover, the plaintiffs' argument concerning the possibility of influencing the resonance hole with the legs does not hold. If the defendants 2 and 3 had solved the problem by placing the resonance hole on the side of the tone fields (which they did with their later instruments, such as the "Hang Gubal" and "Hang Balu", see Rejoinder, para. 255, pag. 933), the question of a closure by the legs would not even arise (all the more so as it is not apparent that the instruments mentioned could not also be played on the lap). Although there may be a certain practicality component here, this does not lead to the assumption of constraints/imperatives that would prevent artistic decisions.

86.4 For the above reasons, the court considers it to be established that an **exactly centred** resonance opening is **not technically necessary**.

Creative, respectively free, creative decisions

87. Now that it has been established that there were **no technical constraints that** could have dominated the design of the "Hang", any design decisions made by defendants 2 and 3 must be examined in more detail. From the fact that there were no mandatory requirements or imperatives, it cannot (yet) be concluded without further ado that a design is individual, which the plaintiffs correctly state (plaintiffs' closing submission, para. 48, pag. 1386). Both parties correctly assume that, under all legal systems to be examined here, the question of any **copyright protection depends** to a large extent on the utilisation of **creative leeway**, i.e. on the **creative decisions of** Defendants 2 and 3 (cf. only Plaintiffs' closing submission, para. 5, pag. 1370 f.; Defendants' closing submission, para. 28, pag. 1358 f.; cf. also para. 108 ff.).

87.1 It is undisputed that the defendants 2 and 3 have decades of experience in researching and creating sound objects and can undoubtedly be described as pioneers in the field of (Swiss) steelpan history.

Not least from the "**creation history**" submitted in **KAB 45**, it is clear that Defendants 2 and 3 have designed and further developed a large number of different sound objects in the course of their activities. They see this as proof of the large number of decisions made by Defendants 2 and 3 on the way to the "creation of the Hang" (cf. Rejoinder, para. 188 et seq., pag. 919 et seq.).

- 87.2 As the plaintiffs rightly point out (see Reply para. 135, pag. 600), the history of the defendants 2 and 3 as instrument makers, or a possible "author individuality" (see only BGE 143 III 373, E. 2.1 with further references) must be separated from the question of the **concrete design of** a specific product, in this case the "Hang".
- 87.3 The fact that Defendants 2 and 3 "described the development history in detail and verbosely prior to the proceedings" (see Plaintiffs' closing statement, para. 6, pag. 1371) is of secondary importance. It can be recognised from these statements that Defendants 2 and 3 attached great importance to the **tonal characteristics of** the "Hang" and recorded or published their findings in this regard (cf. only Reply, para. 183, pag. 620; KB 124, 140, 141). However, the plaintiffs' conclusion that defendants 2 and 3 ultimately "only" worked on the sound, but not on the design of the "Hang" (see, for example, Reply, para. 104, pag. 586; 1st party submission of the plaintiffs, para. 27 et seq., pag. 1301 et seq.), cannot be drawn from this. In the present proceedings, defendants 2 and 3 have to assert and prove the utilisation of a creative leeway. This proof *could* be provided with the help of such pre-litigation publications, but this is not mandatory. Even if such statements do not primarily indicate design decisions, it cannot be concluded from this that no such decisions were made. In addition, the design of **any object of use necessarily also** takes place with regard to its intended use (in the present case "idiophone made of sheet metal with tones" see para. 65 et seq.), which is why it is **not to the disadvantage of** defendants 2 and 3 that they have dealt in more detail with the sound properties of the "Hang". On the contrary, such an in-depth examination seems only logical.
88. The defendants' achievement is the fact that they have created a **novel, previously unknown idiophone**, which has enjoyed worldwide success over the past two decades. However, "novelty" in and of itself - in contrast to patent and design law, see Art. 7 para. 1 of the Federal Act on Patents for Inventions (PatG; SR 232.14) and Art. 2 para. 1 of the Federal Act on the Protection of Designs (DesG; SR 232.12) - is not standardised by law and therefore **cannot be the basis for protection per se**. The fact that the defendants 2 and 3 produce their objects as individual pieces **by (artistic) craftsmanship** (and not industrially) is also not decisive for the question of copyright protection (SOMMER/GORDON, Individualität im Urheberrecht - einheitlicher Begriff oder Rechtsunsicherheit?, sic! 2001, p. 296). In this respect, it is irrelevant that the defendants fight for "their" quality, or rather seem to attach great importance to it (see minutes of the AGM, party interview with defendant 2, p. 38, para. 183, pag. 1261). The same applies in principle to the popularity or success with the public, or the **"hype"** surrounding the "Hang" (cf. KAB 45, p. 18) (cf. EGLOFF, in: Das neue Urheberrecht, Kommentar zum URG, 4th ed., Art. 2 N 17).

Since the (use) value of the item is not to be taken into account (cf. Art. 2 para. 1 CopA), the awards presented to the defendants (namely the Berner Musikpreis 2020, cf. KAB 8) cannot automatically establish the character of a work (cf. EGLOFF, in: Das neue Urheberrecht, Kommentar zum URG, 4th ed., Art. 2 N 26). The material and intellectual **effort** made by the defendants 2 and 3 for the production must also be disregarded (cf. BGE 130 III 714, E. 2.2). Thus, for example, the planning and production of raw moulds by the defendants cannot be taken into account (see KAB 45, p. 8; minutes HV, party interview with defendant 2, p. 40, para. 270 ff., pag. 1263).

89. On the other hand, it is **not to the disadvantage of** defendants 2 and 3 that prototype 1 was created within a **very short time** (see also para. 69). If the plaintiffs describe the joining of two shells as "banal" (cf. only the plaintiffs' closing submission, para. 15 f., pag. 1374 f.), this objection proves to be irrelevant against this background.
90. The **"creation story"** of Defendants 2 and 3 is **revealing** and **relevant** in several respects. Firstly, it is clear from it that it can by no means be said that the shells used for prototype 1 (irrespective of whether they were "steelpan shells" or "pang shells", cf. K-I, para. 60, pag. 53; KA, para. 101, pag. 303; Reply, para. 86, pag. 572; Duplik, para. 200, pag. 921 and para. 370, pag. 954) were merely lying around **"by chance"**, as the plaintiffs claim (cf. Reply, para. 86, pag. 572). Rather, the court is convinced that only defendants 2 and 3 were able to put Mr Reto Weber's wish or idea for a new type of idiophone into practice in the first place due to their (previous) history as steelpan manufacturers. Nor can it be said that the joining of two shells could have been a **"lucky discovery"** (cf. Reply, para. 86 ff., pag. 572 ff.; cf. also KB 108) in the sense that from the outset there could no longer be any intellectual or mental achievement at all (cf. EGLOFF, in: Das neue Urheberrecht, Kommentar zum URG, 4th ed, Art. 2 N 8; cf. also para. 66 above, where it has already been explained that the joining of two shells was already part of the concrete solution finding, sometimes presupposing an intellectual performance). It is precisely this meaning of "coincidence" that must be taken into account from a copyright perspective, and the pre-litigation statements of the defendants themselves are not able to change this (see Reply, para. 88, pag. 573). In view of the large number of **shapes and objects (pre-)created by** Defendants 2 and 3, which were available to Defendants 2 and 3 (cf. KAB 45), the joining of two bowls (of whatever kind) does not appear to be "banal" or "obvious". It would have been much more "banal" or "obvious" if the defendants 2 and 3 **had resorted to pre-existing objects** (such as the "Cornet-pang", cf. KAB 45, p. 14 or the "Tschempan", cf. KAB 45, p. 9) in order to find a suitable shape based on them (cf. Rejoinder, para. 370, pag. 954). In addition, the lentil shape (consisting of two bowls) also does not result from the task (para. 66 ff., or the shape of the "ghatam" serving as a "template") (the plaintiffs therefore do not understand in their statement on Rejoinder novena and novelty submission of 4 November 2022, para. 73, pag. 1032, according to which the task consisted of imitating the roundish shape of the ghatam).

What is relevant is whether it appears impossible that **a third party** would have created the same or essentially the same work with the **same task** (see BGE 134 III 166, E. 2.3.2). In light of the above, this is the case. In this respect, the plaintiffs are wrong in their assertion when they state that "anyone else in the defendant's position would have done so" (plaintiffs' closing statement, para. 16, pag. 1375), especially since this is not apparent from the interrogation of plaintiff 21 (see minutes of the hearing, p. 28 f., para. 359 ff., pag. 1251 f.).

91. The four elements of the "Hang" in dispute here are analysed below with regard to any creative decisions made (or the scope for design that was exploited). This is neither in conflict with the prohibition of the so-called "mosaic-like consideration", which concerns the question of previously recognised elements (cf. BGE 143 III 373, E. 2.4), nor does this change the fact that ultimately the **overall impression** of the work is decisive (cf. para. 102).
92. If a (possibly) innovative initial achievement is to be honoured, the **time of the creation of the work** must be taken into account for the creation of the right: What was statistically unique at the time of creation may later turn out to be more or less banal because the relevant design elements anticipated or even characterised later trends (see STRAUB, Individualität als Schlüsselkriterium des Urheberrechts, GRUR Int. 2001, p. 8 with reference to the criterion of "statistical uniqueness").
93. Moreover, any design decisions must be distinguished from the **endeavours** of Defendants 2 and 3 to **achieve** or improve the **tonal characteristics of the "Hang" according to their own ideas**: Such considerations are likely to have had a significant influence on the history of the creation of the "Hang" (cf. Reply, para. 92 et seq., pag. 577 et seq.), which, however, in view of the intended purpose of the "Hang", appears to be self-evident and is therefore harmless (cf. also para. 87.3). This does not mean that it could be assumed that the defendants 2 and 3 could (only) have made decisions with regard to the sound (or that the sound to be achieved, which was not part of the task anyway, would have de facto dictated the design). The fact that certain pre-litigation statements by Defendants 2 and 3 therefore dealt with the question of specific sound characteristics does not mean that it could be assumed that Defendants 2 and 3 had no room for creative decisions. As will be shown below, the **court considers it established** that defendants 2 and 3 were also (and to a sufficient extent) guided **by design factors**.

Lens shape

94. With regard to the lens shape, the defendants argue that a design deviating from the lens shape would have "destroyed the harmonious convex-concave unity of circular shapes" (Rejoinder, para. 159, pag. 910).

This "natural harmony" would - from the defendant's point of view - have been destroyed if two almost identically shaped convex-concave spherical segments had not been brought together, if instead of the lower shell a differently shaped "plexus holder" [as "lower" segment] had been used (cf. Rejoinder, para. 159, pag. 910).

95 In their comment on the Rejoinder and submission of new facts of 4 November 2022, the plaintiffs argue that "not changing something" or retaining features does not constitute a free creative choice (see submission of 4 November 2022, para. 81, pag. 1033). The court does not share this assessment. The joining of two shells to form a novel lenticular idiophone, which is not known from the previously known set of shapes, is - as simple as it may appear *ex post* - a creative decision by defendants 2 and 3. Contrary to the plaintiffs' view, a (creative) decision may well consist of not changing certain features at all (or only slightly), especially since the plaintiffs' argument is ultimately based on the - incorrect (see para. 90) - assumption that prototype 1 was created purely "by chance" and therefore cannot constitute an intellectual achievement within the meaning of Art. 2 para. 1 CopA. This is not the case. The fact that Defendants 2 and 3 therefore **retained or refined** the lens-like shape of Prototype 1, which was recognisable at the time but was still spherical and not perfectly symmetrical, no longer precludes a creative decision that had already been made at that time. Furthermore, as will be shown below, it is undisputed that the defendants had already dealt with the question of whether and how the playing surface of a sheet metal sound box - in contrast to the steelpan - could be **"turned upside down"** from concave to convex, which was a mandatory prerequisite for the creation of a lens shape, even before Reto Weber's visit. This assessment would not change even if the half-shells from the "Cariri project" were taken into account: According to statements by both parties, these were **used as steelpans**, sometimes with a **concave** curved playing surface (cf. only plaintiffs' submission of 4 November 2022, submission of 4 November 2022, para. 35, pag. 1020; statement on the statement on Rejoinder novena of 30 November 2022, para. 58, pag. 1065 f.). For this reason, the discussion as to whether, by definition, there must be an inseparable connection between the "plexus holder" [as the "lower" segment] and the "plexus" [as the "upper" segment] in a steelpan and whether it was the defendants who were the first to separate the "plexus holder" from the "plexus" is irrelevant (see plaintiffs' submission of 4 November 2022, para. 36, pag. 1021; opinion on the opinion on Rejoinder novena of 30 November 2022, para. 9 et seq, pag. 1059 f.; para. 56 f., pag. 1065). Even if shapes comparable to "Pang" shells were therefore considered to be prior art (see plaintiffs' submission of 4 November 2022, para. 36, pag. 1021), the plaintiffs could not derive anything in their favour from this, especially since the "Cariri" shells with the concave curved playing surface **do not** yet result in a **lens shape**.

Since the question of the previously known set of moulds had already been addressed in the context of the first exchange of pleadings (cf. only KA, para. 125 ff., pag. 309 ff.), the plaintiffs' corresponding assertion regarding the "Cariri" shells proved to be late in any case (Art. 229 ZPO).

- 95.1 The decision of defendants 2 and 3 to combine two shells to form an idiophone and then to retain or refine this form can and must therefore also be considered in the light of their earlier experiments. This also makes it clear that it is not merely a matter of (theoretically) available (but not utilised) options for Defendants 2 and 3, but that in the present case an element was retained and not replaced by variants or components - previously specifically tested by them - along the way. In this respect, the plaintiffs' denial that the defendants could not have chosen between numerous variants is incorrect (Reply, para. 266, pag. 652). This is all the more true as the lens shape was not imposed from the previously known set of shapes. Against this background, the plaintiffs are also wrong when they state that defendants 2 and 3 are not able to demonstrate any design-creative achievements (plaintiffs' submission of 4 November 2022, para. 91, pag. 1036). KAB 45 makes it clear that the defendants had a repertoire of alternative form components (previously created by them) at their disposal, with the help of which they could have tackled the relevant task at hand just as well (if not more simply or "more obviously") (which the plaintiffs fail to recognise in their reply, para. 266, pag. 652). The "Amphorenpan" or "Cornetpan" are mentioned by name (duplicate, para. 114, pag. 894 f.; cf. also KAB 45, p. 14 with the "Parabolpan"). It would even be conceivable that the defendants 2 and 3 could have used the "Tschempan", the manually playable object from 1995 (Reply, para. 150, pag. 604 f.; Rejoinder, para. 124, pag. 899), in an initial trial stage. As already mentioned, the "task" - contrary to the plaintiffs' statements (see plaintiffs' submission of 4 November 2022, para. 73, pag. 1032) - was not necessarily to find a "roundish" shape for the metal ghatam, especially since this would not have been dictated by the task or the purpose of use (for which even the plaintiffs do not seem to assume a criterion of "roundish" [see only Reply, para. 178, pag. 618]). It is therefore not clear why Defendants 2 and 3 could not have resorted to cone-, cylinder- or parabolic-shaped holders for the "plexus holder" [as the "lower" segment] (see plaintiffs' submission of 4 November 2022, para. 73, pag. 1032), especially since the "play on the lap" is also to be regarded as merely optional (cf. para. 66.1). As indicated above, the aforementioned "Cornetpan" from 1998 clearly shows that Defendants 2 and 3 were already working with the idea of a convexly inverted playing surface - in contrast to the steelpan - before Mr Reto Weber's visit (cf. Rejoinder, para. 129, pag. 900). The plaintiffs' denial that that instrument cannot be played on the lap (cf. plaintiffs' submission of 4 November 2022, para. 48, pag. 1024) proves to be unfounded against the background of the statements in the KA, para. 106 f., pag. 302 f. ("The plexus holder used here was a cone-shaped sheet metal funnel that can be placed on the player's lap for a game with the hand.") as late and therefore irrelevant (Art. 229 para. 1 let. b ZPO).

However, the allegation is not relevant insofar as the plaintiffs themselves state that a "ghatam" can also be played standing up (cf. K-I, para. 57, pag. 51) and that Reto Weber set up several ghatams in a semicircle in *front of* him so that he could play them simultaneously in order to produce different sounds (KI, para. 58, pag. 52).

- 95.2 Against this background, it is established that the defendants 2 and 3, by choosing the lens shape consisting of two spherical segments, creatively utilised the scope available to them. Instead of initially resorting to their own pre-existing shape experiments, they solved the problem by joining two shells together to create a highly simple component that was nevertheless unknown to the pre-existing set of shapes, which is not least due to the "inversion" of the (convex) playing surface that is otherwise conventional for brass sound idiophones (namely also steelpans). Accordingly, it cannot be said that the defendants 2 and 3 made a mere "selection" from the alternatives available to them with the lens shape, but rather that they removed themselves from the previously available repertoire of shapes by choosing the lens shape.
- 95.3 The fact that subsequently, in addition to an optical refinement of the lens shape, an optimisation in terms of sound had also taken place (cf. closing statement of the plaintiffs, para. 29, pag. 1379) and that this - optimised - shape should subsequently prove to be "perfect" from the point of view of plaintiff 2 (cf. minutes HV, party interview with plaintiff 2, p. 31, para. 82 et seq, pag. 1254), this does not change anything: at the time of the refinement, the basic features of the lens mould had already been established, which means that the activity of defendants 2 and 3 cannot be dismissed as the "epitome of craftsmanship" (plaintiffs' closing statement, para. 30, pag. 1379). The plaintiffs also do not claim that the lens shape was chosen from the outset for reasons of sound engineering on the occasion of the "craftsmanship" (cf. K-I, para. 60, pag. 53).

Circularly arranged tone fields

96. In this regard, Defendants 2 and 3 argue that they deliberately reduced the number of tone fields compared to the steelpan (KA, para. 184, pag. 332). The plaintiffs counter this argument by pointing out that prototype 1 (already) had seven tone fields, whereas the first generation of the "Hang" had seven to nine tone fields (cf. Reply, para. 223, pag. 635). In their reply, para. 151, pag. 605, the plaintiffs assert, with reference to KB 127, p. 199 f., that the sound fields were already arranged in a circle in the "Fing", "Peng" and "Pong" instruments created by defendants 2 and 3.
- 96.1 The further arguments of the plaintiffs are not to be taken into account (cf. plaintiffs' submission of 4 November 2022, para. 12 et seq. pag. 1014 et seq.), as these prove to be belated (Art. 229 ZPO): The defendants had already stated in the statement of defence that "in the "Hang", the number of sound fields in the plexus had been deliberately reduced [...]" (KA, para. 184, pag. 332).

It is therefore not clear to the court to what extent the statements in the duplicate, according to which an intentional reduction of the existing tones was sought, should be new. The fact that the basic features of the circular arrangement were already apparent in prototype 1 is irrelevant: an assessment to the contrary would have the consequence that the effort made by defendants 2 and 3 would indirectly be taken into account when assessing the requirements for protection, which, however, should not be relevant (see above, para. 88).

- 96.2 The illustration in KA, para. 179, p. 329 f. shows that the defendants 2 and 3 had experimented with arrangements of tone fields other than circular ones, namely with the cross shape or a ring-shaped arrangement (cf. KA, para. 176, pag. 328 f.). The fact that the defendants 2 and 3 did not resort to these earlier shape experiments (or another bowl with more tone fields) is - contrary to the plaintiffs' view - to be regarded as a creative decision. It is irrelevant whether or not bowls with differently (i.e. not round) shaped tone fields were also available in the workshop of Defendants 2 and 3 "during Reto Weber's visit" (see plaintiffs' submission of 4 November 2022, para. 72, pag. 1031). Rather, the defendants 2 and 3 could have focussed on a **maximum** of sounds/tone fields both in prototype 1 and its further developments, which they did not do (whereby the restrictions resulting from the task would have to be taken into account, namely the size and the distance in order to still be playable with the hands, cf. para. 66.2). The fact that the defendants 2 and 3 therefore resorted to a bowl with comparatively few tone fields and - based on this - limited themselves to maintaining this circular arrangement or - conversely - refrained from maximising the use of tone fields is a design decision, albeit to a rather small extent. It should also be taken into account that a reduction in the number of tone fields **does not necessarily have to result in a circular shape**: if the tone fields had been reduced more radically, e.g. to 3, the result would still be a concentric arrangement, but this would not necessarily be perceived as round, but as "triangular". It is also conceivable that four tone fields, for example, could even be perceived as "rectangular" if they were arranged evenly. A reduction to four or three tone fields would be easily compatible with the task (see para. 66), as this did not envisage a minimum number of tone fields. Accordingly, the models in KB-I 75, KB-II 77, KB-III 72, Slide 6, 9, 15, 27, 46, 63, 74, 95, 111, 133 and 191 submitted by the plaintiffs show, for example, that the tone fields of certain models need not (only) be arranged in a circle. It should also be noted that the circular arrangement of the tone fields according to the legal claim refers (only) to the upper half. However, the fact that sound fields on the lower segment would (also) be possible without further ado is shown by the instrument that can be recognised in the video of plaintiff 7 submitted by the plaintiffs (KB-I 18, e.g. sec: 00:53-00:59). By deciding to arrange the sound fields in a circle and (only) on the upper half, the defendants 2 and 3 have utilised a creative leeway.
- 96.3 It has thus been comprehensibly demonstrated by the defendants that a non-circular arrangement of the sound fields would have contradicted the idea of the defendants 2 and 3 to create or maintain a harmony created by the use of circular shapes (cf. Rejoinder, para. 161, pag. 911) and that the defendants 2 and 3 made a creative decision by choosing and maintaining the circular shape.

All the more so as they had previously experimented with other than circular arrangements of sound fields, the defendants 2 and 3 have departed from the previously known with the choice of the (simple) circular shape, which in turn (viewed from above) appears symmetrical and centred within the "upper" segment.

- 96.4 The types of tone field designs illustrated in KAB 45, p. 13 are only informative insofar as they show that Defendants 2 and 3 dealt with a number of differently designed tone fields in terms of design. However, it cannot be seen from the detailed sections shown in KA, para. 174, pag. 327 f., how the tone fields appeared **in their entirety**, i.e. whether they were arranged in a circle or not, which is why this cannot be taken into account in favour of the defendants in the present case. Moreover, it is not the design of the individual tone patches per se that is in dispute here, but the arrangement of the tone patches as such. Whether or not these are therefore sound fields of a steelpan (see Reply, para. 217, pag. 633 and Rejoinder, para. 293, pag. 942) is irrelevant and can be left open.
- 96.5 As a result, it follows that the choice in favour of circularly arranged tone fields represents a design decision by Defendants 2 and 3, albeit to a rather limited extent. The fact that the "reach under the workbench" turned out to be a "stroke of luck", which - in retrospect - would have a decisive influence on the design of the "final" product due to the already (initially recognisable) lens-like shape and the circular arrangement of the tonefields, proves to be harmless. In this respect, it is also irrelevant whether or to what extent there have been no further creative decisions since prototype 1 (cf. Reply, para. 90, pag. 576), whereby this statement would not apply anyway, as the further explanations will also show (para. 97 et seq.).

Dome

97. According to the defendant, the dome in combination with the resonance hole form the vertical centre of the "Hang", sometimes supplementing the "Hang" with a new vertical unit (Rejoinder, para. 170, pag. 913). The dome shape stems from the fact that a mirror-image and visually appealing connection is created in the form of the polarity of the dome and the resonance hole (KA, para. 188, pag. 334). They state that the dome could have been designed as a navel or that the "Ding side" could be completely flat. It would also have been possible to place the dome in a different location (duplicate, para. 172, pag. 914). For purely aesthetic reasons, the dome was placed in the centre at the top and raised upwards (cf. KA, para. 192, pag. 335). The plaintiffs argue that the choice in favour of a (convex) dome (instead of a concave indentation) for the central sound field is merely ergonomic, which ultimately contributes to easier playability (cf. Reply, para. 231, pag. 638 f.).

The choice in favour of a dome was (merely) a consequence of the study of other "dome" instruments (in particular the gong and cymbal) (see Reply, para. 104 ff., pag. 586 f.).

- 97.1 It is undisputed that Defendants 2 and 3 had already used domes in earlier of their sound objects and experimented with the design and placement of dome-like (and convexly curved) sound fields (Rejoinder, para. 133, pag. 902 f., with reference in particular to the "Cornetpang", "Pung" and "Orages", cf. KAB 45, p. 14 and 11; cf. also Rejoinder, para. 173, pag. 914; para. 195, pag. 920; cf. also KA, para. 179, pag. 329 f.). The plaintiffs' reply that the form of previously created idiophones is irrelevant for the copyright protection of the "Hang" (cf. plaintiffs' submission of 4 November 2022, para. 44, pag. 1023) proves to be incorrect in view of the statements in para. 90 above. Particularly in the case of instruments that would at least partially fulfil the task relevant to the "Hang" (para. 66 et seq.), such a consideration is almost inevitable. However, the earlier experiments of Defendants 2 and 3 do not show that they - in contrast to (convex) domes - had dealt more closely with inwardly directed domes or had attempted to shape the dome of the "Hang" (or their earlier idiophones) concave. In this respect, Defendants 2 and 3 are unable to demonstrate the extent to which the existence of (theoretically available) alternative design options can be used to infer decisions made (cf. Rejoinder, para. 172, pag. 914). In this sense, the sound objects "Tubai" and "Kuppel Pung" created by defendants 2 and 3 also show that the domes contained therein were convex (cf. KAB 45, p. 10 and 11). Furthermore, the **convex** design of a dome seems **unoriginal** in view of existing dome shapes such as the gong or the cymbal. The same applies to the decision to place the dome in the centre (see therefore KI, para. 111, p. 77).
- 97.2 The addition of the dome as such, however, appears to be remarkable insofar as it lent the "Hang" an (additional) feature, the existence of which would **not** have been **remotely apparent from the objective**. This circumstance can therefore be taken into account as a design decision in the sense of a **selection decision**, especially since this does not seem obvious at all (see THOUVENIN/WIGGER, comment on the judgement "Blick.ch" of the HGer ZH, in: sic! 10/2022, p. 438 ff.). In this respect, the plaintiffs' assertion that there have been no further creative decisions since Prototype 1 (which allegedly did not originate from any creative activity) proves to be incorrect for this reason as well. The existence of the central dome will also be relevant in the context of the overall impression (see para. 102). On the basis of prototype 1, the addition of a dome was by no means obvious: it would have been much more "obvious" to retain the "upper" central sound field as such, especially since it is clear from KB-II 77, slide 82, 124, for example, that "ordinary" sound fields could certainly be placed instead of a central dome.
- 97.3 The fact that a "gong sound" can be achieved with the dome, i.e. that there is a functional purpose, is regularly the case with objects from the field of applied art and is therefore not of decisive relevance.

As stated in para. 69, it is also irrelevant that - which can be assumed - a "Hang" could sound different if its dome were not placed in the centre, especially since the specific arrangement of the sound fields and that of the dome are likely to have influenced each other.

- 97.4 Against this background, it can be stated that the defendants 2 and 3 also utilised the creative leeway available to them with regard to the dome by creating a combination of features hitherto unknown to the previously known set of forms through their own creative activity by adding an additional feature - without this being apparent from the brief.

Resonance opening

98. With regard to the resonance opening, the plaintiffs argue that the resonance opening was placed on the lower side for sound reasons, in order to enable a Helmholtz resonance (see e.g. Reply, para. 107, pag. 587). The defendants argue that it was a free decision to place the resonance opening on the side without sound fields. It could just as easily have been placed slightly offset or on the side of the "Hang" (Rejoinder, para. 175, pag. 915). The defendants argue that the shape of the resonance opening chosen by defendants 2 and 3 is a "creative reinterpretation of the classic shape of the Helmholtz resonator orientated outwards or upwards" (KA, para. 194, pag. 336). In combination with the dome, the resonance opening represents the "vertical centre of the Hang" (Rejoinder, para. 170, pag. 913, which the applicants dispute as "mere empty words", cf. plaintiffs' submission of 4 November 2022, para. 87, pag. 1035).
99. First of all, it should be noted that the use of a resonance opening - in contrast to the dome - is to be regarded as an element necessarily covered by the task (para. 66 et seq.), which is why the (mere) choice for its use cannot yet be creative. In this respect, the existence of the resonance opening on the "Hang" cannot be readily attributed to an artistic decision by the defendants or it is not apparent that defendants 2 and 3 could describe the resonance opening as "theirs" (see minutes of the HV, p. 45, party interview with defendant 3, para. 154 ff., pag. 1268).
100. As with the arrangement of the dome, but in contrast to the other two elements (i.e. the arrangement of tone fields or the shape of the "plexus holder" [as a "lower" segment]), it is not apparent from the "creation story" in KAB 45 - with the exception of the lateral tuning key for bass sound in the "Tschempan" (cf. KAB 45, p. 9) - that the defendants 2 and 3 had dealt in detail with different possibilities for the *lateral* placement of resonance openings. In the court's view, the - theoretically possible - "slightly offset" or "placed on the side" openings put forward by the defendants therefore merely represent possible, but not actually utilised, leeway. In this respect, it cannot be said that the possibility (not used in the present case) of placing the resonance opening elsewhere than in the centre (e.g. slightly offset) could have been a deliberate design decision.

Prototype 2, on the other hand, shows that it had a (centred) resonance opening on the "upper" ball segment (see only the minutes of the HV, p. 51 f., pag. 1274 f.). Defendants 2 and 3 thus dealt with the question of the placement of the resonance opening in terms of design. Defendants 2 and 3 have since pursued and implemented this idea in more recent sound objects. It is noteworthy that these objects would on the one hand fulfil the task set out in para. 66 et seq. but at the same time have different sound fields and a resonance opening on the same side (see Rejoinder, para. 248, pag. 780 f., "Hang Gubal", "Hang Balu").

- 101 It should also be noted that the defendants 2 and 3, by their own account, decided in favour of a polar relationship between the dome pointing upwards and the neck of the resonance hole pointing inwards (and thus towards the dome) (cf. KA, para. 194, pag. 335), resulting in a mirror-image relationship between the dome and the resonance hole (KA, para. 188, pag. 334). In the court's view, the impression of the desired polarity or contrast is reinforced by the fact that the lower segment has no sound fields (which, according to para. 96.2, was also a design decision). The arrangement and design of the resonance opening was therefore (also) influenced by design decisions, albeit to a rather limited extent. Against this background, the fact that the defendants 2 and 3 placed the resonance opening on the lower spherical segment in the same axis as the opposite dome must be credited as a design decision. The fact that sound considerations may also have played a role (cf. Reply, para. 113 pag. 589; KB 32 p. 12) proves to be harmless, especially since this is the case with every utility object.

Overall impression

102. The design of the "Hang" was neither mandatory by use nor by manufacture. It was shown that i) the defendants 2 and 3 had (particularly from a technical point of view) room for manoeuvre when creating the "Hang" and ii) they used this room for manoeuvre (for the most part or to a sufficient extent) in a creative manner.
103. The decisive factor for copyright protection is ultimately the **artistic impression of the design**, which is not the **necessary** or even **exclusive** consequence of a single building element, but is determined by the **design, lines** and the **interaction of all four elements**. Although the design of one element may dominate and stand out in such a way that it has a formative effect, the comparison of individual elements is **not decisive** (see BGE 143 III 373, E. 2.4 with further references).

Minimalism does not stand in the way of individual design and can even constitute it (BGE 143 III 373, E. 2.8.3, 2.8.5), although it cannot be concluded from this that a minimalist design or a reduction to the essentials is always capable of establishing the necessary individuality (BGer 4A_472/2021; 4A_482/2021 of 17 June 2022, E. 6.1.2 [E. 5 published]).

104. Although the **four elements** in dispute for the "Hang" could all be reduced to **simple geometric figures**, their combination or overall appearance results in an **unmistakable combination of features** that differs from the previously known set of shapes. Defendants 2 and 3 have succeeded in developing their own design language with the "Hang", which they were also able to develop further in their subsequently created objects (see Rejoinder, para. 255, pag. 933 f.). The artistic impression of this design is not a necessary or exclusive consequence of a single element, but rather results from the interaction of these elements, which is demonstrated by the use of simple but clear lines, the symmetries and the arrangement of these elements (horizontally mirrored spherical segments of equal size; vertical axis between dome and resonance opening, concentric around the dome and ring-shaped sound fields arranged in the centre of the segment and at approximately equal distances from each other). The result is an object with a strange appearance, in which the first-time use of the seemingly very simple, but previously unused, lens shape (also) in combination with the outwardly erected central dome is particularly striking. This is emphasised by the contrast between the simple lower half with the resonance hole leading into the cavity, which appears to be a "gullet", and the upper half of the bowl with its protruding dome and tone fields. In this respect, it can (also) be said that the "Hang" stands out in terms of its overall design impression from the set of forms to be considered authoritative here. As a result, it (also) represents an appealing design and is perceived as something new and unique, especially since it is not immediately apparent that the "Hang" is a (percussion) idiophone (see BGE 4A_472/2021; 4A_482/2021, judgment of 17 June 2022, E. 6.1.2 [E. 5 published]). The artistic design of these objects would also achieve the individual character under design law (cf. Art. 2 para. 1 DesG), since the overall impression of the claimed shape differs significantly from the prior art in the judgement of the persons directly interested in purchasing the correspondingly designed products (cf. only BGE 143 III373, E. 2.6.2 with further references).
105. In view of the long term of protection pursuant to Art. 29 CopA, the **requirements for individuality should not be too low** for all works, not just utility objects (BGE 148 III 305, E. 5.3). In view of the above, this requirement is taken into account in the present case.
106. For the reasons stated above, the "Hang" in its "**First Generation**" form **and its further developments** in accordance with the legal claim in points 1 ii) a) - e) ["First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang"] is **protected** under **Swiss copyright law** as a **work** within the meaning of Art. 2 para. 1 CopA.

107. The legal situation with regard to the other versions of the "Hang" does not need to be addressed in view of the comments on the formal part (namely the interest in a declaratory judgement and the certainty of the legal claims, see para. 27 et seq.).

Definition of a work under Union law

Principles

108. The (Union law) concept of a work protected by copyright within the meaning of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No. L 167 of 22 June 2001; "Copyright" or "InfoSoc" Directive) is an autonomous concept of Union law which must be interpreted uniformly throughout the Union. No. L 167 of 22 June 2001; "Copyright" or "InfoSoc" Directive) is an autonomous concept of Union law that must be **interpreted** and **applied uniformly** throughout the Union (see only ECJ, judgment of 12 September 2019 - C-683/17, para. 29, KAB 63). Both parties therefore also rightly argue that the CJEU has defined a harmonised (two-tier) concept of work throughout the EU (see KL, para. 330, pag. 200; KA, para. 263, pag. 353), with a corresponding influence on the application of the national (in the present case relevant German and Dutch) legal systems. However, the national courts continue to have a wide margin of appreciation when applying the concept of a work to the individual types of work. The CJEU leaves it to the national courts to decide when to make use of this leeway in individual cases (see CJEU, judgment of 11 June 2020 - C-833/18, para. 38, KAB 68).
- 108.1 A "**work**" according to the case law of the CJEU exists if (on the one hand) the object in question is an **original** in the sense that it constitutes its author's **own intellectual creation** (see e.g. CJEU, judgment of 11 June 2020 - C-833/18, para. 22, KAB 68 and judgment of 12 September 2019 - C-683/17, para. 29 with further references, KAB 63).
- 108.2 An object is an **original** if it reflects the personality of its author by expressing **his free creative choices**. This is **not** the case if the **creation of** an object was **determined** by **technical considerations, rules** or **other constraints that left no room** for the exercise of artistic freedom (CJEU, judgment of 11 June 2020 - C-833/18, para. 23 f., KAB 68; CJEU, judgment of 12 September 2019 - C-683/17, para. 31 with further references, KAB 63). An object that meets the condition of originality may be protected by copyright even if its creation **was determined by technical considerations, provided that** this does not prevent its author from reflecting his **personality** in that object by expressing **free creative choices** (CJEU, judgment of 11 June 2020 - C-833/18, para. 26, KAB 68).
- 108.3 However, the criterion of **originality cannot** be met **by components** of an object that are **only** characterised by their **technical function**, as this would monopolise thoughts or ideas to the detriment of technical progress (CJEU, judgment of 11 June 2020 - C-833/18, para. 27, KAB 68).

If the expression of **components of** an object is **predetermined** by their technical **form**, the various possibilities of implementing an idea are so limited that **idea and expression coincide** (CJEU, judgment of 11 June 2020 - C-833/18, para. 27 with further references, KAB 68).

- 108.4 Even if there is a **choice regarding** the form of an object, it **cannot be** concluded that this object **necessarily falls** under the term "**work**" within the meaning of Directive 2001/29 (CJEU, judgment of 11 June 2020 - C-833/18, para. 32, KAB 68). The requirements set out in para. 108.1 et seq. above are always decisive. If the shape of an object is exclusively determined by its technical function, there is no eligibility for protection (CJEU, judgment of 11 June 2020 - C-833/18, para. 33, KAB 68).
- 108.5 On the other hand, a **creation** must be **expressed** (cf. e.g. CJEU, judgment of 12 September 2019 - C-683/17, para. 29 with further references, KAB 63). This requires an **object that can be identified** with sufficient precision and objectivity (see CJEU, judgment of 12 September 2019 - C-683/17, para. 32 with further references, CAB 63), even if this form of expression is not necessarily permanent (ECJ, judgment of 13 November 2018 - C-310/17, para. 40, KAB 95).
- 108.6 These requirements are discussed below in the context of the comments on the national legal systems. However, insofar as the defendants argue that copyright protection is (only) excluded if the **overall impression** is **technically conditioned** or necessary (cf. Rejoinder, para. 236, pag. 927), this **cannot be inferred from the** aforementioned principles of the CJEU. Nor can the plaintiffs' assertion be accepted that, in addition to technical considerations, **functional design decisions also** preclude copyright protection (see only reply, para. 176 et seq., pag. 617 et seq.) This interpretation cannot be inferred from the case law of the CJEU either. Rather, the exclusion is limited to forms exclusively determined by its technical function (CJEU, judgment of 11 June 2020 - C-833/18, para. 33, KAB 68).

German law

109. The prerequisite for copyright protection under German law is the existence of a **work** within the meaning of Section 2 of the German Copyright and Related Rights Act (Urheberrechtsgesetz) ["UrhG"] (cf. KAB 57). Protected works of art include, in particular, works of fine art, including works of architecture and applied art and designs of such works (Section 2 (1) no. 4 UrhG). **Applied art serves a utilitarian purpose**, whereas fine art pursues free, purely artistic purposes (BGH, judgement of 13 November 2013, I ZR 143/12, para. 16b, KB 161). German copyright law also requires that the **level of design** of utility objects is **not too low** (see BGH, judgement of 13 November 2013, I ZR 143/12, para. 40, KB 161).
- 109.1 **Works** within the meaning of the UrhG can only be **personal intellectual creations** (§ 2 para. 2 UrhG). This is a creation of an individual character whose aesthetic content has reached such a degree that, in the opinion of circles receptive to art and reasonably familiar with art appreciation, it can be considered an "artistic" achievement.

The aesthetic effect of the design can only justify copyright protection insofar as it is based on an artistic achievement and expresses this (BGH, judgement of 15 December 2020, I ZR 173/21, para. 13b) with further references, KB 232).

- 109.2 These standards **correspond in substance** to the **concept of** a work protected by copyright under **Union law** - to be interpreted and applied uniformly throughout the Union - within the meaning of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (see BGH, judgment of 15 December 2022, I ZR 173/21, para. 14 with further references, KB 232). As a result, free, creative decisions are necessary. Such decisions were made to a sufficient extent in the present case. Reference can be made to para. 91 et seq. in this regard.
- 109.3 In the case of works of applied art, **no higher requirements are** to be placed on the level of design than for works of non-applied art (BGH, judgement of 13 November 2013, I ZR 143/12, para. 41, KB 161). In the case of everyday objects that have design features determined by their intended purpose, only the **scope** for artistic design is regularly limited. For this reason, the question arises to a particular extent as to whether they **are artistically designed beyond their form dictated by their function** and whether this design reaches a **level of design** that justifies copyright protection (BGH, judgement of 15 December 2022 - I ZR 173/21, para. 15; KB 232). A level of design that justifies copyright protection but is nevertheless low leads to a correspondingly narrow scope of protection for the work in question (BGH, judgement of 13 November 2013, I ZR 143/12, para. 41 with further references, KB 161).
- 109.4 With regard to the **purpose of use** and the resulting **creative leeway**, reference can be made to the explanations in para. 65 et seq. There was therefore sufficient creative leeway.
110. Under German law, the previously known **set of shapes** and any existing specifications must also be taken into account (see BGH, judgment of 15 December 2022, I ZR 173/21, para. 24.4, KB 232). With regard to the previously known **set of shapes** and the **specifications** for the design of the "Hang", reference can be made to the explanations in para. 64 and para. 66.2 f. The "Hang" stands out from the previously recognised set of shapes.
- 110.1 The judgment mentioned in the statement of 24 August 2023, para. 33, pag. 1181 (OLG Hamburg, judgment of 25 November 2021, para. 66c, KB 231) cannot change this assessment. In particular, this would mean that the plaintiff's scope for design was restricted (requirement: further development of an (already existing) design of the luminaire). In contrast to the "showcase case" referred to by the plaintiffs, the relevant task in the present case was formulated **very openly**; in some cases there were relatively few **specifications**, let alone a pre-existing design that should have been further developed in the sense of a specification (see para. 66 et seq.).

111. **Technical features**, i.e. those without which the object could not function or features that are used for technical reasons but are freely selectable or interchangeable, cannot justify copyright protection **if their design is based solely on technical requirements** (see BGH, judgment of 12 May 2011, I ZR 53/10, para. 20 with further references, see also para. 30, KB 159).
- 111.1 With regard to **technical constraints** (in the sense of technically mandatory features), which are said to have dictated the design of the "Hang", reference can be made to the explanations in para. 67 et seq. Such technical constraints, which would have left no room for artistic design (see BGH, judgement of 12 May 2011, I ZR 53/10, para. 20, KB 159), did not exist in the present case. Therefore, it cannot be said that - in the words of the CJEU - the defendants 2 and 3 no longer had any room for the exercise of artistic freedom (see above, para. 108.2).
- 111.2 Insofar as the plaintiffs argue that the (mere) choice between **several possible elements, but used for technical reasons**, is not capable of establishing copyright protection or sufficient scope for design (plaintiffs' statement of 24 August 2024, para. 39 f., pag. 1183; cf. also 1st party submission of the plaintiffs, para. 59 f., pag. 1309 f., as well as the plaintiffs' closing statement, para. 53, pag. 1387 f.), they are not to be heard in the present case: the BGH (only) held that the existence of design alternatives **alone** could not be used to derive a creative level of design (but rather that the previously known set of forms and the specifications must also be taken into account as part of the **overall assessment** to be made, cf. BGH, judgment of 15 December 2022, I ZR 173/21, para. 24.4, KB 232; cf. also the judgments of the CJEU, in which it (only) stated that the existence of a **choice** does not **necessarily imply that** there is a work, cf. para. 108.4).
- 111.3 The plaintiffs cannot derive anything else from the "Seilzirkus ruling" of the BGH, according to which an artistic design that goes **beyond a mere technical solution** is required (see BGH, ruling of 12 May 2011, I ZR 53/10, para. 19, 22, KB 159). With regard to the free, creative decisions made in the present case, which the defendants 2 and 3 have expressed (cf. para. 108.2 and 108.5), reference is made to the explanations in para. 91 et seq. In the present case, the mere existence of design alternatives (without taking into account the set of shapes and specifications) does not imply a creative level of design, nor can it be assumed that in the present case the components are only characterised by their technical function, i.e. that the various possibilities of implementing an idea are not so limited that the **idea and expression coincide**:
- 111.4 As already mentioned in para. 67 et seq. above, the creation of the "Hang" cannot be said to have been dominated by technical requirements or considerations, in particular not in terms of sound or playing technique. Accordingly, the expression of these components was not predetermined by their technical form in such a way that - in the words of the CJEU - idea and expression would coincide (cf. para. 108.3 above).

- 111.5 In particular, the fact that the defendants 2 and 3 introduced rules that deviated from the existing models and acted accordingly must be taken into account by creating a product that is not the product of rules, but which can serve as an example or model for the rules it has developed itself, and is thus exemplary as a result (see MATRAS/HOLZBACH, GRUR-Prax 2023, 78). It is not possible to speak of "several possible choices" because it was the defendants 2 and 3 who brought together the features typical of the "Hang" in one and the same object for the first time, without such a combination having resulted from previously known forms. Not least due to the existing scope for design and the previously known set of shapes, it is clear that it was not existing constraints that led to the production of the work, but that Defendants 2 and 3 actually used the scope for design available to them through creative decisions in order to produce a previously unknown combination of features. When implementing the task, including the resulting specifications according to para. 66 et seq., the defendants did not adhere to what was already known for idiophones, but rather left the realm of ("mere") craftsmanship (see OLG Cologne, judgment of 26 January 2024, 6 U 89/23, para. 64). Not least due to the playing surface of the sheet metal sound box being "inverted" to convex and the addition of the dome, which was in no way required by the task, as well as the contrast in the design of the two halves of the shell, the defendants 2 and 3 have left the framework of a purely technical solution. Accordingly, the plaintiffs, who do not consider the "Hang" to be protectable, were not able to submit any previously known designs in the present proceedings which the defendants 2 and 3 would have used. The design of the "Hang" therefore fulfils the quality required under Section 2 UrhG, as Defendants 2 and 3 have filled the design scope available to them with free creative decisions.
112. Accordingly, the reservation - mentioned by the plaintiffs - according to which it is not sufficient for the "creation of individual character" required under copyright law that the design of an object is (merely) neither previously known nor necessary for the object of use to fulfil its function (cf. plaintiffs' statement of 24 August 2023, para. 42, pag. 1184), is correct in principle, but not relevant in the present case.
113. For the reasons stated above, the "Hang" in its **"First Generation"** form **and its further developments** in accordance with the legal claim under points 1 ii) a) - e) ["First Generation of the Hang", "Low Hang", "Second Generation of the Hang", "Integral Hang" and "Free Integral Hang"] is **protected** under **German copyright law as a work within the meaning of Section 2 (1) no. 4 UrhG**.
114. With regard to **prototypes 4 and 5**, it can be stated (concerning the plaintiffs 10 and 12) that the "Hang" proves to be worthy of protection in particular due to the (first-time and previously unknown) combination of the elements in dispute here.

The above-mentioned assessment and thus **eligibility for protection** therefore also applies without further ado to the objects **prototype 4, prototype 5** (cf. legal claim no. 1 i) d) - e) which also **have all the elements in dispute here** (lens shape, central dome, opposite resonance hole and circularly arranged sound fields). Insofar as the plaintiffs 10 and 12 are concerned, the "Hang" is therefore also **protected** under **German copyright law** as a work within the meaning of § 2 para. 1 no. 4 UrhG in the designs according to legal claim no. 1 i) d) - e) [prototype 4 and prototype 5].

115. The legal situation with regard to the other versions of the "Hang" does not need to be addressed in view of the comments on the formal part (namely the interest in a declaratory judgement and the certainty of the legal claims, see para. 27 et seq.).

Dutch law

116. Works of literature, science or art within the meaning of Art. 10 para. 1 of the Dutch Copyright Act ("*Auteurswet*") include, according to (11), also works of applied art and industrial drawings *and* models ("*werken van toegepaste kunst en tekeningen en modellen van nijverheid*") (cf. also KAB 122). A work within the meaning of the aforementioned provision exists if it has **its own original character** ("*eigen oorspronkelijk karakter*") and bears the **personal stamp of its creator** ("*persoonlijk stempel van de ma-ken*>) (cf. Hoge Raad, judgment of 4 January 1991, ECLI:NL:HR:1991:ZC0104, E. 3.4., KB 239 and 239A; judgment of 12 April 2013, ECLI:NL:PHR:2012:BY1532, E. 4.2 a, KB 176 and 176A). This is the criterion of "own intellectual creation" according to the case law of the **CJEU** (see Hoge Raad, judgment of 12 April 2013, ECLI:NL:PHR:2012:BY1532, E. 4.2 a with further references, KB 176 and 176A).
- 116.1 The requirement that the creation must have its own original character means that the shape must **not be borrowed from that of another work** (Hoge Raad, judgment of 30 May 2008, ECLI:NL:HR:2008:BC2153, E. 4.5.1, KB 171 and 171A). In view of the comments on the prior art (para. 64), it has been established in the present case that the shape of the "Hang" is **not borrowed** from that **of another work**.
- 116.2 The criterion of the **personal stamp of the creator** is fulfilled if the form is the result of **creative human labour** and thus creative decisions, i.e. the product of the human mind. However, **banal or trivial** forms that do not reveal any creative effort are not protected (Hoge Raad, judgment of 30 May 2008, E-CLI:NL:HR:2008:BC2153, E. 4.5.1, KB 171 and 171A). However, conscious decisions in the sense that the creator wanted to create a copyright-protected work are not required (Hoge Raad, judgment of 30 May 2008, E-CLI:NL:HR:2008:BC2153, E. 4.5.2 in conjunction with E. 4.1, KB 171 and 171A). E. 4.1, KB 171 and 171A; convincingly the opinion of the plaintiffs in their statement of 24 August 2023, para. 70 f., pag. 1194 f.). A certain selection of elements that are not protected in themselves can also constitute a work, provided that the selection bears the personal imprint of the creator (see Hoge Raad, judgment of 22 February 2013, ECLI:NL:HR:2013:BY1529, E. 3.4 e, KB 170 and 170A).

Moreover, **no different standards** apply to utility objects than to other works (see Hoge Raad, judgment of 12 April 2013, ECLI:NL:HR:2013:BY1532, E. 4.2. b with further references, KB 176 and 176A).

- 116.3 With regard to the "own intellectual creation", which - in the words of the CJEU - presupposes **free creative decisions** of the defendants 2 and 3, reference can be made to para. 91 et seq.
117. Under Dutch law, too, the creator's decisions must **not merely** serve a **technical effect** or be **too much** the result of a **choice** limited by technical principles (cf. February 2013, ECLI:NL:HR:2013:BY1529, E. 3.4 c, KB 170 and 170A; see also Rechtbank Gelderland, judgment of 13 June 2022, ECLI:NL:RBGEL:2022:2942, E. 4.5, KB 244 and 244A, in each case with reference to the case law of the CJEU). **Elements of the work** that **merely** serve a **technical effect** or are **too much** the result of a **selection limited by technical principles** are excluded from protection: However, this exclusion does not extend to all elements that have a technical function because this would - wrongly - exclude designs from the scope of copyright (Hoge Raad, judgment of 12 April 2013, ECLI:NL:HR:2013:BY1532, E. 4.2. c with reference, inter alia, to the case law of the ECJ, KB 176 and 176A). If a work fulfils **technical and functional requirements**, this does not preclude copyright protection. In this case, too, the **scope for design** or **design** decisions can **be such** that there is **sufficient scope** for **creative decisions** by the creator that can constitute a work (Hoge Raad, judgment of 12 April 2013, ECLI:NL:HR:2013:BY1532, E. 4.2 d with further references, KB 176 and 176A). The **choice between different alternatives** does not involve a free choice, which would contribute to the personal stamp, but is **part of the technical design process**; however, the situation is different if the design in its entirety goes beyond the mere function or can at least be distinguished from it (see SPOORNERKADENISSER, Auteursrecht, 4th ed. [KB 240], in particular: *"Hoe dan ook maken dergelijke keuzes pri-mair deel uit van het technische ontwerptraject, en dragen ze in zoverre niet bij aan een eventueel persoonlijk stempel. The situation is different when the design is made as a result of a design that overrides the original function or is therefore not personalised [Such decisions are primarily part of the technical design process and in this respect do not contribute to a personal stamp. However, the situation is different if the design as a whole is given a design that goes beyond the mere function or at least differs from it.]*).
118. With regard to **technical constraints**, **reference** can be made to the explanations in para. 67 et seq. When the "Hang" was created, there was no selection limited by technical principles, nor - in the words of the CJEU - was there any room left for the exercise of artistic freedom (see para. 108.2). Sometimes, the "Hang" does not contain components that - in the words of the CJEU - would **only** be characterised by their technical function.

The various possibilities of realising the idea were therefore not so limited that idea and expression would coincide (see para. 108.3 and para. 111.3 f.). In view of the intended purpose and the associated requirements (para. 66 et seq.), the defendants 2 and 3 had **sufficient** room for manoeuvre to make **creative decisions**.

119. A different assessment would have the consequence that in the present case elements that (also) have a technical function would be - wrongly - excluded from copyright (see Hoge Raad, judgment of 12 April 2013, ECLI:NL:HR:2013:BY1532, E. 4.2 c with reference to the case law of the ECJ, KB 176 and 176A, among others). As already shown in para. 111.5, the activity of Defendants 2 and 3 in the present case was not (merely) limited to a selection decision from technical alternatives, but rather it was Defendants 2 and 3 who brought together the features typical of the "Hang" for the first time, without such a combination having resulted from the form of another work. The "Hang" embodies more than a mere choice between different technical alternatives. Not least because of the "inverted" convex playing surface of the sheet metal sound box and the addition of the dome, which was in no way required by the objective, as well as the contrast in the design of the two halves of the shell, the defendants 2 and 3 have left the framework of a purely technical solution and filled the scope available to them with creative decisions. The design of the "Hang" therefore fulfils the quality required by Art. 10 para. 1 no. 11 *Auteurswet*, as the defendants 2 and 3 have filled the design scope available to them with free creative decisions.
120. Moreover, the plaintiffs' comparison with the Rubik's **Cube**, which - like the "Hang" - is also a "playable" object (see minutes of the General Meeting, 1st submissions of the plaintiffs, para. 63, pag. 1311), is not obvious: In contrast to Rubik's Cube, the "Hang" is neither a "logic game" governed by mathematical rules (see Gerechtshof Arnhem-Leeuwarden, judgment of 13 July 2021, ECLI:NL:GHARL:2021:6712, E. 5.11, KB 185 and 185A; Hof Arnhem, judgment of 25 September 2012, ECLI:NL:GHARN:2012:2836, E. 4.10, KB 260 and 260A), nor is there a patent specification from which "the essential element" of a "Hang" would result (see Gerechtshof Arnhem-Leeuwarden, judgment of 13 July 2021, ECLI:NL:GHARL:2021:6712, E. 5.11, KB 185 and 185A) or on the basis of which its functionality could be verified (especially since there is no such thing as "the one" essential element of a "Hang"). Moreover, it is not a possible "game concept" of the "Hang" that is at issue here, which is why the plaintiffs' references to the corresponding statements on the question of the game concept of the Rubik's Cube (see Rechtbank Gelderland, judgment of 13 June 2022, ECLI:NL:RBGEL:2022:2942, KB 244 and KB 244A) are irrelevant from the outset (see plaintiffs' statement of 24 August 2023, para. 109, pag. 1209).

Moreover, in the case of the "Hang" - as shown above - the choice for the selected design elements was by no means "obvious" (see Arnhem Court, judgment of 25 September 2012, E-CLI:NL:GHARN:2012:2836, E. 4.10, KB 260 and 260A).

121. For the above-mentioned reasons, the "Hang" in its form according to the legal claim under point 1 ii) a) ["First generation of the Hang"] is also **protected** under **Dutch copyright law** as a **work** within the meaning of Art. 10 para. 1 no. 11 *Auteurswet*.
122. The legal situation with regard to the other versions of the "Hang" does not need to be addressed in view of the comments on the formal part (namely the interest in a declaratory judgement and the certainty of the legal claims, see para. 27 et seq.

Summarised conclusions

123. Insofar as the action is to be upheld (namely insofar as the plaintiffs have an interest in a declaratory judgement on the individual versions of the "Hang" according to the legal systems in question), the court seized concludes, in view of the procedural limitation, that all versions of the "Hang" examined in more detail in the present decision **are to be qualified** as **works protected by copyright** (depending on the specific constellation, namely taking into account the version and legal system).
- 123.1 The corresponding legal claims of the plaintiffs must therefore be dismissed. In compliance with the plaintiffs' negative declaratory requests, it is **not established** that (a) in **Switzerland**, (b) in **Germany** and (c) in the **Netherlands no copyright protection exists** for brass sound instruments with the design features (i) lenticular basic shape, consisting of two synclastic spherical segments, (ii) central dome, (iii) opposite resonance hole and (iv) circular tone fields arranged on the upper spherical segment according to the following sketch:



in particular in the following actual configurations:

- i. Prototypes of the "Hang":

d. Prototype 4:



e. Prototype 5:



ii. "Hang":

a. First generation of the "Hang":



b. "Low Hang":

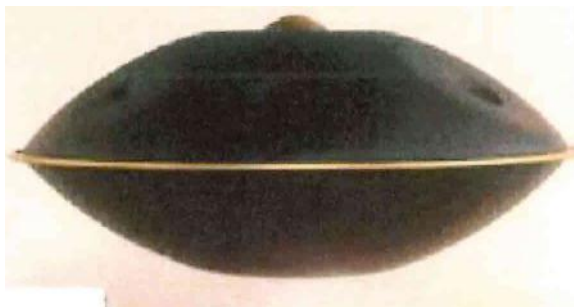


c. Second generation of the "Hang":





d. "Integral Hang":





e. "Free Integral Hang":



On the question of the "precedential effect" of foreign judgements and the exclusion of protection pursuant to Art. 2 para. 7 RBA

124. Against the background of the above statements and the fact that the objects in dispute assessed here have the character of a work under each of the three relevant legal systems, the plaintiffs' statements regarding the question of a possible exclusion of protection pursuant to Art. 2 para. 7 RBA are **not relevant to the decision**, which in particular also concerns the question of the country of origin (see in particular Reply, para. 278 et seq, pag. 655 et seq., para. 308 et seq., pag. 670 et seq.; see also plaintiffs' statement of 24 August 2023, para. 2 et seq., pag. 1171 et seq. and para. 52 et seq., pag. 1188 et seq.; rejoinder, para. 384 et seq., pag. 957 et seq. and para. 436 et seq., pag. 968 et seq.).
125. The court makes its judgement - as the plaintiffs correctly state in their reply, para. 281, 2nd lemma, pag. 657 - (solely) according to its own assessment based on the facts of the case, which are established in the proceedings here. There is no need to go into the question of the existence and scope of any "precedent effect" of foreign (measure) decisions, in particular from Germany and the Netherlands, which dealt with the "Hang" (also) disputed in the present case (see only the plaintiffs' statement of 24 August 2023, para. 29, pag. 1180; 1st party submission of the plaintiffs, para. 78 et seq, pag. 1316; Defendant's closing statement, para. 37 f., 42 f., pag. 1360 f.). For this reason alone, the Commercial Court of Bern does not have to deal in detail with the "correctness" of the facts relevant in those proceedings (see only reply, para. 281 ff. pag. 656 ff.; statement of the plaintiffs of 24 August 2023, para. 28, pag. 1179 f.; 1st party submission of the plaintiffs, para. 80 ff, pag. 1316 et seq.; Plaintiffs' closing statement, para. 52, pag. 1387; Defendants' closing statement, para. 38 et seq., pag. 1360 et seq.).

V. Defendant's procedural request for a positive declaration of copyright protection of the "Hang"

126. As part of their 1st party submission at the main hearing on 21/22 September 2023, the defendants filed a procedural motion that the dispositive ruling should not only dismiss the action, but also positively state that the "Hang" is protected by copyright (see HV minutes, p. 11, pag. 1234). They also maintained this in their closing statement (see Defendants' closing statement, p. 13, para. 73 et seq. (pag. 1367).
127. Because the defendants prevail on the issue of copyright protection in these limited proceedings and the action for a negative declaratory judgement is dismissed insofar as it can be upheld, the defendants' motion must be examined more closely.
128. The defendants justify their application in particular by arguing that they have a legitimate interest in a **positive finding**, which arises from the "numerous, repeated and sustained allegations to the contrary by an entire scene of imitators and the legal uncertainty created as a result" (defendants' closing submission, p. 13, para. 75, pag. 1367).

129. The binding effect of the present decision is limited exclusively to the parties involved in the proceedings (see only BGE 139 III 126, E. 3.1 with further references). In this respect, the decision has neither a legally binding effect on uninvolved third parties nor on an entire "scene", although these could be indirectly affected by it, in particular due to possible future warnings. However, the defendant's application is obviously not aimed at the plaintiffs involved in the present proceedings, but at such third parties or the other "scene members" not affected by this decision. Accordingly, it is not apparent to what extent the defendant has such an interest with regard to the **present proceedings** or the plaintiffs involved in the present proceedings. There is therefore no reason for the court to reformulate the dispositive of the present decision in a positive manner based on the (negatively formulated) legal claim of the action. In addition, due to the differentiated assessment of the plaintiffs' interest in a declaratory judgement, both with regard to the 10 objects in dispute (10 versions of the "Hang") and the three applicable legal systems, it cannot be assumed that a correspondingly positively reformulated dispositive would serve to improve comprehensibility.
130. The defendant's procedural motion is therefore **dismissed**.

VI Litigation costs

131. If the proceedings are ready for judgement, they are terminated by a decision on the merits or a decision not to intervene (Art. 236 para. 1 ZPO). As a rule, the court decides on legal costs in the **final decision**. In the case of an **interim decision** (Art. 237 ZPO), the legal costs incurred up to this point in time **can** be distributed (Art. 104 para. 1 and 2 ZPO). If - as in the present case - a decision is made in advance on one or more separate legal claims, this does not constitute a partial decision according to the case law of the Federal Supreme Court. In this case, the independent dismissal of a main claim also constitutes an **interim decision** (see BGE 146 III 254, E. 2.2).
132. A final decision has been made with regard to plaintiffs 11, 13, 14, 15, 16 and 17 due to the complete rejection of their claim due to the lack of interest in legal protection, which means that the costs attributable to them are to be eliminated and transferred. With regard to the other plaintiffs and legal claims, the limited proceedings end with an interim decision. The court and party costs attributable to them are transferred as part of the final transfer of costs in the main proceedings, sometimes added to the main proceedings. Insofar as the claims of the other plaintiffs are also (partially) rejected, it is justified to transfer these costs only in the course of the further proceedings.
133. In accordance with the outcome of the proceedings (non-admission), the plaintiffs 11, 13, 14, 15, 16 and 17 are to bear the corresponding legal costs as the unsuccessful parties (Art. 106 para. 1 ZPO).

134. If several persons are involved in the proceedings as main or secondary parties, the court shall determine their share of the legal costs. It may recognise joint and several liability (Art. 106 para. 3 ZPO). Plaintiffs 11, 13, 14, 15, 16 and 17 are involved in the lawsuit as simple interveners, represent a joint legal position financed by crowdfunding and - together with the other plaintiffs - have mandated the same legal representatives, which is why plaintiffs 11, 13, 14, 15, 16 and 17 must bear the legal costs to be awarded under joint and several liability (see STERCHI, in: BK ZPO, Art. 106 N 12).

Value in dispute

135. When actions are joined (see Art. 125 let. c ZPO), the **amount in dispute is** added together to determine the costs of the proceedings, provided they are not mutually exclusive (Art. 93 para. 1 ZPO; see GSCHWEND, in: BSK ZPO, 3rd ed., Art. 125 N 19 with further references). Contingent claims that are made in the event that the main claim is rejected are not to be included in the calculation of the value in dispute (see Art. 91 para. 1 ZPO). Against this background, the fact that **three proceedings** were combined in the present case, but the present decision only deals with the corresponding main claims, has no influence on the amount in dispute. For the three combined proceedings as a whole, the parties agree on a **value in dispute of CHF 430,000.00** (see only KA, para. 20, pag. 280).

Court costs

136. For an amount in dispute of CHF 100,000.00 to 500,000.00, the fee before the Commercial Court is CHF 5,000 to 40,000 (Art. 42 para. 1 let. c in conjunction with Art. 4 para. 2 of the Decree on Procedural Costs [VKD; BSG 161.12]). Art. 4 para. 2 of the Procedural Costs Decree [VKD; BSG 161.12]). Within this framework, the procedural costs are calculated according to the total time and labour required, the importance of the matter and the financial capacity of the party liable to pay the costs (Art. 5 VKD). If proceedings become irrelevant or are settled by means of settlement, withdrawal, or non-admission, the minimum fee may be reduced (Art. 9 para. 1 VKD).
137. When determining the court fee to be paid, it must be taken into account that 25 individual plaintiffs demanded a negative declaration of copyright protection under **three legal systems**, especially since **each** plaintiff individually submitted **10 objects** to the court for examination (see legal request no. 1 i) and ii), which had a corresponding influence on the examination of the interest in a declaratory judgement. The fact that the proceedings were also very extensive (even for limited proceedings) (double exchange of pleadings, various novelty submissions), proved to be correspondingly complex due to the international nature of the facts and that a two-day main hearing was held in addition to a one-day instruction hearing, is not to be taken into account in the liquidation of costs relating to the decisions not to intervene.

138. Due to the joint appearance and the crowdfunding carried out, it can be assumed that the plaintiffs have above-average capacity. A court fee of **CHF 8,000.00** therefore appears to be appropriate for the assessment of the interest in a declaratory judgement and jurisdiction in the international relationship, taking into account the particular constellation of claims (25 claimants, negative declaratory judgement, 3 legal systems and 10 objects in dispute). Of this amount, **CHF 2,000.00** is attributable to plaintiffs 11, 13, 15, 16 and 17, who make up around 1/4 of the total number of plaintiffs and whose claim will not be recognised. Due to the joint appearance of the plaintiffs and in view of the crowdfunding organised by the plaintiffs, it appears appropriate to impose the court fee on plaintiffs 11, 13, 14, 15, 16 and 17 with joint and several liability. The amount will be taken from the advance payment of CHF 20,000.00 made by plaintiffs 11, 13, 14, 15, 16 and 17. The balance of all advance payments made will remain in the court's treasury, as the proceedings will continue with the exception of plaintiffs 11, 13, 14, 16 and 17.

Attorney's fee

139. The plaintiffs must also pay compensation to the defendants (Art. 111 para. 2 ZPO). According to Art. 95 Para. 3 ZPO, party compensation includes in particular the reimbursement of necessary expenses (letter a) and the costs of professional representation (letter b). The court awards the party compensation in accordance with the cantonal tariffs (Art. 105 para. 2 ZPO).
- 139.1 In their bill of costs, the defendants request a fee for professional representation of CHF 98,400.00. They argue that with a value in dispute of CHF 430,000.00, the fee to be compensated pursuant to Art. 5 PKV amounts to CHF 11,800.00 to CHF 49,200.00 and request a surcharge pursuant to Art. 9 PKV of 100% (final submission of the defendants, para. 65 f., pag. 1365 f.). They justify the award on the grounds that the present proceedings were very complex and time-consuming due to the merger of 25 plaintiffs, the large number of documents submitted and the three legal systems to be assessed. The initiation of the action by the plaintiffs alone comprised 3 actions with a total of 1321 pages and 286 enclosures. The defendant is a family business that already had to pay fees totalling well over CHF 200,000.00 for the proceedings, despite the greatly reduced fees.
- 139.2 In proceedings at first instance, the fee range extends to CHF 11,800 to 49,200 for an amount in dispute of more than CHF 400,000 to 600,000 (Art. 5 para. 1 PKV).
- 139.3 Within the framework tariff, the party costs are calculated according to the time required in the case, the importance of the dispute and the difficulty of the proceedings (Art. 41 para. 3 of the Cantonal Lawyers Act [KAG; BSG 168.11]).
- 139.4 Only the necessary expenditure is to be remunerated, i.e. the expenditure that appears necessary on objective assessment (STERCHI, in: BK ZPO, Art. 95 N 14).

Only the costs for one lawyer are reimbursed, but not objectively unnecessary expenses, such as those incurred by several lawyers working overlapping (SUTERNON HOLZEN, in: Kommentar ZPO, 3rd ed., Art. 95 N. 37).

- 139.5 With regard to the time required, it must be taken into account in this case - as with the determination of the court fee - that **for the time being** only the costs with regard to the **decision not to intervene** are allocated to those plaintiffs whose claim is not fully recognised, as they are excluded from further proceedings. The costs incurred in the limited proceedings, which could also arise in particular in connection with the three legal systems to be examined, the extensive legal documents in the event of a double exchange of written submissions, various submissions as well as the instruction hearing and the two-day main hearing, will have to be taken into account **in the further proceedings** (see Art. 106 para. 2 ZPO). This is all the more urgent as the legal briefs largely related to substantive law issues and the procedural requirements are to be examined ex officio anyway (Art. 59 f. ZPO).
- 139.6 It can be assumed that the time required for the defendant's legal representatives increased slightly due to the international nature of the dispute and the associated questions regarding the prerequisites for the proceedings, so that the time required can still be assumed to be just average. The fact that the clarifications had to be examined with regard to 25 plaintiffs had a slightly increasing effect. In addition, the defendants were able to limit themselves to disputing the prerequisites for the claim (namely the interest in a declaratory judgement), which is why it can be assumed that the difficulty was average.
140. The value in dispute is the first factor to be taken into account when considering the significance of the dispute. This is above the medium range of the framework tariff. At the same time, it concerns issues of fundamental importance (existence of copyright protection), which means that the proceedings can still be categorised as average in this respect.
141. Finally, Art. 9 PKV provides for a surcharge of up to 100 per cent of the fee for proceedings that require a particularly large amount of time and work, such as difficult and time-consuming collection or compilation of evidence, large file material or extensive correspondence, if a substantial part of the file material or correspondence is in a language other than the court language, or in the case of particularly complex factual or legal circumstances.
142. The surcharge in accordance with Art. 9 PKV only comes into effect if the costs of a procedure cannot be taken into account within the ordinary framework tariff. This is not the case with regard to the issue of non-admission, which is why additional consideration does not appear appropriate.
143. Based on the above factors, the court considers compensation for the parties with regard to the decisions not to enter into the proceedings to be in the middle of the applicable tariff range and appropriate to the effort required, the importance and the difficulty of the case.

Plaintiffs 11, 13, 14, 15, 16 and 17 are jointly and severally liable to compensate the defendants for the costs of professional representation in the **lump sum of CHF 8,500.00** (amounting 1/4 of the utilisation of the framework tariff) plus value-added tax of 7.7%.

Reimbursement of necessary expenses

- 144 Pursuant to Art. 95 para. 3 let. a ZPO, the necessary expenses are to be reimbursed as party costs. The Cantonal Ordinance on Party Costs does not contain any additional provisions on the reimbursement of necessary expenses. The defendants are claiming **expenses totalling CHF 119,295.95**:
- 144.1 The defendants initially claim costs for **advice on German copyright law** from Dr Schröter, a lawyer trained and admitted in Germany, in the form of expenses in the amount of CHF 48,465.00 (incl. VAT) (see the defendants' closing submissions, para. 68 f. and 72, pag. 1366, Exhibit 1).
- 144.2 Furthermore, the defendants claim costs for advice from a **Dutch law firm** specialising in copyright law, KLOS c.s., in the form of expenses of EUR 52,061.86 (amounting to CHF 50,906.45 at an exchange rate of 0.97781/EUR/CHF] (see the defendants' closing submissions, para. 68 f. and 72, pag. 1366, Exhibit 2).
- 144.3 The **defendants argue** in this regard that - due to the plaintiffs' legal claims - all questions arising also had to be clarified under German and Dutch law (see defendants' closing submissions, para. 68, pag. 1366).
- 144.4 Finally, the defendants claim costs in the form of expenses in the amount of CHF 19,924.50 for **translations of all Dutch documents into German** (see defendants' closing submissions, para. 71 and 72, pag. 1366 incl. Exhibit 3). In this regard, the defendants argue that this was only necessary due to the legal claims made by the plaintiffs, especially since the plaintiffs had insisted on a translation of the relevant documents (see defendants' closing submission, para. 70, pag. 1366).
- 144.5 In their submission of 8 December 2023, pag. 1399 et seq., the plaintiffs argue that these are not reimbursable expenses, especially since they include certain expenses that are not related to the present proceedings or other matters (namely Exhibit 2 to the defendants' closing statement). The plaintiffs deny that the defendants ever paid the invoices submitted (namely Exhibits 1 and 3 to the defendants' closing statement).
- 144.6 At this point, it should be noted that the court must regulate the distribution and determination of the costs of the proceedings in its final decision (Art. 104 para. 1 ZPO). This is all the more the case as an appropriate allocation of costs within the meaning of Art. 106 para. 2 ZPO will only be possible in the present case **after the contingent claims have been assessed**: it is theoretically conceivable that the defendants could prevail with regard to the main claim but lose (even if only partially) with regard to the contingent claims.

However, all of the expenses claimed by the defendants above concern expenses relating to substantive **legal matters** (German and Dutch copyright law, translations of foreign-language judgements) and are **not to be passed on to those plaintiffs** whose action is not being pursued. The corresponding expenses are therefore to be claimed as **part of the further proceedings**. On the other hand, it is justified to award the defendants in relation to the plaintiffs 11, 13, 14, 15, 16 and 17 **expenses** of 3% of the amount of the fee awarded, i.e. **CHF 255.00** plus VAT of 7.7%.

- 145 **To summarise, it should be** noted that the plaintiffs 11, 13, 14, 15, 16 and 17 are jointly and severally liable to pay the defendants **compensation** of **CHF 9,429.15** (consisting of a fee of CHF 8,500.00, expenses of CHF 255.00, plus VAT of 7.7% on an amount of CHF 8,755.00, amounting to CHF 674.15) on the basis of the partial decision not to intervene.

The Commercial Court decides:

1. The action is **dismissed** insofar as it relates to **plaintiffs 11, 13, 14, 15, 16 and 17**.
2. The **court costs in this regard**, determined at **CHF 2,000.00**, are imposed on **plaintiffs 11, 13, 14, 15, 16 and 17** with joint and several liability and offset against the advance on costs paid by plaintiffs 10-17. The balance shall remain with the court.
3. The **plaintiffs 11, 13, 14, 15, 16 and 17** are obliged to pay the defendants **compensation of CHF 9,429.15** (fee incl. expenses plus VAT) under joint and several liability.
4. The action is **dismissed** insofar as it relates to legal claims 1 i) a), b) and c) [prototypes 1, 2 and 3].
5. **As far as Swiss copyright law is concerned**, the action is **dismissed with** regard to **plaintiffs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 12**.
6. **As far as German copyright law is concerned**, the action is **dismissed with** regard to **plaintiffs 18, 19, 20, 21, 22, 23, 24 and 25**.
7. As far as the **Dutch copyright law** is concerned, the action will **not be accepted** with regard to **plaintiffs 3, 4, 5, 6, 7, 8 and 9**.
8. Insofar as the **claimants 1 and 2** are concerned, the action is **not upheld** with regard to legal claims no. 1 ii) b), c), d) and e) ["Low Hang", "Second Generation of the Hang", "Integral Hang", "Free Integral Hang"].
9. The action is **dismissed** in so far as it relates to **plaintiffs 1, 2, 3, 4, 5, 6, 7, 8, 9, 18, 19, 20, 21, 22, 23, 24 and 25**, and in so far as it relates to legal claims no. 1 i) d) and e) [prototypes 4 and 5].
10. In all other respects, **the action is dismissed** insofar as it relates to legal claim no. 1. The **proceedings** will be **continued with** regard to legal claims nos. 2 and 3 of the action(s).
11. The court and party costs attributable to items 4-10 shall be awarded on the merits.
12. To be opened (by registered letter):
 - to the parties

Berne, 2 July 2024

On behalf of the Commercial Court

The Vice President:

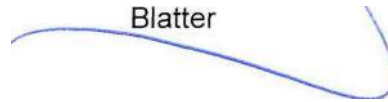


Chief Judge Schlup

The Clerk of the

Court:

Blatter



Information on legal remedies

An appeal against this decision may be lodged within 30 days with the Federal Supreme Court, Av. du Tribunal fédéral 29, 1000 Lausanne 14, in civil matters in accordance with Art. 39 ff., 72 ff. and 90 ff. of the Federal Supreme Court Act (BGG; SR 173.110). The appeal must fulfil the requirements of Art. 42 BGG. The amount in dispute is more than CHF 30,000.00.