

Brussels (8th k.)
12 April 2011

Seat: Lybeer, Van Santvliet
and Herregodts Stokke
A.S. (mrs. Van den
Broecke and De Coster) v.
Premaman (mr. Vandendriessche
loco *De Kesel*) and H3 Products (mr.
Meulemeester loco *Putzeys*)
A.R. No. 2008/AR/3141

Copyright – Chair –
Originality (yes) – Technical
requirements – Choices –

criminationary (no) – Cessation
(yes) – Risk of recidivism –
Measure for the provision of
information – Link to the
cessation

*The choices that were made when
shaping the Tripp Trapp chair were not
simply dictated or imposed by technical
prescriptions. The choices made at the
time were original and not self-evident.
The author, through this choice,
arrangement and combination of
elements, has expressed his creative
spirit in an original way. There is a
similar overall impression between the
Carlo chair and the Tripp Trapp chair.
The respondents have no useful
argument to draw from their allegation
that the appellants did not take legal
action against other chairs. It cannot be
objectively ruled out that the
infringement will be repeated. The
requested termination is not devoid of
purpose. The measure aimed at
disclosing the names and addresses of
the suppliers and purchasers of the
infringing chair is likely to contribute to
the cessation of the infringement.*

[...]

The Applicable Principles

[...]

14. In order for a work to be
protected under Belgian Copyright
Law, the work must be expressed in a
specific form and satisfy the condition

Infringement (yes) –
Consistent overall
impression – Discriminatory
litigation (no) – Strike (yes) –
Risk of repetition – Measure
providing information –
Link with the strike

*The choices made in the design of the
Tripp Trapp chair were not merely
dictated or imposed by technical
regulations. The choices made at the
time were original and not obvious. The
author has expressed his creative spirit
through the choice, arrangement and
combination of the elements, in an
original way.*

*There is a similar overall impression
between the Carlo chair and the Tripp-
Trapp chair.*

of originality (A. Berenboom, *Le
nouveau droit d'auteur et les droits voisins*, p.
59).

The work must be the expression
of the personality of the author; it must
bear the personal stamp of the author
(Cass. 24 February 1995, R.W. 1995-
1996, 433).

In order for a work to bear the
personal stamp of its author, it is
necessary that there should be a choice.
If there is no choice, then everyone is
obliged to follow exactly the same path,
so that no one can put a personal stamp
on the production (F. Gotzen, «The
Court of Cassation and the concept of
"originality" in Belgian copyright»,
Computerrecht 1990/4, p. 161).

National legislation should, as far
as possible, be interpreted in the light
of the provisions of European law. It is
the responsibility of the competent
national authorities and courts to
interpret provisions of national law in a
way that is as far as possible compatible
with the objectives of European
Directives, i.e. to interpret their
national legislation in conformity with
the directive.

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, which lays down
harmonised rules of law in the field of
copyright, is, as is apparent from
recitals 4, 9 to 11 and 20 in the
preamble thereto, based on the
principle that works are protected by
copyright only if they are original, in the
sense that they are the author's own
intellectual creation (Court of Justice,
16 July 2009, No C-5/08, *Infopaq v.*

*The respondents cannot draw a useful
argument from their assertion that the
appellants would not bring legal
proceedings against other chairs. It is
not objectively excluded that the
infringement will be repeated. The
requested injunction is not without
purpose. The measure to indicate the
names and addresses of the suppliers
and customers of the infringing chair is
likely to contribute to the cessation of
the infringement.*

Copyright – Chair –
Originality (yes) – Technical
requirements – Choice –
Infringement (yes) – Similar
overall impression –
Procedure dis-

Danske Dagblades Forening,
www.curia.eu).

The principle on which Directive
2001/29/EC is based is in line with the
general scheme of the Berne
Convention for the Protection of
Literary and Artistic Works of 24 July
1971, from which it follows that the
protection of certain subject-matter
such as literary and artistic works
presupposes that they are creations of
the mind.

Even if the elements of a work
consist of elements which, taken in
isolation, do not in themselves
constitute an intellectual creation of the
author who uses them, the author, by
the selection, arrangement and
combination of these elements in an
original way, may express his creative
spirit and achieve a result which
constitutes an intellectual creation (cf.
Court of Justice 16 July 2009, No. C-
5/08, *Infopaq v. Danske Dagblades
Forening*, marginal number 45,
www.curia.eu).

*Application of the above principles to the
dispute opposing the parties*

Is the Tripp Trapp a copyrighted work?

15. According to the appellants,
the Tripp Trapp chair undeniably bears
the stamp and personality of its
designer, Mr. Opsvik. At the time of
the development of the Tripp Trapp
chair, in the early 1970s, several special
and unique choices would have been
made for a design that would be
substantially different from any
previously designed (high chair).
According to the appellants, the Tripp



Tripp chair is therefore clearly a copyrighted work.

The respondents, on the other hand, argue that the Tripp Trapp chair lacks originality and that the design of the chair is determined by its technique. The appearance of the chair is said to be mainly characterized by the way it is adjusted, by the type of «extendable chair». Any own interpretation of the designer of the chair would be lacking.

The Court of Appeal considered the following:

16. The elements that characterize the Tripp Trapp chair are:

- the two striking, sturdy, vertical support strips in the shape of an angled L;

- the more coloured elements clamped between the support mouldings, creating an overall image of an open, light, and transparent, yet sturdy design;

- the round backrest;
- the two adjustable seat trays that serve as a seat plate and as a footboard;

- certain contrasts: wooden braces and metal crossbars, light wood contrasting with black metal, the contrast in curved planks in the backrest and the curve of the seat and footboard, which contrasts with the harder straight lines, including those of the side view;

- the use of pairs; two braces, two metal crossbars, two (seat and foot) boards, and two curved shelves for the backrest;

- the side view (a harder, straight diagonal as a spine that runs from floor to top point);

- a sober and austere design;
- the use of light-coloured wood.

There is nothing in the file to show that before 1972, i.e. the year in which the Tripp Trapp chair was designed, there was a known (extendable) chair with a design that resembled that of the Tripp Trapp chair in its overall appearance.

It is true that before 1972 there was at least one chair with a recognizable L-shape (*cf.* the Clairmonte chair in France, on which a patent was granted in 1947 in France), but despite the use of the recognisable L-shape for the vertical support strips of that chair, this chair is different in its overall appearance from the Tripp Trapp chair

An L-shaped extendable chair does not automatically have the external characteristics and shape of a Tripp Trapp chair, at least the evidence of this is not provided by the respondents. The illustrations of other designs of extendable chairs submitted by the appellants prove the opposite (*cf.* the Clairmonte chair already mentioned).

The Court of Appeal found that not all the design features of the Tripp Chair are mere translations of ergonomic, functional and technical preconditions. The choices made by Mr. Opsvik in the design of the Tripp Trapp chair were not merely dictated or imposed by technical regulations.

Mr Opsvik has undeniably made design choices. For example, as Professor Marinissen's report rightly points out, Mr Opsvik's choice of (i) styles; (ii) uprights on the underside; (iii) a diagonal in the posts; (iv) a front connection between diagonal and uprights; (v) the use of wood; (vi) metal counterelements; (vii) the use of pairs; (viii) an open, transparent appearance, not at all necessary to give shape to the functionality of the Tripp Trapp chair as an extendable chair. These are pure design choices made by Mr. Opsvik.

There were also various options for the guides of the seat and footboard, for the seat and footboard itself and for the vertical support strips of the Tripp Trapp chair. Mr Opsvik has also made personal design choices in this regard.

For the guides of the seat and footboard, Mr. Opsvik has opted for slots in the vertical support strips. Another design choice was possible, such as the use of slippers or folded metal strips.

It was also possible to use materials other than plywood (which was chosen by Mr. Opsvik) for the seat and footboard. The use of plastic panels is conceivable, as well as the use of metal, rattan or textile for the seat and footboard.

There are also many different versions for the vertical support strips of a chair, in different materials. Instead of wood (solid beech), which Mr. Opsvik opted for, metal, plastic or rattan, or a combination of these materials could be used. The respondents do not in any way prove, and do not even make plausible, that Mr Opsvik's choice of white finished beech wood was not a real choice.

As far as the vertical support strips themselves are concerned, Mr Opsvik opted for flat sections. However, alternatives were just as technically

possible, such as rectangular, square or even round posts. The fact that the slots in the vertical posts must extend over a certain length so that the seat and footboard can be securely attached does not prevent this.

The Court of Appeal therefore ruled that even if a number of functional and technical considerations, as well as some safety regulations, had to be taken into account when designing the Tripp Trapp chair, this does not preclude the possibility that Mr Opsvik at the time when the Tripp Trapp chair was created, in particular in the early 1970s, has made various design choices, which have determined the shape of the chair.

The choices made at the time were original and not obvious. As has already been stated, there is nothing in the file to show that before 1972, that is to say, the year in which the Tripp Trapp chair was designed, there was a known (extendable) chair with a design that resembled that of the Tripp Trapp chair in its overall appearance.

When the Tripp Trapp chair was created by its designer, it stood out from the other (extendable) chairs that existed at the time.

Even if the elements of the Tripp Trapp chair consist of elements which, taken individually, do not constitute an intellectual creation of the author (Mr Peter Opsvik) who uses them (the L-shape of the vertical support mouldings, adjustable elements, the use of wood, the curved backrest, clear and clean lines), the author has by choice, arrangement and combination of these elements in an original way: expressed his creative spirit and arrived at a result that constitutes an intellectual creation.

17. The fact that the Tripp Trapp chair was given a shape that would fit within a particular style, *in this case* the Scandinavian style, does not preclude it from satisfying the criteria for obtaining copyright protection.

It appears from the documents submitted by the appellants that chairs were designed within the Scandinavian style which are completely different in their overall appearance from the Tripp Trapp chair.

18. The Court of Appeal decides that the Tripp Trapp chair is a copyrighted work.

The foregoing applies to both the Tripp Trapp Low Back Chair and the Tripp Trapp High Back Chair with Bracket. After all, the bracket is a (removable) accessory of the Tripp



Tripp Trapp chair that does not make any significant changes to its overall appearance. The high backrest is a variation of the low backrest of the Tripp Trapp chair that also does not make a significant change to the overall look of the Tripp Trapp chair.

The Tripp Trapp high-back chair would be sold in a number of European countries, but not in Belgium. The appellants rightly argue that this chair is also protected by copyright in Belgium by virtue of Article 2(6) *in conjunction with* Article 5 of the Berne Convention for the Protection of Literary and Artistic Works of 24 July 1971.

Does the Carlo chair infringe the copyright on the Tripp Trapp chair?

[...]

When comparing the Tripp Trapp low-back, unbracketed chair, on the one hand, and the Carlo chair, on the other, the following points of similarity stand out:

- Both chairs are apparently made of the same materials, namely light-coloured wood and black metal, which are always used for the same elements;
- both seats are equipped with two striking, sturdy, support rails in the shape of a sloping L;
- Both chairs have more revealed, horizontally clamped, more revealed elements between the support mouldings, creating an overall image of an open, light, and transparent, yet sturdy design;
- Both chairs have a rounded backrest;
- Both chairs have two horizon adjustable seat tops that serve as a seat board and as a footboard;
- Both chairs have a number of the same, well-defined contrasts: wooden braces and metal crossbars, light wood contrasting with black metal;
- Both chairs use pairs: two braces, two metal crossbars, two (seat and foot) boards, and two curved shelves for the backrest;
- Both chairs have a sober and sleek design;
- Both chairs have the same width and thickness ratio of the support strips.

As a result of the abovementioned similarities between the chairs compared, there is a similar overall impression between those seats.

The points of difference between the two seats do not detract from the overall impression between the two seats, in particular the high back of the Carlo chair compared to the low backrest of the Tripp Trapp chair, the presence of a bracket on the Carlo chair (which is only an accessory to it), the slightly curved L-shape of the vertical support strips of the Carlo chair compared to the rigid L-shape of the vertical support strips of the Tripp Trapp chair and the curve on both sides of the seat and footboard of the Carlo chair compared to the curve on only one side of the seat and footboard of the Tripp Trapp chair.

The overall impression between the Tripp Trapp with high back and bracket, on the one hand, and the Carlo chair, on the other, is even more striking than that between the Tripp Trapp chair with low backrest and without bracket, on the one hand, and the Carlo chair, on the other. The photos taken from various angles of the Tripp Trapp with high back and bracket, and the Carlo chair undeniably demonstrate this.

In any aspect of the chairs, the resemblance is particularly striking. In top, front or rear view, the two chairs give an almost identical appearance.

[...]

The Court of Appeal decided that the Carlo chair infringed the copyrights on this chair (be it the Tripp Trapp chair with low back or the one with high back and bracket) and was an unlawful copy or counterfeit of the Tripp Trapp chair.

The respondents' plea of freedom of copying is unfounded, since the Carlo chair disregards the copyright in the Tripp Trapp chair.

20. The respondents cannot draw a useful argument from their assertion that the appellants would not sue other chairs that allegedly infringed their copyright in the Tripp Trapp chair.

The appellants are not necessarily aware of all the copyright infringements in the Tripp Trapp chair.

In addition, they decide for themselves on the procedures they wish to conduct. The copyright protection of the Tripp Trapp chair is not «processed» or expired because the appellants would not take action against all the chairs that allegedly infringe the copyright in the Tripp Trapp chair. The scope of copyright protection on the Tripp Trapp chair is thereby affected.

21. The fact that the appellants do not claim protection of the Tripp Trapp under the design and model rights and that the Tripp Trapp is not (or no longer) the subject of a patent does not preclude the possibility that the Tripp Trapp, if it meets the conditions for doing so, would enjoy copyright protection.

22. The respondents refer to foreign court decisions regarding high chairs other than the Carlo chair, in which it was decided that these other child seats did not infringe the copyrights in the Tripp Trapp chair.

Those high chairs other than the Carlo chair are not the subject of the present proceedings and the court decisions to which the respondents refer are therefore not relevant in the context of the examination of whether or not the Carlo chair infringes the copyright in the Tripp Trapp chair.

23. The respondents argue that by selectively invoking their copyright, in particular only against manufacturers of children's chairs that charge a lower price than that of the Tripp Trapp, the appellants selectively foreclose the market within the European Union.

The Court of Appeal found that the respondents did not provide any evidence of this allegation, so that the Court of Appeal decided that it was unfounded.

The injunction sought by the appellants

24. The first respondent submits that the appellants' claim against it has become devoid of purpose since, following the proceedings initiated by the appellants, it decided to cease to market the Carlo chair, removed all remaining copies of that design from its shops and returned it to its supplier.

It is not objectively inconceivable that the infringement of the copyright in the Tripp Trapp by the first respondent, in her capacity as seller of the Carlo chair, would be repeated.

In addition, in addition to the application for an injunction against the first respondent, the appellants are also seeking a number of measures, which are not devoid of purpose as a result of the fact that it has ceased the marketing of the Carlo chair.

The appellants' claim against the first respondent is therefore not without purpose.



25. In view of Article 1 in conjunction with *Article 87 § 1 of the Civil Code*, the appellants' claim for an injunction is well founded in respect of the Carlo chair, being the chair which is the subject of the conduct.

The first respondent wrongly denies having infringed the appellants' copyright. The first respondent offered and sold the infringing Carlo chair in its shops until the beginning of March 2009.

However, the good faith of the first respondent cannot be seriously doubted, at least bad faith on the part of the first respondent is not proved by the appellants.

The measures sought by the appellants, other than the strike

26. The appellants request the Court of Appeal to order the respondents, within fourteen days of service of this judgment, to provide the appellants' lawyers in writing, in a complete manner and audited by an accountant, with:

- the full name and address details of the supplier(s) and the

LARCIER

professional purchasers of the infringing Carlo chairs,

- the total number of infringing Carlo chairs purchased, ordered, received and/or kept in stock by the intimates, including the purchase prices and purchase dates, supported by clearly legible copies of all orders, order confirmations, invoices and other purchase documents,

- a specification of the total number of infringing Carlo chairs already sold and/or delivered and/or returned by the respondents, as well as the sales prices and delivery dates used by the respondents, supported by means of legible copies of all orders, order confirmations, invoices and other sales documents.

The Court of Appeal finds that the first respondent has already provided the appellants with the information requested for this purpose, so that there is no reason to impose this measure on the first respondent.

The measure sought by the appellants is well founded before the second and third respondents.

After all, the measure sought is of a nature to contribute to the cessation

of the infringement of the appellants' copyright.

In addition, the appellants must have the information requested in order to be able to claim damages in separate proceedings, if necessary.

The second and third respondents have one month from the date of service of this judgment to transmit the documents in question to the appellants.

[...]

For these reasons:

The Court of Appeal,

Doing justice after adversariality,

[...]

- Finds that the appellants' Tripp Trapp chair constitutes a copyrighted work and that the first respondent has infringed, and the second and third respondents are infringing these copyrights by producing and/or distributing the Carlo chair;

- orders the respondents, with immediate effect from the notification of this judgment, to cease and desist from any infringement of the copyrights on the Tripp Trapp chair in and from Belgium, and accordingly to reproduce and/or publish the Carlo chair, including by manufacturing, offering, selling, distributing or otherwise trading this chair and/or to carry out promotional activities for this purpose, such as distributing and/or making available leaflets, advertisements, images or other material depicting the offending chair, in any way and under whatever name, or to be involved in any way whatsoever;

- declare that the injunction is valid on pain of a penalty payment of EUR 5 000 per infringement of that injunction and for each respondent alleged to have committed the infringement;

- order the second and third respondents each to declare to the appellants' lawyers in writing, in a complete manner and under the supervision of an accountant, within a period of one month from the date of service of this judgment:

- the full name and address details of the supplier(s) and the professional purchasers of the infringing Carlo chairs,

- the total number of infringing Carlo chairs purchased, ordered, received and/or stocked by the second and third respondents, with

indication of purchase prices and purchase dates, supported by clearly legible copies of all orders, order confirmations, invoices and other purchase documents,

- a specification of the total number of infringing Carlo chairs already sold and/or delivered and/or returned by the second and third respondents, as well as the selling prices and delivery dates used by the second and third respondents, supported by means of legible copies of all orders, order confirmations, invoices and other sales documents,

- that the abovementioned measure is in force on pain of a penalty payment of EUR 5 000 per respondent (second or third respondent) and for each day of delay in complying with it.

[...]

