

# The Netherlands: Darfurnica, Miffy and the right to parody!

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**Abstract:** The legal community of the Netherlands let out a sigh of relief in May 2011 when the judgment of the District Court of The Hague in preliminary proceedings was handed down in the Darfurnica case.<sup>1</sup> The same feeling of satisfaction prevailed, more recently, when the Court of Appeal of Amsterdam rendered decision in the Miffy case.<sup>2</sup> Both decisions, rendered on appeal, overruled the judgments of first instance, which had given precedence to the protection of intellectual property rights above the user's freedom of ex-

pression in the form of parody. But freedom of expression, and parody in particular, are solidly anchored in the Dutch values and courts more often than not find in favour of the parodist.<sup>3</sup> Apart from the fact that both decisions offer an interesting analysis of where the limit lies between intellectual property protection and artistic freedom, each decision deserves a few words of commentary in view of some noteworthy particularities.<sup>4</sup>

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## A. The Darfurnica case

1 The Darfurnica decision, reproduced below, clearly sets out the facts of the case and the ex parte preliminary proceedings that led to the appeal decision. The case revolved around Plesner's depiction of the Louis Vuitton handbag in the hands of a young African child holding a Chihuahua dog, art series called the 'Simple Living', which aimed at calling the world's attention to the famine in Africa. In first instance, before the District court of The Hague, Louis Vuitton's claim was accepted in ex parte proceedings. On appeal before the District Court of Amsterdam in preliminary proceedings, both parties relied on the fundamental right conferred upon them by the European Convention on Human Rights (ECHR). Plesner relied on Article 10 ECHR, guaranteeing the freedom of expression, whereas Louis Vuitton in-

voked Article 1 of the First Protocol to the Convention, which refers to the protection of property. The Court of Amsterdam's preliminary assessment was that, in the present circumstances, the importance of the letting Plesner continue to freely express her (artistic) opinion in the work 'Simple Living' outweighed the importance of Louis Vuitton's peaceful enjoyment of her property.

2 The Darfurnica case is further interesting for two reasons: first, because of the grounds that served as a basis for the plaintiff's claim; and second, because of the Court of Amsterdam's assessment of adequate fines for breach of intellectual property right. On the first point, Louis Vuitton had the choice of ammunition when seeking a prohibition to use the handbag Audra on T-shirts, posters and other merchandise (e.g. apart from the painting Darfurnica) in relation with an African child holding the bag and a Chihu-

ahua dog: it could have based its claim against the artist either on its copyright, trademark or design right on the bag. Louis Vuitton chose the last and sought an injunction solely based on its Community Design registration for the multi-colour canvas design of the handbag.

- 3 Louis Vuitton claimed that Plesner's use of the Audra handbag (potentially) affected its reputation. As stated Louis Vuitton relied in the context of this proceeding on its Community design rights, the main purpose of which for the owner is the grant of an exclusive right to use the registered external appearance of a product. As such the design right does not seem to serve to protect the reputation of this appearance. Protection of reputation includes not only the object's use as a manufactured article, but also its reference use in art, parody or criticism, thereby shifting the protection of the domain of industrial property, to the realm of expression. The letter of art. 3.16 paragraph 1 Benelux Convention on Intellectual Property does not oppose the protection of the reputation, as this article grants an exclusive right to 'use'. This point requires further elaboration by the courts, however. When examining what level of protection is determined in principle, other factors must be weighed, such as the ratio between the commercial nature of the expression and the "public interest" nature, the extent and intensity of the damage, the extent of dissemination and use of unduly affect the model (or its "reputation"). Leaving aside the question whether the function of the design right can also extend to protect the reputation of the model or even that of the owner, this function is, according to the Court, substantially less important than the defendant's freedom of expression.
- 4 Moreover, the fact that Louis Vuitton is a famous company whose products are very renowned also entailed, for the judge, that the company should put up with critical use to a greater degree than other claimants. As Sakulin explains in his annotation of the case, the reasons for this are first that public figures commonly occupy key positions in society; second, that they themselves often seek access to the media and that they can easily defend themselves; third, that they are often the ones who draw the attention of the public to their product and image; and fourth, that one could fear the emergence of a 'chilling effect' among the public if public figures are able to prohibit simple statements about themselves. Of these four arguments, the judge emphasized the fact that Louis Vuitton looked up the media attention and created it itself. In addition, the judge estimated that luxury goods from Louis Vuitton are an important symbol status, that Louis Vuitton defends its interests easily and happily in the media and in the courts, and that through high penalties, bans on use of its products can therefore create a strong "chilling effect" on artistic expression. All in

all, the judge ruled that a restriction of the freedom of art in this case would be contrary to Art. 10 ECHR. As Sakulin rightly observes, if the protection on designs and models indeed extends to protecting the owner's reputation, there is also a lack of a general exception. For example, trademark law recognizes a general exception, which in principle allows artists to use trademarks in their work.

- 5 On the second point, it is important to recall that the District Court of The Hague ordered a ban on the use of the design, valid throughout the European Union and under penalty of a fine of € 5000 per day. On the day of the interim order Plesner would therefore have had to pay a fine of approximately € 400,000. The maintenance of this already accrued penalty would not only have been a crushing attack on the existence of the artist, it would also brought about a serious 'chilling effect' by other artists and critics. The judge decided therefore to apply the sentence retroactively and thus to abolish already accrued penalty. This is fully in line with the jurisprudence of the European Court of Human Rights, which ruled that even if a statement is not itself in violation of Art. 10 ECHR, the imposition of a penalty so high as to bring about such a strong "chilling effect" can result in a violation of Art. 10 ECHR. If the judge only had lifted the interim order, without ruling on the fine, there would probably still have been a violation of Art. 10 ECHR. The court's ruling on the abolishment of the penalty is a welcome solution.

## B. The Miffy case

- 6 Netherlands' most well-known rabbit Miffy, or Nijntje in Dutch, was at the heart of yet another interesting parody dispute.<sup>5</sup> The case reached the Court of Appeal of Amsterdam which rendered a similar decision to that of the Darfurnica case. The facts are straightforward: Punt.nl is one of the biggest hosting providers in the Netherlands. It owns the domain name www.punt.nl and hosts a large number of websites and blogs including the domains www.gratisanimaties.punt.nl, ww.terreurmutsie.punt.nl and www.support.punt.nl. A total seven cartoons were posted on the first two mentioned websites, depicting Miffy in unusual incarnations. Mercis and Bruna objected to these on the basis of their copyright and trademark rights.
- 7 Punt.nl invoked the exception of parody laid down in article 18b of the Dutch Copyright Act, which reads: **"Publication or reproduction of a literary, scientific or artistic work in the context of a caricature, parody or pastiche will not be regarded as an infringement of copyright in that work, provided the use is in accordance with what would normally be sanctioned under the rules of social custom"**. The parody exception was introduced in

the Dutch Copyright Act in 2004 as a result of the implementation of Directive 2001/29/EC on Copyright in the Information Society. This criterion according to which 'the use must be in accordance with what would normally be sanctioned under the rules of social custom' is not uncommon in the Dutch Act for it also appears in article 15a (quotations) and 16 (educational use). Nevertheless, the criterion must still be interpreted by the courts in the context of a parody.

8 In 2009, the District Court of Amsterdam in preliminary proceedings awarded an injunction relating to two of the seven drawings. The District Court of Amsterdam partly accepted the website owner's parody defence, pointing to the adult themes that clearly contrasted with the small children's world that Nijntje normally occupies. Because of the humorous intent, lack of competitive intentions and lack of confusion, the use of images 2 to 6 as a parody in this case is consistent with what the rules of civil reasonably accepted, such as Article 18b Copyright Act requires. The parody exception was rejected, however, in respect of cartoons 1 and 7 (big red eyed Miffy sniffing cocaine or '*lijntje*'; and Miffy in an airplane about to crash into a skyscraper, or '*nijn-eleven*') because they were deemed to affect the reputation of the trademarks by associating Miffy with drug use and terrorism. This decision gave rise to mixed comments.<sup>6</sup>

9 On 13 September 2011, the Court of Appeal of Amsterdam reversed the ruling in first instance and declared that parodies of Miffy on webforum Punt.nl do not infringe the copyrights owned by Mercis and Bruna. The Court of Appeal declared that parodies in which Miffy is associated with sex, drugs and terrorism, are not necessarily illegal. It reversed the lower court's decision and found that all the images in question can be regarded as admitted parodies (the previously banned "Nijn Eleven"). There is no indiscriminate copies and the boundary lies in the fairness and the rules of social custom. The Court of Appeal drew thereby a more principal line: all cartoons clearly have a humoristic and ironising nature, even though not everyone will think it is funny. Hence these parodies cannot be forbidden based on copyright law or trademark law.

Court of Amsterdam, 22 December 2009 LJN: BK7383 (Mercis B.V. / Punt.nl B.V.), IER 2010, 23.

- 3 Supreme Court, 13-04-1984, NJ 1984, 524 (Suske and Wiske); District Court of Amsterdam, 04-07-1979, NJ 58184; District Court of Utrecht, 09-09-1998, 91084 FED 1998/627 (State of the Netherlands/Pearle); Court of Appeal of Amsterdam, 30-01-2003, IER 78960 (Bassie III); District Court of Amsterdam in preliminary proceedings, 22-12-2006 IER 2007, 39, (Greenpeace/ State of the Netherlands); Court of Appeal of Amsterdam, 06-08-1998, IER 9596 (Archbishop of Utrecht/Stichting Beeldrecht)
- 4 W. Sakulin, Trademark Protection and Freedom of Expression: An inquiry into the Conflict between Trademark Rights and Freedom of Expression under European Law, Alphen aan den Rijn: Kluwer Law International 2010, p. 231-328.
- 5 Court of Appeal of Amsterdam, decision of 13 September 2011, LJN: BS7825, (Mercis B.V./ Punt.nl B.V. ) overturning District Court of Amsterdam, 22 December 2009 LJN: BK7383 (Mercis B.V. / Punt.nl B.V.), IER 2010, 23 with commentary from D.F.W. Grosheide. Unfortunately there is no English translation available for either decision.
- 6 District Court of Amsterdam, 22 December 2009 LJN: BK7383 (Mercis B.V. / Punt.nl B.V.) AMI 2010-4, pp.127-132 with commentary from D.J.G. Visser.

1 District Court of The Hague, 4 May 2011, IER 2011/39 with commentary from W. Sakulin (Nadia Plesner Joensen/Louis Vuitton Malletier SA) overturning the ex parte decision Court in preliminary proceedings of The Hague of 27 januari 2011, LJN: BP9616 KG RK 10-214 (Louis Vuitton Malletier SA/ Nadia Plesner Joensen). The unofficial translation of the decision of the Court of Appeal was made by Kennedy Van der Laan, attorneys in Amsterdam, representing defendant Nadia Plesner, available at: [http://www.nadiaplesner.com/Web-site/Verdict\\_English.pdf](http://www.nadiaplesner.com/Web-site/Verdict_English.pdf)

2 Court of Appeal of Amsterdam, decision of 13 September 2011, LJN: BS7825, (Mercis B.V./ Punt.nl B.V. ) overturning District

This is an unofficial translation of the judgment of May 4, 2011, obtained by artist Nadia Plesner against Louis Vuitton. This translation is made by Kennedy Van der Laan attorneys in Amsterdam, the firm that represents Nadia Plesner.

## **JUDGMENT**

### **COURT OF THE HAGUE**

Civil Law Section

Case number / case list number: 389526 / KG ZA 11-294

#### **Judgment in preliminary relief proceedings dated 4 May 2011**

in the matter between:

**NADIA PLESNER JOENSEN**,  
residing in Winkel, municipality of Niedorp,  
claimant,  
attorneys: *mrs.* J.P. van den Brink and C. Wildeman of Amsterdam,

versus

the company incorporated under foreign law  
**LOUIS VUITTON MALLETIER SA**  
having its registered office in Paris, France,  
defendant,  
attorney: *mr.* B.J. van den Broek of Amsterdam.

Hereinafter the parties will be referred to as Plesner and Louis Vuitton

#### **1. The Proceedings**

- 1.1. The course of the proceedings appears from:
- the summons of 16 March 2011 with 9 exhibits;
  - the motion submitting exhibits of Louis Vuitton, with 15 exhibits,
  - the additional exhibits 10 up to and including 17 of Plesner,
  - the additional exhibits 16 up to and including 18 of Louis Vuitton,
  - the additional exhibits 18 and 19 of Plesner,
  - the additional exhibits 20 up to and including 22 of Plesner,
  - the additional exhibits 23 up to and including 27 of Plesner,
  - the additional exhibit 28 (specification of the costs) of Plesner,
  - the specification of the costs of Louis Vuitton,
  - the challenge incident which the judge concerned has accepted,

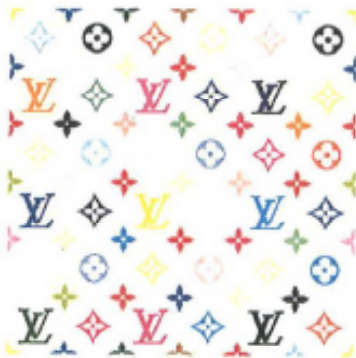
- the oral hearing, held on 20 April 2011, on the occasion of which the lawyers of both parties have submitted pleadings.

1.2. Finally, the judgment was rendered.

## 2. The Facts

2.1. Louis Vuitton is a fashion house operating worldwide which is active on the market for luxury fashion accessories, including bags and trunks, under the name of Louis Vuitton.

2.2. Louis Vuitton is holder of, *inter alia*, the Community designs registration with the number 000084223-0001 for “graphic symbols” filed on 6 October 2003. This concerns the so-called Multicolor Canvas Design. The publication of the registration took place on 24 February 2004. The illustration pertaining to this registration is shown below.



2.3. Since April 2005 Louis Vuitton is bringing a bag on the market under the name “Audra”, which has the Multicolor Canvas Design. An illustration of the Audra Bag is shown below:



2.4. Plesner is an artist occupying herself with the production and trading of art. She also operates under the name Geminink. Plesner presents her work, *inter alia*, on the website [www.nadiaplesner.com](http://www.nadiaplesner.com).

2.5. Since 2007 an important theme in the work of Plesner is the difference in attention in the media



between the situation in Darfur (Sudan) and other areas in crisis on the one hand, and the entertainment industry, on the other hand. By establishing a link between these two extremes, Plesner wants to illustrate that the media interest in people like Paris Hilton, which in Plesner's eyes is excessive, negatively affects the interest for the wrongs in Darfur.

2.6. In this framework, in 2008 Plesner made the work "*Simple Living*" which is shown below. The work shows an African child holding a Chihuahua dressed in pink and a hand bag. This is a reference to Paris Hilton, of whom many pictures have been published in which she is depicted with the same attributes. Plesner gave the following explanation in this respect: *Since doing nothing but wearing designer bags and small ugly dogs apparently is enough to get you on a magazine cover, maybe it is worth a try for people who actually deserve and need attention. If you can't beat them, join them! This is why I chose to mix the cruel reality with showbiz elements in my drawing "Simple Living".* The work "*Simple Living*" is as follows:



2.7. In 2007 and the beginning of 2008 Plesner used "*Simple Living*" as an illustration on T-shirts and posters, which she sells for the benefit of an organization dedicated to helping the victims in Darfur. "*Simple Living*" is also shown (or was shown) on various pages of the website [www.nadiaplesner.com](http://www.nadiaplesner.com).

2.8. At the time, Louis Vuitton was not happy with the association that the public taking cognizance of the work of Plesner could make between Louis Vuitton and the situation in Darfur. It summoned Plesner to cease the use of the illustration "*Simple Living*". After it appeared that Plesner would not cease that use, Louis Vuitton requested the French Court to issue an *ex parte* order while relying on its Community design right. In a decision of 25 May 2008 the President of the *Tribunal du Grande Instance* of Paris prohibited "*la présentation, l'offre à la vente et la commercialisation de produits contrefaisant le dessin communautaire*" (the presentation, offering for sale and the exploitation of the products infringing the Community design) on pain of a penalty of €5,000 per day, and Plesner was provisionally ordered to pay an amount of one Euro by way of (symbolic) damages.

2.9. As a result of the consultations between Plesner and Louis Vuitton, which took place after the

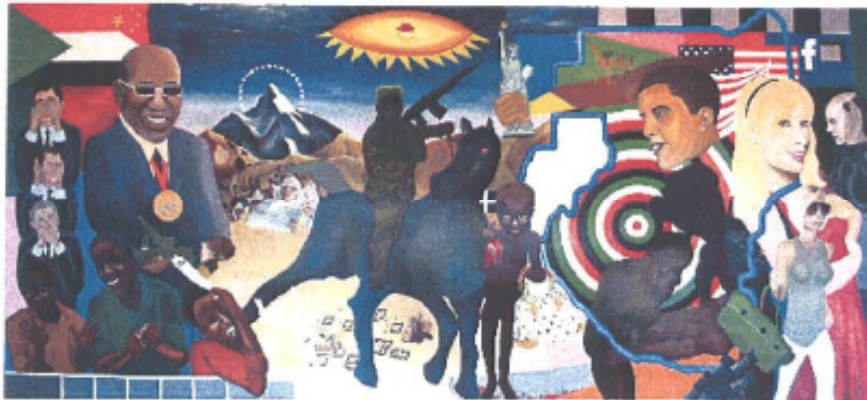
order had been imposed, the Danish attorney who assisted Plesner at that moment informed (the attorney of) Louis Vuitton, *inter alia*, as follows.

*"After considerations Nadia Plesner, unfortunately, is obliged to consider that the settlement negotiations are terminated as of today.*

*[...] Nadia Plesner maintains that she has not infringed and has never had the intention to infringe the rights of Louis Vuitton Malletier.*

*As Nadia Plesner maintains to have the crisis in Darfur as the objective for the 'Simple Living' campaign, Nadia Plesner has from today removed the reference on the t-shirt/bag to designs that might be analyzed or interpreted as a reference to Louis Vuitton Malletier's rights. In addition, any other reference to designs that could be analyzed or interpreted as a reference to Louis Vuitton Malletier including the blog on [www.nadiaplesner.com](http://www.nadiaplesner.com) will be removed today."*

2.10. Plesner continued to make works in which she combines the situation in Darfur with the world of show business, in order to thus generate attention and money for aid organizations active in areas in crisis. In 2010 she completed the painting "Darfurnica", shown below, which is an adaptation of Picasso's "Guernica", in which she also included the illustration of "Simple Living". This painting is shown below:



2.11. At an exhibition in Copenhagen, which opened on 7 January 2011, "Darfurnica" was shown and offered for sale. The invitation to the exhibition shows the location of the exhibition with the "Simple Living" illustration in front of it. Within the framework of the exhibition a number of "Simple Living" T-shirts and posters were offered for sale and (in any case) a number of "Simple Living" T-shirts were sold.

2.12. Louis Vuitton requested the Court in preliminary relief proceedings of The Hague on 27 January 2011 for an *ex parte* order against Plesner (residing in the Netherlands) and the gallery that organized the exhibition. Just like in 2008, it relied on its Community design right in this respect. The application contains, *inter alia*, the following passages.

13. To its dismay, Louis Vuitton had to conclude last week that Plesner has *again* started using the picture of the Audra Bag as illustrated above.

14. For example, Plesner has included the picture in a painting that the respondent under 2 ("Galleri Esplanaden"; Exhibit 5) has recently been offering for sale (price: 500,000 DKK = €67,000) (Exhibit 6). During this art sale exhibition, various other works of Plesner are offered for sale besides this painting. The art sale exhibition will run (in any case) until the end of January 2011.

15. In addition thereto, Plesner once again started selling the *Simple Living* Products – i.e. the T-shirts and the posters -, which contain the picture of the Audra Bag (Exhibit 7). As far as Louis Vuitton has been able to ascertain, the *Simple Living* Products originating from Plesner are at present being sold in any case during the above-mentioned art sale exhibition by the respondent under 2. However, it cannot be excluded that these products are or will also be sold through other channels in Europe (see below).

16. The picture with the Audra Bag is also used by the respondents on various expressions originating from them, for example on the invitations to the art sale exhibition (Exhibit 8). Thus, the picture with the Audra Bag of Louis Vuitton is being used as an "eye-catcher" for the exhibition, where, as said, many other works of art of Plesner are offered for sale besides the painting with the Audra Bag.

17. Furthermore, the picture with the Audra Bag of Louis Vuitton is used in various places on Plesner's websites, including on the website [www.nadiaplesner.com](http://www.nadiaplesner.com), where Plesner offers her products for sale under the name of "Geminink". As Exhibit 9 the home page of this site is submitted, i.e. the first page that visitors of Plesner's website get to see. The picture with the Audra Bag of Louis Vuitton is prominently placed here too.

[...]

23. As Louis Vuitton has not permitted the respondents to use the infringing pattern or to offer or to put on the market any products bearing the infringing pattern, or to perform any other act reserved by Louis Vuitton in respect of the pattern, the rights with regard to the Design are being infringed, as envisaged in Article 19 (1) of the Community Designs Regulation.

24. The picture showing the infringing pattern is being used in the Netherlands and in the rest of Europe, inter alia by its use on the websites of the respondent under 1, which are accessible in the Netherlands and the rest of Europe, and on which Plesner and her sole proprietorship with the Dutch business address are mentioned (cf. Exhibit 9). Furthermore, the pattern is used on the above-mentioned products that are being offered and sold by the respondents, including the *Simple Living* Products and the various expressions that have been disseminated in connection with the art sale exhibition in Denmark.

25. As far as said products are not yet being offered or sold in other European countries, there is a real and concrete threat that this will happen, since Plesner intends to put up the exhibition where the infringing products are being offered and sold also elsewhere in Europe.

**Part A. of the relief sought is as follows.**

[Louis Vuitton requests the Court in preliminary relief proceedings] to order the respondents immediately after service of the decision to be rendered on the basis of this application, to cease and desist any infringement, including by the acts specified in paragraphs 14-17 and 23-25 of this application, of the Community design with number 84223-0001 in the European Union;



2.13. In an *ex parte* decision of 28 January 2011 the Court in preliminary relief proceedings of The Hague prohibited Plesner and the gallery to infringe the Community design right of Louis Vuitton. The decision contains, *inter alia*, the following grounds for the decision.

2.3. In 2008 the respondent under 1 [Plesner, court] used a work of art to draw attention to the situation in Darfur, which may be described as genocide. The court understands that for this purpose she wished to draw attention to the poignant difference between luxury and affluence on the one hand, and poverty and famine in Darfur on the other hand. She has expressed the aspect of luxury by using the Design of the applicant in her work of art. She has succeeded in her purpose. Partly because of her work of art, the genocide in Darfur came to the attention of the general public in 2008. The impact of the work of art also contributed to the fame of the respondent under 1 as an artist. The applicant [Louis Vuitton, court] argues that the respondent under 1 is now using her work or art as an eye-catcher for her own products and work. As exhibit 8, it has submitted a representation of the use of the work or art as a signboard for her current exhibition in Copenhagen. The illustration used as an eye-catcher, as submitted in exhibit 8, is depicted below.



2.4. The Court in preliminary relief proceedings will not express an opinion on whether there was a ground for justification for the unauthorized use of the Design in 2008. In the present situation, and in view of the present use, it is unlikely that there is a ground for justification for the advertising and merchandising for the artist's own work. This entails that the injunction will be granted as requested in the manner set forth below. Considering the arguments put forward in the application in paragraph 35 ff., it is sufficiently plausible that a postponement would cause the applicant irreparable damage.

**Part 3.1. of the relief sought is as follows.**

[The Court in preliminary relief proceedings] orders each individual respondent immediately after service of this decision to cease and desist any infringement, including by the acts specified in paragraphs 14-17 and 23-25 of the application, of the Community design with number 84223-0001 in

the European Union;

### 3. The Dispute

3.1 Plesner claims – in summary – that in a judgment, to the extent possible provisionally enforceable, the Court in preliminary relief proceedings will review the decision of 27 January 2011 with application number KG RK 10-214, in the sense that the order imposed in this decision will be annulled, at any rate lifted, while ordering Louis Vuitton to pay the legal costs pursuant to Section 1019h of the Dutch Code of Civil Procedure (hereinafter: DCCP).

3.2 Louis Vuitton has put forward a defence.

3.3. Below, the arguments of the parties will be further discussed, in so far as relevant.

### 4. The Adjudication

4.1. Firstly, the parties differ of opinion on the question of whether under the *ex parte* order imposed, (acts with) the painting “Darfurnica” should also be included. The wording of the operative part of the judgment of the Court in preliminary relief proceedings indeed seems to suggest that also the exhibition and the offering for sale of the painting fall under the prohibited acts since they are described in number 14 of the application and the Court in preliminary relief proceedings has referred to the operative part of the judgment. However, at the hearing Louis Vuitton has indicated upon request that it does not wish that the order also extends to that painting, so that the order, for the sake of clarity, will already be reviewed to that extent.

4.2. Next, it is in dispute whether the prohibition (except for the painting Darfurnica) to use the illustration of the black boy with Chihuahua and bag (“*Simple Living*”) as shown under 2.6 and under 2.13, ground for the decision 2.3, has to be maintained. In this framework both parties rely on their fundamental right as set out in the European Convention on Human Rights (hereinafter: ECHR) and the accompanying Protocols. Plesner has argued that she is entitled to perform the act’s that Louis Vuitton holds against her on the basis of Article 10 of the ECHR, which relates to the freedom of expression. Louis Vuitton has invoked Article 1 of the first Protocol of the ECHR, that relates to the protection of property, including its design rights. That the concept of “property” in the last-mentioned provision should also include the rights of intellectual property has been confirmed by the European Court of Human Rights in the *Anheuser / Busch* decision (European Court of Human Rights 11 October 2005, IER 2007/46) and, moreover, has not been disputed by Plesner.

4.3. Since this case concerns fundamental rights that are on an equal footing but conflicting, according to established case law of the European Court of Human Rights, a fair balance should be sought between the general interest and the interests of the parties involved. In the *Appleby v. United Kingdom* case, in which complaints were brought forward about the fact that the owner of a shopping complex prohibited a particular demonstration while relying on his property right, the European Court of Human Rights considered as follows.

“39. The Court reiterates the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals [...].

40. In determining whether or not a positive obligation exists, regard must be had to the fair balance

*that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities [...]."*

European Court of Human Rights 6 May 2001 (*Appleby et al. - United Kingdom*, NJ 2010/207, AB 2004/139).

4.4. Plesner intends to increase the public's attention regarding the situation in Darfur, *inter alia* by making works of art in which she combines the situation in Darfur with the world of show business in an attempt to expose that, in her view, the world of glamour gets too much attention (of the media and the public) and the poignant situation in Darfur gets (much) too little. In this respect she uses illustrations with symbolic and/or iconic value, in which sometimes intellectual property rights are vested. Plesner has argued that this use is nevertheless justified, because these intellectual property rights cannot be held against her, since her right to freedom of (artistic) expression should outweigh these rights in the given circumstances.

4.5. Louis Vuitton has opposed the use of the work "*Simple Living*", in which Plesner has included the Audra bag or a bag with corresponding pattern, and the use of that work on T-shirts, posters and on the websites of Plesner, because according to Louis Vuitton, Plesner is thus infringing its Community design right for the Multicolor Canvas Design. In the framework of these proceedings it does not rely on possible other intellectual property rights or, for instance, performance.

4.6. Under preliminary judgment, in the present circumstances the interest of Plesner to (continue to) be able to express her (artistic) opinion through the work "*Simple Living*" should outweigh the interest of Louis Vuitton in the peaceful enjoyment of its possession. The following circumstances state the reasons in this respect

4.7. Louis Vuitton bases its action against Plesner especially on (potential) damage to its reputation. However, as stated, in the framework of these proceedings Louis Vuitton only relies on its Community design rights, the main objective of which is to establish a sole right for the rightholder to use the appearance of a product registered by it. Leaving aside the question of whether the function of the design right may also extend to the protection of the reputation of the design or even the reputation of the rightholder, under preliminary judgment this function is to be deemed less essential in any case.

4.8. Opposite Louis Vuitton's fundamental right to peaceful enjoyment of its exclusive rights to the use of the design, there is, according to established case law of the European Court of Human Rights, the fundamental right of Plesner that is high in a democratic society's priority list to express her opinion through her art. In this respect it applies that artists enjoy a considerable protection with regard to their artistic freedom, in which, in principle, art may "offend, shock or disturb" (cf. European Court of Human Rights 25 January 2007, *RvdW 2007*, 452, *Vereinigung Bildender Künstler v. Austria*, ground for the decision 26 and 33). In this respect it is furthermore important that the use by Plesner is to be regarded for the time being as functional and proportional and that it does not serve a mere commercial purpose. Under preliminary judgment it is plausible that Plesner's intention with "*Simple Living*" is not (or was not) to free ride with Louis Vuitton's reputation in a commercial sense. She rather uses Louis Vuitton's reputation to pass on her society-critical message as mentioned under 2.5 above and, moreover, besides the bag she also depicts another luxury/show business picture in the form of a Chihuahua dressed in pink. It has neither been argued, nor has it



become evident otherwise that at any moment Plesner has suggested that Louis Vuitton would be involved in the problems in Darfur (which would be incorrect). Apart from the question of whether it could be taken into consideration in this design-right case that after seeing “*Simple Living*” a part of the public could possibly think that Louis Vuitton (or, as the Court has added: a Chihuahua dressed in pink) is in any sense involved in the problems in Darfur, the Court in preliminary relief proceedings does not deem that this has become plausible and Louis Vuitton has not submitted any evidence thereof either, while in these preliminary relief proceedings there is no room to furnish further evidence. The circumstance that Louis Vuitton is a very well-known company, the products of which enjoy a considerable reputation, which it also stimulates through advertising famous people, moreover implies that Louis Vuitton must accept critical use as the present one to a stronger degree than other rightholders (cf., *inter alia*, European Court of Human Rights 15 February 2005, NJ 2006, 39, *Steel and Morris v. UK*, ground for the decision 94).

4.9. The circumstance that Plesner has begun to increasingly use the illustration of “*Simple Living*” as an eye-catcher for its activities, under preliminary judgment does not make her use unlawful. Firstly, as already considered, the illustration is to be regarded as a lawful statement of the (artistic) opinion of Plesner. This is not different if the illustration is somewhat used as an eye-catcher, all the more because Plesner has argued, insufficiently refuted, that the work occupies a central position in her oeuvre (concerning Darfur) and that to that extent establishing extra attention (for the exhibition with the problems in Darfur as a theme) is justified. The use as an eye-catcher does not already degenerate it into an expression of a ‘pure commercial nature’, just like a newspaper should not have a lesser far-reaching protection of the freedom of speech by pursuing profits with the articles it publishes. This requires convincing additional circumstances, which have neither been argued nor otherwise become evident.

4.10. The order imposed in the decision of 28 January 2011 will therefore be quashed in its entirety. In view hereof, the other objections against the remaining in force of the decision do not have to be discussed. The Court in preliminary relief proceedings does not give an opinion either on the question of whether the present case – in view of the mutual fundamental rights at stake and the related weighing of respective interests – was suitable for *ex parte* proceedings.

#### *Ex tunc functioning of the quashing*

4.11. In view of the fact that the respondent does not have any other remedies with which such a measure can be disputed, under preliminary judgment - different from what the Court in preliminary relief proceedings of this Court assumed on 14 December 2009, *iept* 20091214 (*Kruidvat - Adventure Bags*) - the review of the decision can be given with retroactive effect. After all, a different judgment would imply that the forfeiture of penalties in the interim as a result of a(n) (as afterwards ruled: wrongly) issued *ex parte* decision cannot be cancelled in any way whatsoever, since according to established case law proceedings on the merits to be instituted cannot affect the forfeited penalties as a consequence of the preliminary measure. Therefore, the Court in preliminary relief proceedings is convinced and will therefore pronounce the quashing with retroactive effect.

#### *Legal Costs*

4.12. Louis Vuitton, being the party found against, will be ordered to pay the costs of the proceedings. Plesner claims an order to pay the costs of the proceedings pursuant to Section 1019h of the DCCP and claims, according to her specification of costs submitted to the Court, a compensation in the amount of EUR 78,271, including an amount of EUR 8,368.50 for challenging proceedings.



4.13. Louis Vuitton objects against the – in its opinion in view of the nature of the present proceedings disproportional – amount of the costs on the part of Plesner. In this respect Louis Vuitton is referring to the Indication Rates in Intellectual Property cases, in which an amount of at most EUR 15,000 is attached to preliminary relief proceedings. The Court in preliminary relief proceedings will, in view of the objection of Louis Vuitton and in view of the fact that Plesner has not stated any special circumstances that justify why her costs would have to be considerably higher than the EUR 15,000 mentioned, take the Indication Rates as a starting point. Under preliminary judgment, the costs for the challenge requested by Plesner should not be included. After all, the challenge proceedings were not particularly aimed at (a defence against) the enforcement of an intellectual property right but to the replacement of a judge, to which, moreover, Louis Vuitton was not a formal party but only an interested party summoned pursuant to Section 271 of the DCCP. However, even if the challenge proceedings would have to be regarded as proceedings as meant in the Enforcement Directive or Section 1019h of the DCCP, respectively, fairness requires to oppose an order to pay the costs of the proceedings against Louis Vuitton, because, essentially, it has nothing to do with these proceedings between Plesner and the judge concerned.

4.14. The costs on the part of Plesner are therefore estimated to be:

- summons	EUR 76.31
- court registry fee	258.00
- attorney's fees	<u>15,000.00</u>
Total	EUR 15,334.31

In appropriate cases, the costs of the writ of summons must be increased by the turnover tax payable thereon.

## 5. The Decision

### The Court in Preliminary Relief Proceedings

5.1. quashes the order (with retroactive effect) issued on 27 January 2011 against Plesner,

5.2. orders Louis Vuitton to pay the costs of the proceedings, which costs have been assessed until this date on the part of Plesner to be EUR 15,334.31,

5.3. declares this judgment provisionally enforceable;

This judgment is rendered by *mr.* E.F. Brinkman and pronounced in open court on 4 May 2011.