[*Translation from the German language*]

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District Court [*Landgericht*] Hamburg

File no.: 308 O 206/13

[Stamp: **Pronounced on:**
[in handwriting: March 31, 2050]
~~As clerk of the Court~~] signature illegible

[Coat of arms]

Judgment

IN THE NAME OF THE PEOPLE

In the matter

DIN Deutsches Institut für Normung e.V.,
represented by the members of the executive board
Dr.-Ing. Torsten Bahke and Rüdiger Marquardt,
Am DIN-Platz, Burggrafenstraße 6,
10787 Berlin

- Plaintiff -

Legal counsel:
Rechtsanwälte **Boehmert & Boehmert**,
Meinekestraße 26,
10719 Berlin, Gz.: DINN60007

versus

1) **Public.Resource.Org, Inc.**,
1005 Gravenstein Highway North,
Sebastopol,
California 95472, United States of America

- Defendant named in 1 -

2) **Carl Malamud**,
1005 Gravenstein Highway North,
Sebastopol,
California 95472, United States of America

- Defendant named in 2 -

Legal counsel for the Denfendants named in 1 and 2:
Rechtsanwälte **Klimpel, Kreutzer, Weitzmann,**
Almstadtstraße 9/11,
10119 Berlin

[*Translation from the German language*]

1. The Defendants are sentenced on penalty of an administrative fine of up to € 250,000 to be fixed by the court for each reported instance of violation, or, in the event such fine cannot be recovered, alternatively, detention of up to six months (the administrative fine not to exceed € 250,000 in each case; detention not to exceed a total of two years), for the Defendant named in 1) to be enforced vis-à-vis its presidents – each individually – to refrain from making the technical standards listed hereinafter publicly available for download by internet users at places and times of their discretion, namely the following
   - DIN EN 14781 (Annex K1); and/or
   - DIN EN 14782 (Annex K2); and/or
   - DIN EN 1400-1 German version (Annex K3); and/or
   - DIN EN 1400-1 English version (Annex K4); and/or
   - DIN EN 1400-2 German version (Annex K5); and/or
   - DIN EN 1400-2 English version (Annex K6).

2. The Defendants shall jointly and severally bear the costs of the legal dispute.

3. The judgment is provisonally enforceable for the Plaintiff against provision of security in the amount of € 55,000.

Statement of facts

[…]

Reasons for the decision

The admissible complaint is founded. The Plaintiff is entitled vis-à-vis the Defendants to claim cessation of infringement under Sec. 97 para. 1 of the German Copyright Act [*Urhebergesetz – UrhG*] on account of making the DIN-EN standards in dispute publicly available.

A. The complaint is admissible. The court to which the matter has been referred is, in particular, internationally and locally competent.

The international and local competence derives from Sec. 32 German Code of Civil Procedure [*Zivilprozessordnung – ZPO*], since with its complaint the Plaintiff asserted infringements committed in Germany with respect to those copyrights to which it is entitled in Germany with regard to the DIN-EN standards named in the complaint (cf. *German Federal Court of Justice* [Bundesgerichtshof – BGH]*, GRUR 2004, 855, 856 – Hundefigur* [dog figure]; *GRUR 2007, 691 margin no. 18 et seq. – Staatsgeschenk* [state gift]). The Plaintiff's DIN-EN standards are, in accordance with their intended use, also available in Germany (cf. *BGHZ 167, 91 - Arzneimittelwerbung im Internet* [Advertising of medicine on the Internet], *with additional supporting references*). Since the sole subject of the complaint is the infringement of the rights of exploitation under copyright law, for which the Plaintiff seeks protection in Germany, German copyright law must be applied to the matter in dispute (cf. *BGH, GRUR 2007, 691 margin no. 22 – Staatsgeschenk* [state gift], *GRUR 2010, 628 margin no. 14 – Vorschaubilder I* [preview images I]).

B. The complaint is founded.

I. The DIN-EN standards in dispute are works protected by copyright. The protectability of the DIN-EN standards does not, as argued by the Plaintiff, already arise from Sec. 5 para. 3 UrhG (see in this regard no. 1), but from Sec. 2 para. 1 nos. 1 and 7, para. 2 UrhG (see in this regard no. 2). Contrary to the view held by the Defendants, the copyright protection is also not revoked by a (corresponding) application of Sec. 5 para. 1 UrhG (see in this regard no. 3).

1. The protectability of the DIN-EN standards in dispute does not arise from Sec. 5 para. 3 UrhG. While Sec. 5 para. 1 UrhG exempts acts, decrees, official ordinances and announcements, as well as decisions and officially drafted principles on decisions, from copyright protection, Sec. 5 para. 3 UrhG makes it clear that the copyright in private

normative works is not affected by any acts, decrees, ordinances, or official announcements making reference to them, without reproducing their wording. In doing so, Sec. 5 para. 3 UrhG thus stipulates in its scope of application, however, that a private normative work as a work within the meaning of Sec. 2 para. 2 UrhG enjoys copyright protection. However, this provision is not attributed an independent effect providing grounds for protection. Rather, the grounds for protection are determined by the general provisions of Sec. 2 UrhG. Contrary to the view held by the Plaintiff, nothing to the contrary results from the grounds given for the draft act of the German Federal Government with regard to Sec. 5 para. 3 UrhG (*Bundestag Drucksache 15/38 page 16*). On the contrary it is stated there that:

> "This revision is to take account of the justified interest of private standardization bodies while at the same time trying to avoid a situation where through the otherwise imminent restriction of self-funding of such bodies, extensive government subsidies become necessary, or the activity of these commendable bodies is put at risk. As a general rule, acts, decrees, ordinances or official announcements will only make reference to private normative works, thus upholding copyright protection."

As expressed in the legal wording of Sec. 5 para. 3 UrhG, it is assumed in the grounds for the act, without providing more detail, that normative works are works protected by copyright. This provision only "upholds" the protection under copyright law. The fact that Sec. 5 para. 3 UrhG was intended to replace the prerequisites for protection of Sec. 2 UrhG cannot be inferred from the grounds provided for the act. This would, on the one hand, be contrary to Sec. 5 UrhG's position in the statutory procedural system as being an exemption provision to Sec. 2 UrhG. On the other, due to the implication of such provision, the stipulation of a clear legal provision would have been required. Against this background, a basic decision with legislative effect can only be inferred from the provision of Sec. 5 para. 3 UrhG to the extent a possible, and assumed, protection pursuant to Sec. 2 para. 2 UrhG with regard to private normative works of the Plaintiff does not become inapplicable pursuant to Sec. 5 para. 3 UrhG. The decision of whether this protection exists or not is thus left to the assessment of the individual case within the scope of Sec. 2 UrhG.

2. The DIN-EN standards in dispute are literary works pursuant to Sec. 2 para. 1, para. 2 UrhG and the illustrations contained therein are protected as representations of a scientific or technical nature within the meaning of Sec. 2 para. 1 no. 7, para. 2 UrhG.

a) The DIN-EN standards in dispute are literary works within the meaning of Sec. 2 para. 1 no. 1, para. 2 UrhG.

aa) The personal intellectual creation pursuant to Sec. 2 para. 2 UrhG for literary works pursuant to Sec. 2 para. 1 no. 1 UrhG can arise from the way the content is formulated and presented as well as from the particular creativity that goes into collecting, structuring and arranging the presented material (cf. for example *BGH, GRUR 2011, 134 margin no. 36 – Perlentaucher, with additional supporting references*). The same also applies to sets of technical rules to which the DIN-EN standards in dispute belong as a result of determining the state of the art (*BGH, GRUR 2002, 958, 959 – Technische Lieferbedingungen* [Technical terms of delivery] *with additional supporting references*; cf. also *Loewenheim in Schricker/ Loewenheim, Urheberrecht* [Copyright law], 4th edition *§ 2 margin no. 56 with additional supporting references*). Even if with regard to scientific and technical works the way the content is formulated and presented can to a large extent not be used to provide grounds for the existence of a personal intellectual creation, and protection cannot, on principle, refer to the depicted state of the art itself (cf. *BGH, GRUR 2011, 134 margin no. 36 – Perlentaucher*), anyone who puts into words a set of technical rules that is complex and pre-determined in terms of content may be left with a significant creative freedom regarding the concept and execution of the literary presentation. Such creative freedom may not only exist with regard to selecting the form and type of collecting, structuring and arranging of the material while applying individual principles of organization and design (*cf. BGH, GRUR 1986, 739, 741 et seq. – Anwaltsschriftsatz* [Lawyer's written pleading]), but may also refer to the linguistic expression and the clarity manifesting therein (*cf. BGH, GRUR 2002, 958, 959 - Technische Lieferbedingungen* [Technical terms of delivery]). According to these court decisions, sets of technical rules may in particular distinguish themselves by

> "not only reproducing technical specifications as such, but by describing them in detail in understandable form; therefore the expression and clarity of linguistic form may thus also have an impact in this regard. These sets of technical rules aiming at a linguistic implementation in understandable form, are most comparable with instruction manuals which also aim at expressing frequently complex sets of technical rules, not only by making clear selections and arrangements, but above all by expressing them in a language that can be easily understood [...]. In this regard, such sets of rules fundamentally differ from mere

> lists where the information provided therein is, in terms of copyright, in the public domain and the individual creative effort can only be the selection and arrangement of the material."

With regard to literary works that serve practical purposes [*Gebrauchszwecke*], no separate requirements of clearly exceeding the boundaries of everyday linguistic creations must be met in order for an individual creation to exist (*within this meaning probably BGH, GRUR 2002, 958, 959 – Technische Lieferbedingungen* [Technical terms of delivery], *GRUR 2011, 134 margin no. 36, 54 – Perlentaucher; but see another interpretation BGH GRUR 1986, 739, 741 et seq. – Anwaltsschriftsatz* [Lawyer's written pleading]; *cf. Schulze in Dreier/ Schulze, UrhG, 4th edition, § 2 margin no. 85; A. Nordemann in Fromm/Nordemann, UrhR, 11th edition, § 2 margin no. 60 et seq.; Loewenheim in Schricker/Loewenheim, § 2 margin no. 35 et seq., 57*). This assessment is in accordance with the principles derived from the decisions of the ECJ regarding the autonomous works definition under Union law applicable to the case at hand on the basis of Sec. 19a UrhG, Art. 3 of Directive 2001/29. A literary work is eligible for copyright protection if it depicts an original in the sense that it is the author's own intellectual creation. It is necessary, also according to the decisions of the German Federal Court of Justice (BGH), that the author is given sufficient freedom for creative work and that he uses such freedom (cf. *ECJ, GRUR 2012, 156 margin no. 50 – BSA/ Kulturminister* [BSA/Minister of Culture]; *GRUR 2012, 166 margin no. 87 – Painer*). With regard to literary works, the creative work can arise from the way the subject is presented or from the linguistic expression itself (*ECJ, GRUR 2009, 1044 margin no. 37, 44 – Infopaq*). In this regard, the interpretation must be broad due to the protective purpose of Directive 2001/29.

In converse conclusion, a protection of the work is only excluded with regard to the collection, structuring and arrangement of the material, if the structuring and arrangement of the content is imperatively required for factual reasons and does not allow for any freedom of individual design (cf. BGH, *GRUR 1986, 739, 741 et seq. – Anwaltsschriftsatz* [Lawyer's written pleading]; *likewise ECJ, GRUR, 2011 margin no. 39 – Football Dataco with regard to sui generis database rights*). The degree of creative individuality is in this respect assessed according to the intellectual and creative overall impression of the actual design, also if compared overall with already existing designs (*BGH, GRUR 1993, 34, 36 – Bedienungsanleitung* [Instruction manual]).

bb) Taking these principles into consideration, the DIN-EN standards in dispute meet the requirements for personal intellectual creations pursuant to Sec. 2 para. 1 no. 1, para. 2 UrhG.

(1) The question of whether DIN standards as private normative works are eligible for copyright protection pursuant to Sec. 2 para. 1 no. 1, para. 2 UrhG has not yet been decided by the German Federal Court of Justice. To the extent the German Federal Court of Justice extended the exception of Sec. 5 para. 1 UrhG in its old version to DIN standards in its decision “DIN-Norm” (*GRUR 1990, 1003 - DIN-Norm* [DIN standard]), it is not possible to derive any indications therefrom regarding the question of whether the protection is founded pursuant to Sec. 2 para. 2 UrhG. Since the Appellate Court had made no declarations regarding the protectability of the standards in dispute there, the protectability had to be assumed as existing for reasons under appellate law alone (cf. BGH GRUR 1990, 1003 - DIN-Norm [*DIN standard*]; also assessment of protectability pursuant to Sec. 2 UrhG: BGH GRUR 1984, 117 - VOB/C; therefore ambiguous *Loewenheim in Schricker/Loewenheim, Urheberrecht* [Copyright law], *4th edition, § 2 margin no. 103, Bullinger in Wandkte/Bullinger, Praxiskommentar zum Urheberrecht* [Commentary on copyright law], *4th edition 2014, § 2 margin no. 146, where apodictical reference is made to the named decisions in order to state grounds for such types of work being copyright protected*).

(2) The protectability of the DIN-EN standards in dispute arises with regard to the case at hand from their linguistic design and from the arrangement of the respective matter of regulation at the lower structural levels of the respective DIN-EN standard, at least to the extent that the matter of regulation itself is arranged and structured. In this respect, a personal intellectual creation exists.

It must, however, be conceded to the Defendants that the structuring of the standards in dispute is substantially prescribed as classification and arrangement of the matter of regulation at the upper structural levels through DIN standard 820 (Standardization) and the selection of the facts treated in the DIN-EN standards is strongly influenced by the circumstances known as the state of the art. Nevertheless, the DIN-EN standards in dispute have the required level of originality due to their individual linguistic form of expression at the lower structural levels – at least with regard to the longer text passages of the DIN-EN standards in dispute. Here, a technically complex problem is put together and conveyed in understandable form. The freedom of design arising from this area was used in a creative way. In their complexity, the DIN-EN standards in dispute clearly exceed the mere stringing together of technical representations and regulations regarding a subject. In detail:

(a) The structuring of the DIN-EN standards in dispute has no individuality at the upper structural levels with regard to the structuring and arrangement of the respective matter of

regulation, however, at the lower structural levels they have a degree of individuality that goes beyond that of mere craft.

(aa) The upper structural levels of the DIN-EN standards in dispute are substantially the same and are in accordance with the requirements of DIN standard 820 (Standardization), a DIN standard which stipulates as its scope of application the determination of rules for organizing and drafting documents that are intended as international standards, technical specifications or publicly available specifications.

This DIN standard contains in no. 5, inter alia, requirements on how to structure normative works in terms of content and numbering. In no. 5.1.3 of DIN standard 820 (Standardization), the elements of an "ordinary structuring" are listed as follows: cover sheet, table of content, foreword, introduction, scope of application, normative references and terms. This organization was mainly adopted in the DIN-EN standards in dispute. DIN standard 820 (Standardization) also regulates further structural levels of normative works, it regulates for example in no. 5.1 that "characteristic values" of a product (e.g. installation rules and confirmations of quality) must each be clearly defined. Accordingly, the "product information," e.g. in no. 7 of DIN-EN standard 1400-1 (Soothers), or the "product labeling" in no. 8 of DIN-EN standard 14782 is listed separately at the end.

Further provisions regarding the structuring of content of normative works can be found in no. 5.1.2 of DIN standard 820 (Standardization), "Thematic division into a number of parts." This paragraph requires that if there are "common as well as individual statements on a subject," the "common statements" must "be treated in the first part, and the individual statements which may modify or supplement the general statements must be treated in individual parts." This requirement was complied with in all DIN-EN standards in dispute. By way of example, reference is made to DIN-EN standard 14781 (Racing bicycles) and the structural item 4.6 including its sub-structural items). Moreover, no. 5.2.4 of DIN standard 820 (Standardization) entitled "Paragraph" contains further provisions on how to organize the structuring of normative works, from which it follows that introductory paragraphs should be avoided and are to be included in a subsection of their own. No. 6 of DIN standard 820 (Standardization) entitled "Formulation" provides, inter alia, requirements for the design of structural items in terms of content. No. 6.1.3, for example, regulates that the foreword must not contain any requirements, recommendations, pictures or tables.

Finally, Annex ZC.9, DIN 820-2 also contains a requirement for the organization of a European standard when being published as a national standard which the DIN-EN standards in dispute meet by having cover sheets that comply with the design stipulated

therein.

(ß) In contrast to the upper structural levels described above, the lower structural levels show a personal intellectual level of creation. The undisputed changes with regard to the lower structural levels described in the Plaintiff's written pleading of May 14, 2014, page 8 et seq. show that there was sufficient freedom with regard to the structural design at the lower levels, which describe the core of the matter of regulation, and that such freedom was used. It must be taken into consideration in this regard that the application of general rules of logical organization does not prevent seeing a personal intellectual creation in the actual implementation of the general rule (cf. BGH – Anwaltsschriftsatz [Lawyer's written pleading], GRUR 1986, 739, 741 et seq., no. II.2a) and no. II 2b), even if these rules are prescribed in DIN standard 820 (Standardization), such as, for example, that general statements which apply to several matters of regulation, must be put first, cf. no 5.1.2 of DIN standard 820 (Standardization). For as the changes of the DIN-EN standards in dispute referred to by the Plaintiff prove: it was possible to structure the material in different ways without one version being more correct than the other. The design of the individual standards rather shows the implementation of the freedom of design available to the employees and thus their intellectual creation. In this respect, the line of mere craft was clearly crossed since the respective matter of regulation is complex, and its logical, clear organization clearly goes beyond the mere stringing together of thematically related information.

By way of example, reference is made in this context to the changes in the structuring of DIN-EN standard 14781 (Racing bicycles). In the final version of DIN-EN standard 14781 (Racing bicycles), for example, in para. 4 "Requirements and test methods" of the final version of DIN-EN standard 14781 (Racing bicycles), the new structural item "Brake tests and strength tests – special requirements" has been included in comparison to the draft versions of the year 2000 (Annex K 23) or 2002 (Annex K 28), which concentrates several statements in terms of content regarding "Brake tests and strength tests" at the beginning of the structuring. In addition, the structural items of the paragraph "Brakes" of DIN-EN standard 14781 (Racing bicycles), for example, were newly arranged and their content reworded in the course of developing the standard. The draft of DIN-EN standard 14781 (Racing bicycles) of the year 2000 (Annex K 23), for example, presented the structural items 4.3.2 "Brack-lever position" and 4.3.3 "Brack-lever grip dimension" in two structural items, at the same structural level with 4.3.1 "Braking systems." In the final version of DIN-EN standard 14781 (Racing bicycles), both structural items are combined in structural item 4.5.2 "Hand-operated brakes," which is now at the same structural level as "Braking systems" (4.5.1). In the draft version of the year 2000, no. 4.3.4 was simply entitled "Attachment of brake assembly"; in the final version of the standard it is, in accordance with the content of this paragraph (which

remained unchanged) now supplementarily called “Attachment of brake assembly and cable requirements.” The following section 4.3.6 “Brake adjustment” of the draft of the year 2000 was re-named, its content linguistically revised and it is now called “Security test on brack-block and brack-pad assemblies” (4.5.4) in the final version.

(ß) Even if one could agree with the Defendants that the collection and selection of the facts regulated in the respective DIN-EN standard result essentially from the given matter of regulation (“work item”) on the one hand and on the other from the state of the art, it arises from the actual compilation of the facts, together with the ability of expression apparent in the DIN-EN standards in dispute and the clarity of their linguistic form, that, with regard to the matter in dispute, a complex technical matter is depicted in linguistically understandable form and in this respect achieves a degree of individuality that is necessary for copyright protection.

The above also applies if it is taken into consideration that DIN standard 820 (Standardization), inter alia, makes formulation proposals for normative works. No. 6.2.1 stipulates, for example, that the structural item “Scope” of a standard is to contain formulations such as, for example “This international standard specifies ....” and the applicability of the normative work is to be introduced by “This international standard applies to ...” This has been implemented with regard to the DIN-EN standards in dispute (e.g. DIN-EN standard 14781 (Racing bicycles) where it reads under no. 1 entitled Scope: “This European Standard specifies (...) requirements (...)”, “It applies to racing bicycles (...)”, “It does not apply to (...)”). The changes the Plaintiff identified in the course of developing the standard, for example in DIN-EN standard 14781 (Racing bicycles) (written pleading of May 14, 2014, sheet 15 et seq., for example with regard to no. 4.5.1.1 “Exposed protrusions”), as well as longer text passages, for example no. 4.6.7.5.2.4, however, clearly show irrespective thereof the creative design of the core of the matter of regulation, which gives the standard an individual character if regarded as a whole. An expression is consistently chosen which depicts the content to be conveyed in an understandable, precise form and thus – as mandatory for standards – without any vagueness in terms of content. In doing so, and contrary to the view held by the Defendants, it is especially the simple sentence and word structure always adhered to which provides grounds, inter alia, for the assumption that a personal intellectual creation exists. The DIN-EN standards in dispute first of all reduce the requirements for a product group (Racing bicycles, roofing, soothers) to the essentials, and individual aspects of the respective product (e.g. with regard to racing bicycles: sharp edges, fasteners, cracks, protrusions, brakes, steering, frames, front fork, wheels and tires, rims, pedals, saddles, drive-chain, chain guard, spokes, lighting and warning devices) are selected which must mandatorily be dealt with in the text. In a further step, the requirements for these

aspects to be dealt with are abstracted and implemented into a generally understandable, for a large number of cases valid language.

b) The technical drawings contained in the DIN-EN standards in dispute are protected as representations of scientific or technical nature pursuant to Sec. 2 para. 1 no. 7 UrhG.

aa) With regard to representations of scientific or technical nature pursuant to Sec. 2 para. 1 no. 7 UrhG, the creative effort required pursuant to Sec. 2 para. 2 UrhG must lie in the representation itself and must result from its design (cf. *BGH GRUR 1993, 34, 35 – Bedienungsanleitung* [Instruction manual]; *Loewenheim in Schricker/Loewenheim, Urheberrecht* [Copyright law]*, 4th edition, § 2 margin no. 200*). A creative effort when making a representation can, however, only be developed if there is sufficient freedom for creative activity. With regard to representations where the type of representation results from the nature of the matter and is thus necessary and usual, or where the type of representation results from the DIN standards, the freedom of design is severely restricted. The freedom of design is furthermore restricted in areas, where the highest level of accuracy of the reproduction is essential. However, protection within the meaning of Sec. 2 para. 1 no. 7 UrhG already exists, precisely due to the freedom of design restricted from the outset if the representation expresses an individual intellectual activity in the representation which goes beyond everyday work in the area of technical drawings, with regard to which a lower degree of individual character suffices (*BGH, GRUR 2011, 803, margin no. 62 – Lernspiele* [Educational games] *with additional supporting references; GRUR 1993, 34, 35 – Bedienungsanleitung* [Instruction manual]; *GRUR 1991, 529, 530 – Explosionszeichnungen* [Exploded drawings]). From this it follows on the one hand that the “small coin” is protected under the scope of application of Sec. 2 para. 1 no. 7, para. 2 UrhG, but on the other it follows from a low degree of individuality that the scope of protection with regard to the work in question is limited accordingly (*BGH GRUR 1991, 530 Explosionszeichnungen* [Exploded drawings] *with additional supporting references; established case law*).

bb) Measured against these requirements, the technical drawings included in the DIN-EN standards in dispute are eligible for copyright protection. The drawings reproduce complex technical matters, which require a partial abstraction from the real circumstances in order to make the representation clear, and which serve the purpose of illustrating the particular subject to which they refer. As an example for the extent of the freedom of design given and used by the parties involved when developing the DIN-EN standards, reference is made to the drawings for the section “Handbrake-lever grip dimensions” included in the draft of the

year 2000 (Annex K 23, there no. 4.3.3.1) and the final DIN-EN standard 14781 (Racing bicycles) (there no. 4.6.2.2.2.): although both show the top view of a part of a bicycle handlebar, the representations differ considerably from one another. This is not solely attributable to the fact that one shows a straight and the other a bent handlebar. Rather the representations of the handlebar including the handbrake have an entirely different design. The same holds true for the drawing entitled "Examples of minimum dimensions of exposed protrusions" in the section "Protrusions" included in the same DIN-EN standard. The three parts depicted in the draft of the year 2000 (Annex K 23, there no. 4.2.1) are shown in a top view, whereas in the final version of DIN-EN standard 14781 (Racing bicycles) (there no. 4.5.1.2.) they are depicted from a slanted perspective.

To the extent the Defendants only generally allege that the design of the technical drawings included in the DIN-EN standards in dispute meet the requirements of DIN standards, this submission, if no further substantiation is made, does not suffice in order to refute that the existing and used freedom of design with regard to the technical drawings has, as shown, been used. The Defendants did not furnish a specific example for their allegation on the basis of which it would have been possible for the court to verify this allegation.

3. Finally, and contrary to the view held by the Defendants, Sec. 5 para. 1 UrhG does not revoke the copyright protection the DIN-EN standard enjoys.

a) Sec. 5 para. 1 UrhG does not apply simply due to its wording, since the DIN-EN standards in dispute are neither part of the German Product Safety Act [*Produktsicherheitsgesetz – ProdSG*] nor of the Product Safety Directive on which this Act is based, nor of the Construction Product Regulation [*BauproduktVO*]. The Product Safety Act makes reference, inter alia, to DIN-EN standard 14781 (Racing bicycles), DIN-EN standard 1400-1 (Soothers), and DIN-EN standard 1400-2 only in order to determine the safety of a product in general. In the same way and by generally referring to the compliance with standards, the Construction Product Regulation, inter alia, also refers to DIN-EN 14782 (Roofing). An interpretation of Sec. 5 para. 1 UrhG to the effect that making reference to DIN-EN standards is sufficient in order for them to apply is excluded by Sec. 5 para. 3 UrhG, since this provision explicitly stipulates that the copyright in private normative works is not affected by paragraph 1 if they are "merely" referred to without reproducing their content. Sec. 5 para. 3 UrhG thus substantiates the provision of Sec. 5 para. 1 UrhG.

b) An interpretation of Sec. 5 para. 1 UrhG contrary to its wording as substantiated in Sec. 5 para. 3 UrhG is contrary to the explicit legislative intent and is furthermore not

required under constitutional law.

aa) The provision of Sec. 5 para. 3 UrhG cannot be interpreted restrictively, to the effect that it will not be applied in such cases where reference to private normative works results in stating grounds for a statutory presumption of conformity (e.g. the safety of a product). This would be contrary to the explicit and clear legislative intent. The introduction of the regulation of paragraph 3 was made according to the grounds of the law (*Bundestagsdrucksache 15/38, page 16*) for the purpose of amending the consequences of the decisions of the Federal Court of Justice regarding the interpretation of Sec. 5 para. 1 UrhG in its old version, according to which it was possible that the mere reference to DIN standards in acts and ordinances (there state building regulations [*Landesbauordnungen*]) lead to an exemption from copyright protection pursuant to Sec. 5 para. 1 UrhG (cf. *BGH, GRUR 1990, 1003 DIN-Norm* [DIN standard]). In this decision, the Federal Court of Justice had stated:

> "According thereto, the introduction of DIN standards as technical building regulations serves the purpose of substantiating the general clause of "generally recognized rules of technology (architecture)" congruently contained in the state building regulations, and thus of facilitating the building permit process under administrative law. Their meaning in this respect is not restricted to an internally binding effect vis-à-vis subordinated authorities but there is also an external self-binding effect, as correctly presumed by the Appellate Court. Those willing to build, intending to execute their building projects in accordance with the introduced DIN standards, will be entitled to a building permit, at least under aspects of building supervision. This results directly from the legal provision contained in the state building regulations that the introduced technical building provisions (also) apply as generally recognized rules of technology (architecture) which must be complied with by those willing to build. However, compliance with these rules may be proven in another way than by observing the DIN standards; pursuant to Sec. 3 para. 1 sentence 3 of the German Building Code NW [*Bauordnung – BauO*], it is even possible to deviate from the generally recognized rules if it is possible to exclude a threat to public safety and order when availing oneself of another solution. The introduced DIN standards' lack of being mandatory, however, is irrelevant for an assessment under copyright law. Since pursuant to Sec. 5 para. 1 UrhG, it is not only these standards that lead to an exemption from copyright protection, but also administrative provisions, because they can be of particular importance for the application and interpretation of applicable law. In cases of dispute it is solely relevant whether the DIN standards have become part of the official announcements introducing them and are thus attributable to the administration as manifestation of its own will. This is the case here. This follows – irrespective of their not mandatorily binding character in every case– from the external binding effect described above. Thereby, the DIN standards introduced under building supervision are attributed an importance which is similar to a legal rule, at least vis-à-vis those willing to build who comply with them.")

With reference thereto it is stated in the grounds for the act, which are already quoted above:

> "The proposed regulation regarding Sec. 5 does not correspond to any requirement of the Directive. The submitted draft is only used as an opportunity to introduce the long due safeguarding of copyright protection for private bodies of standardization, such as, for example, the German Institute for Standardization e.V. [*Deutsche Institut für Normung e.V. – DIN*]. Acts, decrees, official ordinances and announcements do not enjoy copyright protection pursuant to Sec. 5 para. 1. According to the "DIN-Norm" decision of the Federal Court of Justice issued in 1990 (BGH GRUR 1990, 1003), private standards can also lose their protection under copyright law if acts or official announcements, by referring to them, adopt them in such a way that a certain external effect is created. But in such cases where public standards or announcements refer to private normative works, there is the legitimate interest of the private intellectual creators of such standards to safeguard their copyright, and in particular to finance themselves through the sale of such normative works or by making them publicly available. Public interest is, in contrast, satisfied if the standards referred to are easily accessible for everyone and can also be purchased against an adequate remuneration (cf. in detail Loewenheim, Amtliche Bezugnahmen auf private Normenwerke [*Official references to private normative works*] and Sec. 5 Copyright Law, included in the commemorative publication for Otto Sandrock, page 609). This does not apply, however, to the extent private normative works are incorporated into official works. The person subject to law is not to be exposed in this respect to any persisting preemptory rights in parts of the legal provisions. This revision is to take account of the justified interest of private standardization bodies while at the same time trying to avoid a situation where through the otherwise imminent restriction of self-funding of such bodies, extensive government subsidies become necessary, or the activity of these commendable bodies is put at risk. Normally, acts, decrees, ordinances and official announcements only make reference to private normative works so that copyright protection will be upheld."

In view of this unambiguous legislative intent, the interpretation pursuant to general laws as suggested by the Defendants is ruled out.

bb) Such an interpretation is furthermore also not required under constitutional law. The disclosure requirement deriving from Art. 20 para. 3 in connection with Art. 2 para. 1 of the Basic Law of the Federal Republic of Germany [*Grundgesetz – GG*] does not require an interpretation of Sec. 5 paras. 1 and 3 UrhG in conformity with the constitution to the effect that copyright protection for DIN standards is refused for such cases where the reference to DIN standards included in acts (or similar rules) leads to a legal presumption of conformity if the DIN standards are complied with.

According to the decisions of the German Federal Constitutional Court [*Bundesverfassungsgericht – BVerfG*] and the Federal Administrative Court

[*Bundesverwaltungsgericht – BVerwG*], the adequate disclosure of generally binding, legal regulations with external effect is a constitutional (effectiveness) requirement applicable to all normative acts. From the rule of law of Art. 20 para. 3 GG there follows the legal certainty requirement, according to which it must be clearly discernible for a person subject to law which provisions apply to him in the individual case (*BVerfG, judgment of November 22, 1983, 2 BvL 25/81, juris margin no. 35; Liebler, jurisPRBVerwG 22/2013 annotation 5 with additional supporting references.*). According thereto, the announcement of such regulatory elements to which reference is made must be accessible for the affected party, and its nature must be suitable for official rulings. This disclosure requirement also applies to rules incorporated by means of reference; they, too, must be accessible for the affected party in reliable form and without unreasonable difficulty. According to the decisions of the Federal Constitutional Court, it is not, however, necessary to cite the publication reference for a reference object, but in such case the provision must at least be identified in sufficiently precise form (*Liebler loc. cit.*).

According to the decisions of the Federal Administrative Court (*judgment of June 27, 2013, BVerwGE 147, 100 margin no. 22 et seq.*), the disclosure requirement is already met if it is possible to inspect the normative works at DIN standard repositories which have been established throughout Germany. The Court shares this assessment.

II. The Plaintiff has a standing to sue. The Defendants did not cast doubt upon the presumption arising from Sec. 10 paras. 1 and 3 UrhG in favor of the Plaintiff. Pursuant to Sec. 10 para. 1 UrhG and unless evidence is provided to the contrary, such party is assumed to be the author of a work which is named in a customary manner as author in the reproductions of a published work or in the original of an artistic work. This assumption applies accordingly to holders of exclusive rights of use pursuant to Sec. 10 para. 3 UrhG.

The DIN-EN standards in dispute show a copyright (©) note in the Plaintiff's favor. To which extent the copyright (©) note alone can already justify the presumption of conformity of Sec. 10 UrhG is in dispute in literature. Some hold that the copyright (©) note readily argues in favor of an ownership in all rights of use (*Schulze in Dreier/Schulze, Urheberrecht* [Copyright law]*, 4th edition, § 10 margin no. 65; Ahlberg in Beck'scher Online-Kommentar Urheberrecht* [Beck's cher online commentary on coyright law]*, publisher: Ahlberg/Götting, as of July 1, 2014, 5th edition*) while others hold that the copyright (©) note itself does not trigger the presumption of conformity pursuant to Sec. 10 para. 3 UrhG but that it rather only represents an indication of ownership in the exclusive rights of use. In order to provide

grounds for the presumption of conformity, an addition is required that points out the exclusivity of the granted rights (*Thum in Wandtke/Bullinger, UrhG, 4th edition 2014, § 10 margin no. 48ff, Loewenheim in Schricker/Loewenheim, UrhG, 4th edition 2010, § 10 margin no. 19*). However, it is not necessary to reach a conclusion in this dispute with regard to the case at hand, since the DIN-EN standards in dispute have such addition to the copyright (©) note. The addition to the copyright (©) note that "any form of reproduction, even in excerpts, requires the approval" of the Plaintiff clarifies if reasonably assessed from the perspective of an objective third party, that the Plaintiff is the holder of the exclusive rights of use in the DIN-EN standards. The formulation "any form of reproduction" exceeds the reproduction definition under copyright law contained in Sec. 16 UrhG and refers to any activity of use, as otherwise the addition "any form" would not have been required. Accordingly, the addition to the copyright (©) note refers to any and all reproductions of the DIN-EN standard, irrespective of their type and form.

The Defendants did not vitiate the assumption that the Plaintiff is the exclusive holder of the rights. The Defendants' proven submission alone, that the "flow of rights" with regard to DIN-EN-1400.1 (Soothers) at CEN level from which the Plaintiff derives its rights had by no means been severely disciplined, does not suffice in order to invalidate this assumption. This submission does not suffice in order to determine in which DIN-EN standard contributions the CEN was not granted rights. This assumption in particular does not allow for any conclusions as to whether there is a lack of an employee's grant of rights who, in terms of copyright, contributed a relevant part to the DIN-EN standard. It is also not required to adopt another view, because the Plaintiff, as held by the Defendants, is subject to the secondary burden of proof, at least with regard to the participants in the standardization committee meetings, since with regard to the case in dispute the Defendants would otherwise not be able to demonstrate and furnish proof of the Plaintiff's lack of standing to sue. Such secondary burden of proof is not required with regard to the case at hand. The Defendants do not contest that the DIN-EN standards in dispute were created in CEN's sphere of organization and the rights of use therein, to the extent they were granted to the CEN by those persons working on the DIN-EN standards, were transferred to the Plaintiff. They only allege that not all persons working on the DIN-EN standards granted the rights of use to CEN. The information advantage required in order to assume that a party is subject to the secondary burden of proof does not exist, since the Plaintiff in addition has no direct access of its own to the information concerning who participated in the preparation of the DIN standards. It rather derives its exclusive rights of use from the CEN. There is also no need for a different legal assessment due to the judgment cited by the Defendants (*Hamm Higher Regional Court [Oberlandesgericht – OLG], GRUR-RR 2012, 192, juris margin no. 40 –*

Musiktheater im Revier [Musical theater in the district]), or the judgment of the Federal Court of Justice referred to therein (*GRUR 2009, 1046, margin no. 42 – Kranhäuser* [crane towers]), since both decisions were issued with regard to Sec. 10 para. 1 UrhG. It is not possible to apply the principles laid down there to the relationship between the holder of the exclusive rights of use and his adversary. Besides, the Plaintiff made sufficient submission regarding the facts of the chain of title directly known to him, namely the derivation of rights from the CEN.

III. The infringement of rights, their unlawfulness, as well as the Defendants' standing to be sued is undisputed between the parties. It is undisputed that the Defendant named in 2) has caused DINEN standard 14781 (Racing bicycles), DIN-EN standard 14782 (Roofing), DIN-EN standard 1400.1 (Schnuller) and (Soother) and DIN-EN standard 1400.2 (Schnuller) and (Soother) to be made publicly available on the website "law.resource.org" operated by the Defendant named in 1), and according to the website of the Defendant named in 1) has assumed responsibility therefor. Even if the scope of protection of the DIN-EN standards may be low, since the used freedom of design is low, it is at least affected if the respective DIN-EN standard is incorporated in identical form.

IV. The risk of repetition is given. The unlawful use justifies the assumption that the infringement may be repeated. In order to prove otherwise, the provisions of a genuine, unlimited, unreserved cease-and-desist declaration, including an adequate penalty clause would have been required in addition to the Defendants' ceasing to make the standards in dispute publicly available (*cf. Dreier in Dreier/Schulze, Urheberrecht* [Copyright law]*, 4th edition, § 97 margin no. 41, 42; v. Wolff in Wandtke/Bullinger, Urheberrecht* [Copyright law]*, 4th edition 2014, § 97 margin no. 34, 35*). Such declaration was not provided by the Defendants until the end of the oral hearing.

C. The ancillary decisions were based on Secs. 91, 709 sentence 2 ZPO. To attribute a portion of the costs to the Plaintiff due to the substantiation of the relief sought pursuant to the written pleading of October 7, 2015, was not necessary since the relief sought by the Plaintiff, if reasonably assessed, was from the outset directed at the prohibition of the actual infringing embodiment.

Dr. Tolkmitt	Geuß	Rohwetter
Presiding judge at the District Court	Judge at the Regional Court	Judge at the Regional Court

[Stamp of the Regional Court of Hamburg: Certified; Lindner, as clerk of the court]

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Annex K1 to K11
308 O 206/13

Annex K1
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

☞EDICT OF GOVERNMENT☜

In order to promote public education and public safety, equal justice for all, a better informed citizenry, the rule of law, world trade and world peace, this legal document is hereby made available on a noncommercial basis, as it is the right of all humans to know and speak the laws that govern them.

DIN EN 14781 (2006) (English) : Racing bicycles - Safety requirements and test methods [Authority: Directive 2001/95 /EC]

[*Translation from the German language*]

Annex K2
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

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DIN EN 14782 (2006) (English) :
Self-supporting metal sheet for roofing, external cladding and internal lining - Product specification and requirements
[Authority: Directive 2001/95/EC

[*Translation from the German language*]

Annex K3
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

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DIN EN 1400-1 (2002) (German): Child use and care articles - Soothers for babies and young children - Part 1: General safety requirements and product information [Authority: Directive 2001/95/EC]

[*Translation from the German language*]

Annex K4
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

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DIN EN 1400-1 (2002) (English) : Child use and care articles - Soothers for babies and young children - Part 1: General safety requirements and product information [Authority: Directive 2001/95/EC]

[*Translation from the German language*]

Annex K5
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

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DIN EN 1400-2 (2002) (German): Child use and care articles - Soothers for babies and young children - Part 2: Mechanical requirements and tests [Authority : Directive 2001/95/EC]

[*Translation from the German language*]

Annex K6
in the matter DIN
vs. Public inter alia
File no.
BOEHMERT & BOEHMERT
ANWALTSSOZIETÄT

Bundesrepublik Deutschland

[Federal Republic of Germany]

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DIN EN 1400-2 (2002) (English) : Child use and care articles - ·soothers for babies and young children - Part 2: Mechanical requirements and tests (Authority: Directive 2001/95/EC]