[Norwegian Coat of Arms]

THE SUPREME COURT OF NORWAY

On 27 June 2012, the Supreme Court rendered judgment in

HR-2012-01325-A, (case no. 2011/2020), civil case, appealed judgment,

I. Trumf AS	(Advocate Inge Svae-Grotli - under assessment for right of audience)
vs.	
Stokke AS Peter Opsvik AS Peter Opsvik	(Advocate Arne Ringnes)
II. Peter Opsvik	(Advocate Arne Ringnes)
vs.	
Trumf AS	(Advocate Inge Svae-Grotli - under assessment for right of audience)

V O T I N G:

(1) Justice **Endresen**: The case concerns issues relating to the infringement of copyright and trademark, etc., in connection with the marketing and sales of highchairs.

(2) In the early 1970s, the Norwegian furniture designer Peter Opsvik designed the Tripp Trapp highchair. The copyright has subsequently been assigned to Peter Opsvik AS. The chair is manufactured and sold by Stokke AS on the basis of an exclusive licence agreement. The royalties have been specified at 1.78 percent of turnover, and Stokke AS has also assumed an obligation to pursue any infringement of the copyright.

(3) The Tripp Trapp chair is designed like a staircase, with adjustable seat and footplates that are inserted into transverse grooves. The chair has a slanting “L shape” that carries the plates and the back, and which means that no rear legs are needed on the chair.

(4) In 1972, a patent was registered in respect of the attachment mechanism for the optional height adjustment of the seat and footplates on the Tripp Trapp chair. The patent expired in the autumn of 1992. The patent was limited to the technical solution for the attachment of seat and footplates at different heights, cf. § 39 of the Patents Act. After the patent protection lapsed in 1992, a large number of different highchairs based on the patented solutions have been manufactured. A number of these chairs are very similar to the Tripp Trapp chair. On this basis, Stokke AS has argued, with considerable success, that these chairs are infringing the copyright associated with the Tripp Trapp chair. Proceedings are still pending in several jurisdictions.

(5) Stokke AS is also the holder of trademark rights relating to the chair. The slogan “The chair that grows with the child” has been used in the marketing of the Tripp Trapp chair since the 1980s. The slogan was registered as a trademark with the Norwegian Industrial Property Office on 15 May 2008, on the basis of actual use.

(6) Stokke AS has manufactured and sold more than 8 million copies of the Tripp Trapp chair, and it has gained broad recognition. Sales are now taking place in a number of markets, and turnover remains stably in the region of 500,000 chairs a year.

(7) The core business of Trumf AS is to manage the membership-based loyalty programme “Trumf”. Customers affiliated with the programme accumulate bonus points when purchasing goods and services from those businesses that are members. In 2007/2008, the bonus points could be redeemed against cash or goods, and Trumf AS offered the members many types of goods, which were presented in a membership magazine and on the Internet. The range of goods available for selection varied considerably over time, and included many product categories. Furniture was not normally included in the assortment of goods. In the years 2007 and 2008, Trumf AS had a turnover of goods in the range of NOK 60 million. Contributions from partners and the refund of intra-group costs brought the total annual turnover for each of the two years to approximately NOK 85 million. Trumf AS forms part of Norgesgruppen, which is primarily engaged in activities within the grocery industry.

(8) From the autumn of 2007, Trumf AS marketed and sold the highchair Oliver to its members. The Oliver chair is also designed like a staircase, with adjustable seat and footplates that are inserted into transverse grooves. And it does have a slanting L shape, like the Tripp Trapp chair. The most prominent difference between the two chairs is that the slanting L shape of the Tripp Trapp chair exhibits straight lines, whilst the Oliver chair features arched lines instead.

(9) The Oliver chair is manufactured in China. Trumf AS took delivery of the chair from one if its usual suppliers, Isenkram AS. After the sale of the Oliver chair came to the knowledge of Stokke AS, it wrote to Trumf AS on 12 September 2008, demanding that the sales be discontinued, whilst at the same time requesting additional details concerning, *inter alia*, the sales that had taken place.

(10) Trumf AS immediately discontinued sales of the Oliver chair, and removed the advertising for the said chair from its website. Stokke AS was referred to the supplier of the Oliver chair for additional details. As per this point in time, Trumf AS had sold a total of 974 chairs. The price per chair to its members was NOK 599. This price was significantly lower than the recommended retail price of the Tripp Trapp chair, which was NOK 1399, inclusive of Value Added Tax.

(11) The importer, Isenkram AS, and another distributor of the Oliver chair in Norway, Coop Norge, also received letters demanding that their marketing and sales of the Oliver chair be discontinued. Stokke AS has subsequently reached an amicable arrangement with Coop Norge.

(12) On 13 July 2009, Stokke AS, Peter Opsvik AS and Peter Opsvik instituted legal proceedings against Trumf AS, with a claim for the sales and marketing of the Oliver highchair to be discontinued, an obligation to refrain therefrom in future, as well as a claim for damages for economic and non-economic loss, invoking alleged violations of the Copyright Act, the Marketing Act and the Trademark Act. The legal proceedings were also instituted against Isenkram AS, but the case has subsequently been dismissed as far as that respondent is concerned after that company was declared bankrupt.

(13) The Follo District Court rendered judgment on 26 March 2010, concluding as follows:

> **"1. The Court finds in favour of Trumf AS.**
>
> **2. Stokke AS, Peter Opsvik AS and Peter Opsvik are ordered, jointly and severally, to pay, within 2 – two – weeks of service of the judgment, the legal costs of Trumf AS in the amount of NOK 690,000, with the addition of statutory late payment interest, cf. § 3, first sentence, of the Late Payment Interest Act, from the due date until payment is made."**

(14) The District Court concluded that the Tripp Trapp chair met the creative step requirement under the Copyright Act, but that the Oliver chair did not represent a copyright infringement. The District Court further concluded that Trumf AS had not violated the Marketing Act or infringed the trademark held by Stokke AS.

(15) Stokke AS, Peter Opsvik AS and Peter Opsvik appealed the judgment of the District Court to the Borgarting Court of Appeal.

(16) Before the Court of Appeal, the statement of claim was amended to also include a claim for a declaratory judgment to the effect that the Oliver chair represents an infringement of the copyright to the Tripp Trapp chair (Claim 1).

(17) The Borgarting Court of Appeal rendered judgment on 23 August 2011, concluding as follows:

> **"1. Claim 3 concerning an obligation to refrain from marketing and sales of the Oliver chair and Claim 7 concerning an obligation to hand over the remaining copies of the Oliver chair, in the statement of claim submitted by Stokke AS, Peter Opsvik AS and Peter Opsvik, are dismissed.**
>
> **2. The Oliver chair represents an infringement of the copyright to the Tripp Trapp chair.**
>
> **3. Trumf AS has violated § 4 of the Trademark Act by using the trademark "The chair that grows with the child".**
>
> **4. Trumf AS is ordered to pay damages for economic loss to Stokke AS in the amount of 451,268 – four hundred and fifty one thousand two hundred and sixty eight – Norwegian kroner.**
>
> **5. Trumf AS is ordered to pay damages for economic loss to Peter Opsvik AS in the amount of 7,903 – seven thousand nine hundred and three – Norwegian kroner.**
>
> **6. The Court finds in favour of Trumf AS with regard to the claim for damages for non-economic loss from Peter Opsvik.**
>
> **7. No legal costs are awarded, whether before the District Court or before the Court of Appeal.**
>
> **8. The damages awarded under Items 4 and 5 fall due for payment two weeks after service of the present judgment."**

(18) Trumf AS has appealed the judgment of the Court of Appeal, with the exception of Items 1 and 6 of the conclusion, to the Supreme Court. The appeal pertains to the general interpretation of the law on the part of the Court of Appeal, as well as its specific application of the law and its assessment of the evidence.

(19) The appellees have filed a Notice of Intention to Defend. It is argued in the Notice of Intention to Defend that the amount of damages awarded is, in part, too low, but no cross-appeal has been filed on such grounds. However, Peter Opsvik has filed an ancillary appeal inasmuch as the Court of Appeal found in favour of Trumf AS with regard to his claim for damages for non-economic loss, cf. § 55 of the Copyright Act.

(20) Some new materials have been presented before the Supreme Court, providing, *inter alia*, supplementary details concerning the introduction of the Tripp Trapp chair in the market in 1973 and subsequent years. Moreover, there has been submitted a written statement from the expert appointed by the appellant, which expert only rendered oral testimony before the Court of Appeal. Finally, there have been submitted additional juridical rulings to shed light on the legal assessment of the Tripp Trapp chair in other jurisdictions. Nevertheless, the main aspects of the case are presented in the same way before the Supreme Court as before the Court of Appeal.

(21) The appellant, *Trumf AS*, has in the main invoked the following:

(22) The Tripp Trapp chair does not enjoy copyright protection. The Court of Appeal appears to be adopting a correct legal perspective, but its specific discussion demonstrates that it is nonetheless applying an incorrect legal norm. The copyright infringement assessment of the Court of Appeal does in actual fact imply that Stokke AS is granted an exclusive right to the ideas behind the Tripp Trapp chair, which specifically means the use of wood and black metal screws and rods, the cantilever principle and height adjustment options. Besides, the failure of the judgment to say anything about which elements are deemed to form the basis for the copyright makes it difficult to evaluate the interpretation of the law on the part of the Court of Appeal.

(23) The copyright does not encompass the technical solutions. In other words, the copyright cannot be used to extend the time-limited protection granted under the patent legislation. The cantilever principle, which implies that the chair does not have supporting rear legs, had been used in a number of chairs earlier on, and no protection can be obtained for the application of that principle. No protection can be obtained in respect of the concept. Design that reflects the intended function of a product for daily use does not enjoy protection under copyright law. The same must apply to design intended to facilitate the mass production of the product. Nor can the use of manifestations from a specific style and the use of other known design elements form the basis for copyright. Moreover, the Court of Appeal incorrectly disregards the consideration that the burden of proof lies with the party claiming a copyright, and that a cautionary principle must be applied in assessing whether the creative step requirement has been met.

(24) The protection accorded to artistic works intended for practical use under § 1, cf. § 2, of the Copyright Act is limited. The functionality requirements imply a special and significant limitation in the scope for variation as far as artistic works intended for practical use are concerned. The copyright does not protect the functional elements. It follows from the legislative history that this must result in strict originality requirements in this area in order for the creative step requirement to be deemed to have been met.

(25) The assessment under the Copyright Act must be made on the basis of Norwegian law. Foreign case law offers little guidance. Furthermore, foreign rulings must be considered from the perspective that the issue of protection for the Tripp Trapp chair has in some cases not been in dispute. The creative step requirement for

artistic works intended for practical use is, moreover, less strict under, *inter alia*, Swedish and Danish law than it is under the Copyright Act.

(26) It must be of decisive importance for purposes of the specific assessment that the Tripp Trapp chair has a simple and practical design with no additional aesthetical value or style elements to which an exclusive right is claimed. The style elements of the Tripp Trapp chair are based on known designs of chairs and highchairs from the late 19th and early 20th century. Many chairs with approximately the same main style existed in 1972. The Tripp Trapp chair is not characterised by individual, creative efforts. It lacks a distinctive aesthetical manifestation that exists independently of the necessary requirements as to function, etc. The stylistic expression is predominantly a necessary result of ergonomic, functional and technical solutions, and all free, known, technical, safety-related, functional, ergonomic and stylistic elements have to be disregarded for purposes of the assessment as to whether the product is protected by copyright.

(27) Alternatively, provided that the Tripp Trapp chair does enjoy copyright protection, it is argued that the Oliver chair does not represent an infringement of such copyright. Only very close imitations can represent infringement of the copyright as far as artistic works intended for practical use are concerned. The Oliver chair is not a copy of the Tripp Trapp chair. The Oliver chair reclines more, and its centre of gravity is further back. The side supports have an "S shape", and not a slanting "L shape". The overall impression conveyed by the Oliver chair is materially different. First of all, such is the case with the rounded shapes and the floating lines. The style is more playful. The Court of Appeal nonetheless suggests that the two chairs are so similar as to make confusion likely, but risk of confusion is of no relevance to an infringement assessment under copyright law.

(28) It is denied that there is any infringement of the trademark "The chair that grows with the child". The slogan is without the ability to specify the commercial origin of the product. It is limited to a description of the qualities of the chair, and it comprises common and descriptive Norwegian words. Stokke AS did not obtain a registration for this slogan until May 2008.

(29) Nonetheless, the trademark has been registered, and the validity of the registration is not subject to judicial review, but it is clearly a weak trademark that offers very limited protection.

(30) Trumf AS has not used the slogan as a distinctive feature. The wording "This great highchair grows with your child" was used as an integral part of the text in a brochure, and does not represent an attempt at exploiting the trademark of Stokke AS. Trumf AS has done nothing more than providing a correct description of the product that is being marketed. This does not imply any infringement of the registered trademark.

(31) Under any circumstance, the appellant has acted in good faith, which means that a claim for damages is of no merit, whether under the Copyright Act or under the Trademark Act. Trumf AS was engaged in long-term cooperation with the supplier, Isenkram AS, prior to the commencement of sales of the Oliver chair in October/November 2007. It submitted a design registration from OHIM (the Office for Harmonization in the Internal Market) and a safety assessment of the chair. Only upon the communication from Stokke AS in September 2008 did Trumf AS become aware that the design registration had been declared invalid, and that Stokke had registered the trademark. Trumf AS then discontinued the sales with immediate effect.

(32) However, a reasonable consideration may be stipulated if it is concluded that there is an infringement in objective terms, cf. § 55, second paragraph, of the Copyright Act and § 58, second paragraph, of the Trademark Act. Under the Copyright Act, the consideration is limited to the earnings that have been achieved through

the infringement of the right held by the other party, and it can be concluded that Trumf AS lost money on these sales. Under the Trademark Act, a reasonable consideration shall be stipulated, and the question will be what would constitute reasonable royalties. The royalties agreed between Stokke AS and Peter Opsvik AS, of 1.78 percent, may constitute a benchmark, but these pertain to the licensing of a product that enjoyed 20 years of patent protection, and which is also protected under the Copyright Act. However, the royalties to be determined [here] are limited to the use of the "trademark", and since it can hardly be assumed that such use has resulted in any additional sales, the royalties must be close to zero.

(33) Even if the Court was to conclude that the appellant has acted negligently, it is argued that the Court of Appeal has made several mistakes in determining the amount of damages. The Court of Appeal has largely ignored the causality requirement, and has not applied sufficiently stringent requirements as far as evidence of economic loss is concerned. It is entirely unrealistic that two thirds of those who purchased the Oliver chair within the Trumf system would instead have been purchasing the considerably more expensive Tripp Trapp chair.

(34) To the extent that it is concluded that there are grounds for awarding damages or consideration in respect of the use of the trademark, a deduction must be made in the amount of the damages for infringement of the copyright in order to prevent double damages. Correspondingly, a deduction would have to be made in any damages that were to be awarded to Peter Opsvik.

(35) The ancillary appeal must be dismissed. Under § 55, first paragraph, second sentence, of the Copyright Act, it is a prerequisite for awarding damages in respect of non-economic loss that the culprit has acted with wilfully or with gross negligence. Trumf AS acted in reasonable good faith in the present case, and the prerequisites for awarding damages in respect of non-economic loss are not met.

(36) In ruling on the matter of legal costs, weight must under any circumstance be attached to the settlement offers made by Trumf AS prior to the institution of legal proceedings and in its Notice of Intention to Defend against appeal.

(37) Trumf AS has filed the following statement of claim:

> **"In respect of the appeal:**
>
> **1. The Court to find in favour of Trumf AS**
>
> **2. Trumf AS to be awarded legal costs before the District Court, the Court of Appeal and the Supreme Court**
>
> **In respect of the ancillary appeal:**
>
> **3. The appeal to be dismissed**
>
> **4. Trumf AS to be awarded legal costs before the District Court, the Court of Appeal and the Supreme Court"**

(38) The appellees, *Stokke AS, Peter Opsvik AS and Peter Opsvik,* have in the main argued that the Tripp Trapp chair enjoys copyright protection, cf. § 1, second paragraph, no. 10, of the Copyright Act. The chair is highly original, and represented a pioneering and new design for highchairs when it was created in 1972. The design is the result of an innovative, independent artistic effort. The design is not a result of its function, relating to movable seat and footplates. This function could have been realised in countless ways. It

follows from a ruling from a Norwegian court of first instance and from a number of foreign judgments that the Tripp Trapp chair enjoys comprehensive protection against imitations, cf. § 2 of the Copyright Act.

(39) It is so obvious that the creative step requirement is met that it becomes irrelevant to discuss whether there is any justification for stipulating special requirements within the area of artistic works intended for practical use. No such additional requirement applies, but such a requirement, if applicable, would under any circumstance have been met. Correspondingly, it is of little relevance to engage in a detailed discussion as to whether a cautionary principle may be invoked.

(40) It has also been established through long-standing case law in a number of European countries that the Tripp Trapp chair enjoys copyright protection. Partly, such copyright has not been disputed, and when it has been disputed the outcome in all cases has been the same, with the exception of a ruling in a Japanese court of first instance, which ruling found in favour of Stokke AS on other grounds. There is no basis for stipulating a stricter requirement under Norwegian law. As far as the European context is concerned, developments are clearly heading in the direction of complete coordination of the creative step requirement, and developments are moving towards expanded protection. It is of particular interest that protection in Germany, where Stokke AS has also prevailed before the courts with its claim for copyright protection, has historically been so strict that it is now being asked whether the level must be deemed to have been toned down through case law from the European Court of Justice in a number of areas.

(41) The Oliver chair does undoubtedly represent an infringement of the copyright to the Tripp Trapp chair. The Oliver chair is produced on the basis of knowledge about the Tripp Trapp chair, and has been modelled on that chair. It is a completely derivative adaptation without any independent and original design elements. It conveys the same overall impression. The curved lines amount to a distortion of the lines of the Tripp Trapp chair, added with the intent of creating a difference from the original, whilst at the same time freeloading on the originality and goodwill associated with the Tripp Trapp chair. The copyright also offers protection against poor adaptations like this one.

(42) Stokke AS has established and subsequently registered the trademark “The chair that grows with the child”. This is a suggestive, and not a descriptive, slogan. It is not the chair, but the child, that is growing. The slogan has been used consistently and on a large scale to identify the Tripp Trapp chair since the 1980s. The slogan is likely to be impressed onto the consciousness of the average consumer, and has become a distinctive characteristic through long-term use.

(43) In its marketing of the Oliver chair, Trumf AS has used the slogan “This great highchair grows with your child” as a trademark. The marketing has featured a supplementary description to the effect that the chair is adjustable. This use is identical to how the trademark held by Stokke AS is used. At a minimum, Trumf AS’ use of the slogan is likely to give rise to confusion between the products; it evokes associations with the Tripp Trapp chair. Trumf AS’ use of its slogan is undermining the quality guarantee and goodwill conferred by the Stokke AS’ slogan on the Tripp Trapp chair. There is a violation of § 4 of the Trademark Act.

(44) Alternatively, in the event that the above reasoning does not prevail, it is argued that there is a violation of § 8a and §1 of the Marketing Act of 1972.

(45) Stokke AS is entitled to damages pursuant to § 55, first paragraph, of the Copyright Act, cf. general provisions under the law of torts. Trumf AS has acted with intent. The requirement as to intent does not include the legal assessment as to whether there is infringement. In that regard the question is whether the mistake of law on the part of Trumf AS has been excusable, and such is clearly not the case. Trumf AS chose, having knowledge of the Tripp Trapp chair, to market the Oliver chair without clarifying

its relationship to the original. Nor did Trumf AS do anything to clarify what could be deduced from the design registration.

(46) The Court of Appeal has incorrectly assumed that sales on the part of Stokke AS have only been reduced by 600 chairs. Stokke AS has lost sales corresponding to the number of Oliver chairs that has been sold by Trumf AS, and any deduction made from such number is in any event clearly excessive. The claim is based on average profits of NOK 450 per chair and 974 chairs. From this must be deducted the royalties that are claimed directly by Peter Opsvik AS, in the amount of NOK 12,829. In addition, there is the undisputed claim in the amount of NOK 10,000 in respect of investigation costs. This results in a claim for damages for economic loss in the amount of NOK 435,470.50.

(47) Furthermore, it is argued that the Court of Appeal has been correct in awarding Stokke AS damages in respect of loss of goodwill, but that the amount awarded is too low. Damages in the discretionary amount of NOK 250,000 are claimed in respect of future loss of goodwill (loss of reputation and market disturbances).

(48) In the eventuality that the Supreme Court concludes that Trumf AS has not acted negligently, it is alternatively requested that Trumf AS be ordered to relinquish the earnings the company has achieved through the infringements, cf. § 55, first paragraph, second sentence, of the Copyright Act.

(49) Moreover, Stokke AS is claiming reasonable royalties in respect of the wrongful use of the trademark "The chair that grows with the child", cf. § 58 of the Trademark Act. The infringement pertains to a very well established and highly valuable trademark, inseparably associated with the Tripp Trapp chair. 20 percent of the gross turnover of Trumf AS is held to represent reasonable royalties, and the claim is specified at NOK 116,685 on these grounds. No deduction shall be made in respect of such damages in the damages relating to the infringement of the copyright. The infringements pertain to different interests.

(50) Peter Opsvik AS is entitled to damages in respect of loss of royalties as the result on the marketing and sales of the Oliver chair on the part of Trumf AS. Lost sales of the Tripp Trapp chair amount to 974 copies. Based on an average price of NOK 740, the base amount is NOK 720,760. Royalties of 1.78 percent on this amount to NOK 12,829.

(51) Peter Opsvik has appealed, in his ancillary appeal, the ruling of the Court of Appeal with regard to the claim for damages for non-economic loss, cf. § 55, first paragraph, second sentence, of the Copyright Act. The claim concerns the infringement of the moral right relating to the Tripp Trapp chair, which right has been retained by Peter Opsvik. Trumf AS has acted with gross negligence. The prerequisites for corporate liability are met. The person who was the *de facto* general manager had full knowledge of all aspects of the case. Moreover, the error was first made by the head of procurement, who held overall responsibility for this independent part of the business. Consequently, it does not prevent the claim for damages in respect of non-economic loss from being upheld that upholding such claim is conditional upon the prerequisites for corporate liability being met.

(52) Stokke AS and Peter Opsvik AS have filed the following statement of claim:

> **"1. The appeal to be dismissed.**
>
> **2. Stokke AS to be awarded legal costs before the District Court, the Court of Appeal and the Supreme Court."**

(53) Peter Opsvik has filed the following statement of claim:

> **"1. Trumf AS to be ordered to pay damages to Peter Opsvik in respect of non-economic loss in an amount determined at the discretion of the Court.**
>
> **2. Peter Opsvik to be awarded legal costs before the District Court, the Court of Appeal and the Supreme Court."**

(54) *I have concluded* that the damages awarded to Stokke AS must be reduced by a minor amount, but that the appeal must be dismissed in all other respects. I have further concluded that the ancillary appeal must be upheld.

(55) § 1 of the Copyright Act stipulates that any person who creates an artistic work shall have the copyright therein. It follows from second paragraph, no. 10, of the said provision that works intended for practical use fall within the scope of such provision, but it is also here a requirement that the relevant object can be characterised as an artistic work.

(56) The key element of the copyright is an exclusive right to the exploitation of the work. Such exclusive right also encompasses the said work in a different embodiment, but the scope of the copyright is not so wide as to include any adaptation that is sufficiently comprehensive as to create a new and independent work, cf. § 2 and § 4 of the Copyright Act. The exclusive right conferred by the copyright applies for the lifetime of its creator and for 70 years after the end of the year of his death.

(57) The Copyright Act does not provide further details as to what qualifies as an artistic work for purposes of the statute, but this has been established in more detail through case law.

(58) On page 11, the Court of Appeal presents the legal context as follows:

> **"Copyright pursuant to § 1, no. 10, of the Copyright Act encompasses the artistic expression or form of the item. The question is whether the design of the Tripp Trapp chair must, on the basis of an overall legal assessment, be deemed to constitute an artistic work within the meaning of the statute, cf. the ruling published on page 964 onwards of the 1962 volume of the *Retstidende* court reporter for the Supreme Court. The design must result from an individual creative effort, and such effort must have brought about something – in this case of artistic value – that is considered to be original. This is in Norwegian law often referred to as the creative step requirement, cf. *Retstidende*, 2007 volume, page 1329 onwards (Huldra), paragraphs 43 – 45, and Rognstad: *Opphavsrett* ["Copyright Law"], page 81 onwards, and the references set out therein."**

(59) This summary is clearly supported by the two Supreme Court rulings referred to by the Court of Appeal. In the Wegner case from 1962, which also concerned a piece of furniture, the following is stated on page 967:

> **"It is of decisive importance to the assessment in this case whether Wegner – apart from the technical combination of the elements – has designed a table that must be characterised, based on an overall assessment, as an artistic work within the meaning of the statute. It is my understanding of the statute that it must in a case like the present one be a requirement that the ideas of the creator have been realised in such a manner as to create, in the form of his work, something original of artistic value."**

(60) Paragraph 43 of the ruling published on page 1329 onwards of the 2007 volume of the *Retstidende* court reporter emphasises, under reference to, *inter alia*, the Wegner Judgment, the following:

> **"In order for an embodiment to be characterised as an "artistic work" within the meaning of the Copyright Act, it must result from a creative effort of an individual nature, which effort must have brought about something that is perceived to be original."**

(61) Paragraph 44 of the said judgment indicated that the probability that another creator could have created an identical work may provide guidance as to whether the creative step requirement is met, but it is emphasised that "the decisive factor is whether an individual creative effort has resulted in something that is perceived to be original." The subsequent paragraph adds a

clarification, of relevance to the present case: “Even if a work is based on known individual elements, these may be combined in such a manner that the work as a whole is perceived to be original.”

(62) The appellant has strongly emphasised that a particularly strict creative step requirement must be applied for purposes of considering an artistic work intended for practical use to qualify for copyright protection. It is noted, in this context, that the long period of protection resulting from considering an artistic work to qualify for copyright protection makes it especially problematic to confer such protection on artistic works intended for practical use.

(63) The issue is discussed in Recommendation XI (1960-61) to the Odelsting, in which the Standing Committee on Education and Church Affairs emphasised the following on the basis of a review of individual rulings:

> **“An important consideration here is also that items intended for practical use offer the designer much less scope for variation than do other works, thus implying that it may seem problematic to grant the creator such a long-term exclusive right to a specific design as is conferred under the Copyright Act. An exclusive right to a specific design may in such a case conceivably be very close to a *de facto* patent on a specific item intended for practical use.”**

(64) Nevertheless, the Standing Committee refrained from submitting any amendment proposal, as it noted the following:

> **“The Committee does not consider it prudent to make amendments without a thorough examination of these special problems, and will therefore not submit any proposal for the inclusion of special provisions concerning the protection accorded to these forms of artistic expression in the present draft legislation.”**

(65) Thereafter, the issue was raised in the Recommendation on the Act relating to Designs, submitted on 9 June 1967. The Committee concludes, on page 40, that there is no reason to introduce any special rule for the area of artistic works intended for practical use:

> **“However, if the relatively strict requirements that have been adopted thus far continue to be applied, which requirements must probably in practice be deemed to exclude the possibility of duplication within the area of protected works, thus implying that only the most individually characteristic part of what are ordinarily referred to as artistic works intended for practical use will achieve protection under the Copyright Act, most of the objections that can be raised against copyright protection for artistic works intended for practical use cease to be of relevance. From the perspective of principles, it is difficult to justify a copyright law distinction between artistic works intended for practical use and other artistic works, and it will in practice not be possible to make any exact distinction between artistic works intended for practical use and other artistic works.”**

(66) No proposal for special regulation of copyright for items intended for practical use was submitted, but it will be noted that “a relatively strict requirement” applies as far as creative step within this area is concerned. Current law is summarised as follows on page 94 of Rognstad: *Opphavsrett* [“Copyright Law”]:

> **“The protection afforded by the Copyright Act should not be so broad in scope as to also block the exploitation of purely functional elements. This implies that objects and other embodiments of a highly functional nature should be subjected to a stricter originality or creative step assessment than non-functional embodiments. At the same time, the protection against imitations should in such case be relatively narrow in scope. Consequently, it is the degree of functionality – and not the artistic classification – that determines the differentiated creative step and imitation assessment within the areas of artistic works intended for practical use and other artistic works.”**

(67) I am of the view that this is a useful clarification, especially since it is hardly possible to define any unequivocal distinction between artistic works intended for practical use and other artistic works. However, I am of the view that it may be unclear whether one can conclude that a stricter norm applies, or whether the difficulty in such

cases of achieving the necessary creative step is instead a reflection of the fact that there will, for products that are dominated by their functional elements, be more limited scope for independent artistic expression. This will in any case have no impact on how I perceive the matter.

(68) The appellees have strongly emphasised that it follows from recent case law from the European Court of Justice that the previously rather strict creative step requirement has been modified within the areas regulated by specific directives. It is argued that such case law has now accumulated to such a level as to have established a joint European creative step concept that implies less strict requirements than were previously the case, which concept must also be of relevance in other areas than those to which the directives apply directly.

(69) However, it is a fact that no issued directive covers the matter of creative step with regard to artistic works intended for practical use, which area is subject, in part, to diverging legislation within the EU countries. Even if the presentation of case law submitted by the appellees were to be correct, it would consequently under no circumstance be binding as far as a ruling on creative step with regard to artistic works intended for practical use on the basis of Norwegian law is concerned, and I therefore see no reason to discuss this in any further detail.

(70) I will embark on an assessment, based on the above, as to whether Stokke AS has a copyright on the Tripp Trapp chair. I mention, by way of introduction, that such assessment must be based on the factual situation in 1973, when the chair was introduced. However, the legal assessment is made on the basis of the current conception of justice.

(71) When the Tripp Trapp chair was launched in the market, the focus was placed on the functional elements. And in a memorandum written by Peter Opsvik, probably in the early 1980s, he states that: "The design of the chair did actually come about as a result of the functions it was intended to serve."

(72) The fact that more weight was attached to the concept than to the design at the time of the introduction of the Tripp Trapp chair cannot, in my opinion, be accorded weight for purposes of the creative step assessment. The design was original and good – the concept was likely to attract attention. It is obvious that the creator's downplaying of his own creative effort is of no relevance. An objective assessment needs to be made.

(73) It is therefore appropriate to start out with the evaluations of the two experts, although their evaluations are so diverging that they cannot be said to provide clarification in themselves.

(74) The expert appointed by the appellant, Jan Jacobs, Professor of Industrial Design, from the Netherlands, deems it obvious that the Tripp Trapp chair does not feature the necessary creative step. In his statement submitted before the Supreme Court, he writes, *inter alia*, that:

> **"The Tripp Trapp chair is without any doubt developed within the style of post war Scandinavian Design. But in contrast to other well-known Scandinavian designers and their personal interpretation of their design, there is no such interpretation in <u>this</u> product. The overall construction and the details are both based on functional and technical solutions which are common and predictable."**

(75) Professor Jacobs thereafter explains the difference between what he calls a passive and an active approach to the design work. The passive form is to let function and technical solutions determine the design. He writes the following about the Tripp Trapp chair in this context:

> **"In my opinion it is without a doubt that** [sic] **the Tripp Trapp chairs** [sic] **is the result of the first approach: a passive design, which should not lead to copyright protection. The most discussed part of the chair, the two carriers and their gradient, are both based on the analogy of a staircase and the wish to avoid too big tensions on the fixation of the seat by bigger children ..."**

(76) The conclusion is therefore:

> **"In my opinion the chair is too simple due to the fact that it is based on offering ergonomic functional and technical solutions, and as a result the Tripp Trapp chair lacks having its own interpretation of the style elements of Scandinavian Design. Coming back to the criteria of the "Gute Industrieform", the Tripp Trapp lacks the socalled** [sic] **"Eigenstaendigkeit"."**

(77) The expert appointed by the appellee, Erika Lagerbielke, Professor of Glass Design, from Sweden, finds, on the other hand, that the creative step requirement is undoubtedly met. She considers the Tripp Trapp chair to be a design icon, and summarises her more comprehensive evaluation as follows:

> **"All in all, the TRIPP TRAPP highchair is clearly the product of independent and original artistic work, with a bold, robust and functionalistic design expression. The TRIPP TRAPP highchair is a very good example of good design with a stylistically consistent functionalist expression, which provides very good user benefit, features a personal style, and offers a good reflection of its period in both its artistic style and in its functional analysis."**

(78) There does not appear to be appreciable disagreement between the two experts with regard to what is relevant for purposes of the assessment of creative step, but their specific evaluations are clearly not the same. However, the Tripp Trapp chair has also been evaluated in other relevant contexts. In an expert statement from 2008 in connection with a dispute in the Netherlands, A. H. Marinissen, Professor Emeritus of Industrial Design, from the Netherlands, describes the Tripp Trapp chair as a striking creation, and summarises his evaluation as follows – in [English] translation:

> **"Although the design of the Tripp Trapp chair does, broadly speaking, fit into the general trend within Scandinavian furniture design (light wood and candid, plain and simple details), it deviates sharply from the trend of its period, which called for colourful, curved and rounded shapes. Its strikingly rectilinear shape, its airy nature, its "floating" look, and its open and readily understandable structure justify the conclusion that we are here dealing with a completely original design, from the perspective of the time of its launch, not least when considering what highchairs looked like at that time."**

(79) Although there may be different opinions with regard to the relevance of the invoked foreign judicial rulings for purposes of determining Norwegian law, the isolated description of the Tripp Trapp chair in these rulings is undoubtedly of interest. It can thus clearly be concluded that the evaluations are generally in conformity with the view expressed by Professor Lagerbielke. Danish Supreme Court Judgment U 2001 747 H states that the Tripp Trapp chair has a pioneering and entirely exceptional unique design, and that it is the result of an independent creative effort. A comprehensive ruling of 1 November 2001 from the Court of Appeal in Hamburg states, *inter alia*, the following (in English translation):

> **"Due to the design elements defining the overall appearance, the creation of the Tripp Trapp chair shows an aesthetic surplus so considerably outperforming an average designer's skill that an artistic work of considerable design originality is present falling within the scope of copyright law, and this is true even in view of the fact that industrial design protection may also apply at lower thresholds."**

(80) A statement from the Opinion Committee of the Swedish Society of Crafts and Design, dated 14 February 1994, draws similar conclusions:

> **"Mr Opsvik's design is highly personal, through stringency and consciousness in the design details. The chair, when viewed from an overall perspective, is highly distinct when compared to earlier designs. The main shape; the slanting L shape, was entirely new and revolutionary, and lacked any precursors. There would appear to be no risk of duplication."**

(81) The Court of Appeal summarises its view as follows:

> **"In summary, the Court of Appeal notes that the Tripp Trapp chair is characterised by simple and stringent lines that create a light and airy overall impression. When looked at from the front, whether directly or at an angle, this has to do with both the seat and the footplates, as well as the metal rods, being narrow. Parallel lines are repeated in the side supports, the two plates, the split back support and the two black metal rods. As a contrast to the straight lines, the backrests are curved. This is repeated in curves at the back of the seat and footplate, as well as the rounded fronts of these plates and the reclining footrest at the back. Professor Erika Lagerbielke has described this as a harmonic, rhythmic and "musical" characteristic. The chair has a design that communicates safety and sturdiness.**
>
> **The simple, light and stringent overall impression is repeated when looking at the chair from the side. The slanting "L shape" of the side supports makes the chair appear considerably lighter than would, for example, the use of four legs. At the same time, the "L shape" is characteristic and prominent, and thereby of key importance to the overall impression. Moreover, the width of the chair when looked at from the front, and the width of the wood in the side supports, contribute to conveying an impression of strength and stability.**
>
> **The Court of Appeal finds, based on an overall assessment, that the said design elements of the Tripp Trapp chair convey an overall impression of originality, which is the result of an independent, creative effort. The design must be characterised as distinctive and featuring a high degree of innovation when compared to existing chairs. Consequently, the requirements applicable to artistic works are clearly met."**

(82) I agree with this, and when taking into consideration the many concurrent evaluations made in other contexts with regard to the Tripp Trapp chair as an artistic work, I am unable to conclude that the issue can be said to be an uncertain one.

(83) The question is therefore whether the appellant has infringed the copyright to the Tripp Trapp chair by marketing and selling the Oliver chair. The two experts also have highly diverging views as far as this issue is concerned. Professor Jacobs concluded that there are major or minor differences in all details of the two chairs, and summarised his view as follows:

> **"Where the Tripp Trapp chair is purely functional, showing an overall form based on using just basic forms and connections, the Oliver chair shows curved lines and a gentle expression.**
>
> **There are major differences between the two chairs. One could say that the form of the Tripp Trapp chair is the result of a passive design approach, while the form of the Oliver [chair] is the result of an active design approach. The differences are so explicit and prevelant** [sic] **that, in my opinion, no layman would ever confuse that** [sic] **the two chairs as being one of** [sic] **the same."**

(84) Professor Lagerbielke emphasises that:

> **"The dominant impression is that the Oliver chair has been created to look as similar to TRIPP TRAPP as possible, for the purpose of facilitating the said confusion, and that the differences to be found in the design style are primarily intended to distinguish Oliver from TRIPP TRAPP".**

(85) The summary goes on to state the following:

> **"I am of the opinion that the Oliver highchair is an obvious copy of TRIPP TRAPP inasmuch as a majority of the important design expressions have been copied directly. First of all, the slanting L-shaped side supports, and even the slender and tautly designed seat and footplate. Details that in Oliver could just as well have been designed differently, whilst retaining the functional attributes.**
>
> **The fact that Oliver is not a copy in all details does not prevent it from being perceived as a copy on the basis of an overall artistic assessment, when taking into consideration the originality of TRIPP TRAPP, as well as the observation that the details copied from TRIPP TRAPP are those details that define its identity. Those details that differ are in all cases weakly designed, and contribute to making Oliver a product with a significantly lower creative step."**

(86) It will be noted that Professor Jacobs' assessment is largely a function of his views with regard to the copyright issue. This has implications when it comes to what weight can be attached to his views. There would seem to be general agreement, at least in Denmark, Sweden and Norway, that the degree of innovation has consequences in terms of how broad the protection against imitations is in scope. The scope of protection will be determined by how original and distinctive an artistic work is. The scope of protection reflects the scope of the individual creative effort. Although it will generally be problematic to grant extensive protection to items intended for practical use that meet everyday needs, such a perspective carries limited weight in relation to a distinctive artistic work like the Tripp Trapp chair. The German ruling I referred to earlier emphasises, in particular, the wide freedom of choice facing Mr Opsvik in the detailed design of his highchair – also within the limits defined by the technical solution. The same is emphasised in the decision of the Office for Harmonization in the Internal Market of 12 February 2008, in which the design registration of a chair similar to the Oliver chair was declared invalid at the request of Stokke AS:

> **"The examples of prior designs of highchairs given by the Holder demonstrate that despite these technical constraints there is still a large degree of freedom for designers of highchairs. In particular, there is no need for using a characteristic L-shaped structure which characterizes the prior design."**

(87) It is emphasised that the scope for variation is virtually unlimited, and the following is stated with regard to what was different about the registered design when compared to the Tripp Trapp chair:

> **"The modifications of the RCD [Registered Community Design] with respect to the prior design are limited to the addition of a rounded front bar in comparison to a straight front bar in the side view of the prior design, and to the rounding of the edges which do not change the basic design of the chair."**

(88) A corresponding assessment seems appropriate when making the comparison in a copyright context.

(89) Two Danish Supreme Court judgments, U.2001.747H (Tvilum) and the Supreme Court judgment of 28 June 2011 (Lulu) would appear to be premised on the Tripp Trapp chair, as a functional object, only enjoying protection against "very close" imitations. However, the fact that both judgments strongly emphasise the distinctiveness of the Tripp Trapp chair does clearly indicate that the scope of protection is influenced by the creative step in this area as well. Both judgments must in any circumstance be interpreted by also looking at what the Court considers to be "very close" infringements. The two chairs that these judgments held to infringe the copyright of

the Tripp Trapp chair were also modified versions in which the incorporated differences were, at the very least, not less likely to distinguish those chairs from the original than is the case with the Oliver chair.

(90) The appellant has argued that the infringement assessment has been made more complicated through the failure of the Court of Appeal to specify which parts of the Tripp Trapp chair the copyright relates to. I am unable to attach any weight to this objection. Although individual elements of the design may determine whether the creative step requirement is deemed to have been met, the copyright relates to the [artistic] work, and the comparison must therefore be made on the basis of the overall impression conveyed by the [artistic] work.

(91) The appellant has strongly emphasised the importance of the curved side supports that are used for the Oliver chair, and has in that context argued that the German judgment, to which I have previously referred, did in fact note that this was one way of escaping the shadow cast by the Tripp Trapp chair. I am a view that this reflects a misunderstanding of the German ruling. It does note that the use of curves and rounded forms m a y result in a diverging overall impression, not that it w i l l result in such divergence.

(92) The ruling of the Court of Appeal is, the way I read the judgment, based on the fundamental approach that results from what I have said thus far. The specific assessment of the Court is as follows:

> **"The Court of Appeal is of the view that the innovative characteristics of the Tripp Trapp chair are echoed in the Oliver chair when the two chairs are compared from the front, whether directly or at an angle. Both the seat and footplates, as well as the metal rods, are narrow. Parallel lines are repeated in side supports, the two plates and the two black metal rods. As a contrast to the straight lines, the backrests are curved. This is repeated in curves at the back of the seat and footplate, as well as the rounded fronts of these plates and the reclining footrest at the back. Consequently, the light and airy overall impression conveyed by the Tripp Trapp chair is replicated in the Oliver chair.**
>
> **The first difference noted is that the back support of the Oliver chair consists of only one piece, which is curved both at the top and at the bottom. However, the impression conveyed by this difference is limited by the fact that the back support of the Oliver chair features an oval opening. At the same time, the location of the wooden support between the legs of the Oliver chair result in it being perceived as somewhat more airy than the Tripp Trapp chair at the bottom. Another minor difference is that the Oliver chair features a black metal tip on the front at floor level. Its purpose is to prevent the chair from tilting forwards. All in all, the Court of Appeal is of the view that the Oliver chair must be perceived as a very close imitation when the chairs are looked at from the front, whether directly or at an angle. Besides, the Court of Appeal is of the view that these are in many contexts the two most important viewing angles for purposes of evaluating what chairs like these look like – in connection with both marketing and practical use.**
>
> **Another characteristic of the Tripp Trapp chair is the contrast between[, on the one hand,] the supporting parts in light wood colour and, on the other hand, pronounced rods and screws in black metal. This is also replicated in the Oliver chair.**
>
> **There are also considerable similarities between the chairs when viewed from the side. The Tripp Trapp chair is also characterised by the inverted, slanting "L shape" of the side support and the leg. This contributes, as mentioned, to the light and airy overall impression, not least when compared to traditional four-legged chairs.**
>
> **The Oliver chair is also based on this so-called cantilever principle, the application of which to chairs is relatively rare. Consequently, this main design feature of the Tripp Trapp chair is replicated in the Oliver chair. However, the side support and the horizontal leg have been given a curved shape in the Oliver chair, in contrast to the right-angled** [sic] **side support of the Tripp Trapp chair. Consequently, the stringent nature of the Tripp Trapp chair is not fully copied in this respect. The black metal tip at the front of the leg is also more visible when looking at the Oliver chair from the side. Nevertheless, the use of the cantilever principle, relatively similar width of the side support and the leg, as well as the previously mentioned narrow plates that are rounded and curved, result in the Oliver chair presenting considerable similarities with the characteristics of the Tripp Trapp chair – also when the chairs are compared from the side. The Court of Appeal has also noted that somewhat similar**

> **differences in the design of the side supports were not deemed to be of decisive importance in the said two Danish Supreme Court judgments."**

(93) After having inferred that the Oliver chair cannot be considered an independent artistic work, the Court of Appeal concludes as follows:

> **"The artistic distinction of the Tripp Trapp chair lies, as previously mentioned, in innovative individual elements, and the original combination of these with older, known individual elements. The Court of Appeal is of the view that the said elements are replicated to a very large extent in the Oliver chair. Consequently, the predominant part of those characteristics of the design expression that convey the identity of the Tripp Trapp chair are also found in the Oliver chair. The similarities are very extensive, not least when considering the large scope for variation that presents itself. All in all, the Oliver chair must be perceived as a very close imitation of the Tripp Trapp chair."**

(94) I agree with this summary, and it follows from this that the Oliver chair represents an infringement of the copyright protection conferred on the Tripp Trapp chair.

(95) Damages have been claimed in respect of the copyright infringement, but I will revert to the issue of damages after discussing the trademark dispute.

(96) Stokke AS did already in the early 1980s begin to highlight the special function of the Tripp Trapp chair by using the slogan "The chair that grows with the child" or similar. The slogan soon entered into use as a trademark, and the trademark was registered on 15 May 2008 on the basis of actual use.

(97) In advertisements and items posted on its website, Trumf AS has presented the Oliver chair through a picture and the following wording:

> **"This great highchair grows with your child. The clever design allows you to easily adjust the seat and the foot support, and thus enjoy the chair for many years. A robust and stable highchair that is easy to assemble."**

(98) The question is therefore whether the appellant has wrongfully made use of the trademark held by Stokke AS in contravention of the exclusive right conferred under § 4 of the Trademark Act. The fact that the wording is incorporated into the presentation of the qualities of the chair suggest that it is not being used as a trademark, but as far as content is concerned the wording does not convey any information not also featured in the remainder of the description, and its nature is more or less that of a slogan corresponding to the trademark held by Stokke AS. However, in this context it is not necessary to take a view on whether Trumf AS has used the wording as a trademark. Such use is not a prerequisite for concluding that a trademark held by others can be said to have been used in contravention of the exclusive right conferred under § 4 of the Trademark Act.

(99) Stokke AS' trademark has now been registered, and the validity of such registration cannot be subjected to judicial review in an infringement action. Nevertheless, Trumf AS has strongly emphasised that the trademark is clearly descriptive, and that corresponding language is used by a number of other suppliers, including suppliers of children's furniture and other goods for children. It is argued, on this basis, that the protection is so weak as to only apply to identical trademark use.

(100) I find no reason to embark on a detailed assessment as to how strong the trademark held by Stokke AS can be said to be. Given my assessment of the other facts of the case, this is

of no relevance. Nor is there any reason to discuss other manufacturers' use of the basic element of Stokke AS' slogan.

(101) The wording used by Trumf AS in its marketing is close to that of Stokke AS' trademark, and there is a clear risk that the average consumer may fail to notice the nuances, and incorrectly draw the conclusion that the Oliver chair comes from the same supplier as does the Tripp Trapp chair. Such a possibility is of course particularly obvious in the context of the marketing of a chair that is so similar to the chair to which the trademark relates as to constitute copyright infringement. The risk of such an incorrect conclusion is also increased by the failure of the Trumf AS marketing materials to specify the identity of the supplier.

(102) I am of the view that Trumf AS' marketing was likely to harm the interest that the trademark is intended to protect; primarily the ability of the trademark to work as a commercial guarantee as to origin. Besides, the commercial value of the trademark may be undermined through common use and through it also being associated with a product that lacks the design qualities featured by the Tripp Trapp chair. I therefore deem it evident that Trumf AS' use of the wording "This great highchair grows with your child" infringed the exclusive right of Stokke AS to the trademark "The chair that grows with the child".

(103) I will now address the claims for damages for economic loss in the appeal case. It follows from § 55 of the Copyright Act that damages in respect of copyright infringements may be claimed under the general provisions of the law of torts. The relevant basis for liability in the present case is employer's liability, cf. § 2-1 of the Damages Act.

(104) I conclude, as did the Court of Appeal, that Trumf AS was well aware of the Tripp Trapp chair, and that those who acted on behalf of the company must necessarily have been aware that the Oliver chair shared a number of similarities therewith. However, Trumf AS is arguing that the representatives of the company made a mistake of law that cannot be blamed on them on grounds of negligence.

(105) Inasmuch as it failed to make any attempt at legal clarification, and the company instead relied on registration of the design of the Oliver chair, without any knowledge as to what could be deduced from such registration, the company has clearly taken a chance. Anyone engaging in commerce shall, at a minimum, familiarise himself with the key legal regulations within the relevant business areas, and there is clearly no justification for exempting Trumf AS from liability on grounds of excusable mistake of law.

(106) In calculating the loss, one must start out, as did the Court of Appeal, with what aggregate contribution margin loss Stokke AS must be assumed to have incurred. The contribution margin on each individual chair is not in dispute; the disagreement concerns how many of the 974 purchasers of the Oliver chair would alternatively have purchased the Tripp Trapp chair. If it could be assumed that the functional elements of the Oliver chair had been decisive for the purchasers, the Tripp Trapp chair must be considered the obvious alternative choice, but the not insignificant price difference means that it must be assumed that some of the purchasers would have refrained from making a purchase or would have chosen other alternatives. The parties have, as will be noted from the presentation of their arguments, strongly diverging opinions as far as this is concerned. However, no new elements of importance to the assessment have been presented before the Supreme Court, and I have concluded, as did the Court of Appeal, that an appropriate discretionary estimate as to the number of sales lost is 600 chairs. This represents a contribution margin loss of NOK 270,000.

(107) Furthermore, the Court of Appeal has deemed it appropriate to award Stokke AS damages for loss of goodwill, and has presented the following reasoning in relation thereto:

> **"Moreover, the Court of Appeal concludes that Stokke AS has incurred a loss as the result of market disturbances. Photographs of the Oliver chair were made available to more than half a million Norwegian customers for many months. The marketing and sale of an imitation of weaker design may impair interest in the original, and have a negative general effect on the reputation of the Tripp Trapp chair, and thereby that of Stokke AS. The goodwill loss is assumed, on a discretionary basis, to be NOK 150,000."**

(108) I agree with the reasoning of the Court of Appeal. The amount of damages awarded appears to be realistic.

(109) It is not disputed before the Supreme Court that Stokke AS must be awarded damages in the amount of NOK 10,000 as compensation for investigation expenses, thus implying that the overall loss incurred through the infringement of Stokke AS' copyright amounts to NOK 430,000 before correction.

(110) Peter Opsvik AS has incurred a loss in the form of lost royalties as the result of reduced sales of the Tripp Trapp chair. The appellant has argued, as previously noted, that the amount of damages awarded must be reduced because the sales loss [estimate] must be reduced significantly, but has no other objections as far as the calculation of damages for economic loss is concerned. When it is assumed that sales of the Tripp Trapp chair were reduced by 600 units, the amount of royalties [lost] is NOK 7,903. Stokke AS would have had to pay these royalties if sales had not been reduced, and the amount of damages awarded to Stokke must therefore be reduced correspondingly.

(111) It follows from § 58, first paragraph, first sentence, of the Trademark Act that Stokke AS is entitled to a consideration equivalent to reasonable royalties for the trademark infringement, provided that Trumf AS has acted wilfully or negligently. Given its knowledge of the Tripp Trapp chair, it was also in this relation negligent to refrain from making further enquiries, and it is obvious that Trumf AS cannot be considered to have made an excusable mistake of law. In determining the consideration, the Court of Appeal has assumed royalties of 5 percent, and has thereafter calculated royalties for 974 chairs at a price of NOK 599 per chair. I agree with the calculation of the royalties – these are royalties on the trademark, not on the product. However, I am of the view that consideration cannot be awarded in respect of the 600 chairs for which Stokke AS has already been awarded damages reflecting their entire contribution margin. The amount of consideration in relation to the trademark infringement is therefore NOK 11,200, and the total amount of damages awarded to Stokke AS is NOK 433,297.

(112) Peter Opsvik has appealed the judgment of the Court of Appeal inasmuch as he was not awarded damages for non-economic loss resulting from the infringement of his copyright. The right to economic exploitation has been assigned to Stokke AS, but Mr Opsvik has retained the moral right as creator, cf. § 3 of the Copyright Act.

(113) The Court of Appeal does not explicitly rule on who may incur liability on behalf of Trumf AS, but finds that none of those involved on the part of the company have acted negligently. On these grounds, the claim was not upheld.

(114) It is a fact that damages for non-economic loss under § 55 of the Copyright Act from the company cannot be awarded on the basis of employer's liability. Trumf AS can only be held liable, on the basis of so-called corporate liability, for those who can be said to have acted on behalf of the company – cf. Proposition No. 34 (1987-88) to the Odelsting, Item 5 – Comments on § 5.

(115) I am of the view that it is therefore appropriate to first take a view on who might potentially incur liability of this nature on behalf of the company. It can be concluded, based on the evidence submitted, that the directors and the person who was, at least in formal terms, the general manager were not involved in the matter. Truls Fjeldstad, who was consulted in connection with the evaluation as to whether the Oliver chair should be included in the assortment of goods, has stated that the organisation probably also perceived him to be the person in charge in 2007, but this is not explored in more detail, and it cannot be assumed that Mr Fjeldstad was the *de facto* general manager.

(116) With regard to who was responsible for procurement, Mr Fjeldstad writes in a written statement to the Supreme Court that such responsibility was held by the head of procurement. Mr Fjeldstad writes the following concerning the period after the procurement strategy had been established:

> **"The head of procurement had an independent role and independent responsibilities. As long as the strategy was adhered to, no details and products were discussed in the management group, other than the head of procurement reporting on how she was doing relative to plan."**

(117) In a supplementary statement, Mr Fjeldstad has added that the general manager had delegated the procurement decision to the head of procurement, although the general manager could nevertheless exercise his power to oppose the inclusion of specific goods in the assortment of goods. It must therefore be concluded that decision-making authority within an area of key importance to the company had been delegated to the head of procurement. The question is whether the company may incur corporate liability for errors made by an employee in such a position.

(118) Proposition No. 48 (1965-66) to the Odelsting, page 64 (the proposition on the Act relating to Damages in Certain Relations) indicates fairly narrow limits for such liability, whilst at the same time leaving it to the courts of law to define such limits. The Supreme Court has allowed room for somewhat broadening the scope of corporate liability, cf., in particular, the rulings published on page 626 onwards of the 1994 volume of *Retstidende* and on page 209 onwards of the 1995 volume of *Retstidende*. The ruling published on page 770 onwards of the 2012 volume of *Retstidende* discusses the issue, but the case is resolved by concluding that the culpability requirement is deemed not to be met.

(119) Legal theory assumes that corporate liability may be triggered by other persons than the directors and the general manager. The following is stated on page 203 of Lødrup, *Lærebok i erstatningsrett* ["Textbook on the Law of Torts"], 6th edition:

> **"In determining who shall be deemed to belong to the corporate bodies, the Supreme Court has set aside corporate law considerations and organisational considerations, and has linked liability to the person with the ultimate power to make decisions within each area of the business. This means that the demarcation can more readily be premised on statutory objectives under the law of torts."**

(120) The following is added on the subsequent page:

> **"However, the concept of manager may extend beyond the senior management team of the company, inasmuch as it may also include lower levels holding the ultimate independent decision-making authority, which authority is frequently to be found at the divisional manager level. Depending on the duties and size of the business, one may readily end up in a situation where a large number of people must be deemed to be acting on behalf of the business. Consequently, it is such person's duties as manager that is of interest, and not only where in the organisational structure he is located, and the** [action] **or omission that triggers liability must have its origin in his duties as manager."**

(121) Professor Hagstrøm, who appears, in the main, to draw the line more or less as indicated by Professor Lødrup, emphasises in *Obligasjonsrett* ["The Law of Obligations"], second edition, page 493, a relevant policy consideration:

> **"It must, at the same time, be noted that the provisions on gross individual culpability under the law of torts will be of little practical importance if the relevant circle of persons is solely defined on the basis of company law provisions and organisational law provisions. The actual handling of ongoing matters, and this**

> **applies both within the private law and the public law spheres, is not in the hands of bodies in the company law sense of the term, but in those of subordinates."**

(122) Professor Hagstrøm goes on to conclude that the Supreme Court has taken the stand that corporate liability is also triggered by errors on the part of "senior subordinates". That is probably reading somewhat too much into the judgments referred to, even if also taking into consideration the arbitration awards invoked by Professor Hagstrøm in support of his view. However, I am of the view that it will be appropriate to attach sufficient weight to the policy considerations to conclude that corporate liability is triggered, at a minimum, when the authority to make decisions within one of the main areas of the company has been delegated to a manager, like the head of procurement in the present case.

(123) It will then be necessary to determine whether the head of procurement has acted wilfully or with gross negligence. I refer, in this context, to what I have said about the assessment of culpability in relation to liability for damages in respect of economic loss. The decision to market and sell the Oliver chair was made in full knowledge of both that chair and the Tripp Trapp chair. A deliberate chance was taken.

(124) The approach adopted by the Supreme Court of Denmark in respect of the corresponding issue with regard to criminal liability, Danish Supreme Court judgment of 28 June 2011 (Lulu), is pertinent:

> **"Lulu Baby ApS has been aware of all the factual circumstances on the basis of which it has been concluded that the Lulu chair must be deemed to represent a very close imitation, which implies an infringement of the copyright associated with the Tripp Trapp chair. The fact that the company has been of the view that the Lulu chair did not represent such a very close imitation of the Tripp Trapp chair cannot relieve it of criminal liability ..."**

(125) Corresponding considerations have prevailed in a number of cases relating to damages in Norway, cf. the rulings published in *Retstidende*, 1995 volume, page 1948 onwards, 2005 volume, page 41 onwards, paragraphs 67 and 68, and 2009 volume, page 265 onwards. The following in stated in paragraph 67 of the latter of these judgments:

> **"§ 55, first paragraph, second sentence, of the Copyright Act stipulates that the court may award damages for non-economic loss to the injured party if the right of the depicted person under § 54c has been infringed with intent or through gross negligence. I deem it evident that the prerequisites for awarding damages for non-economic loss are met. As can be inferred from the interview with Kristine Moody in the Verdens Gang newspaper, and as quoted above, the use of the picture was intentional. Her belief that the use of the picture was lawful represents a mistake of law that does not give rise to any exemption from liability for damages."**

(126) Consequently, when one has to disregard, for purposes of assessing whether the culpability requirement [is met], such uncertainty as may have been associated with the legal assessment of the copyright issues, it is my view that it must be evident that the culpability requirement has been met.

(127) I have therefore concluded that the ancillary appeal must be upheld. I have concluded, on the basis of a discretionary assessment, that it is appropriate to award damages for non-economic loss in the amount of NOK 20,000.

(128) In the appeal proceedings before the Borgarting Court of Appeal, the Court found in favour of Stokke AS and Peter Opsvik AS as far as the main part of their claims were concerned. However, the Court of Appeal concluded that weighty considerations made it reasonable for Trumf AS to be exempted from liability for legal costs before both the District Court and the Court of Appeal, cf. § 20-2, third paragraph, of the Civil Procedure Act. The Court of Appeal noted, *inter alia*, that the dominant issue raised by the case was open to doubt, that Trumf AS had presented a settlement offer that would largely have covered the damages that were awarded, that Trumf AS discontinued the marketing of the Oliver chair as soon as the communication from Stokke AS was

received, as well as the case raising fundamental issues of major practical importance. Although I have not found any of the main issues in the case to involve doubt, I find that the other circumstances referred to by the Court of Appeal may justify a decision not to award legal cost before the District Court and the Court of Appeal.

(129) Stokke AS has argued before the Supreme Court that the amounts of damages awarded before the Court of Appeal were too low by far, and partly significant increases in the damages have been claimed in respect of the various items. Nevertheless, the statement of claim calls for the appeal to be dismissed, and it must therefore be concluded that the case has been won. Legal costs have to be awarded before the Supreme Court, as I am unable to see that the circumstances that justified sharing the legal costs before the two courts below carry the same weight after the case was appealed to the Supreme Court. At the time of the filing of the notice of appeal, there existed a judgment from the Court of Appeal that thoroughly examines and deliberates the arguments that were invoked on the part of Trumf AS. I am of the view that the judgment of the Court of Appeal provides such a level of clarification that it did not reasonably justify an appeal.

(130) The appellee has claimed a total of NOK 1,410,000 in legal costs before the Supreme Court. It has been stated that 95 percent of the costs refer to the main appeal. No objections have been raised in respect of the cost specification, and I find that legal costs should be awarded in accordance with such specification.

(131) The cross-appeal [sic] has been upheld, and I am of the view that Peter Opsvik must be awarded legal costs before the Supreme Court. Both parties have stated that 5 percent of the overall legal costs refer to the ancillary appeal, and legal costs are awarded in the amount of NOK 70,000.

(132) I vote in favour of the following

J U D G M E N T:

1. The judgment of the Court of Appeal is amended inasmuch as the amount of damages in Item 4 of its conclusion shall be 433,297 – four hundred and thirty three thousand two hundred and ninety seven – Norwegian kroner. The appeal filed by Trumf AS is dismissed in all other respects.

2. Trumf AS shall pay the legal costs of Stokke AS before the Supreme Court in the amount of 1,340,000 – one million three hundred and forty thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

3. Trumf AS is ordered to pay damages for non-economic loss to Peter Opsvik in the amount of 20,000 – twenty thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

4. Trumf AS shall pay the legal costs of Peter Opsvik before the Supreme Court in the amount of 70,000 – seventy thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

(133) Justice **Webster:** I agree with the main aspects of the reasoning of the first Justice to deliver his opinion, as well as with his conclusions.

(134) Justice **Bull:** Likewise.

(135) Justice **Noer:** Likewise.

(136) Justice **Øie:** Likewise.

(137) After the votes had been cast, the Supreme Court rendered the following

J U D G M E N T:

1. The judgment of the Court of Appeal is amended inasmuch as the amount of damages in Item 4 of its conclusion shall be 433,297 – four hundred and thirty three thousand two hundred and ninety seven – Norwegian kroner. The appeal filed by Trumf AS is dismissed in all other respects.

2. Trumf AS shall pay the legal costs of Stokke AS before the Supreme Court in the amount of 1,340,000 – one million three hundred and forty thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

3. Trumf AS is ordered to pay damages for non-economic loss to Peter Opsvik in the amount of 20,000 – twenty thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

4. Trumf AS shall pay the legal costs of Peter Opsvik before the Supreme Court in the amount of 70,000 – seventy thousand – Norwegian kroner within 2 – two – weeks of the service of the present judgment.

Correct transcript certified:

[Stamped: “OFFICE OF THE SUPREME COURT – OSLO”] [Signature]