ECLI:NL:RBGEL:2026:7234

Court	Gelderland District Court
Date of judgment	23 September 2026
Date of publication	24 September 2026
Case number	C/05/441458 / HA ZA 24-484
Areas of law	Civil law
Special features	First instance – single judge
Subject matter	Intellectual property. Copyright. The lower part and one upper of the five Birkenstock sandals at the centre of the case contain a copyright-protected element. Lidl has recognisably copied these elements without Birkenstock's permission. This constitutes an infringement of Birkenstock's copyright. Birkenstock's claims were largely upheld. National ban. The alternative ground of slavish imitation was rejected. The presence of a distinct market identity was not sufficiently substantiated. An order for costs was made on mixed grounds.
References	Rechtspraak.nl

Please note that is a machine translation and not an official translation!

Judgment

Gelderland District Court

Civil law

Arnhem

Case number: C/05/441458 / HA ZA 24-484

Judgment of 23 September 2026

in the case of

1. the company incorporated under German law

BIRKENSTOCK IP GMBH,

with its registered office and place of business in Linz am Rhein, Germany, and

2. the company incorporated under German law

BIRKENSTOCK GLOBAL SALES GMBH,

with its registered office and place of business in Linz am Rhein,

Germany, the claimants,

solicitors: J.C.H. van Manen and L.E. Dijkman,

against

1. the company incorporated under German law

LIDL NEDERLAND GMBH,

with its registered office in Neckarsulm, Germany, and also having its place of business in Huizen, and
2. the company incorporated under German law

LIDL STIFTUNG & CO KG,

with its registered office in Neckarsulm, Germany, and also having a place of business in Breda, and
3. the company incorporated under German law

RIEG & NIEDERMAYER GMBH,

with its registered office at (73037)

Göppingen, Germany, the defendants,

solicitors: M.F.J. Haak, M.G.W. Peijnenburg and L. Snellenberg.

The claimants will hereinafter be referred to collectively as 'Birkenstock et al.' and individually as 'Birkenstock IP' and 'Birkenstock Global' respectively. The defendants will hereinafter be referred to collectively as 'Lidl et al.' and individually as 'Lidl Nederland', 'Lidl Stiftung' and 'R&N' respectively.

1 The proceedings

1.1. The course of the proceedings is set out in:

- the judgment in the interlocutory proceedings of 15 January 2025
- the notice of submission of supplementary exhibits 14 to 35 on the part of Birkenstock et al.
- the notice of submission of supplementary exhibits 36 to 54 on the part of Birkenstock et al.
- the notice of submission of supplementary exhibits 55 to 62 on the part of Birkenstock et al.
- the document submitting supplementary exhibits 63 to 68 on the part of Birkenstock et al.
- the statement of defence with exhibits 1 to 19 on the part of Lidl et al.
- the document submitting supplementary exhibits 20 to 36 on the part of Lidl et al.
- the supplementary exhibit 37 from Lidl et al.
- the sandals deposited on behalf of Birkenstock et al.
- the minutes of the oral hearing of 26 August 2025
- the document submitted in response to the judgment of the Court of Justice of the European Union in the MIO v KONEKTRA case on behalf of Birkenstock et al.
- the statement in response to the judgment in Cases C-580/23 and 795/23 (MIO and others) on behalf of Lidl and others

1.2. Finally, the date of the judgment has been set for today.

2 Introduction

2.1. Various sandals marketed under the Birkenstock brand name have been the subject of legal proceedings in recent years. This has been the case, at least, in the Netherlands and Germany. Reference is made to the judgment of the German Bundesgerichtshof of 20 February 2025[1] and the judgment of the Midden-Nederland District Court of 12 November 2025.[2] The subject of these proceedings has consistently been whether those sandals, as a whole or in part, are protected by copyright. Both judgments were delivered prior to the judgment handed down by the Court of Justice of the European Union on 4 December 2025 in the joined cases *of Mio* and *Konektra*.[3]

2.2. The court finds that one element of the sole of the Birkenstock et al. sandals is protected by copyright and that this also applies to (one element) of the upper of one specific sandal, namely the 'Madrid' model. The court also finds that Lidl Nederland and R&N are infringing the copyright held by Birkenstock et al. There can be no question of unlawful conduct on the part of Lidl et al. through slavish imitation, as the requirement of an 'original character' has not been met. The court will therefore dismiss the claims brought by Birkenstock
grant the claims in (somewhat) limited form. The court will set out below the reasons for reaching these conclusions.

3 The facts

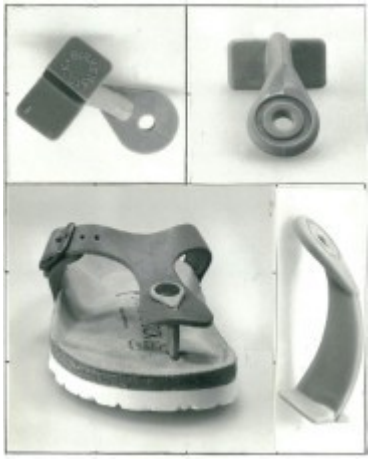
3.1. Birkenstock IP and Birkenstock Global form part of the Birkenstock Group. Among other things, this group is involved in the development and sale of sandals, known in the market as Birkenstocks. The Birkenstock sandal comes in various styles. The first model was launched by the Birkenstock Group in 1963 under the name Madrid. Other models followed in the years that followed, including the Arizona in 1973, the Boston in 1976, the Florida in 1982 and the Gizeh in 1983. These models look as follows (photographs taken from the summons):

3.2. On 21 December 1983, Karl Birkenstock applied for and was granted an international design right, covering, amongst other territories, the Benelux. The application lists the following designs:

V. EXACT DESIGNATION (without description) OF THE ARTICLES IN WHICH IT IS INTENDED TO INCORPORATE THE DESIGNS[3]:

1 Toe-divider for sandals, beachsandals and health sandals
2 health sandal ~~exhibiting a toe-divider and a surgical-footbed~~
3 fastener-strap-member for sandals, shoes, health-sandals, ~~bags, pockets, suit-cases~~ and article of clothing
4 sandal ~~exhibiting fastener-strap-members and a surgical-footbed~~
5 shoe ~~exhibiting fastener-strap-members and a surgical-footbed~~

The application also contains the following photographs:



3.3. Lidl Nederland and Lidl Stiftung form part of the international supermarket group Lidl. Lidl sells both food and non-food items. The Lidl group operates worldwide and runs supermarkets in, amongst other places, the province of Gelderland, including in Arnhem. It also operates an online shop.

3.4. The non-food items offered by the Lidl group also include sandals. The women's sandals are sold under the ESMARA and NATURAL WALK BY ESMARA brands, and the men's sandals are sold under the LIVERGY and NATURAL WALK BY LIVERGY brands. These brands are registered in the European Union in the name of Lidl Stiftung. The sandals look as follows:

3.5. R&N is a German company which, according to the German commercial register, is engaged (among other things) in the trade in footwear and related products. It also produces its own collections. R&N is listed as the manufacturer on the labels attached to two pairs of ESMARA-branded sandals at issue, which are sold by Lidl in the Netherlands.

3.6. Birkenstock and others wrote to Lidl by letter dated 7 May 2024 stating that the Lidl sandals referred to in point 3.4 above infringe the copyright held by Birkenstock

sandals. Birkenstock and others have ordered Lidl to cease selling those allegedly infringing sandals, but Lidl has so far refused to do so.

4 The dispute

4.1. Birkenstock et al. seek a judgment, to be declared enforceable immediately:

A. To order Lidl and others, each individually, immediately upon service of this judgment, to cease any infringement of Birkenstock IP's copyright or any unlawful acts against Birkenstock and others, as described in the writ of summons, and, more specifically, with immediate effect, to cease and desist from offering for sale and marketing the infringing sandals;

B. Order Lidl and others to pay an immediately payable penalty of 5,000.00 per day (with any part of a day counting as a whole day) for each day that a defendant acts in breach of the injunction sought under I, or, at the discretion of Birkenstock and others, 250.00 per product offered or traded in breach of that order, and that the penalty payable shall be capped at 250,000.00, or such penalties as the court may order in the interests of justice;

C. Order Lidl et al., each individually, to provide, within two weeks of service of this judgment, to the solicitors of Birkenstock et al., a statement, accompanied by all relevant documents in support of that statement, concerning the total number of infringing sandals that (each of) the defendants and/or their professional customers have manufactured, ordered, held in stock and/or sold in the Netherlands, broken down by product, as well as the full contact details of the relevant product(s) and/or supplier(s) and professional customers of the infringing sandals;

D. Order Lidl and others to pay an immediately payable penalty of 10,000.00 per day (with any part of a day counting as a whole day) for each day that a defendant acts in breach of the order sought under III, and that the penalty payable be capped at 750,000.00, or, in the alternative, such penalty payments as the court may order in the interests of justice;

E. to declare that Lidl et al., with their infringing sandals, have infringed the copyright of Birkenstock IP;

F. Order Lidl and others jointly and severally to pay compensation for all damages suffered by Birkenstock and others as a result of their infringing or unlawful acts, to be quantified at a later stage;

G. Order Lidl and others jointly and severally to pay the full costs of these proceedings in accordance with Article 1019h of the Code of Civil Procedure.

4.2. Birkenstock and others put forward two grounds of claim. Primarily, they allege copyright infringement; in the alternative, they allege slavish imitation.

4.3. Lidl and others are mounting a joint defence. With regard to Lidl Stiftung and R&N, the primary submission is that the court lacks jurisdiction. With regard to Lidl Nederland and (in the alternative) with regard to Lidl Stiftung and R&N, it is argued that the claims should be dismissed, with an order against Birkenstock et al. to pay the costs of these proceedings, to be declared enforceable provisionally, pursuant to Article 1019h of the Code of Civil Procedure.

4.4. The parties' arguments will be addressed below, in so far as they are relevant to the assessment of this dispute.

5 The assessment of formal/preliminary matters

Competence

5.1. Birkenstock and others are, in essence, seeking an injunction against the alleged unlawful conduct of Lidl and others, in relation to the manufacture and sale of infringing sandals. In response to the summons served on them in that context, Lidl Stiftung and R&N raised two preliminary objections regarding jurisdiction, which were decided by judgment in preliminary proceedings dated 15 January 2025.4 In short, that judgment bases the jurisdiction of the District Court of Gelderland on the finding that (i) R&N, as the manufacturer and importer, is named on the (labels of the) infringing sandals, so that, in that sense, it offers the products together with Lidl et al. under their trade names, and (ii) it is not in dispute that the offering, promotion and sale of those sandals take place both in Dutch Lidl shops – several of which are located in the district of Gelderland – and online via the website linked to the domain name www.lidl.nl. Lidl Stiftung and R&N do not agree with this ruling and have further elaborated on their defence of lack of jurisdiction in their statement of defence in the main proceedings, with the aim of persuading the court to reach a different conclusion. On the basis of that further elaboration, the court sees no reason and/or possibility to reconsider its earlier final ruling regarding its jurisdiction and will hereinafter examine and assess the substance of the claims against Lidl Stiftung and R&N.

5.2. In the aforementioned interim judgment of 15 January 2025, the court held that jurisdiction to hear this dispute in respect of Lidl Stiftung and R&N is based on Article 7(2) of the Brussels I-bis Regulation. However, that jurisdiction is limited to the territory of the Member State of the court seised on that basis.5 On that basis of jurisdiction, the Dutch court therefore has no cross-border jurisdiction in respect of Lidl Stiftung and R&N. In so far as Birkenstock et al. sought to argue this during the oral hearing, they have failed to recognise the foregoing.

Claims against Lidl Stiftung

5.3. Birkenstock et al. have jointly referred to Lidl Nederland and Lidl Stiftung as 'Lidl' in the writ of summons. Birkenstock et al. contend that Lidl is a globally operating supermarket group that focuses on the lower-price segment and that, in that capacity, Lidl sells, amongst other things, sandals and flip-flops. Birkenstock et al. assume in this regard that both Lidl Nederland and Lidl Stiftung, as part of the Lidl group, supply the full range of supermarket products. Lidl Stiftung has, however, pointed out that it has only one site in the Netherlands, which is not a supermarket branch but a distribution centre where foodstuffs are processed exclusively by third parties. Birkenstock et al. have not contested this. However, the unlawful conduct of which Birkenstock et al. (also) accuse Lidl Stiftung is the distribution and sale of the (allegedly) infringing sandals. It is not in dispute that sandals fall within the non-food category and not within the foodstuffs category and that, in so far as Lidl Stiftung carries out activities in the Netherlands, this cannot therefore entail any unlawful conduct as alleged by Birkenstock et al. in these proceedings. Birkenstock et al. have in no way substantiated what specific allegation they are now making against Lidl Stiftung in this regard. In the circumstances, the court finds that it has not been established that Lidl Stiftung acted unlawfully towards Birkenstock et al. For this reason, the claims brought by Birkenstock et al. against Lidl Stiftung will be dismissed.

Claims against R&N

5.4. R&N maintains that it cannot be held liable in the matter at hand in these proceedings either. However, to substantiate the contrary, Birkenstock et al. have submitted three pairs of (allegedly) infringing sandals bearing a label. The labels contain a product description in (among other languages) Dutch, and two of the three labels list R&N as the manufacturer and importer of the sandal in question. The court noted this during the

The matter was put to R&N during the oral hearing and was not contested on R&N's behalf. Consequently, R&N has failed to provide sufficient grounds for disputing that the (allegedly) infringing sandals, against which Birkenstock et al. are taking action in these proceedings, were manufactured by it and imported for sale by Lidl Nederland. This makes R&N, in principle, liable for any loss suffered should it be held that the sandals in question, as argued by Birkenstock et al., are infringing. An assessment of this follows below.

Breach of Article 21 of the Code of Civil Procedure

5.5. In their statement of defence, Lidl et al. raised two points alleging that Birkenstock et al. had breached the obligation under Article 21 of the Code of Civil Procedure. Under this provision, a party is obliged to set out the facts relevant to the decision fully and truthfully. In the event of non-compliance, the court may draw whatever conclusions it deems appropriate. The court agrees with Lidl et al. that, certainly with regard to the summary explanation provided by Birkenstock et al. in the writ of summons concerning the ground of slavish imitation, Birkenstock et al. did not set out all the facts relevant to the assessment. Apart from this finding, the court sees no grounds for drawing any further conclusions. In view of the legal debate that ensued, no evidence has emerged of any detriment suffered by Lidl et al.

6 The substantive assessment

Ground (i) – copyright

Authorship

6.1. Birkenstock and others claim copyright in the lower part of Birkenstock sandals, as well as copyright in five different uppers for those sandals. They argue that Karl Birkenstock is the designer and, in copyright terms, the creator of these models and the lower part. The court finds that, in the absence of any proper challenge to this, this has been sufficiently established. The argument put forward by Lidl and others that Karl Birkenstock received assistance from Christian and Alex Birkenstock during the design process and, in that sense, cannot be regarded as the independent creator, has not been sufficiently substantiated. The mere fact that the names of these two gentlemen appear in subsequent agreements cannot lead to that conclusion. Both Karl Birkenstock and the Birkenstock Group have for decades publicly stated that Karl Birkenstock is the designer and creator of Birkenstock sandals, and this has been confirmed once again in the context of these proceedings, at least on their behalf. Consequently, Karl Birkenstock will be regarded as the creator in the further assessment.

Enforcement and exploitation rights

6.2. The question of who is entitled to the enforcement and exploitation rights in respect of the alleged copyright must be assessed under German law. It is established that, under German law, copyright itself vests in the creator and is non-transferable, whereas the rights of exploitation and enforcement are transferable.

6.3. It follows from the extract from the German commercial register submitted by Birkenstock et al. that Karl Birkenstock was a director of C.B. Orthopädie GmbH from 1952 to 1999, a company which changed its name to Birkenstock Orthopädie GmbH on 27 January 1970. In

It was during this period that the five pairs of sandals, which are the subject of the present proceedings, were designed and brought to market. In the absence of any sufficient rebuttal, it is established that Karl Birkenstock (tacitly) granted the rights to exploit and enforce these sandals to the aforementioned company.

6.4. Furthermore, it is apparent from the German commercial register that Birkenstock Orthopädie GmbH on

On 19 December 2001, it merged with (and continued as) the limited partnership Birkenstock Orthopädie GmbH & Co KG. In doing so, the entire assets of Birkenstock Orthopädie GmbH, including intellectual property rights, were transferred to that company by way of universal succession. Birkenstock Orthopädie GmbH & Co KG was subsequently dissolved on 30 September 2013, after which all its assets, including the intellectual property rights, were transferred in their entirety to the company Birkenstock Sales GmbH.

6.5. Birkenstock et al. submit that Birkenstock Sales GmbH, by agreement of

On 1 May 2021, Birkenstock transferred the intellectual property rights relevant to these proceedings to Birkenstock IP. Lidl and others dispute that there has been a conclusive transfer of the IP rights, at least to the extent that Birkenstock IP can enforce those rights in court. However, they have failed to provide sufficient grounds for this contention. In response to the defence put forward by Lidl et al., Birkenstock et al. have submitted a written statement by Dr K. Wegner, in which the origin of the copyright and the transfer of those rights to Birkenstock IP in 2021, as set out in the legal grounds above, are substantiated in detail and supported by annexes. Karl Birkenstock had already provided a similar statement, albeit less detailed, in May 2022. Given the content of these statements, it cannot be established that the chain of title was broken at any point, as Lidl et al. contend.

6.6. In addition to all this, insofar as the relevant intellectual property rights had not already been transferred, this was in any event effected by the agreement of 11 May 2023. On that date, Karl Birkenstock agreed with Birkenstock IP that, insofar as he still held certain copyright and usage rights in the Birkenstock sandals at that time, he had transferred them to Birkenstock IP on that date. The agreement also stipulates that Birkenstock IP accepted the grant of those rights. The fact that this agreement refers generally to rights of use and does not additionally mention any specific enforcement rights does not, in the court's view, mean that Birkenstock IP has no right to take action against the alleged copyright infringements.

6.7. All of this means that, at least at the start of the present proceedings, Birkenstock IP held the rights to exploit and enforce the copyright, as claimed by Birkenstock et al., in the sandals developed by Karl Birkenstock. Consequently, this defence put forward by Lidl et al. is unfounded, and the court must now address the question of whether the sandals in question are protected by copyright.

Copyright protection Introduction

6.8. Birkenstock sandals, as utilitarian objects, are to be regarded as works of applied art. Two key issues (when protection applies and when an infringement occurs) relating to the copyright protection of utilitarian objects were at the heart of the judgment delivered by the Court of Justice of the European Union (CJEU) on 4 December 2025 in the joined cases *of Mio* and *Konektra*.6 In this judgment, the CJEU has introduced a certain degree of refinement into the existing case-law relating to the copyright protection of works of applied art. The CJEU has also, for the first time, provided specific guidance on the assessment criteria to be applied when determining whether there has been an infringement of the copyright in a utilitarian object.

6.9. Within the scope of these proceedings, the parties have had the opportunity to comment on these preliminary ruling proceedings before the CJEU. During the oral hearing, the parties referred in this regard to the Opinion delivered by Advocate General Spzunar in the *Mio* and *Konektra* case.7 Following the oral hearing, the delivery of the judgment was adjourned until the CJEU had delivered its judgment. Each party has, by separate document, expressed its views on the content of the judgment and the consequences it believes this to have for these proceedings.

The assessment framework (i): when is an article protected by copyright?

6.10. The court must assess whether (the lower part of) the Birkenstock sandals, as presented to the court, are protected by copyright. In view of the harmonised aspects of copyright law, the court must specifically assess whether these Birkenstock sandals, or specific elements of those sandals, are to be regarded as a work within the meaning of Article 2(a) of the Copyright Directive.8 It follows from the established case law of the Court of Justice of the European Union that this concept of a 'work' presupposes the combination of two cumulative elements. Firstly, the object in question must be original, in the sense that it constitutes an independent intellectual creation by its author (creator). Secondly, only those elements that are the expression of such an intellectual creation may be regarded as a work.

6.11. It is both necessary and sufficient that the work reflects the author's personality by giving expression to that author's free and creative choices. Conversely, where the production of an object is subject to technical considerations, rules or other constraints that leave no scope for creative freedom, that object cannot be regarded as possessing the originality required to constitute a work. The same requirements apply to the assessment of originality in objects of applied art as those applicable to the assessment of originality in other types of objects. However, account must be taken of the specific nature of the category of works in question. Works of applied art are distinguished from other categories of works by the fact that they are, first and foremost, utilitarian objects. Such objects are the result of their creators' know-how and choices. These choices may be dictated by technical, ergonomic or safety constraints, or may stem from standards or agreements established within the sector in question.

6.12. An object may be original even if its creation is partly determined by technical considerations, provided that such determination has not prevented the author from reflecting his or her personality in that object by expressing free and creative choices. The criterion of originality cannot be met by elements of a work that are characterised solely by their technical function, since copyright protection does not extend to ideas.

6.13. When assessing the originality of an utilitarian object, the court must examine and identify the creative choices made in its form in order to be able to classify it as protected by copyright, on the understanding that, even where the author has made choices not dictated by technical or other constraints, the creative nature of those choices within the meaning of copyright law must not be presumed. In this regard, the components of an utilitarian object are subject to the same rules as the object as a whole. Furthermore, whilst artistic or aesthetic considerations do form part of the creative activity, the mere fact that an object produces such an effect does not, in itself, make it possible to determine whether that object is an intellectual creation that reflects the author's freedom of choice and personality and thus meets the requirement of originality. When assessing originality, account may be taken of the creative process and the author's intentions, provided that those elements are expressed in the work itself, without, however, the court basing its assessment

may rely solely on those elements.

Are these works protected by copyright?

6.14. Taking the foregoing into account, the court will assess whether the five pairs of sandals, which form the core of the claims brought by Birkenstock et al., satisfy the 'work' test. The court will carry out these assessments on the basis of the works as presented and described by Birkenstock et al. in paragraphs 34 to 39 of the writ of summons. On the basis of those images and descriptions, an assessment will be made below as to whether the works are protected by copyright. In making this assessment, the court has also taken into account the physical sandals deposited with the court registry by Birkenstock et al. The sandals deposited with the court registry were exhibited during the oral hearing and were available to the court in chambers.

6.15. The court finds that the works in respect of which copyright is claimed can be identified with sufficient precision and objectivity. The court sees no grounds for a different conclusion in the arguments put forward by Lidl et al. in their statement of defence. Furthermore, it is clear from the (extensive) defence put forward by Lidl et al. that it must have been sufficiently clear against what Lidl et al. were required to defend themselves. In this respect, the element of expression has been satisfied.

6.16. In assessing the element of originality, the following is taken as a starting point. A sandal is a specific type of (summer) footwear, the design of which is, by its very nature, functionally driven. For instance, a lower part is required to protect the foot, to which – in order to be able to walk in them – an upper part must be attached. The sole of every Birkenstock sandal, the footbed, is identical. This has been asserted by Birkenstock and others and has not been sufficiently refuted by Lidl and others. These sandals are distinguished from one another by their individual uppers. Birkenstock and others have argued that both the lower part and the five distinct uppers are protected by copyright.

The lower part of all sandals

6.17. According to Birkenstock et al., the lower part of all Birkenstock sandals is characterised (among other things) by the following original elements listed below. In this regard, Birkenstock et al. referred in the writ of summons to the images included below.

- (i) It has a flat design and its shape is characterised by a gently sloping profile.
- ii) The profile line creates a difference in height all round, so that a subtle 'wall' is formed at the rear which slopes down in height towards the front.
- iii) A recess (4) has been incorporated on the heel side of the footbed (right-hand illustration). The central section is a curved raised area (3). A specifically shaped edge (1 and 2) runs along the toes.
- (iv) The component consists of several layers, of which the following are visible: the cork middle layer, a velour covering and a synthetic sole.
- v) The side is unlined, so that the cork from which this part of the footbed is made remains visible.

6.18. Lidl et al. dispute that the lower part qualifies as a protected work or part thereof. In their view, elements (i) to (iv) are entirely functionally determined, and the fifth element is a stylistic element that is not eligible for protection. To substantiate the functionality of the footbed, Lidl et al. refer to the website of Birkenstock et al., which (among other things) provides a fairly detailed account of the so-called 'facts' regarding the footbed. It is stated there that the footbed mimics the imprint of a foot in the sand and that its construction helps the feet to walk and stand in the shoes for hours on end without undue strain, thereby promoting health and well-being. The footbed provides the foot with a secure grip and supports the natural structure of the foot, according to the website. The various elements of the footbed are referred to as the heel support, the longitudinal arch support, the transverse arch support, the toe grip and the footbed edge, and specific functions are attributed to all these elements in this context.

6.19. The parties' arguments raise the question of whether the lower section is, in itself, protected by copyright. The court considers this as follows. With regard to the first element, it must be noted that, whilst the choice to design the lower section as a flat piece is indeed a matter of freedom, it does not necessarily demonstrate any creativity. The gently sloping profile line to which Birkenstock
As referred to below, this is also known as 'umriss' by and on behalf of the parties. In the expert report by Mr [Expert 1] (hereinafter: [Expert 1]), dated 10 February 2025 and drawn up at the request of Birkenstock et al., it is emphasised that Birkenstock's 'umriss' clearly deviates from the standard last shape for sandals, both in the 1960s and today. The outline tapers from wider than normal at the back near the heel to even wider at the front near the toes, with the front ending in an extra-wide, curved arch, whilst the long sides running from back to front are a perfectly straight line. According to [expert 1], the silhouette designed by Karl Birkenstock was entirely new and remains exceptional to this day; *'an iconic invention, purely creative and aesthetic in nature*'. The expert report by Mr [Expert 2] (hereinafter: [Expert 2]), drawn up at the request of Lidl et al., takes the opposite view and states (among other things) that the outline of the footbed is based on the natural imprint of the sole of the foot, with a wide toe box chosen to provide support and comfort to as wide a group of people as possible. According to [expert 2], the footbed is constructed from a series of technical solutions within known physiological limits and does not constitute a design arising from free creative considerations. [expert 1] responded to the statement by [expert 2] in a second statement, dated 16 August 2025. [Expert 1] states that the various elements of the Birkenstock sandals relevant to the proceedings naturally serve an ergonomic function, but that these could just as easily have been designed differently whilst fully retaining their functionality. After all, as [Expert 1] explains, there is considerable scope for variation. On this point, [Expert 1] considers [Expert 2]'s statement to be too simplistic.

6.20. The court finds that the design of the footbed conforms to the anatomical shape of the foot. This has also been explicitly stated by Birkenstock et al. and is consistent with the statements made by [expert 1] and [expert 2]. If the various support elements of the footbed were designed differently, this would detract from the footbed's functional usability, and the same applies to the wide heel shape which tapers towards the front into an even wider forefoot. If the natural footprint is taken as the starting point, it is inherent to that shape that the footbed slopes gently, as Birkenstock et al. themselves also point out. Consequently, the sloping profile line is functionally (technically) determined, and there is no question of a free creative choice with regard to this element. The court sees no grounds to reach a different conclusion based on the further arguments put forward by Birkenstock et al., including those made during the oral hearing.

6.21. The choice of the profile line around the lower section, which creates a difference in height so that a 'wall' is formed at the rear that slopes downwards towards the front, is – contrary to the arguments put forward by Lidl and others – a matter of free choice. After all, that choice is not dictated by technical considerations, as argued by Birkenstock and others.

has been substantiated and has not been sufficiently refuted by Lidl et al. Lidl et al.'s reference to the expert report by Dr Helmut Stinus (Exhibit 12 to the statement of defence) is insufficient for this purpose. It does not follow from that report that the design of the wall relied upon by Birkenstock et al. is entirely and solely dictated by its technical function, which is the direct consequence of the choice to create a footbed that fully conforms to the anatomical shape of the foot. The differences in height used by Birkenstock et al. in their sandals, and the way in which these differences are arranged, are the result of their own free and creative choices.

In agreement with expert [expert 1], the court is of the opinion that this is clearly visible when viewed in profile from the footbed:

The court further agrees with [expert 1] that the lower part of a sandal comes in many variations and that the moulded sidewall is not essential for the functional use of a sandal. This has been contested by Lidl et al. without sufficient substantiation. The sharp contrast in height and the way in which the height gradient is shaped, with a subtly present curve, demonstrates, in the court's view, the designer's individuality to a sufficient degree. That choice was not dictated by technical, ergonomic or safety constraints. Nor does that choice stem from standards or agreements established in the sector in question. The latter point has not been raised by Lidl et al., nor has the court found otherwise.

6.22. The recess on the heel side of the footbed, the arched raised section in the centre and the specially shaped edge at toe level – which Birkenstock and others have referred to as the third element – are part of, and together form, the footbed. In itself, the decision to fit a footbed to the lower part is a matter of choice; after all, even without a footbed, the lower part can still serve a functional purpose as part of a sandal. However, the specific shape of the footbed is dictated by the human body and is, to that extent, not a matter of choice. This shape derives directly from the anatomical shape of the foot, and no deviating (creative) choices are possible without compromising its function and purpose. The various parts of the footbed therefore do not demonstrate any creative choices that would qualify for copyright protection. Furthermore, Lidl et al. have substantiated their argument, with reference to various expert statements, that the decision to include the footbed was motivated by and largely determined by ergonomic considerations.

6.23. The choice of different layers – of which the cork middle layer, a velour covering and a synthetic sole are visible – is, in itself, a matter of freedom, but does not demonstrate a degree of creativity that warrants legal protection. Of the various visible layers, the black bottom layer is the most striking. This layer effectively forms the sole of the lower part. The presence of a clearly visible sole on a sandal does not constitute a creative choice. The fact that the side of the lower part is unlined (the fifth element put forward by Birkenstock and others), so that the cork from which this layer of the lower part is made remains visible, is also assessed by the court as a free choice, which is, however, not creative. The creativity of the choice is not immediately apparent from the element of the lower part itself, and Birkenstock et al. have not, in addition, outlined any circumstances to support their view that this constitutes a creative choice expressing the creator's personality.

6.24. All of this means that only the difference in height used – which creates a wall at the back that slopes downwards towards the front – can be regarded as a copyright-protected element. The other elements of the lower part cited by Birkenstock et al. are not eligible for copyright protection.

The (upper of the 'Madrid' model)

6.25. The 'Madrid' consists of the aforementioned lower part, to which, according to Birkenstock et al., a distinctive upper has been attached, characterised, amongst other things, by the following original elements:

- i) The fastening consists of a single strap that tapers across the instep of the foot. This strap falls over a wider strap with slightly sloping lines and rounded corners.
- (ii) On the side, the straps extend down to the plastic sole and disappear between the footbed and the sole.
- iii) The straps are relatively narrow, which gives a minimalist look at the top whilst the side of the sandal, the cork remains largely visible.
- iv) The fastening strap is not finished with visible stitching or other decorative elements.
- v) Prominently featured on the fastening strap is a rectangular buckle with slightly rounded corners.

6.26. Lidl et al. dispute that the upper of the 'Madrid' model is protected by copyright. According to Lidl et al., the choice of fastening is dictated by technical considerations and the absence of straps between the footbed and the sole is not original. Furthermore, according to Lidl et al., the relatively narrow straps appear in countless earlier sandals and are therefore not original, whilst the absence of visible stitching or other decorative elements cannot give rise to copyright protection. On the basis of prior art, the prominently visible buckle relied upon by Birkenstock et al. is also not original, and since, according to Lidl et al., the combination of the lower part and the upper is merely a whole comprising designs already known at the time, Birkenstock et al.'s claim must also be dismissed on this point, according to Lidl et al.

6.27. The court considers as follows. The first element relied upon by Birkenstock and others is the fastening of the Madrid upper. The choice to design the fastening by means of a single strap that tapers across the instep of the foot is a matter of design freedom. Lidl and others are correct in arguing that a fastening serves the technical function of the sandal. However, Lidl and others fail to recognise that what is relevant to the assessment is the manner in which the fastening is designed. That design is not (entirely) determined by technical considerations, nor is it solely the result of ergonomic constraints. The choice to have a clearly visible narrower strap – in this case approximately two centimetres wide – running across a clearly visible wider strap of approximately five centimetres demonstrates a sufficient degree of creativity. In that sense, it reflects the designer's personality and thus constitutes a copyright-protected element of the Madrid upper. This is not the case, however, with the design choice to use slightly sloping lines and rounded corners. That choice is, in a sense, free, but is, on the other hand, commonplace and trivial. It therefore lacks the necessary creativity. Birkenstock
The defendants have failed to prove otherwise.

6.28. The fact that the straps on the side of the sandal extend down to the plastic sole and disappear between the footbed and the sole is, in itself, a matter of design choice, but this too does not demonstrate any creativity. It is, above all, a sound method of fastening, which, moreover, is in keeping with the understated design of the upper at the lower part of the sandal. In so far as Lidl et al., by referring to existing design heritage, dispute that this constitutes an innovative design, they fail to recognise that the guiding criterion is originality and not novelty. Furthermore, the relatively narrow straps of the 'Madrid' upper do not constitute a creative choice, but rather express a minimalist design style. The expression of a particular style is not eligible for copyright protection, which is why Birkenstock and others cannot derive copyright protection from this element.

6.29.

The same applies to the finish of the fastening strap, which has no visible stitching or other decorative elements. The design style employed by Birkenstock is characterised by a certain simplicity, in which there is little or no scope for (decorative) additions to the basic shape. That is a matter of choice, but not a creative one. Finally, the court finds that Birkenstock et al. have failed to sufficiently set out and substantiate what exactly is meant by the prominent presence of a rectangular buckle on the fastening strap. Assuming that the fastening strap of a sandal is, by its very nature, virtually always visible and that the buckle on that strap must also be visible in order to serve its functional purpose as a buckle, it is not apparent – in the absence of further justification, which is lacking – how this element could be entitled to copyright protection. The concept of a 'work' implies the existence of an object that can be identified with sufficient precision and objectivity. In the court's view, this applies not only to an object that is eligible for copyright protection as a whole, but also to its various elements. This condition is not met with regard to this particular element, and therefore this element is not entitled to copyright protection either.

6.30. All of this means that only the pattern formed by the clearly visible narrower strap, approximately two centimetres wide, running across a clearly visible wider band, approximately five centimetres wide, constitutes a copyright-protected element of the upper of the Madrid.

The (upper of the) Arizona model

6.31. The Arizona also consists of the aforementioned lower section, to which, according to Birkenstock et al., a distinctive upper has been attached. In Birkenstock et al.'s view, this upper is characterised, amongst other things, by the following original elements:

- i) The fastening consists of two 'straps' that fall over the instep of the foot. The straps are two rectangular straps, albeit with slightly sloping lines and rounded corners.
- (ii) The two straps are joined at the side of the sandal to form a single strap, which continues to the plastic sole and disappears between the footbed and the sole.
- iii) The aforementioned strap is attached directly to the cork on the side and runs across the entire width of the straps, so that it covers a large part of the side of the component.
- iv) The sides of the strap, where the straps meet at the side of the sandal, run taper off.
- (v) The straps are not finished with visible stitching or other decorative elements.
- vi) An open space is left between the straps, and the straps form straight panels, albeit with slightly rounded corners.
- vii) Prominently visible on the straps are two rectangular (again with slightly rounded corners) buckles.

6.32. Lidl et al. dispute that the upper of the Arizona sandal is protected by copyright. Lidl et al. argue that the elements cited by Birkenstock et al. are not original. According to Lidl et al., these elements were already being used by others in virtually identical form well before Birkenstock launched the Arizona sandal on the market. Moreover, these are largely functional choices dictated by technical considerations, so that there can be no question of any copyright protection, according to Lidl et al. Nor is the sandal as a whole – in which the various elements mentioned must be viewed in conjunction with the lower part – eligible for copyright protection, due to its functionality and the lack of free and creative choices.

6.33. The court is of the view that the design of the Arizona's fastening system, consisting of two straps that go over the instep, whilst certainly original, does not demonstrate creativity. It is established

It is stated that the double straps are a variant of a pre-existing work, namely the upper of the Madrid sandal with a single strap (discussed above). In the *Mio* and *Konektra* judgment, the Court of Justice of the European Union ruled that where the subject matter in question is a variant of an existing work by the same author and is original, it may indeed enjoy copyright protection provided that the creative elements taken from the original remain present and reflect the personality of that same author.9 As already held above, the creative aspect of the 'Madrid' design is that a clearly visible narrower strap runs across a significantly wider strap.
It must be noted that this element has, in itself, been incorporated into the 'Arizona' design, but to a much lesser extent. The difference in width between the two straps is considerably smaller – not two by five centimetres, but three by four and a half – meaning that this aspect is less striking and pronounced in the 'Arizona' design. The choice of straps that differ only slightly in width is, in the court's view, commonplace and trivial and is therefore not eligible for copyright protection. The same applies to the choice of straps with slightly sloping lines and rounded corners, meaning that these aspects also fall outside the scope of protection. The fact that the straps on the side of the sandal extend down to the plastic sole and disappear between the footbed and the sole is, in itself, a matter of design choice, but – as has already been considered above in relation to the 'Madrid' design – does not demonstrate any creativity.

6.34. The court found that the decision to use a strap attached to the cork at the side and running across the entire width of the straps, so that it covers a large part of the side of the lower section, was technically motivated. The choice of two straps makes the upper wide, with the result that it naturally extends further over the side of the lower part. Furthermore, the fact that the wide strap is attached directly to the cork and in its entirety to the lower part is an ergonomic choice designed to enable the straps to be fastened securely and to allow the sandal to be used functionally. The fact that the sides of the wide strap taper off is, furthermore, a matter of choice that does not demonstrate any creativity. The fact that an open space has been left between the straps is not a choice but a necessity for creating the straps. After all, in the absence of an open space, there would be a single continuous piece of leather and no straps at all. The choice to design the straps as straight strips with slightly rounded corners is, in itself, a matter of design freedom, but it does not demonstrate any degree of creativity either.

6.35. The decision not to finish the straps with visible stitching or other decorative elements, and the choice of prominently visible buckles on the straps, are elements that have already been discussed and assessed in the context of the assessment of the upper of the Madrid. This assessment, set out above in paragraph 6.29, applies in full to the upper of the Arizona, meaning that these elements cannot be regarded as copyright-protected features in this case either.

6.36. As a result, the upper of the Arizona is not protected by copyright.

The (upper of the) Florida model

6.37.

This brings us to the Florida sandal. Birkenstock et al. argue that the Florida, too, consists of the aforementioned lower part, to which a distinctive upper has been attached which, in their view, is characterised, amongst other things, by the following original elements:

- i) The fastening consists of three 'straps' that fall over the instep of the foot. The straps are narrow and rectangular, though with sloping edges and a rounded end.
- (ii) The three straps are joined at the side of the sandal to form a single strap, which continues to the plastic sole and disappears between the footbed and the sole.
- iii) The aforementioned strap is attached directly to the cork on the side and runs across the entire width of the straps, so that it covers a large part of the side of the component.
- iv) The sides of the strap, where the straps converge on the side of the sandal, run taper off diagonally.
- (v) The straps are not finished with visible stitching or other decorative elements.
- vi) An open space is left between the straps, and the straps form straight panels, albeit with slightly rounded corners.
- vii) Rectangular buckles (again with slightly rounded corners).

6.38. The defence put forward by Lidl et al. is essentially the same as that put forward in relation to the 'Arizona' (see: ground 6.32.), except that the 'Florida' has three straps rather than two. Lidl et al. therefore dispute that the upper of the 'Arizona' is protected by copyright.

6.39. The court considers as follows. The decision to design the upper of the 'Florida' model with three straps is, in itself, a matter of freedom, but, given the 'Madrid' model with one strap and the 'Arizona' model with two straps, it does not demonstrate a lack of creativity. In that sense, the Florida is a further development of existing work (the Madrid), from which the only feature deemed to be protected by copyright has not been (visibly) copied. The choice of narrow rectangular straps for the Florida is a matter of artistic freedom, but not creative, and the choice of sloping edges and a rounded end is commonplace and trivial. Elements ii, iii, v, vi and vii correspond to elements that have already been discussed and assessed in relation to the other sandals, and therefore do not require separate consideration with regard to the Florida. These elements do not fall within the scope of protection of this sandal. What remains is element iv, in relation to which Birkenstock et al. argue that the choice to have the sides of the band where the straps meet at the side of the sandal taper diagonally enjoys copyright protection. Whilst the court considers this sloping finish to be a matter of design freedom, it has not been demonstrated that it constitutes a creative choice. In the absence of further explanation, which is lacking, it is not apparent how this element reflects the creator's individuality.

6.40. In view of this, the conclusion is that the upper of the Florida is not a work protected by copyright.

The (upper of the model) Boston

6.41. Birkenstock et al. further argue that the Boston also consists of the aforementioned lower part, to which a distinctive upper has been attached. In Birkenstock's view, this upper is characterised et al., by the following original elements, amongst others:

- i) Although the Boston has the distinctive lower part in question, it is less clearly visible, as it is largely covered by the upper.
- ii) The upper is cut from a single piece of (suede) leather which curves gently over the instep of the foot.
-

iii) A single suede leather strap in the same colour is fitted to the upper. The single strap is secured by means of a simple slit.

- iv) The single strap runs across two visible slits in the upper.
- v) The sandal has a wide opening for the foot and contains no other

openings or holes, apart from the two small slits through which the buckle strap passes.

- vi) A clearly visible buckle is fitted to this strap. The buckle is rectangular but this

has rounded corners.

- vii) The upper is attached directly to the side of the lower and

thereby covering most of the visible cork layer. The attachment extends down to the plastic sole, where it disappears between the footbed and the sole. It is finished with a rounded edge on the side.

6.42. Lidl et al. dispute that this constitutes a work protected by copyright. They argue that, in view of the identical prior art, element (i) does not constitute a creative choice, and that elements (ii) to (vi) likewise do not, as they lack any originality. According to Lidl et al., element (vii) is dictated by technical considerations, and finally, the rounded finish is a stylistic choice from which no copyright protection can be derived. Consequently, no copyright applies to (the upper of) the Boston.

6.43. The court considers as follows. Contrary to the arguments put forward by Birkenstock and others, the fact that the lower part of the sandal is less visible because it is largely covered by the upper part does not constitute a matter of free choice eligible for copyright protection. After all, the choice of a clog-style design inherently entails that the front of the sandal is completely closed. The choice to cut the upper of the 'Boston' from a single piece of (suede) leather is, in itself, a matter of free choice, but does not demonstrate a sufficient degree of creativity. Nor has Birkenstock et al. demonstrated this. Furthermore, the fact that this piece of leather falls over the instep of the foot with a simple curve is determined by ergonomic and functional considerations. This curve follows the anatomical shape of the foot and therefore cannot be designed any differently from how it is currently designed, in order to retain its functionality as a sandal. The fact that a single strap of suede leather in the same colour is fitted to the top of the upper is a choice that, whilst free, is not creative. Without further explanation – which is lacking – it is not clear how this choice reflects the designer's personality.

6.44. With regard to the second part of element (iii) referred to by Birkenstock, the court considers as follows. Birkenstock et al. acknowledge, in principle, that the strap and the slit serve a function. They argue, however, that there are countless ways to design these and to make them visible or concealed, or to conceal them partially. In the absence of any further substantiation – which is lacking – the court does not agree with Birkenstock et al. in their assertion that there are countless ways to design the strap and the slit. After all, the choice is between fastening by means of a slit or no slit at all. Furthermore, Birkenstock et al. have in no way demonstrated that the way in which the slit on the 'Boston' model is designed constitutes a free and creative choice. The slit is situated in a logical position, namely in the centre of the upper. Nor has it been substantiated in any way that the chosen dimensions (thickness of the strap, width of the slit) are creative. Element (iv) also fails to meet the substantive test. The choice to incorporate two visible slits (notches at the top of the upper) in combination with the choice of a visible strap running across the top of the upper automatically entails that the strap runs across two visible slits. To that extent, therefore, that choice is not free. The manner in which the slits are designed is not itself put forward by Birkenstock et al. as an element protected by copyright; the court will therefore leave this point undiscussed.

6.45. In the court's view, the opening in the upper of the Boston model is functionally driven. Owing to the clog-like shape of this upper, the front of the sandal is completely closed, meaning that the opening at the back is the only way to slip the foot in. What Birkenstock et al. mean by a 'generous opening' cannot be determined with sufficient objectivity. The court considers the absence of other openings or holes in the upper – having regard, inter alia, to the choice of a clog-style design and the minimalist style of the Birkenstock sandal in general – to be a commonplace and trivial choice, which means that element (v) is also not eligible for copyright protection. The fact that a clearly visible buckle is fitted to the strap is, just as in the case of the other

The design of the models has been assessed and determined by their function. In order to fasten the strap, it must pass through the buckle, and for this to be possible, the buckle must be visible. Furthermore, the choice of a rectangular buckle with rounded corners is commonplace and trivial. The fact that the upper of the Boston covers the majority of the visible cork layer of the lower section is dictated by technical considerations. After all, the choice of a closed front is inextricably linked to the fact that this front covers the vast majority of the lower part. The fact that the attachment of the upper extends to the synthetic sole, where it disappears between the footbed and the sole, is – as already considered above with regard to the other sandals – admittedly a free choice, but not a creative one. Finally, the same applies to the fact that the side is finished with a rounded edge. A rounded upper is commonplace and – in the absence of further explanation, which is lacking – therefore does not reveal the designer's individuality.

6.46. Given the current state of affairs, the conclusion is that the upper of the Bosten is not a work protected by copyright.

The (upper of the) Gizeh model

6.47. On 21 December 1983, Karl Birkenstock applied for a design right in Germany. This application related to five designs, namely:

1. toe divider for sandals, beach sandals and health sandals;
2. health sandal;
3. fastener-strap-member for sandals, shoes, health sandals and articles of clothing;
4. sandal;
5. shoe.

The photographs of the five different design elements included in the application, reproduced above in paragraph 3.2, show, insofar as is currently relevant, (in particular) the toe divider used in the Gizeh sandal and its incorporation into the upper of this sandal. Contrary to the arguments put forward by Lidl et al., it cannot be inferred from this that the design right specifically covered the entire sandal and, consequently, the footbed/lower part as well. The original elements which, according to Birkenstock et al., characterise the lower part – including, for example, the curved profile line – are not mentioned as design elements as such. Furthermore, these are not visible in the photographs either. Since Lidl et al. have not raised any defence against the claim that the Birkenstock footbed itself is protected by copyright, the court considers it sufficiently established that the design right related solely to the upper of the Gizeh sandal.

6.48. The upper of the Gizeh sandal was registered on 21 December 1983 under an international design registration, which covered, amongst other territories, the Benelux. Until 1 December 2003, the maximum term of protection for a Benelux design right was fifteen years. In this specific case, therefore, the design right remained in force until 21 December 1998. During this period, the Uniform Benelux Law on Designs (BTMW) was in force. Article 21(3) of the BTMW stipulated that, in principle, the expiry of the design right also entailed the expiry of the copyright in the subject-matter of protection. However, the copyright remained in force if the holder of the Benelux design right was a

made, filed and published a so-called declaration of maintenance. It is established that Karl Birkenstock did not make such a declaration (in good time).

6.49. The Supreme Court has ruled that the repeal of section 21(3) of the BTMW after

1 December 2003 does not result in copyright that had lapsed under the old regime being revived.10 Birkenstock et al. do indeed take the view that the copyright in question has not lapsed, as Section 21(3) of the BTMW does not apply to this situation, but that view is not accepted. According to Birkenstock et al., the design registration was renewed for a further five years following the expiry of the initial fifteen-year period, meaning that the design right continued until 21 December 2003 and thus came to an end when Section 21(3) of the BTMW had already lapsed on 1 December 2003. Consequently, the declaration of continuation would no longer be required for the copyright to continue. It is, however, established that the design right in question was subject to a statutory maximum term of fifteen years at the time of its registration, so that, in the court's view, an apparent (administrative) error on the part of the registration office cannot bring about any (legally valid) change to this.

6.50. In view of this state of affairs, it must be concluded that the copyright in the upper of the Gizeh sandal – in the absence of a declaration of continuation filed in good time – expired on 21 December 1998. The consequence is that Birkenstock et al. have no legally valid ground of appeal in these proceedings. However, as it has already been held that the lower part of the Gizeh sandal did not form part of the design registration, the copyright in that part did not lapse at the same time as the design right.

Assessment of infringement

The assessment framework (ii): when does an infringement occur?

6.51. It follows from the case law of the Court of Justice of the European Union that an infringement of copyright occurs where a copyright-protected work is used without the authorisation of the rightholder. This applies even where the use relates to a relatively small part of the copyright-protected work, provided that part, as such, expresses the author's own intellectual creation. In order to establish an infringement of copyright, the court must
(i) to establish that at least some original creative elements of the protected work have been used without authorisation; and (ii) to determine whether these elements – that is, elements which give expression to the choices that reflect the personality of the author of that work – have been reproduced in a recognisable manner in the allegedly infringing work. A comparison of the overall impression created by each of the conflicting works is not decisive in the assessment, as this criterion applies to the protection of designs.11

6.52. In their pleadings, the parties each addressed the question of infringement primarily on the basis of the 'overall impression' criterion. In their submissions following the Mio & Konektra judgment, the parties had the opportunity to further substantiate their arguments on the basis of the aforementioned 'reproduction' criterion.

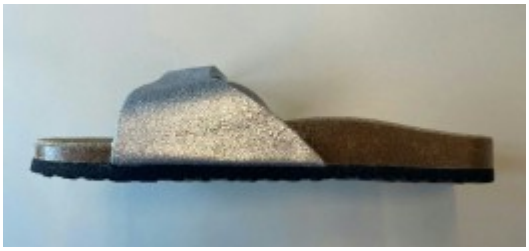
The lower part of all sandals

6.53. The court considers that the copyright-protected element of the lower part of the Birkenstock sandals, namely the sidewall of the profile line, has been copied in a recognisable manner in the sandals of Lidl et al., and that this therefore constitutes an infringement. In their statement of defence, Lidl et al. submitted, amongst other things, the following photographs, in which the lower part of the Birkenstock et al. sandals can be seen on the left

See, on the right, the lower section of Lidl et al. (paragraph 6.3.3(b) of the Statement of Defence):

In this photograph, the lower section of Lidl et al. appears to be (entirely) flat, with no recognisable incorporation of the copyright-protected element from the lower section of Birkenstock et al.'s design.

However, upon examination of the lower parts of the sandals that Birkenstock and others have made available to the court in the context of these proceedings, a different picture emerges. For comparison, the court refers to the photographs below, which were taken by the registrar. The photographs on the left show the lower parts of the sandals belonging to Birkenstock and others. The photographs on the right show the lower parts of the sandals belonging to Lidl and others.



6.54. The court has ruled in this regard that the height difference used, which forms a wall at the rear of the lower part that slopes downwards towards the front, is protected by copyright. In line with Birkenstock et al., the court is of the opinion that the lower part of the sandals produced by Lidl et al. also consists of a wall, in which a certain height difference is present. Although the lower part of the sandals produced by Lidl et al. is, as a whole, somewhat flatter compared to the lower part used in the sandals produced by Birkenstock et al., it must be noted that, proportionally, it exhibits a similar gradient. That gradient is characterised by a higher rear section which slopes downwards in a clearly visible wave towards a flatter front section. The court finds that there has been a recognisable copying of the copyright-protected profile of the sole. It has not been alleged or established that Birkenstock
et al. granted permission for this. Consequently, Lidl Nederland and R&N are infringing the copyright of Birkenstock et al. in that element of the lower part.

6.55. Lidl et al. have explicitly pointed out, with regard to the Boston sandal, that the lower part of this sandal is less clearly visible, as it is largely covered by the upper of the Boston. However, the court is of the opinion that, even in the case of the sandal marketed by Lidl et al., which exhibits characteristics corresponding to those of the Boston sandal designed by Birkenstock et al., the lower part has been recognisably copied, meaning that this sandal also constitutes an infringement. Reference is made in this regard to the photograph below, which was taken by the court clerk. The contour, characterised by a higher rear section that slopes down in a clearly visible wave towards a flatter front, is unmistakably visible.

Consequently, Lidl and others are infringing the sole of all five pairs of Birkenstock's sandals.

The (upper of the Madrid model)

6.56. The court has identified the following as a copyright-protected element of the Madrid model: the arrangement of the clearly visible narrower strap, approximately two centimetres wide, over a clearly visible wider strap, approximately five centimetres wide.

The court finds that here too, contrary to the arguments put forward by Lidl et al., there has been a recognisable copying without the authorisation of Birkenstock et al. Reference is made to the photographs below, which were taken by the court clerk. The photograph on the left shows the 'Madrid' model by Birkenstock et al., whilst the photograph on the right shows the similar sandal by Lidl et al.

Lidl and others have also pointed out that the upper strap they use is more than one centimetre wider than the strap used by Birkenstock and others. Whilst this is a difference, it

does not detract from the fact that this constitutes a recognisable imitation. This ruling establishes that Lidl Nederland and R&N are infringing the copyright of Birkenstock et al. in the (upper of the 'Madrid' model).

Ground (ii) – slavish imitation

6.57. Given that the court has, in all the foregoing, ruled that Lidl and others are only infringing the copyright held by Birkenstock and others in respect of the lower part of all five sandals and the upper of the Madrid sandal, the court now turns to the assessment of the alternative ground of slavish imitation in relation to the uppers of the Arizona, Florida, Boston and Gizeh.

Preliminary considerations

6.58. The court observes, by way of introduction, that it has been argued in the literature that there is no basis for a prohibition based on slavish imitation of *solely* (elements of) the design of a product, particularly where (those elements of) that product are not eligible for copyright protection.12 This reasoning is based on the argument that this is contrary to the purpose of various provisions of European law, in particular Article 34 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). Whether this is the case is ultimately a matter for the Court of Justice of the European Union (CJEU) to decide in proceedings under Article 267 TFEU. The court sees no reason to refer questions for a preliminary ruling on this matter to the CJEU. It follows from the court's findings set out below that the reliance on slavish imitation cannot succeed on substantive grounds. Consequently, in the light of Article 267 TFEU, there is no need to refer questions for a preliminary ruling.

Substantive

6.59. The relevant legal framework, as established by settled case law of the Supreme Court, is as follows.13 With regard to the imitation of a tangible product that is not (or is no longer) protected by an absolute intellectual property right, the imitation of such a product is, in principle, permitted, although this principle is subject to an exception where such imitation is likely to cause confusion amongst the public and the imitating competitor fails to fulfil its obligation to take all reasonable measures, without compromising the quality or functionality of its product, to prevent any risk of confusion arising from the similarity of the two products. Imitation in a manner that causes unnecessary confusion constitutes a form of unfair competition, against which a claim in tort may be brought. Confusion regarding an imitated product can only arise if that product has a distinctive character on the relevant market, that is to say: if it differs in its external appearance from other, similar products on that market (the 'Umfeld'). The extent to which that product must differ from such similar products in order for the appearance of imitations to give rise to a risk of confusion depends, amongst other things, on the nature and quantity of similar products currently present on the relevant market.

6.60. When assessing whether a consumer might confuse an imitation with the imitated product, the key consideration is the impact of the similarity on the consumer's purchasing decision. The decisive factors here are the overall impression created by each product and how it is perceived by a less attentive buying public, who do not usually see the two products side by side. The court, which must assess whether, in a specific case and having regard to the overall impressions of comparable products, there is (a risk of) unnecessary confusion amongst the relevant public, must take into account all the relevant circumstances of that case. In doing so, the court need not, as a general rule, assume that, for the purposes of the confusion test, points of similarity carry greater weight than points of difference. It also depends on the circumstances of the case whether, and to what extent, the public will, when making a purchasing decision, be guided by the way in which the products are or will be perceived after purchase (post-sale), or whether they will (also) pay attention to features that are not apparent during use

be visible, and on the packaging of the various products. The burden of proof regarding the product's distinct identity on the market lies with the party invoking the legal consequence.

6.61. Furthermore, in all these cases, only the external appearance of the product can determine whether the product has established a distinct identity on the market. Popularity, brand recognition or a large market share are not relevant in this regard. A product that has once acquired a distinct identity on the market may experience a decline in that identity. That distinct identity may also disappear wholly or partly (become diluted) as more similar products appear on the market and establish themselves.

6.62. Whether the product has its own distinct identity must be assessed on the basis of two relevant points in time. Contrary to the arguments put forward by Lidl et al., these are (i) the market situation at the time the alleged infringement commenced and (ii) the time at which the court delivers its judgment. With regard to this second point in time, it should be noted that the court may only take into account (substantiated) arguments put forward by the parties during the proceedings prior to the judgment. In this case, due to a lengthy adjournment, there has been a considerable lapse of time between the oral hearing and the date on which this judgment is delivered.

6.63. The court finds that, in the light of the detailed arguments put forward by the parties, Birkenstock and others, given the substantiated challenge raised by Lidl and others, have failed to demonstrate sufficiently that the uppers of the four Birkenstock sandals referred to above still have a distinctive character on the market at the time of this judgment. Furthermore, having regard to Birkenstock et al.'s own submissions, this criterion could not have been met in 2018. The court will explain this finding below.

6.64. By way of introduction to this explanation, the court observes that Birkenstock and others set out their arguments regarding this second ground in a very concise manner in the writ of summons. Only three margin numbers in the writ of summons relate to this ground. Merely a summary of the legal framework was provided, accompanied by a few isolated comments relating to the case. It was only after Lidl and others had submitted their substantive response that Birkenstock and others set out further arguments in a written statement. On that occasion, a large number of exhibits were also submitted. These exhibits are, in essence, identical to those submitted by Birkenstock et al. in the proceedings against the Scapino retail chain, in which the Midden-Nederland District Court delivered its judgment on 12 November 2025.14

6.65. The year 2018 is relevant for the first assessment date. The court thus concurs with the arguments put forward by the parties. It must be acknowledged that Birkenstock et al. have pointed out that Lidl
et al. had not, as early as 2018, placed all the relevant Birkenstock sandals on the market as alleged imitations; however, it was stated at the hearing that this was not being raised as an issue. In the view of Birkenstock et al., the outcome would not be any different.

6.66. The court considers that, for the year 2018, Birkenstock et al. have not provided sufficient concrete and factual evidence in the proceedings to demonstrate that they have a distinct market identity. The reason for this finding is that Birkenstock et al. have only provided evidence relating to the second reference date. During the oral hearing, it was stated on behalf of Birkenstock et al. that it is highly unlikely that the distinctive character of their sandals in the market in 2018 was substantially different from that of today. Reference is made, amongst other things, to media coverage of Birkenstock sandals and the fact that sales of (classic) Birkenstock sandals in the Netherlands amount to more than 300,000 pairs annually. The court agrees with Lidl et al. that this does not constitute evidence capable of supporting the conclusion that there was a sufficiently distinct market position in the relevant product market at the time of the first relevant reference point.

6.67. With regard to the second assessment date, Birkenstock and others argue that their own view of the market is based on the market surveys they have carried out. Lidl and others have raised objections to, amongst other things, the methodology followed in the survey and the manner in which conclusions may be drawn

linked to the data obtained from market research. The parties discussed this at length in the pleadings and during the oral hearing. The court is of the opinion that in 2025 (and extrapolated to the date on which this judgment is delivered) there can be no question of the uppers of the Birkenstock sandals in question having a distinctive character. In view of the arguments put forward by the parties, the results of the various market surveys carried out by Birkenstock et al. and the counter-surveys conducted by Lidl et al., no such distinctive character has been demonstrated. Furthermore, in reaching this conclusion, the court took into account that Lidl et al. had substantiated their claim that, for several years, a large number of sandals, which bear a (very) strong resemblance to the various Birkenstock sandals, have been placed on the market by various suppliers. Birkenstock et al. further argued that Lidl et al. had failed to specify the market shares of imitators, whilst suggesting that those shares are minimal. The court considers that the large number of similar sandals indicates that various imitations have become established on the Dutch market. Any market shares are of secondary importance in this regard. As a globally operating company, Birkenstock and others should have made greater efforts to combat imitations. As considered above, the court is familiar with the infringement proceedings brought by Birkenstock et al. against the Scapino retail chain. The parties have submitted a large number of procedural documents from those proceedings as exhibits, and it follows from these that Birkenstock et al. have been actively sending letters to parties regarding infringement since 2015. However, it also follows that Birkenstock et al. have never taken decisive action. They have, in effect, allowed a wide variety of similar sandals to enter the market, which have also managed to establish themselves. This has given rise to a substantial design heritage, as a result of which any distinctive identity they may have had has already been diluted.

6.68. The claims of Birkenstock et al., based on unlawful conduct through slavish imitation, cannot therefore be upheld.

The claims brought

6.69. Having regard to all of the foregoing, the court now proceeds to assess the various claims brought by Birkenstock and others. In this assessment, it is found that Lidl and others have infringed Birkenstock and others' copyright in the lower part of all sandals and the upper of the Madrid model.

Claims A and B – injunction

6.70. The sought injunction will be granted in the manner set out in the judgment. The manner in which this injunction is to be granted is sufficiently clear and specific. In doing so, the court has (partially) accommodated the defences put forward by Lidl et al. The injunction will apply only to the territory of the Netherlands. The court's jurisdiction to hear the claims brought against R&N is limited to the territory of the Netherlands (see also paragraph 5.2 above). Birkenstock et al. have not put forward any facts from which it follows that Lidl Nederland has committed infringing acts outside the territory of the Netherlands. To that extent, there are no grounds for granting an injunction with a broader territorial scope.

6.71. The penalty payment claimed will also be awarded. The court considers that the penalty payment of 5,000.00 per day claimed by Birkenstock et al. is reasonable and proportionate. The penalty payment will be capped at 250,000.00. The court sees no grounds for imposing a penalty payment for each infringing sandal. That part of the claim for a penalty payment will be dismissed.

Claims C and D: order to provide information

6.72. The order to provide information will be enforced in the manner set out in the judgment. The manner in which this order is to be implemented is sufficiently clear and specific. In doing so, the court has (partially) accommodated the defences put forward by Lidl et al. This order will also be issued solely in respect of the territory of the Netherlands. Neither party has clarified the date on which the infringing conduct of Lidl Nederland and R&N commenced. The screenshots of the website <www.lidl.nl> submitted by Birkenstock et al. as Exhibit 3 to the writ of summons do not provide any insight into this matter either. After all, these screenshots do not include a date on which they were taken. It is established that Birkenstock et al. wrote to Lidl Nederland and R&N on 7 May 2024. In any event, infringing conduct was taking place on that date. The court will, somewhat arbitrarily, order Lidl Nederland and R&N to provide the requested statement covering the six-month period preceding the dispatch of the aforementioned letter of demand. The statement must therefore cover the period from 7 November 2023.

6.73. The court agrees with Lidl et al. that the requested period of two weeks following service of this judgment is too short to allow for the obligation to provide information to be reasonably complied with. Lidl et al. have stated – a fact not disputed by Birkenstock et al. – that a period of three months following service is realistic. The court sees no reason to grant Lidl et al. a shorter period than the aforementioned three months.

6.74. The penalty payment claimed will be awarded in the manner set out in the judgment. The court sees grounds for setting the penalty payment at a lower amount than that claimed.

Claims E and F: declaration of law and referral to the damages assessment

6.75. The court agrees with Lidl and others that Birkenstock and others have no legally recognised interest in the declaration sought. The writ of summons explained, with regard to this claim, that such a declaration could strengthen any future proceedings against other infringers. In the court's view, that interest is insufficient, and therefore the declaration sought will not be granted.

6.76. Lidl et al. have not put forward any specific defence against the reference to the proceedings for damages. The court agrees with Birkenstock et al. that it is plausible that Birkenstock et al. have suffered damage as a result of the infringing acts by Lidl Nederland and R&N. To that extent, the claim by Birkenstock et al. is therefore admissible. Lidl et al. have put forward a briefly substantiated defence against the claim for joint and several liability for any damage suffered by Birkenstock et al. That defence is dismissed, having regard to the provisions of Article 6:102(1) of the Dutch Civil Code.

Legal costs

6.77. Lidl Netherlands and R&N have been found largely to be in the wrong and must therefore pay the costs of the proceedings (including subsequent costs). Birkenstock et al. are claiming compensation for the order to pay legal costs, seeking, pursuant to Article 1019h of the Code of Civil Procedure, 80 per cent compensation for the copyright claim and 20 per cent for the claim relating to tort. Pursuant to Article 1019h of the Code of Civil Procedure, the unsuccessful party is, upon application, ordered to pay reasonable and proportionate legal costs and other costs incurred by the successful party, unless equity precludes this. Birkenstock and others have sufficiently itemised the costs they have claimed. The parties are in agreement regarding this division between the copyright claim and the claim for tort. The court will adopt this division.

6.78. The indicative fee schedule for intellectual property cases (February 2026 version) specifies a maximum fee of 48,000.00 for complex substantive cases (following the exchange of supplementary pleadings and/or oral proceedings). Lidl et al. have not disputed that this rate applies to the present case. The court sees no reason to deviate from the maximum rate for a complex substantive case. Birkenstock et al. are claiming a total amount of (74,176.01 + 900 =) 75,076.00 in legal costs.

This sum includes an amount of 15,287.66 in costs for a market survey. As this survey was carried out in connection with the alleged tort – which, as an alternative basis for the claims, is dismissed – the costs of this survey are not eligible for reimbursement. The court fee of 688.00 is included separately in the statement of costs and is therefore also deducted from the court costs. As the claims against Lidl Stiftung are dismissed, the bailiff's fees are reduced by one third to 626.64. This leaves a balance of 58,786.13, of which 47,028.90 (80 per cent) is attributable to the copyright claim. The court considers the amounts set out therein to be reasonable and proportionate. As the actual costs (after applying the 80 per cent adjustment) are lower than the indicative rate, these costs will be awarded in full.

6.79. Claims based on slavish imitation shall be dismissed. The amount of legal costs will therefore not be supplemented by the 20 per cent of the applicable liquidation rate claimed by Birkenstock et al.

6.80. Taking all this into account, the costs of the proceedings on the part of Birkenstock et al. are assessed at:

- court fees 688.00
- court costs 47,028.90
- incidental costs 198.00 (plus the increase as stated in the decision)

Total 47,914.90

6.81. The statutory interest claimed on the legal costs is awarded as set out in the decision.

6.82. The judgment is (partly) a joint and several judgment. This means that any of the defendants may be required to pay the full amount. If one defendant pays (part of) the amount, the other defendant is no longer required to pay that (part of the) amount.

Enforceable immediately

6.83. The judgment will be declared provisionally enforceable, which is only to be expected in a judgment finding that unlawful conduct has taken place. The court sees no grounds in the arguments put forward by Lidl and others to reach a different conclusion. Lidl et al. argue that exceptional market conditions (a wide supply of comparable sandals from many manufacturers and distributors over several decades) necessitate an exception to the main rule. The court does not agree with this and has found no evidence of exceptional circumstances. Nor does the argument put forward by Lidl et al. regarding the existence of competitively sensitive information – which they claim prevents the disclosure order from being declared provisionally enforceable – alter the court's decision. After all, Birkenstock and others are free to commence proceedings for damages, in addition to any appeal proceedings, in order to obtain compensation for their losses. To this end, it is necessary for Birkenstock and others to gain access to the data sought.

7 The decision

The court

7.1. dismisses the claims against Lidl Stiftung,

7.2. orders Lidl Nederland and R&N, each separately, to refrain, with immediate effect following the service of this judgment, from any infringement of the copyright in the 'Madrid' sandal of Birkenstock et al., more specifically by ceasing with immediate effect, and continuing to refrain from, offering for sale and trading in sandals that infringe the copyright in the sole of all sandals and the upper of the 'Madrid' sandal of Birkenstock et al.,

7.3. orders Lidl Nederland and R&N, each separately, to pay to Birkenstock et al. a penalty payment of 5,000.00 for every day or part of a day that they act in breach of the injunction referred to in paragraph 7.2, until a maximum of 250,000.00 has been reached,

7.4. orders Lidl Nederland and R&N, each separately, to provide the solicitors for Birkenstock et al. with a statement, within three months of this judgment being served, accompanied by relevant documents in support of that statement, covering the period from 7 November 2023, regarding the number of sandals that infringe the copyright subsisting in the lower part of all sandals and the upper of the 'Madrid' sandal of Birkenstock et al., which Lidl Nederland, R&N and/or their professional customers in the Netherlands:

have had manufactured, have

ordered,

have (had) in stock, and/or have sold,

furthermore, Lidl Nederland and R&N must provide the full contact details of the manufacturers and/or suppliers and professional buyers of the sandals that infringe the copyright in the lower part of all five sandals and the upper of the 'Madrid' sandal by Birkenstock et al.,

7.5. orders Lidl Nederland and R&N, each separately, to pay Birkenstock et al. a penalty payment of 1,000.00 for every day or part of a day on which they have acted in breach of the order referred to in paragraph 7.4, until a maximum of 100,000.00 has been reached,

7.6. orders Lidl Nederland and R&N jointly and severally to compensate Birkenstock et al. for the loss they have suffered as a result of the infringing acts established by the court, to be quantified at a later stage,

7.7. orders Lidl Nederland and R&N jointly and severally to pay the legal costs incurred by Birkenstock et al. in the sum of 47,194.90, to be paid within fourteen days of being notified to do so, plus 98.00 and the costs of service should Lidl Nederland and R&N fail to comply with the order for costs in due time and the judgment is subsequently served;

7.8. orders Lidl Nederland and R&N jointly and severally to pay statutory interest to Birkenstock et al. as referred to in Article 6:119 of the Dutch Civil Code on the legal costs if these have not been paid within fourteen days of being notified to do so,

7.9. declares the decisions set out in paragraphs 7.2 to 7.8 to be enforceable with immediate effect,

7.10. dismisses the claim in respect of the remainder or any other claim.

This judgement was delivered by Mr M.D.R. Joppe and pronounced in open court on 23 September 2026.	
!DO NOT REMOVE, SPACE FOR SECRETARY'S SIGNATURE!	!DO NOT REMOVE, SPACE FOR JUDGE'S SIGNATURE!
	!DO NOT REMOVE, SPACE FOR STAMPS!

---

[1] Federal Court of Justice 20 February 2025, ECLI:DE:BGH:2025:200225UIZR16.24.0.

[2] Midden-Nederland District Court, 12 November 2025, ECLI:NL:RBMNE:2025:5837.

[3] Court of Justice of the European Union 4 December 2025, ECLI:EU:C:2025:941, Mio & Konektra.

[4] Gelderland District Court, 15 January 2025, ECLI:NL:RBGEL:2025:1054.

[5] See CJEU 3 October 2013, ECLI:EU:C:2013:635 (Pinckney) and CJEU 22 January 2015, ECLI:EU:C:2015:28 (Hejduk).

[6] Court of Justice of the European Union, 4 December 2025, ECLI:EU:C:2025:941, Mio & Konektra.

[7] Opinion of Advocate General M. Szpunar, 8 May 2025, ECLI:EU:C:2025:330.

[8] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[9] CJEU 4 December 2025, ECLI:EU:C:2025:941, Mio & Konektra, paragraph 79.

[10] Supreme Court 17 April 2020, ECLI:NL:HR:2020:750 (*Montis v Goossens*), grounds 3.5–3.6.

[11] See: Court of Justice of the European Union 4 December 2025, ECLI:EU:C:2025:941, Mio & Konektra, paragraphs 84 to 87.

[12] Reference is made to the doctoral thesis: J. Torenbosch, *The doctrine of slavish imitation tested against European law* (diss. Utrecht), Amsterdam: deLex 2025.

[13] See Supreme Court 20 November 2009, ECLI:NL:HR:2009:BJ6999 (Lego), Supreme Court 19 May 2017, ECLI:NL:HR:2017:938 (All Round/Simstars) and the references cited therein.

[14] Midden-Nederland District Court, 12 November 2025, ECLI:NL:RBMNE:2025:5837.