

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

JUDGMENT

COURT OF THE HAGUE

Civil Law Section

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

Judgment in preliminary relief proceedings dated 4 May 2011

in the matter between:

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

versus

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

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

1. The Proceedings

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

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

1.2. Finally, the judgment was rendered.

2. The Facts

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

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



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



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

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

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

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



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

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

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

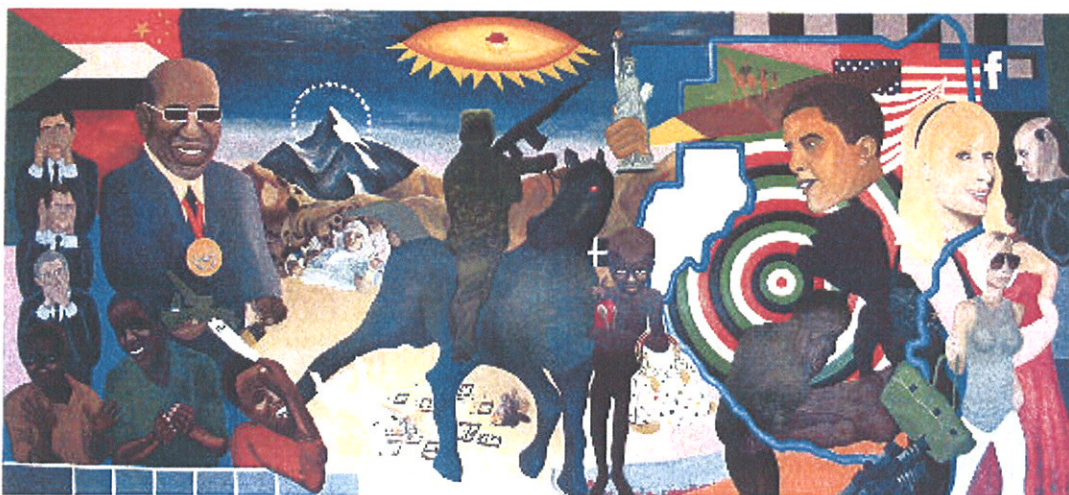
order had been imposed, the Danish attorney who assisted Plesner at that moment informed (the attorney of) Louis Vuitton, *inter alia*, as follows.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

Part A. of the relief sought is as follows.

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

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

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



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

Part 3.1. of the relief sought is as follows.

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

the European Union;

3. The Dispute

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

3.2 Louis Vuitton has put forward a defence.

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

4. The Adjudication

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ex tunc functioning of the quashing

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

Legal Costs

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

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

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

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

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

5. The Decision

The Court in Preliminary Relief Proceedings

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

5.2. orders Louis Vuitton to pay the costs of the proceedings, which costs have been assessed until this date on the part of Plesner to be EUR 15.334,31,

5.3. declares this judgment provisionally enforceable;

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