

**JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)**

3 July 2003

In Case T-129/01,

**José Alejandro SL**, established in Alicante (Spain), represented by I. Temiño Cenicerros, lawyer,  
applicant,

v

**Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)**,  
represented by F. López de Rego and J.F. Crespo Carrillo, acting as Agents,  
defendant,

**intervener,**

**Anheuser-Busch Inc.**, established in Saint Louis, Missouri (United States), represented by V. von Bomhard, lawyer,

ACTION brought against the decision of the First Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) of 20 March 2001 (Case R 230/2000-1), concerning an opposition procedure between Anheuser-Busch Inc. and José Alejandro SL, THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES (Second Chamber), [...] having regard to the written procedure and further to the hearing on 22 January 2003, gives the following

**Judgment**

**Background to the dispute**

1. On 7 May 1996 the applicant filed an application for a Community trade mark at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (the Office), pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).
2. The trade mark in respect of which registration was sought is the word sign BUDMEN.
3. The goods in respect of which registration of the trade mark was sought were in Classes 10, 16 and 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, and correspond to the following descriptions for each class:
  - Class 10: orthopaedic footwear;
  - Class 16: stationery; plastic materials for packing (not included in other classes) and packing materials of paper and cardboard;
  - Class 25: clothing, footwear, headgear.
4. The application was published in *Community Trade Marks Bulletin* No 14/98 of 2 March 1998.
5. On 1 June 1998, the intervener lodged a notice of opposition pursuant to Article 42 of Regulation No 40/94. The opposition is directed against the registration of the mark claimed, for all goods covered by the trade mark application. The ground relied on in support of the opposition was the likelihood of confusion referred to in Article 8(1)(b) of Regulation No 40/94. The opposition is based on the existence of earlier national trade marks registered in Denmark (No 6703.1993) for all goods in Classes 16 and 25; in Ireland, first, for books, printed matters, stationery, writing instruments, calendars, greeting cards, clipboards, portfolios and binders,

office requisites (other than furniture), labels, bumper stickers, posters, playing cards, paper tablecloths and napkins, coasters, paper filters and handkerchiefs, photographs, postcards, albums, wrapping paper, transfers (decalcomanias), all included in Class 16 (No 151535) and, second, for clothing, footwear, headgear, sweatshirts, T-shirts, caps and socks, in Class 25 (No 151537); and in the United Kingdom, first, for books, printed matter, stationery, writing instruments, calendars, greeting cards, clipboards, portfolios and binders, office requisites (other than furniture), labels, bumper stickers, posters, playing cards, paper tablecloths and napkins, coasters, paper filters and handkerchiefs, photographs, postcards, albums, wrapping paper, transfers (decalcomanias), but not including adhesives, adhesive substances and adhesive materials and goods of the same description as adhesives, adhesive substances and adhesive materials in Class 16 (No 1458297) and, second, for sweatshirts, T-shirts, jackets, ponchos, visors, sweaters, cardigans, jump-suits and vests, shorts, tracksuits, night-shirts, housecoats, underwear, scarves, swimwear beach robes, shorts, caps, skiing suits, leotards, anoraks, trousers, skirts, shirts, blouses, jeans, ties, socks, belts, gloves, dresses, hosiery, beach slippers, boots, shoes, slippers and sandals, all included in Class 25 (No 1458299). Those marks are represented by the word mark BUD.

6. By decision of 17 December 1999, the Office's Opposition Division partially upheld the opposition and refused registration of the mark claimed for the goods clothing, footwear and headgear in Class 25 on the grounds that the sign BUD in the earlier Danish mark No 6703.1993 was identical to the first syllable of the sign BUDMEN covered by the mark claimed and that the Class 25 goods designated by the two marks were identical, which was likely to create confusion in the mind of the public in Denmark.

7. On 21 February 2000 the applicant filed an appeal at the Office under Article 59 of Regulation No 40/94 against the Opposition Division's decision.

8. The appeal was dismissed by a decision of the First Board of Appeal of 20 March 2001 (the contested decision), which was notified to the applicant on 27 March 2001.

9. The Board of Appeal found that the decision of the Opposition Division was well founded, given that there was a likelihood of confusion in the mind of the public owing to the fact that the goods designated by the mark claimed and the earlier marks registered in Denmark (No 6703.1993), Ireland (No 151537) and the United Kingdom (No 1458299) (the earlier marks) were identical and the fact that the conflicting signs BUD and BUDMEN were visually, phonetically and conceptually similar (paragraph 15 and 19 to 21 of the contested decision).

### **Procedure and forms of order sought**

10. By an application drawn up in Spanish and lodged at the Registry of the Court on 11 June 2001 the applicant brought this action.

11. By a document of 3 September 2001, the intervener lodged its objection, pursuant to the first subparagraph of Article 131(2) of the Rules of Procedure of the Court of First Instance, to Spanish being used as the language of the case before the Court of First Instance and asked that English be the language of the case. In support of its objection, it referred to the fact that English had been the second language of the trade mark application pursuant to Article 115(3) of Regulation No 40/94 and had been the language of the case before the Opposition Division and the Board of Appeal.

12. Acting pursuant to the third subparagraph of Article 131(2) of the Rules of Procedure, the Court designated Spanish as the language of the case, in view of the fact that the applicant had lodged the contested trade mark application in Spanish, in accordance with Article 115(1) of Regulation No 40/94.

13. The Office lodged its defence on 21 September 2001, whilst the intervener lodged its statement in intervention on 2 January 2002. The applicant lodged a reply on 8 April 2002. The Office lodged a rejoinder on 25 June 2002.

14. By way of measure of organisation of procedure, the Court asked the applicant to clarify the form of order sought at the hearing.

15. The hearing was held on 22 January 2003. The intervener did not attend the hearing; its representative had informed the Court that it was unable to attend due to events outside its control. The Court did not deem it necessary to ask the intervener to lodge written observations on the question posed to the applicant.

16. The President of the Second Chamber closed the oral procedure on 26 March 2003.

17. The applicant claims that the Court should:

- vary the contested decision, uphold the action and grant the application for a Community trade mark for all Class 25 goods;
- in the alternative, vary the contested decision, uphold the action and grant the Community trade mark application in respect of footwear;
- order the parties to bear their own costs.

18. The Office contends that the Court should:

- dismiss the applicant's application;
- order the applicant to pay the costs.

19. The intervener contends that the Court should:

- dismiss the applicant's application and uphold the contested decision;
- order the applicant to pay the costs, including those incurred by the intervener.

20. At the hearing, the applicant explained that by the term vary it actually meant annulment of the contested decision.

### **Admissibility of the applicant's forms of order sought**

21. In the second part of its first and second heads of claim, the applicant asks the Court to grant the application for a Community trade mark for all Class 25 goods and, in the alternative, in respect of footwear only. The applicant is thus asking that the Office be ordered to register the mark claimed for the goods in question.

22. It is appropriate to recall that, under Article 63(6) of Regulation No 40/94, the Office is required to take the measures necessary to comply with the judgment of the Community judicature. Accordingly, it is not for the Court of First Instance to issue orders to the Office. It is for the latter to draw the appropriate inferences from the operative part of the Court's judgments. The applicant's head of claim asking for the Community trade mark application to be granted for all Class 25 goods and, in the alternative, in respect of footwear only, is therefore inadmissible (Case T-331/99 *Mitsubishi HiTec Paper Bielefeld v OHIM* (Giroform) [2001] ECR II-433, paragraph 33; and Case T-34/00 *Eurocool Logistik v OHIM* (EUROCOOL) [2002] ECR II-683, paragraph 12).

### Claim for annulment of the contested decision

23. The applicant puts forward a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94.

#### *Arguments of the parties*

24. With respect to the comparison of the conflicting signs, the applicant disagrees with the Board of Appeal's finding in paragraph 19 of the contested decision that there is a visual similarity between the signs BUD and BUDMEN, since the only difference between them is the syllable MEN in the mark claimed. The applicant maintains that the visual differences between the marks are obvious because the signs in question do not contain any drawings, they have a single syllable in common and the last syllable of the sign in the mark claimed definitely produces a visual dissimilarity.

25. With respect to the phonetic comparison of the signs in question, the applicant states that the second syllable MEN of the mark claimed, which is necessarily pronounced audibly and clearly in all the languages of the European Union, has a major impact on the pronunciation of the sign BUDMEN, which eliminates any phonetic similarity between the marks in question. In addition, the pronunciation of the earlier national mark, BUD, is short, concise and hard, whilst the mark claimed, BUDMEN, is longer.

26. Lastly, as regards the conceptual comparison of the signs, the applicant states that the word BUDMEN has no meaning in English or Danish, the languages of the relevant public, because it is a coined term comprising a random or original combination of two syllables, which confer distinctive character on the mark claimed.

27. The applicant adds that the Board of Appeal was wrong to find in paragraph 21 of the contested decision that the average consumer could perceive the disputed mark as a variant of the earlier national marks because the distinctive element of the marks is BUD and that he might therefore understand MEN as indicating the intended purpose. According to the applicant, in order to indicate that Class 25 goods are intended for men, it is not necessary or sufficient to use MEN together with the distinctive element of a mark. On the contrary, marks which are intended to designate the purpose of a Class 25 product are usually made up of a distinctive element followed by the expression for men, for women or for children. In its reply the applicant referred to documents in order to show that some known marks in the men's clothing sector do not use signs comprising the term MEN.

28. As regards the comparison of the goods, the applicant does not contest the Board of Appeal's finding in paragraph 15 of the contested decision that the goods designated by the earlier national marks and the mark claimed are identical.

29. Turning to the marketing aspects of the goods in question, the applicant states that the intervener's Class 25 goods are distributed by way of promotion or marketing linked to the beer brand BUD. It supports this statement using documents attached as annexes to the application. It also argues that the intervener has not demonstrated that it used its mark for footwear, which is the applicant's main centre of interest. In support of its contention, the applicant produces as annexes to the application seven statements by representatives of marketing firms on the absence of likelihood of confusion between the marks in question and on the distinctive character of the mark claimed.

30. In addition, the applicant states that, in Case 144/81 *Keurkoop* [1982] ECR 2853, the Court stated at paragraph 24 that the exclusive rights conferred by a mark may not be relied on improperly when the principal purpose of the mark is not compromised. The applicant states in its reply that that principle clearly served as inspiration for Regulation No 40/94 and First

Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1988 L 40, p. 1) and may be read implicitly into the Office's decisions.

31. Lastly, the applicant refers to its Spanish trade mark registration No 1.984.896 BUDMEN. According to the applicant, the decision by the Spanish patent and trade mark office to accept the mark, following opposition by the intervener concerning the earlier national trade mark BUD, shows that the two marks coexist on the market without engendering confusion in the minds of consumers. In addition, the numerous registrations of Community, international and national marks in Class 25 containing the sign BUD (including BUDGIE and BUDDYZ registered in the United Kingdom and BUDDY registered in Denmark, which cover Class 25 goods) show that the intervener does not have a monopoly or exclusive right over the sign BUD.

32. The Office submits, as a preliminary point, that it is refraining from intervening in aspects of the dispute which, by their nature, concern only the debate between the applicant and the intervener and that its arguments relate only to the questions concerning the application of the Community trade mark rules, which it contends must be clarified.

33. As regards the comparison of the marks, the Office contends that the conflicting signs are visually, phonetically and conceptually similar. It submits that, conceptually, the sign BUDMEN may give rise to a separation of the elements BUD and MEN. It submits that the latter element is descriptive and devoid of distinctive character because it refers to the purpose of the goods covered by the mark claimed.

34. In conclusion, the Office submits that the Board of Appeal rightly applied the relevant legislation and case-law in holding there to be a likelihood of confusion of the conflicting signs.

35. The intervener submits that the Opposition Division and the Board of Appeal rightly held that there is a likelihood of confusion between the marks. The marks at issue are visually, phonetically and conceptually similar. It contends that the suffix MEN in BUDMEN, the mark claimed, is perceived not only by English-speaking consumers but also by the Danish public as a descriptive element indicating the masculine nature or purpose of the clothing, footwear and headgear covered by the mark claimed. Thus, it submits that the suffix MEN is secondary to the dominant element BUD perceived as indicating the origin of the goods.

### ***Findings of the Court***

36. Article 8(1)(b) of Regulation No 40/94 provides that, upon opposition by the proprietor of an earlier trade mark, the mark claimed is not to be registered if because of its identity with or similarity to the earlier trade mark and the identity or similarity of the goods or services covered by the trade marks there exists a likelihood of confusion on the part of the public in the territory in which the earlier trade mark is protected; the likelihood of confusion includes the likelihood of association with the earlier trade mark. Article 8(2)(a)(ii) of Regulation No 40/94 provides that an earlier trade mark is a trade mark registered in a Member State with a date of application for registration which is earlier than the date of application for registration of the Community trade mark.

37. According to the case-law on the interpretation of Article 4(1)(b) of Directive 89/104, a provision whose regulatory content is in essence the same as Article 8(1)(b) of Regulation No 40/94, the likelihood that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17; Case T-104/01 *Oberhauser v OHIM - Petit Libero (Fifties)* [2002] ECR II-4359, paragraph 25).

38. According to the same case-law, the likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22; *Canon*, paragraph 16; *Lloyd Schuhfabrik Meyer*, paragraph 18; and Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 40; *Fifties*, paragraph 26).

39. That global assessment implies some interdependence between the factors taken into account, and in particular the similarity between the trade marks and between the goods or services identified. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa (*Canon*, paragraph 17 and *Lloyd Schuhfabrik Meyer*, paragraph 19). The interdependence of those factors is expressly referred to in the seventh recital in the preamble to Regulation No 40/94, according to which the concept of similarity is to be interpreted in relation to the likelihood of confusion, the assessment of which depends, *inter alia*, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services designated.

40. In addition, the perception of marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*SABEL*, paragraph 23 and *Lloyd Schuhfabrik Meyer*, paragraph 25). For the purposes of that global assessment, the average consumer of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect. In addition, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but has to place his trust in the imperfect image of them that he has retained in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (*Lloyd Schuhfabrik Meyer*, paragraph 26).

41. In this case, since the earlier marks are registered in Denmark, Ireland and the United Kingdom and the products in question are general consumer goods (clothing, footwear and headgear), the relevant public in relation to which likelihood of confusion must be assessed is composed of average consumers in those three Member States (see, to this effect, Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services (ELS)* [2002] ECR II-4301, paragraph 48).

42. In light of the foregoing considerations it is appropriate to examine the comparison of the goods concerned and the conflicting signs carried out by the Board of Appeal.

43. The Board of Appeal held that the Class 25 goods covered by the earlier national marks are identical to the goods clothing, footwear and headwear covered by the trade mark application (paragraph 15 of the contested decision). The applicant does not contest the Board of Appeal's finding on this point.

44. It is therefore common ground that there is identity between the goods covered by the conflicting marks.

45. As regards comparison of the signs, according to the case-law, the global assessment of the likelihood of confusion must, as regards the visual, aural or conceptual similarity of the marks in question, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components (*SABEL*, paragraph 23 and *Lloyd Schuhfabrik Meyer*, paragraph 25). It is therefore necessary to compare the conflicting signs in this case at the visual, aural and conceptual levels.

46. The Board of Appeal rightly stated in paragraph 19 of the contested decision that the two signs are word marks written in normal typing and capital letters. The earlier marks comprise a single, three-letter syllable. The mark claimed comprises two syllables of three letters each.
47. As regards the visual comparison, the Court notes that the first syllable of the Community mark claimed, BUD, corresponds to the only syllable of the sign constituting the earlier marks and that the only difference is that the Community mark claimed also includes a second syllable, MEN. As rightly pointed out by the intervener, the suffix MEN must be viewed as ancillary to the element BUD, since it occupies second place in the sign. The Court also notes that the sign constituting the earlier national marks is included in its entirety in the mark claimed.
48. In regard to the aural comparison, the Board of Appeal states that both signs begin with the same letters and are pronounced in the same manner, with the second syllable of the Community mark claimed being less audible than the first syllable. The Board of Appeal concludes that the marks are therefore phonetically similar (paragraph 20 of the contested decision).
49. The Court finds that the element BUD, the only component of the earlier national marks, also constitutes the first syllable of the mark claimed, accentuates it and therefore is predominant in relation to the second syllable, MEN.
50. Since the dominant syllable of the mark claimed and the earlier national marks are identical, the Court finds that the Board of Appeal was right in holding that the marks in question are visually and phonetically similar.
51. As regards the conceptual comparison of the conflicting marks, the Court notes that, as rightly pointed out by the Office and the intervener, the element MEN constitutes the English word men and may be understood as such in English-speaking parts of the Community and in Member States such as Denmark, where English is a widely-understood language. In those circumstances, it is quite likely that the relevant public will view the mark BUDMEN as a derivation of the sign BUD.
52. The Court observes that, given the differences which usually exist between clothing for men and women, the conveying of the information to the public that the clothing is intended for male customers represents an essential characteristic of the goods in question which is taken into account by the relevant public (Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 34).
53. Accordingly, the suffix MEN in the mark claimed is likely to carry a suggestive or even descriptive connotation for the relevant public that the clothing, footwear and headwear covered by that mark are intended for male customers. The Court notes that the public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark.
54. It follows that, from a conceptual viewpoint, the first syllable BUD must be viewed as the dominant element of the mark claimed.
55. In the context of the global assessment of the likelihood of confusion, it must be borne in mind that the average consumer retains only an imperfect image of the mark and accords preponderant importance to the predominant component of the mark enabling him, on the occasion of a subsequent purchase, to identify the mark in question. Consequently, when the average consumer finds clothing products designated by the mark BUDMEN, the likelihood that he might associate those clothing products with clothing products marketed under the earlier mark BUD is very probable and indeed plain (see, to this effect, *Fifties*, paragraph 48).
56. Turning to the conditions under which the products in question are marketed, the applicant's argument based on the earlier national marks' being associated with beer whereas the

mark claimed refers only to footwear cannot avail it. The intervener in this case has not referred to any reputation its earlier marks may have in relation to beer; nor did it show that they had acquired a reputation in respect of the products for which they were registered, particularly clothing. In those circumstances, as the intervener rightly pointed out, the reference to the current use of the marks and their possible association with the mark claimed is devoid of relevance.

57. It is appropriate, however, to examine the objective conditions under which the marks may be in opposition on the market. It must be observed that it is common in the clothing sector for the same mark to be configured in various different ways according to the type of product which it designates. It is also common for a single clothing manufacturer to use sub-brands (signs that derive from a principal mark and which share with it a common dominant element) in order to distinguish his various lines from one another (women's, men's, youth). In such circumstances it is conceivable that the relevant public may regard the clothing designated by the conflicting marks as belonging, admittedly, to two distinct ranges of products but as coming, none the less, from the same undertaking (see, to this effect, *Fifties*, paragraph 49). Accordingly, the Board of Appeal was right to find that the public might believe that the products designated by the mark BUDMEN formed part of a new range of products and were marketed by the proprietor of the BUD mark or by an economically-linked undertaking (paragraph 22 of the contested decision).

58. Accordingly, regard being had to the nature of the products covered by the conflicting marks, the differences between the signs are not sufficient to dispel the likelihood of confusion in the mind of the relevant public.

59. In addition, the interdependence of the various factors to be taken into account in the overall assessment of the likelihood of confusion confirms that conclusion. It is common ground that the products covered by the mark claimed and those covered by the earlier national marks are identical. The corollary of that identity is that the scope of any differences between the signs in question is reduced. As the Court has observed, there may be a likelihood of confusion, notwithstanding a lesser degree of similarity between the trade marks, where the goods or services covered by them are very similar and the earlier mark is highly distinctive (*Lloyd Schuhfabrik Meyer*, paragraph 21 and *ELS*, paragraph 77).

60. This finding is not invalidated by the applicant's other arguments.

61. Firstly, with respect to the applicant's argument that the contested decision is inconsistent with earlier decisions of the Opposition Division and the Board of Appeal of the Office, it must be observed that the applicant has not established the existence of situations comparable to the one at issue here. Next, it should be borne in mind that the legality of decisions of the Boards of Appeal is to be assessed purely by reference to Regulation No 40/94, as interpreted by the Community Courts, and not the Office's practice in earlier decisions (Case T-32/00 *Messe München v OHIM* (electronica) [2000] ECR II-3829, paragraph 47; and Case T-130/01 *Sykes Enterprises v OHIM* (REAL PEOPLE, REAL SOLUTIONS) [2002] ECR II-0000, paragraph 31). Accordingly, the argument based on possible inconsistency between the contested decision and the Office's earlier decisions cannot avail the applicant.

62. Turning, secondly, to the applicant's argument that the Spanish patent and trade mark office decided to accept its Spanish trade mark registration No 1.984.896 BUDMEN, following opposition by the intervener concerning the earlier trade mark BUD, a decision which it alleges shows that the two marks may coexist on the market without engendering confusion in the minds of consumers, the Court finds, as stated by the Office and the intervener, that the earlier marks at issue in this case are protected in the United Kingdom, Ireland and Denmark. Spain is, therefore, not the relevant territory for the purposes of examining the likelihood of confusion between the

conflicting marks. It follows that the argument based on the coexistence of the marks in Spain is irrelevant.

63. Thirdly, with respect to the applicant's arguments concerning the existence of Community, international and national trade marks registered for Class 25 goods containing the sign BUD which, in its view, shows that the intervener does not have a monopoly or exclusive right over the sign, suffice it to observe that those marks are in no way related to the present case, as the Office has pointed out. Those allegations are thus irrelevant for the purposes of examining the likelihood of confusion between the conflicting marks in this case.

64. As regards the applicant's argument inferred from *Keurkoop*, according to which the exclusive rights conferred by a mark may not be relied on improperly when the principal purpose of the mark is not compromised, the Court finds that this argument is not relevant. The ability to oppose registration of a Community mark on the basis of an earlier mark so as to prevent a likelihood of confusion on the part of the public within the meaning of Article 8(1)(b) of Regulation No 40/94 is part of the specific subject-matter of trade mark law as interpreted by the Community Courts, that is to say, the right of the proprietor to oppose any use of the mark which is likely to impair the guarantee of origin (Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others* [1996] ECR I-3457, paragraph 48; and Case C-143/00 *Boehringer Ingelheim and Others* [2002] ECR I-3759, paragraphs 12 and 13).

65. In light of the foregoing, the Board of Appeal was correct in finding that there was a likelihood of confusion between the disputed mark BUDMEN and the earlier national marks.

66. The above reasoning applies in full to all products referred to in connection with the mark claimed, namely clothing, footwear and headwear. The Court notes that, in the light of the identity between the products covered by the conflicting marks, the examination of the likelihood of confusion is the same for all the products covered by the mark claimed. It follows that the Board of Appeal was correct in finding that there was a likelihood of confusion for all the products covered by the mark claimed, including the footwear referred to in the applicant's alternative claim.

67. As regards the documents annexed to the applicant's application and reply and the intervener's statement in intervention, which were not submitted to the Board of Appeal, regard cannot be had to those documents because the purpose of actions before the Court of First Instance is to obtain review of the legality of decisions of the Boards of Appeal of the Office for the purposes of Article 63 of Regulation No 40/94. It is not the Court's function to review the facts in the light of documents adduced for the first time before it. To allow that evidence would, moreover, be contrary to Article 135(4) of the Rules of Procedure, according to which the parties' submissions may not change the subject-matter of the proceedings before the Board of Appeal. Accordingly, the evidence adduced by the applicant and the intervener for the first time before the Court must be excluded, without its being necessary to assess their probative value (see, to this effect, Case T-247/01 *eCopy v OHIM (ECOPY)* [2002] ECR II-0000, paragraph 49).

68. It follows from all the foregoing that the action must be dismissed.

### Costs

69. Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Office and the intervener in accordance with the forms of order sought by them.

On those grounds, THE COURT OF FIRST INSTANCE (Second Chamber) hereby:

- 1. Dismisses the action;**
- 2. Orders the applicant to pay the costs.**

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