JUDGMENT OF THE COURT (First Chamber)

27 November 2008 *

In Case C-252/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England and Wales) (Civil Division), made by decision of 15 May 2007, received at the Court on 29 May 2007, in the proceedings

Intel Corporation Inc.

v

CPM United Kingdom Ltd,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič (Rapporteur), A. Tizzano, A. Borg Barthet and E. Levits, Judges,

* Language of the case: English.

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 April 2008,

after considering the observations submitted on behalf of:

— Intel Corporation Inc., by J. Mellor QC, instructed by CMS Cameron McKenna LLP,

— CPM United Kingdom Ltd, by M. Engelman, Barrister, and M. Bilewycz, registered trade mark attorney,

— the United Kingdom Government, by V. Jackson, acting as Agent, and S. Malynicz, Barrister,

— the Italian Government, by I.M. Braguglia, acting as Agent, and G. Aiello, avvocato dello Stato,

— the Commission of the European Communities, by W. Wils, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(4)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1, 'the Directive').

2 The reference was made in proceedings in which Intel Corporation Inc. ('Intel Corporation') is applying for a declaration of invalidity against the registration of the INTELMARK trade mark owned by CPM United Kingdom Ltd.

Relevant provisions

Community law

3 Article 4 of the Directive, entitled 'Further grounds for refusal or invalidity concerning conflicts with earlier rights', provides:

'1. A trade mark shall not be registered or, if registered, shall be liable to be declared invalid:

(a) if it is identical with an earlier trade mark, and the goods or services for which the trade mark is applied for or is registered are identical with the goods or services for which the earlier trade mark is protected;

(b) 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, which includes the likelihood of association with the earlier trade mark.

2. "Earlier trade marks" within the meaning of paragraph 1 means:

(a) trade marks of the following kinds with a date of application for registration which is earlier than the date of application for registration of the trade mark, taking account, where appropriate, of the priorities claimed in respect of those trade marks;

…

(ii) trade marks registered in the Member State …

…

…

4. Any Member State may furthermore provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where, and to the extent that:

(a) the trade mark is identical with, or similar to, an earlier national trade mark within the meaning of paragraph 2 and is to be, or has been, registered for goods or services which are not similar to those for which the earlier trade mark is registered, where the earlier trade mark has a reputation in the Member State concerned and where the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark;

…'

4 Article 5(2) of the Directive, entitled 'Rights conferred by a trade mark', provides:

'Any Member State may also provide that the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with, or similar to, the trade mark in relation to goods or services which are not similar to those for which the trade mark is registered, where the latter has a reputation in the Member State and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.'

5 The Court has interpreted that provision as follows in paragraphs 29 and 30 of its judgment in Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-12537:

‘29 The infringements referred to in Article 5(2) of [Directive 89/104], where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23).

30 The existence of such a link must, just like a likelihood of confusion in the context of Article 5(1)(b) of Directive [89/104], be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, in respect of the likelihood of confusion, [Case C-251/95] *SABEL* [[1997] ECR I-6191], paragraph 22, and [Case C-425/98] *Marca Mode* [[2000] ECR I-4861], paragraph 40).’

National law

6 The Directive was transposed in the United Kingdom of Great Britain and Northern Ireland by the Trade Marks Act 1994.

7 Under section 5(3)(a) of the Trade Marks Act, ‘[a] trade mark which … is identical with or similar to an earlier trade mark … shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark [or international trade mark (EC)] in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark’.

8 Section 47(2)(a) of the Trade Marks Act provides that '[t]he registration of a trade mark may be declared invalid on the ground … that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Intel Corporation is, inter alia, the proprietor of the national word mark INTEL, registered in the United Kingdom, as well as of various other national and Community trade marks consisting of or including the word 'Intel'. The goods and services in respect of which those marks were registered are, essentially, computers and computer-linked goods and services in Classes 9, 16, 38 and 42 under 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.

10 According to the order for reference, the INTEL mark has a huge reputation in the United Kingdom for microprocessor products (chips and peripherals) and multimedia and business software.

11 CPM United Kingdom Ltd is the proprietor of the national word mark INTELMARK, registered in the United Kingdom with effect from 31 January 1997 for 'marketing and telemarketing services' in Class 35 under the Nice Agreement.

12 On 31 October 2003 Intel Corporation filed at the United Kingdom Trade Mark Registry an application for a declaration of invalidity against the registration of the INTELMARK trade mark on the basis of section 47(2) of the Trade Marks Act, claiming that the use of that mark would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier INTEL trade mark within the meaning of section 5(3) of that act.

13 Its application was dismissed by decision of the Hearing Officer of 1 February 2006.

14 The appeal brought by Intel Corporation to the High Court of Justice of England and Wales, Chancery Division (Intellectual Property), was dismissed on 26 July 2006.

15 Intel Corporation then appealed to the Court of Appeal (England and Wales) (Civil Division).

16 Intel Corporation argued before that court that both Article 4(4)(a) and Article 5(2) of the Directive seek to protect a proprietor of a trade mark with a reputation against the risk of dilution.

17 Relying on the judgment in *Adidas-Salomon and Adidas Benelux*, it considers that, in order to enjoy the protection conferred by Article 4(4)(a) of the Directive, it is

sufficient that the degree of similarity between the earlier mark with a reputation and the later mark has the effect that the relevant section of the public establishes a link between those two marks. A 'link' means any kind of mental association between those two marks, so a mere bringing to mind of the earlier mark is enough.

18 Furthermore, relying on paragraph 30 of the judgment in *General Motors*, Intel Corporation submits that, where the earlier mark both is unique and has a strong distinctive character, it must be accepted that detriment to it will be caused by virtually any use for any other goods or services. It adds that, where the earlier mark is unique and well known, it is important to stop any encroachment at the outset, otherwise that mark will suffer a death by a thousand cuts.

19 The national court states, first, that 'Intel' is an invented word with no meaning or significance beyond the products which it identifies, that the INTEL mark is unique in the sense that the word of which it consists has not been used by anyone for any goods or services other than those marketed by Intel Corporation and, finally, that that mark has a huge reputation in the United Kingdom for computers and computer-linked products.

20 Secondly, the national court considers that the INTEL and INTELMARK trade marks are similar, but starts from the premiss that the use of INTELMARK does not suggest a trade connection with Intel Corporation.

21 Thirdly, the national court states that the goods — essentially, computers and computer-linked products — and services for which Intel Corporation's national and Community marks consisting of or including the word 'Intel' were registered are dissimilar to the services covered by the registration of the INTELMARK trade mark.

22 It is uncertain whether, in such factual circumstances, the proprietor of the earlier mark with a reputation is entitled to the protection provided for in Article 4(4)(a) of the Directive. More generally, it raises the question of the conditions and scope of that protection.

23 Accordingly, the Court of Appeal (England and Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) For the purposes of Article 4(4)(a) of the [Directive], where:

(a) the earlier mark has a huge reputation for certain specific types of goods or services,

(b) those goods or services are dissimilar or dissimilar to a substantial degree to the goods or services of the later mark,

(c) the earlier mark is unique in respect of any goods or services,

(d) the earlier mark would be brought to mind by the average consumer when he or she encounters the later mark used for the services of the later mark,

are those facts sufficient in themselves to establish (i) "a link" within the meaning of paragraphs 29 and 30 of [*Adidas-Salomon and Adidas Benelux*], and/or (ii) unfair advantage and/or detriment within the meaning of that Article?

(2) If no, what factors is the national court to take into account in deciding whether such is sufficient? Specifically, in the global appreciation to determine whether there is a "link", what significance is to be attached to the goods or services in the specification of the later mark?

(3) In the context of Article 4(4)(a) [of the Directive], what is required in order to satisfy the condition of detriment to distinctive character? Specifically, (i) does the earlier mark have to be unique, (ii) is a first conflicting use sufficient to establish detriment to distinctive character and (iii) does the element of detriment to distinctive character of the earlier mark require an effect on the economic behaviour of the consumer?'

The questions

Preliminary observations

24 It should be noted that the wording of Articles 4(4)(a) and 5(2) of the Directive is essentially identical and is designed to give trade marks with a reputation the same protection.

25 Accordingly, the interpretation of Article 5(2) of the Directive given by the Court in *Adidas-Salomon and Adidas Benelux*, applies equally to Article 4(4)(a) of the Directive (see, to that effect, Case C-292/00 *Davidoff* [2003] ECR I-389, paragraph 17).

The protection given by Article 4(4)(a) of the Directive

26 Article 4(4)(a) of the Directive establishes, for the benefit of trade marks with a reputation, a wider form of protection than that provided for in Article 4(1). The specific condition of that protection consists of a use of the later mark without due cause which takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark (see, to that effect, in respect of Article 5(2) of the Directive, *Marca Mode*, paragraph 36; *Adidas-Salomon and*

Adidas Benelux, paragraph 27, and Case C-102/07 *adidas and adidas Benelux* [2008] ECR I-2439, paragraph 40).

27 The types of injury against which Article 4(4)(a) of the Directive ensures such protection for the benefit of trade marks with a reputation are, first, detriment to the distinctive character of the earlier mark, secondly, detriment to the repute of that mark and, thirdly, unfair advantage taken of the distinctive character or the repute of that mark.

28 Just one of those three types of injury suffices for that provision to apply.

29 As regards, in particular, detriment to the distinctive character of the earlier mark, also referred to as 'dilution', 'whittling away' or 'blurring', such detriment is caused when that mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark is weakened, since use of the later mark leads to dispersion of the identity and hold upon the public mind of the earlier mark. That is notably the case when the earlier mark, which used to arouse immediate association with the goods and services for which it is registered, is no longer capable of doing so.

30 The types of injury referred to in Article 4(4)(a) of the Directive, where they occur, are the consequence of a certain degree of similarity between the earlier and later marks, by virtue of which the relevant section of the public makes a connection between those two marks, that is to say, establishes a link between them even though it does

not confuse them (see, in relation to Article 5(2) of the Directive, *General Motors*, paragraph 23; *Adidas-Salomon and Adidas Benelux*, paragraph 29, and *adidas and adidas Benelux*, paragraph 41).

31 In the absence of such a link in the mind of the public, the use of the later mark is not likely to take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark.

32 However, the existence of such a link is not sufficient, in itself, to establish that there is one of the types of injury referred to in Article 4(4)(a) of the Directive, which constitute, as was stated in paragraph 26 of this judgment, the specific condition of the protection of trade marks with a reputation laid down by that provision.

The relevant public

33 The public to be taken into account in order to determine whether registration of the later mark may be declared invalid pursuant to Article 4(4)(a) of the Directive varies depending on the type of injury alleged by the proprietor of the earlier trade mark.

34 First, both a trade mark's distinctiveness and its reputation must be assessed, first, by reference to the perception of the relevant public, which consists of average

consumers of the goods or services for which that mark is registered, who are reasonably well informed and reasonably observant and circumspect (as regards distinctive character, see Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 34; as regards reputation, see, to that effect, *General Motors*, paragraph 24).

35 Accordingly, the existence of injury consisting of detriment to the distinctive character or the repute of the earlier mark must be assessed by reference to average consumers of the goods and services for which that mark is registered, who are reasonably well informed and reasonably observant and circumspect.

36 Secondly, as regards injury consisting of unfair advantage taken of the distinctive character or the repute of the earlier mark, in so far as what is prohibited is the drawing of benefit from that mark by the proprietor of the later mark, the existence of such injury must be assessed by reference to average consumers of the goods or services for which the later mark is registered, who are reasonably well informed and reasonably observant and circumspect.

Proof

37 In order to benefit from the protection introduced by Article 4(4)(a) of the Directive, the proprietor of the earlier mark must adduce proof that the use of the later mark 'would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark'.

38 The proprietor of the earlier trade mark is not required, for that purpose, to demonstrate actual and present injury to its mark for the purposes of Article 4(4)(a) of the Directive. When it is foreseeable that such injury will ensue from the use which the proprietor of the later mark may be led to make of its mark, the proprietor of the earlier mark cannot be required to wait for it actually to occur in order to be able to prohibit that use. The proprietor of the earlier mark must, however, prove that there is a serious risk that such an injury will occur in the future.

39 When the proprietor of the earlier mark has shown that there is either actual and present injury to its mark for the purposes of Article 4(4)(a) of the Directive or, failing that, a serious risk that such injury will occur in the future, it is for the proprietor of the later mark to establish that there is due cause for the use of that mark.

Point (i) of Question 1 and Question 2

40 By point (i) of Question 1 and Question 2, the national court asks, essentially, what the relevant criteria are for the purposes of establishing whether there is a link, within the meaning of the judgment in *Adidas Salomon and Adidas Benelux* ('a link'), between the earlier mark with a reputation and the later mark in respect of which a declaration of invalidity is sought.

41 The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case (see, in respect of Article 5(2) of the Dir-

ective, *Adidas-Salomon and Adidas Benelux*, paragraph 30, and *adidas and adidas Benelux*, paragraph 42).

42 Those factors include:

— the degree of similarity between the conflicting marks;

— the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;

— the strength of the earlier mark's reputation;

— the degree of the earlier mark's distinctive character, whether inherent or acquired through use;

— the existence of the likelihood of confusion on the part of the public.

43 In that respect, the following points must be made.

44 As regards the degree of similarity between the conflicting marks, the more similar they are, the more likely it is that the later mark will bring the earlier mark with a

reputation to the mind of the relevant public. That is particularly the case where those marks are identical.

45 However, the fact that the conflicting marks are identical, and even more so if they are merely similar, is not sufficient for it to be concluded that there is a link between those marks.

46 It is possible that the conflicting marks are registered for goods or services in respect of which the relevant sections of the public do not overlap.

47 The reputation of a trade mark must be assessed in relation to the relevant section of the public as regards the goods or services for which that mark was registered. That may be either the public at large or a more specialised public (see *General Motors*, paragraph 24).

48 It is therefore conceivable that the relevant section of the public as regards the goods or services for which the earlier mark was registered is completely distinct from the relevant section of the public as regards the goods or services for which the later mark was registered and that the earlier mark, although it has a reputation, is not known to the public targeted by the later mark. In such a case, the public targeted by each of the two marks may never be confronted with the other mark, so that it will not establish any link between those marks.

49 Furthermore, even if the relevant section of the public as regards the goods or services for which the conflicting marks are registered is the same or overlaps to some

extent, those goods or services may be so dissimilar that the later mark is unlikely to bring the earlier mark to the mind of the relevant public.

50 Accordingly, the nature of the goods or services for which the conflicting marks are registered must be taken into consideration for the purposes of assessing whether there is a link between those marks.

51 It must also be pointed out that certain marks may have acquired such a reputation that it goes beyond the relevant public as regards the goods or services for which those marks were registered.

52 In such a case, it is possible that the relevant section of the public as regards the goods or services for which the later mark is registered will make a connection between the conflicting marks, even though that public is wholly distinct from the relevant section of the public as regards goods or services for which the earlier mark was registered.

53 For the purposes of assessing where there is a link between the conflicting marks, it may therefore be necessary to take into account the strength of the earlier mark's reputation in order to determine whether that reputation extends beyond the public targeted by that mark.

54 Likewise, the stronger the distinctive character of the earlier mark, whether inherent or acquired through the use which has been made of it, the more likely it is that,

confronted with a later identical or similar mark, the relevant public will call that earlier mark to mind.

55 Accordingly, for the purposes of assessing whether there is a link between the conflicting marks, the degree of the earlier mark's distinctive character must be taken into consideration.

56 In that regard, in so far as the ability of a trade mark to identify the goods or services for which it is registered and used as coming from the proprietor of that mark and, therefore, its distinctive character are all the stronger if that mark is unique — that is to say, as regards a word mark such as INTEL, if the word of which it consists has not been used by anyone for any goods or services other than by the proprietor of the mark for the goods and services it markets — it must be ascertained whether the earlier mark is unique or essentially unique.

57 Finally, a link between the conflicting marks is necessarily established when there is a likelihood of confusion, that is to say, when the relevant public believes or might believe that the goods or services marketed under the earlier mark and those marketed under the later mark come from the same undertaking or from economically-linked undertakings (see to that effect, inter alia, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17, and Case C-533/06 *O2 Holdings and O2 (UK)* [2008] ECR I-4231, paragraph 59).

58 However, as is apparent from paragraphs 27 to 31 of the judgment in *Adidas-Salomon and Adidas Benelux*, implementation of the protection introduced by Article 4(4)(a) of the Directive does not require the existence of a likelihood of confusion.

59 The national court asks, in particular, whether the circumstances set out in points (a) to (d) of Question 1 referred for a preliminary ruling are sufficient to establish a link between the conflicting marks.

60 As regards the circumstance referred to in point (d) of that question, the fact that, for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark would call the earlier mark to mind is tantamount to the existence of such a link.

61 As regards the circumstances referred to in paragraphs (a) to (c) of that question, as is apparent from paragraph 41 to 58 of this judgment, they do not necessarily imply the existence of a link between the conflicting marks, but they do not exclude one either. It is for the national court to base its analysis on all the facts of the case in the main proceedings.

62 The answer to point (i) of Question 1 and to Question 2 must therefore be that Article 4(4)(a) of the Directive must be interpreted as meaning that whether there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the earlier mark with a reputation and the later mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.

63 The fact that for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark with a reputation to mind is tantamount to the existence of such a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.

64 The fact that:

— the earlier mark has a huge reputation for certain specific types of goods or services, and

— those goods or services and the goods or services for which the later mark is registered are dissimilar or dissimilar to a substantial degree, and

— the earlier mark is unique in respect of any goods or services,

does not necessarily imply that there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.

Point (ii) of Question 1 and Question 3

65 By point (ii) of Question 1, the national court asks whether the circumstances set out in points (a) to (d) are sufficient to establish that the use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark. By Question 3, the national court asks, essentially, what the relevant criteria are for the purposes of assessing whether the use of the later mark is or would be detrimental to the distinctive character of the earlier mark.

66 First, as was pointed out in paragraph 30 of this judgment, the types of injury referred to in Article 4(4)(a) of the Directive, where they occur, are the consequence of a certain degree of similarity between the earlier and later marks, by virtue of which the relevant section of the public makes a connection between those two marks, that is to say, establishes a link between them even though it does not confuse them.

67 The more immediately and strongly the earlier mark is brought to mind by the later mark, the greater the likelihood that the current or future use of the later mark is taking unfair advantage of, or is detrimental to, the distinctive character or the repute of the earlier mark.

68 It follows that, like the existence of a link between the conflicting marks, the existence of one of the types of injury referred to in Article 4(4)(a) of the Directive, or a serious likelihood that such an injury will occur in the future, must be assessed globally, taking into account all factors relevant to the circumstances of the case, which include the criteria listed in paragraph 42 of this judgment.

69 As regards the strength of the reputation and the degree of distinctive character of the earlier mark, the Court has already held that the stronger the earlier mark's distinctive character and reputation the easier it will be to accept that detriment has been caused to it (see, regarding Article 5(2) of the Directive, *General Motors*, paragraph 30).

70 Secondly, the circumstances listed in points (a) to (d) of Question 1 are not sufficient to establish the existence of unfair advantage and/or detriment within the meaning of Article 4(4)(a) of the Directive.

71 So far as concerns, in particular, the fact referred to in point (d) of that question, as follows from paragraph 32 of this judgment, the existence of a link between the conflicting marks does not dispense the proprietor of the earlier trade mark from having to prove actual and present injury to its mark, for the purposes of Article 4(4)(a) of the Directive, or a serious likelihood that such an injury will occur in the future.

72 Lastly, as regards, more particularly, detriment to the distinctive character of the earlier mark, the answer to the second part of the third question must be that, first, it is not necessary for the earlier mark to be unique in order to establish such injury or a serious likelihood that it will occur in the future.

73 A trade mark with a reputation necessarily has distinctive character, at the very least acquired through use. Therefore, even if an earlier mark with a reputation is not unique, the use of a later identical or similar mark may be such as to weaken the distinctive character of that earlier mark.

74 However, the more 'unique' the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character.

75 Secondly, a first use of an identical or similar mark may suffice, in some circumstances, to cause actual and present detriment to the distinctive character of the earlier mark or to give rise to a serious likelihood that such detriment will occur in the future.

76 Thirdly, as was stated on paragraph 29 of this judgment, detriment to the distinctive character of the earlier mark is caused when that mark's ability to identify the goods or services for which it is registered and used as coming from the proprietor of that mark is weakened, since use of the later mark leads to dispersion of the identity and hold upon the public mind of the earlier mark.

77 It follows that proof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.

78 It is immaterial, however, for the purposes of assessing whether the use of the later mark is or would be detrimental to the distinctive character of the earlier mark, whether or not the proprietor of the later mark draws real commercial benefit from the distinctive character of the earlier mark.

79 The answer to point (ii) of Question 1 and to Question 3 must therefore be that Article 4(4)(a) of the Directive is to be interpreted as meaning that whether a use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.

80 The fact that:

— the earlier mark has a huge reputation for certain specific types of goods or services, and

— those goods or services and the goods or services for which the later mark is registered are dissimilar or dissimilar to a substantial degree, and

— the earlier mark is unique in respect of any goods or services, and

— for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark to mind,

is not sufficient to establish that the use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark, within the meaning of Article 4(4)(a) of the Directive.

81 Article 4(4)(a) of the Directive must be interpreted as meaning that:

— the use of the later mark may be detrimental to the distinctive character of the earlier mark with a reputation even if that mark is not unique;

— a first use of the later mark may suffice to be detrimental to the distinctive character of the earlier mark;

— proof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.

Costs

82 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 4(4)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that whether there is a link, within the meaning of Case C-408/01 *Adidas-Salomon and Adidas Benelux*, between the earlier mark with a reputation and the later mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.**

2. **The fact that, for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark with a reputation to mind is tantamount to the existence of such a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.**

3. **The fact that:**

   — **the earlier mark has a huge reputation for certain specific types of goods or services, and**

   — **those goods or services and the goods or services for which the later mark is registered are dissimilar or dissimilar to a substantial degree, and**

— the earlier mark is unique in respect of any goods or services,

does not necessarily imply that there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks.

4. Article 4(4)(a) of Directive 89/104 must be interpreted as meaning that whether a use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.

5. The fact that:

— the earlier mark has a huge reputation for certain specific types of goods or services, and

— those goods or services and the goods or services for which the later mark is registered are dissimilar or dissimilar to a substantial degree, and

— the earlier mark is unique in respect of any goods or services, and

— for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark to mind,

is not sufficient to establish that the use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark, within the meaning of Article 4(4)(a) of Directive 89/104.

6. Article 4(4)(a) of Directive 89/104 must be interpreted as meaning that:

— the use of the later mark may be detrimental to the distinctive character of the earlier mark with a reputation even if that mark is not unique;

— a first use of the later mark may suffice to be detrimental to the distinctive character of the earlier mark;

— **proof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.**

[Signatures]