JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

21 April 2010 *

In Case T-361/08,

Peek & Cloppenburg, established in Hamburg (Germany),

van Graaf GmbH & Co. KG, established in Vienna (Austria),

represented by V. von Bomhard, A. Renck, T. Dolde and J. Pause, lawyers,

applicants,

* Language of the case: German.

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by S. Schäffner, acting as Agent,

defendant,

the intervener in the proceedings before the General Court, allowed to replace the Office of the Permanent Secretary, The Prime Minister's Office, Thailand, the other party to the proceedings before the Board of Appeal of OHIM, being

The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, established in Bangkok (Thailand), represented by A. Kockläuner, lawyer,

ACTION brought against the decision of the Fourth Board of Appeal of OHIM of 10 June 2008 (Case R 1677/2007-4), relating to opposition proceedings between Peek & Cloppenburg and the Office of the Permanent Secretary, The Prime Minister's Office, Thailand,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro (Rapporteur), President, S. Papasavvas and N. Wahl, Judges,

Registrar: J. Plingers, Administrator,

gives the following

Judgment

Background to the dispute

1 On 29 October 2004, the Office of the Permanent Secretary, The Prime Minister's Office, Thailand, submitted a Community trade mark application to the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) pursuant to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), as amended (replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

2 The trade mark in respect of which registration was sought is the figurative sign reproduced below:



3 The goods in respect of which registration was sought fall within Classes 24 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, for each of those classes, to the following description:

— Class 24: 'silk';

— Class 25: 'clothing, made of silk'.

4 That application was published in *Community Trade Marks Bulletin* No 24/2005 of 13 June 2005.

5 On 7 September 2005, one of the two applicants in the present case, Peek & Cloppenburg, filed, pursuant to Article 42 of Regulation No 40/94 (now Article 41 of Regulation No 207/2009), a notice of opposition to registration of the mark applied for, alleging a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (now Article 8(1)(b) of Regulation No 207/2009).

6 The opposition was based on the German registration No 30336340 of the following figurative mark:



7 That trade mark was filed on 18 July 2003 and registered on 14 June 2004 for the following goods and services in Classes 18, 25 and 35:

— Class 18: 'Leather goods, in particular belts, bags, containers (in Class 18), and fancy leather goods, in particular purses, wallets, key holders, umbrellas';

— Class 25: 'Clothing (including knitted and woven clothing and articles of clothing in leather) for women, men and children, in particular outer clothing, interior clothing, leisure wear and sports wear; shoes including boots and slippers, belts';

— Class 35: 'Advertising, business management, business administration, office functions, product presentation, distribution of samples for advertising purposes, auction of goods and services, market studies'.

8 The opposition was directed against all the goods covered by the trade mark application.

9 By decision of 15 October 2007, the Opposition Division dismissed the opposition, on the ground that the conflicting signs were not similar and that, in any event, there was no likelihood of confusion on the territory of the Community.

10 On 26 October 2007, Peek & Cloppenburg filed an appeal with OHIM against the Opposition Division's decision.

11 On 15 November 2007, Peek & Cloppenburg applied to the Deutsches Patent- und Markenamt (German Patent and Trade Mark Office) for the transfer of the earlier trade mark to the other applicant in this case, van Graaf GmbH & Co. KG ('van Graaf').

12 By decision of 10 June 2008 ('the contested decision'), the Fourth Board of Appeal of OHIM dismissed the appeal. It confirmed the decision of the Opposition Division that the signs at issue were visually, phonetically and conceptually different so that it was not necessary to compare the goods concerned, since one of the conditions of Article 8(1)(b) of Regulation No 40/94 was not met. It stated that, even if there were a similarity between the signs by reason only of their conceptual similarity, the result would not be altered even if the goods concerned were considered to be identical, since the relevant public would not be mistaken as to their commercial origin.

13 On 11 August 2008, the Deutsches Patent- und Markenamt issued a certificate stating that van Graaf was the new proprietor of the trade mark in place of Peek & Cloppenburg with effect from 17 November 2007.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court on 27 August 2008, the applicants brought the present action.

15 OHIM and The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, lodged their responses at the Registry of the Court on 16 December 2008.

16 On 16 December 2008, in connection with its response, The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, lodged an application for replacement for the purpose of intervening

in proceedings before the Court in place of the Office of the Permanent Secretary, The Prime Minister's Office, Thailand, and sent, on 8 January 2009, to the Court's Registry, a copy of the contract of assignment of the Community trade mark Thai Silk.

17 By letter registered at the Court's Registry on 2 February 2009, OHIM expressed its agreement to that application for replacement. By registered letter of the same date, the applicants indicated that they had no objection to that replacement.

18 By order of 19 June 2009, the Court gave leave to The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, to replace the Office of the Permanent Secretary, The Prime Minister's Office, Thailand, as intervener in the proceedings before the Court.

19 By decision of 9 July 2009, the Court decided to reject the response of The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, as inadmissible, on the ground that it was only from the date of the order of the Court, 19 June 2009, that it became an intervener in the dispute, so that, on the date when the response was lodged, that is, 16 December 2008, it was not a party to the dispute. The Court requested the intervener to put forward its arguments concerning the present case at the hearing.

20 By letter lodged at the Court's Registry on 24 July 2009, The Queen Sirikit Institute of Sericulture, Office of the Permanent Secretary, Ministry of Agriculture and Cooperatives, Thailand, relodged its response of 16 December 2008 along with its annexes so that they would be taken into account in the present proceedings, that is, essentially in order to preserve its right to be heard.

21 The President of the Eighth Chamber of the Court decided, in the light of the specific circumstances of this case, to accept the document and to allow the other parties to make submissions in its regard at the hearing.

22 The applicants, Peek & Cloppenburg and van Graaf, claim that the Court should:

— annul the contested decision;

— order OHIM to pay the costs.

23 OHIM contends that the Court should:

— dismiss van Graaf's action as inadmissible;

— dismiss Peek & Cloppenburg's action as unfounded;

— order the applicants to pay the costs.

24 The intervener contends that the Court should:

— dismiss the action as inadmissible;

— dismiss the action as unfounded;

— order the applicants to pay the costs.

25 The parties presented oral argument and replied to the questions put by the Court at the hearing on 8 October 2009.

Admissibility of the action

Arguments of the parties

26 The applicants state that, on procedural grounds and as a precaution, the action was brought by Peek & Cloppenburg, as the party formally adversely affected within the meaning of Article 63(4) of Regulation No 40/94 (now Article 65(4) of Regulation No 207/2009), and by van Graaf as the party substantively adversely affected. They also request to be informed of any decision of the Court to the effect that only one of them has capacity to bring proceedings.

27 On the basis of Article 63(4) of Regulation No 40/94, OHIM points out that Peek & Cloppenburg was party to the proceedings before the Board of Appeal and therefore it alone is entitled to bring proceedings. It is true that the trade mark has been assigned to van Graaf and that company is substantively adversely affected by the contested decision. However, it is the formal status of party to the appeal proceedings which is decisive for the purposes of that provision. As van Graaf was never a party to the proceedings before the Board of Appeal, it does not have capacity to bring proceedings.

28 According to OHIM, which refers to the case-law of the Court, van Graaf could intervene in place of Peek & Cloppenburg by reason of the assignment of the earlier trade mark, provided it applies to be subrogated to the latter and the Court authorises that subrogation by an order. No application for subrogation has been made by van Graaf.

29 The intervener contends that the action is inadmissible on the ground, first, that, with effect from 17 November 2007, Peek & Cloppenburg is no longer the proprietor of the mark, so that the contested decision cannot adversely affect it within the meaning of Article 63(4) of Regulation No 40/94 and, second, that van Graaf was not party to the proceedings before the Board of Appeal and did not intervene in those proceedings, although it became proprietor of the earlier trade mark shortly after the lodging of the appeal before the Board of Appeal. Thus, neither of the two applicants has an interest in bringing proceedings.

Findings of the Court

30 Article 63(4) of Regulation No 40/94 provides that an action against a decision of the Board of Appeal is 'open to any party to proceedings before the Board of Appeal adversely affected by its decision'.

31 It should be pointed out in that regard that, in a case in which assignment of the mark occurred after the decision of the Board of Appeal but before the introduction of an action before the Court, it has been held that, in accordance with Article 63(4) of Regulation No 40/94, the new owners of an earlier trade mark may bring an action before the Court and should be accepted as a party to the proceedings once they have proven ownership of the right invoked before OHIM (Case T-301/03 *Canali Ireland* v *OHIM - Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 19).

32 It should also be pointed out that, in *CANAL JEAN CO. NEW YORK*, paragraph 31 above, since the new holder of the mark submitted proof of transfer of the mark and OHIM recorded that transfer after the proceedings before the Board of Appeal, that new holder became the party to the proceedings before OHIM (paragraph 20).

33 In the present case, it is apparent from the case-file that, by letter of 15 November 2007, Peek & Cloppenburg applied to the Deutsches Patent- und Markenamt for the transfer of a number of trade marks, including the earlier mark, to van Graaf and that the Deutsches Patent- und Markenamt issued a certificate to van Graaf's representative on 11 August 2008 certifying the transfer to it of that mark with effect from 17 November 2007, so that van Graaf became a party to the proceedings before OHIM within the meaning of Article 63(4) of Regulation No 40/94 (see also, to that effect, Case T-134/06 *Xentral* v *OHIM - Pages jaunes (PAGESJAUNES.COM)* [2007] ECR II-5213).

34 That conclusion cannot be invalidated by the fact that the transfer of the earlier mark was officially registered by the Deutsches Patent- und Markenamt rather than by OHIM, since the earlier mark was registered in Germany and it has not been contested that assignment of that mark to van Graaf took place.

35 The action is thus admissible in relation to van Graaf.

36 Since one and the same application is involved, there is no need to consider whether Peek & Cloppenburg is entitled to bring proceedings (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31; Case T-374/00 *Verband der freien Rohrwerke and Others* v *Commission* [2003] ECR II-2275, paragraph 57; and Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraph 50).

37 It follows from all the foregoing that the action must be declared to be admissible.

Substance

38 The applicants rely on a single plea in law, alleging infringement of Article 8(1)(b) of Regulation No 40/94.

Arguments of the parties

39 The applicants claim that the goods covered by the mark applied for in Class 25 are identical to those covered by the earlier trade mark. With regard to the goods covered by the mark applied for in Class 24 and those covered by the earlier trade mark in Class 25, there is similarity, since both clothing and silk fall within the category of textiles. In addition, since clothing is for wear and can be made of silk used in its manufacture, those goods are in competition. The distribution channels and sales outlets are also often identical.

40 The applicants argue that the signs at issue are very similar visually as they are dominated by an illustration of a peacock, so that the minimal differences between the signs in the representation of peacocks and the secondary elements are not sufficient to cause consumers to perceive them differently. The applicants claim that it is unrealistic and completely incomprehensible to consider, as the Board of Appeal did, that it is impossible 'to associate the respective figurative elements with a specific species of animal'. On the contrary, they take the view that the average consumer will recognise in the signs at issue the representation of a peacock, which is not descriptive for goods in Classes 24 and 25, thereby attracting the consumer's attention. Moreover, the elements which differentiate one sign from the other, that is, the frame, line and colours, are secondary to the point that they will not distract the attention of the average consumer from the common dominant elements. In addition, for German consumers the expression 'Thai Silk' is descriptive of the silk and clothing, since they understand perfectly what it means, and it will therefore not affect the perception of the trade mark applied for.

41 According to the applicants, a number of judgments of this Court have held there to be a likelihood of confusion due to similar visual elements, even though one of the signs to be compared has a word element as well, without the enhanced distinctive character of the other sign being taken into account.

42 The applicants add that, aurally, the signs at issue are either highly similar or not comparable and that, conceptually, they are highly similar or identical.

43 They conclude that, on the German market, there is a likelihood of confusion on the part of the relevant public, which is constituted of consumers who are reasonably well informed and reasonably observant and circumspect. Moreover, it should be borne in mind, first, that the consumer will have an imperfect recollection of the trade marks and, second, that the earlier trade mark is intrinsically highly distinctive.

Visual comparison of the marks is particularly important in the light of the goods at issue, which are generally sold in self-service stores.

44 OHIM and the intervener contend that the Court should reject the plea.

Findings of the Court

45 Under Article 8(1)(b) of Regulation No 40/94, upon opposition by the proprietor of an earlier trade mark, the trade mark applied for 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'.

46 In addition, under Article 8(2)(a)(ii) of Regulation No 40/94 (now Article 8(2)(a)(ii) of Regulation No 207/2009), earlier trade marks mean trade marks 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.

47 According to settled case-law, the risk 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 (see the judgment of 10 September 2008 in Case T-325/06 *Boston Scientific* v *OHIM - Terumo (CAPIO)* (not published in the ECR), paragraph 70 and the case-law cited; see also, by

analogy, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 29, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 17).

48 In addition, 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 (see *CAPIO*, paragraph 47 above, paragraph 71 and the case-law cited; see, by analogy, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22, and Case C-425/98 *Marca Mode* [2000] ECR I-4861, paragraph 40).

49 That global assessment entails a certain interdependence between the factors taken into account and, in particular, between the similarity of the trade marks and the similarity of the goods or services covered. Accordingly, a low degree of similarity between those goods or services may be offset by a high degree of similarity between the marks, and vice versa (Case C-234/06 P *Il Ponte Finanziaria* v *OHIM* [2007] ECR I-7333, paragraph 48, and Case T-6/01 *Matratzen Concord* v *OHIM - Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 25). 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 on numerous elements and, in particular, on the recognition of the trade mark on the market, the association which can be made with the used or registered sign, the degree of similarity between the mark and the sign and between the goods or services identified (see *CAPIO*, paragraph 47 above, paragraph 72 and the case-law cited).

50 Furthermore, the global assessment of the visual, aural or conceptual similarity of the signs at issue must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of Article 8(1)(b) of Regulation No 40/94 – 'there exists a likelihood of confusion on the part of the public' – shows that the perception of marks in the mind of the average consumer of the type of 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 (see *CAPIO*, paragraph 47 above, paragraph 73 and the case-law cited; see also, by analogy, *SABEL*, paragraph 48 above, paragraph 23, and *Lloyd Schuhfabrik Meyer*, paragraph 47 above, paragraph 25).

51 For the purposes of the global assessment of the likelihood of confusion, the average consumer of the goods concerned is deemed to be reasonably well informed, and reasonably observant and circumspect. Furthermore, 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 must place his trust in his imperfect recollection of them. 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 (Case T-104/01 *Oberhauser* v *OHIM - Petit Liberto (Fifties)* [2002] ECR II-4359, paragraph 28, and Case T-186/02 *BMI Bertollo* v *OHIM - Diesel (DIESELIT)* [2004] ECR II-1887, paragraph 38; see, by analogy, *Lloyd Schuhfabrik Meyer*, paragraph 47 above, paragraph 26).

52 In the present case, it is apparent from paragraph 16 of the contested decision, first, that the Board of Appeal took into account the German-speaking public, since the earlier trade mark is a German mark and, second, that the relevant public in respect of which the likelihood of confusion is to be assessed is that consisting of the average German-speaking consumer, who is presumed to be reasonably well informed, and reasonably observant and circumspect. That premiss, which was moreover not contested by the applicants, must be confirmed.

53 The intervener contends that the relevant public is a public with a high level of attention.

54 However, concerning goods such as those in the present case which are everyday consumer goods, the Board of Appeal rightly considered that the relevant public consisted of the average consumer deemed to be reasonably well informed and reasonably

observant and circumspect (see, to that effect, Case T-423/04 *Bunker & BKR* v *OHIM - Marine Stock (B.K.R.)* [2005] ECR II-4035, paragraph 54 and the case-law cited).

Similarity of the signs

55 First, as to the visual comparison, the Board of Appeal correctly found, in paragraph 17 of the contested decision, that the signs at issue were visually different.

56 It is the case that the two signs are composed of an element representing an animal. Thus, the mark applied for is composed of an animal meant to represent a peacock in stylised form seen in profile, standing and facing to the right, its feet not visible and its long tail appearing to be covered in ocelli. That element is blue in colour and appears in the centre of a circle, also blue, under which is the expression 'Thai Silk'. In comparison, the earlier trade mark is composed of an element which also represents a winged creature, seen in profile in a standing position and facing to the right, which is not immediately discernible as representing a peacock, since the representation is schematic. That winged creature has a crest, feet schematically drawn and a tail which appears to be covered in scales. However, even if a part of the relevant public might perceive in that figurative element the representation of a peacock, that representation is so far removed from the stylised representation of that animal in the mark applied for that the relevant public would visually perceive them differently.

57 As the Board of Appeal rightly stated in paragraph 21 of the contested decision, the mere fact that the two representations are oriented to the right cannot give rise to a visual similarity between the signs at issue.

58 Second, concerning the aural comparison, it must be pointed out that, in the strict sense, the aural reproduction of a complex sign corresponds to that of all its verbal elements, regardless of their specific graphic features, which fall more within the scope of the analysis of the sign on a visual level (Case T-352/02 *Creative Technology* v *OHIM - Vila Ortiz (PC WORKS)* [2005] ECR II-1745, paragraph 42).

59 In that regard, as the Board of Appeal rightly noted in paragraph 23 of the contested decision, the signs at issue are also different. The mark applied for is composed of the word element 'Thai Silk', which does not appear in the earlier trade mark. Since the relevant public will use that word element to refer to the mark applied for, there is no aural similarity that could possibly ensue from the relevant public identifying the same animal in the two signs. It cannot be envisaged that the relevant public will refer to the mark applied for using – rather than its word element – the German word corresponding to the animal represented in its figurative element, which is, incidentally, somewhat imprecise, since it cannot be excluded that the relevant public will not directly recognise a peacock in that figurative element.

60 Even if the word element of the mark applied for may be considered to be descriptive, as the applicants claim, that does not preclude the relevant public, when it has to refer to the trade mark, exclusively using its word element rather than the term corresponding to the animal represented in its figurative element, since that correspondence is, by its nature, indirect and, in this particular case, there is uncertainty as to the term, notwithstanding the case-law upon which the applicants rely, according to which the public does not regard a descriptive element forming part of a compound mark as the distinctive and dominant element of the overall impression conveyed by that mark (see the judgment of 22 May 2008 in Case T-205/06 *NewSoft Technology* v *OHIM – Soft (Presto! Bizcard Reader)* (not published in the ECR), paragraph 56 and the case-law cited).

61 Third, as regards conceptual comparison, it is true, as the Board of Appeal held in paragraph 24 of the contested decision, that, for there to be similarity, the two representations must be directly perceived by the relevant public as representing a peacock.

It is also true that such an assumption cannot be confirmed, inasmuch as the two representations are visually dissimilar.

62 However, it cannot be ruled out that part of the relevant public may recognise a peacock in the two figurative elements, which could thus indicate a certain conceptual similarity between the signs at issue. The earlier trade mark, although drawn schematically, contains some of the attributes of a peacock, namely the crest and the long tail. As to the mark applied for, it is more directly close to a representation of a peacock because of the presence of ocelli and the general posture.

63 In that regard it should be pointed out that conceptual similarity arises from the fact that two marks use images with analogous semantic content (*SABEL*, paragraph 48 above, paragraph 24). Thus, to the extent that it is considered that the relevant public might be led to discern peacocks in the signs at issue, those signs use images which concur in their conceptual content, in the sense that such images suggest or transmit to the relevant public an idea of the beauty or elegance of the goods concerned, qualities which are traditional attributes of the peacock.

64 However, it is clear that such conceptual similarity must be regarded as weak because the signs at issue indirectly suggest or transmit to the relevant public the same conceptual content.

65 To that extent, it must be held that the Board of Appeal was wrong to conclude, in paragraph 24 of the contested decision, that the signs at issue presented no conceptual similarity. It is, however, clear that that cannot, at this stage, lead to the annulment of the contested decision, since the Board of Appeal, in paragraph 29 of the contested decision, when considering whether there was a conceptual similarity between the signs at issue, also examined whether there was any likelihood of confusion.

Similarity of the goods

66 As follows from paragraph 29 of the contested decision, the goods covered by the earlier trade mark are in Class 25, that is clothing, including that covered by the figurative Community trade mark Thai Silk in Classes 24 and 25, that is, respectively, silk and clothing made of silk.

67 It follows that the goods at issue must be considered to be identical, so that the intervener's argument that clothing and silk are not identical cannot be upheld.

Likelihood of confusion

68 Although the goods at issue are identical and despite the weak conceptual similarity between the signs at issue, the Board of Appeal correctly concluded that the overall impression given by the marks at issue would not give rise to a likelihood of confusion in the minds of the relevant public.

69 In that regard, it should be pointed out that conceptual similarity resulting from the fact that two marks use images with analogous semantic content might give rise to a likelihood of confusion where the earlier trade mark has a particularly distinctive character either per se or because of the reputation it enjoys with the public. However, where the mark is not especially well known to the public and consists of an image with little imaginative content, the mere fact that the two marks are conceptually similar is not sufficient to give rise to a likelihood of confusion (see *SABEL*, paragraph 48 above, paragraphs 24 and 25).

70 It is clear that it follows neither from the case-file nor from the applicants' argument that the earlier trade mark has a particularly distinctive character either per se or because of any supposed reputation.

71 Moreover, it should be noted that, in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market. The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs (Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look* v *OHIM - Naulover (NLSPORT, NLJEANS, NLACTIVE and NL-Collection)* [2004] ECR II-3471, paragraph 49).

72 Having regard to the goods concerned and the way in which they are marketed, it must be stated that visual and aural similarities between the signs at issue, which in this case are the most important, are specifically absent.

73 Thus, the visual and aural differences found are such as to neutralise the weak conceptual similarity. Faced with the two signs at issue, it is completely impossible that the relevant public could establish a link between them giving rise to a likelihood of confusion and causing it to believe that the goods concerned came from the same undertaking or from economically-linked undertakings. Moreover, even if clothing producers do sometimes create a number of lines of goods, it is wholly improbable, as the Board of Appeal correctly stated in paragraph 32 of the contested decision,

that the relevant public, faced with the two signs at issue, could believe that they were variants of the same mark or sub-brands of the same manufacturer.

74 In those circumstances, the single plea must be rejected and the action accordingly dismissed.

Costs

75 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Peek & Cloppenburg and van Graaf have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by OHIM and the intervener.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Peek & Cloppenburg and van Graaf GmbH & Co. KG to pay the costs.

Martins Ribeiro Papasavvas Wahl

Delivered in open court in Luxembourg on 21 April 2010.

[Signatures]