

In *You-View.tv v. Office for Harmonization in the Internal Market [OHIM]*, the General Court held that the opponent in trade mark opposition proceedings was permitted to submit late evidence concerning the ownership of the earlier trade mark registration on which the opposition was based.

In September 2011, the company YouView TV Limited filed an application for the registration of the word mark "YouView+" as a Community trade mark in classes 9, 16, 38, 41 and 42. Following publication, You-View.tv filed a notice of opposition on the basis of its earlier Benelux figurative trade mark registration "You View You-View.tv" in classes 35, 38 and 41. In the course of the opposition proceedings, OHIM notified the opponent that it had to substantiate the earlier rights pursuant to Rule 19(2) of Commission Regulation (EC) No. 2868/95 implementing Council Regulation (EC) No. 40/94 on the Community trade mark. The notification indicated that OHIM would not inform the opponent whether the required evidence was missing and that the opposition would be rejected without any examination of its merits if the evidence was not filed within the time period set by the Office. The opponent filed an extract from the Benelux Trade Mark Office indicating You-View.tv BVBA, i.e. not You-View.tv, as the name of the holder of the earlier mark. Since the opposition was filed in the name of You-View.tv, and not You-View.tv BVBA, OHIM's Opposition Division rejected the opposition in its entirety in its decision of September 2012. It explained that there was a discrepancy between the opponent's name and the name of the holder of the earlier trade mark and that the opponent had not provided any evidence of the transfer of ownership of the earlier mark.

In the appeal proceedings, the opponent submitted evidence intended to establish its ownership of the earlier mark. It argued, inter alia, that it had become a public limited company prior to the opposition and that the modification of its legal form had not been notified to the Benelux Trade Mark Office at that time.

The Fourth Board of Appeal rejected the opponent's argument and held that OHIM had, in the circumstances of the present case, no discretion to accept the facts and evidence submitted after the expiry of the respective time limit. It argued that it was prevented by Rule 20(1) in conjunction with Rule 19 of Regulation No. 2868/95 to exercise its discretion. The opponent submitted a further appeal to the General Court.

The opponent raised three pleas in law, amongst others an infringement of Article 76(2) of Regulation (EC) No. 207/2009 on the Community trade mark and of Rule 20(1) of Regulation No. 2868/95.

On hearing the appeal, the General Court annulled the decision of OHIM's Board of Appeal. In referring to the decision of the Court of Justice in Case C/120/12 P *Rintisch v. OHIM*, the General Court held that the above provisions do not preclude the Board of Appeal from using its discretion under Article 76(2) of Regulation No. 207/2009 in order to take account of facts and evidence submitted late in the opposition proceedings. The General Court confirmed that the Board of Appeal had been wrong to consider Rule 20, indicating that OHIM should reject an opposition if the opponent fails to provide within the prescribed period evidence of the earlier rights relied on, as a provision which would prevent OHIM exercising its discretion.

The reason why the opponent's appeal to the General Court was successful in the present case was due to the fact that OHIM did not exercise its discretion at all. This was contrary to the Court's earlier case law in the cited *Rintisch* judgment as well as in the famous *Kaul* case. However, the lesson of the General Court's decision should not be that opponents may safely rely on a second round as regards the evidence as to their ownership of the earlier trade marks. In exercising its discretion, OHIM's Opposition Division may reject such subsequent evidence out of order because it could have been submitted in time. Opponents are therefore called to be extra vigilant when it comes to the formalities of oppositions filed at OHIM.

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This article first appeared on WTR Daily, part of World Trademark Review, in July 2014. For further information, please go to [www.worldtrademarkreview.com](http://www.worldtrademarkreview.com)