Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 13 January 2016[1]

Case C-597/14 P

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)
v

Xavier Grau Ferrer

(Appeal — Community trade mark — Opposition by the proprietor of an earlier trade mark — Proof of the existence, validity and scope of protection of the earlier trade mark — Account taken by the Board of Appeal of evidence submitted out of time — Regulation (EC) No 207/2009 — Article 74(2) — Regulation (EC) No 2868/95 — Third subparagraph of Rule 50(1)))

I – Introduction

1. By its appeal, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) asks the Court to set aside the judgment of the General Court of the European Union of 24 October 2014 in *Grau Ferrer* v *OHIM — Rubio Ferrer (Bugui va)*,[2] by which that court upheld the action for annulment of the decision of the Fourth Board of Appeal of OHIM relating to opposition proceedings between Mr Xavier Grau Ferrer, on the one hand, and Messrs J.C. Rubio Ferrer and A. Rubio Ferrer, on the other.[3]

2. Among other matters, this appeal raises an important point of procedure in relation to OHIM's practice, namely the scope of the discretion of the Boards of Appeal in the event of the admission of evidence submitted out of time, in accordance with Article 76(2) of Regulation (EC) No 207/2009.[4]

3. This issue, which the Court has already had occasion to examine,[5] once again raises questions relating to both case-law and legislation.

1 — Original language: French.

2 — T-543/12, EU:T:2014:911 ('the judgment under appeal').

3 — Decision of 11 October 2012 (Joined Cases R-274/2011-4 and R-520/2011-4, 'the contested decision').

4 — Council Regulation of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1).

5 — Judgments in *OHIM* v *Kaul* (C-29/05 P, EU:C:2007:162); *New Yorker SHK Jeans* v *OHIM* (C-621/11 P, EU:C:2013:484); *Centrotherm Systemtechnik* v *centrotherm Clean Solutions* (C-609/11 P, EU:C:2013:592); *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

II – Legal framework

A – *Regulation No 207/2009*

4. Article 41(3) of Regulation No 207/2009, which governs the filing of an opposition to the registration of a Community trade mark, provides:

‘Opposition must be expressed in writing and must specify the grounds on which it is made. … Within a period fixed by [OHIM], the opponent may submit in support of his case facts, evidence and arguments.’

5. Article 76(2) of that regulation provides:

‘[OHIM] may disregard facts or evidence which are not submitted in due time by the parties concerned.’

B – *Regulation (EC) No 2868/95*

6. Rule 15(2) of Regulation (EC) No 2868/95 [6] provides:

‘The notice of opposition shall contain:

…

(b) a clear identification of the earlier trade mark or earlier right on which the opposition is based, namely:

(i) … the indication of the file number or registration number of the earlier mark, the indication whether the earlier mark is registered or an application for registration, as well as the indication of the Member States including, where applicable, the Benelux, in or for which the earlier mark is protected, or, if applicable, the indication that it is a Community trade mark;

…

(e) a representation of the earlier mark as registered or applied for; if the earlier mark is in colour, the representation shall be in colour;

…’

7. Rule 19 of that regulation provides:

‘1. The Office shall give the opposing party the opportunity to present the facts, evidence and arguments in support of his opposition … within a time limit specified by it and which shall be at least 2 months starting on the date on which the opposition proceedings shall be deemed to commence …

6 — Commission Regulation of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark, as amended by Commission Regulation (EC) No 1041/2005 of 29 June 2005 (OJ 2005 L 172, p. 4, ‘Regulation No 2868/95’).

2. Within the period referred to in paragraph 1, the opposing party shall also file proof of the existence, validity and scope of protection of his earlier mark or earlier right, as well as evidence proving his entitlement to file the opposition. In particular, the opposing party shall provide the following evidence:

   (a) if the opposition is based on a trade mark which is not a Community trade mark, evidence of its filing or registration, by submitting:

   …

      (ii) if the trade mark is registered, a copy of the relevant registration certificate and, as the case may be, of the latest renewal certificate, showing that the term of protection of the trade mark extends beyond the time limit referred to in paragraph 1 and any extension thereof, or equivalent documents emanating from the administration by which the trade mark was registered;

…'

8. Rule 20(1) of the same regulation provides:

'If until expiry of the period referred to in Rule 19(1) the opposing party has not proven the existence, validity and scope of protection of his earlier mark … the opposition shall be rejected as unfounded.'

9. The third subparagraph of Rule 50(1) of Regulation No 2868/95 provides:

'Where the appeal is directed against a decision of an Opposition Division, the Board shall limit its examination of the appeal to facts and evidence presented within the time limits set in or specified by the Opposition Division in accordance with the Regulation and these Rules, unless the Board considers that additional or supplementary facts and evidence should be taken into account pursuant to Article [76](2) of … Regulation [No 207/2009].'

III – Background to the dispute

10. On 23 October 2008, Messrs J.C. Rubio Ferrer and A. Rubio Ferrer filed with OHIM an application for registration of a Community trade mark consisting of a figurative sign including the word elements 'Bugui va' in respect of certain goods and services falling within classes 31, 35 and 39 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 ('the Nice Agreement').

11. On 10 August 2009, Mr Grau Ferrer filed a notice of opposition to registration of that mark which was based on two earlier trade marks, each consisting of figurative signs including the word element 'Bugui':

— Spanish trade mark No 2600724, registered for all the goods in class 31 of the Nice Agreement; and

— Community trade mark No 2087534, registered for goods and services in classes 31, 32 and 39 of the Nice Agreement.

12. On 21 December 2010, the Opposition Division of OHIM partially upheld the opposition.

13. On the one hand, it rejected the opposition based on the Spanish trade mark after finding that the applicant had not produced any document containing a representation of that trade mark and, therefore, any proof of its existence within the prescribed time limit. On the other hand, it partially upheld the opposition based on the Community trade mark, on the ground that, in the case of some of the goods in respect of which registration had been sought, there was a likelihood of confusion with the trade mark applied for.

14. Two appeals against that decision were filed on 10 and 14 February 2011 respectively by Mr Grau Ferrer and Messrs J.C. Rubio Ferrer and A. Rubio Ferrer.

15. By the decision at issue, the Fourth Board of Appeal of OHIM upheld the appeal filed by Messrs J.C. Rubio Ferrer and A. Rubio Ferrer and dismissed the appeal filed by Mr Grau Ferrer.

16. With regard to the opposition based on the Spanish trade mark, the Board of Appeal confirmed the Opposition Division's decision that proof of the existence of that trade mark had not been furnished.

17. As for the opposition based on the Community trade mark, it took the view, contrary to the Opposition Division, that the evidence produced was not sufficient to demonstrate that that trade mark had been put to genuine use in a form which does not alter its distinctive character. It therefore annulled the Opposition Division's decision and rejected the opposition filed by Mr Grau Ferrer in its entirety.

IV – The judgment under appeal

18. By application lodged at the Registry of the General Court on 18 December 2012, Mr Grau Ferrer brought an action for the annulment of the decision at issue.

19. In support of that action, he raised three pleas in law alleging, first, infringement of Articles 75 and 76 of Regulation No 207/2009 and Rule 50 of Regulation No 2868/95; secondly, incorrect assessment of the genuine use of the earlier Community trade mark; and, thirdly, incorrect assessment of the likelihood of confusion.

20. The General Court upheld the first plea in law, in paragraphs 17 to 52 of the judgment under appeal, on the ground that, so far as concerns the opposition based on the Spanish trade mark, the Board of Appeal failed to exercise its discretion under Article 76(2) of Regulation No 207/2009 and the third subparagraph of Rule 50(1) of Regulation No 2868/95.

21. The General Court held that the Board of Appeal had to decide, in a reasoned manner, whether it was necessary to take into account the evidence of the validity of the earlier Spanish trade mark even though that evidence had been furnished for the first time before it and, therefore, out of time.

22. As regards the effects of that procedural infringement, the General Court stated that it was not for it to examine, for the first time, whether it was necessary to take into account the evidence of the validity of the earlier trade mark which had been submitted out of time, it being for the Board of Appeal to make that assessment in the decision that it would give following the annulment of the contested decision.

23. Furthermore, the General Court also upheld the third complaint raised under the second plea in law, in paragraphs 72 to 88 of the judgment under appeal, after finding, with regard to the opposition based on the earlier Community trade mark, that the proof of genuine use adduced by Mr Grau Ferrer before OHIM was sufficient, since it related to signs which were broadly equivalent to that earlier trade mark as registered.

24. The General Court therefore annulled the decision at issue, without needing to examine the third plea in law.

V – Forms of order sought by the parties

25. By its appeal, OHIM claims that the Court should set aside the judgment under appeal and, if the appeal is upheld, dismiss the action against the decision at issue or, failing that, refer the case back to the General Court and order Mr Grau Ferrer to pay the costs. The other parties to the proceedings before the General Court did not set out the forms of order sought.

VI – Analysis

26. OHIM raises three grounds of appeal.

27. The first and second grounds allege infringement, in two different respects, of the provisions conferring on the Board of Appeal the discretion to admit evidence submitted out of time, namely Article 76(2) of Regulation No 207/2009 and the third subparagraph of Rule 50(1) of Regulation No 2868/95.

28. I shall focus my analysis on those two grounds of appeal. The third ground, alleging infringement of point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009, must, for the reasons that I shall set out briefly at length, be dismissed at the outset as inadmissible.

A – *The statement of grounds for the judgment under appeal*

29. As a preliminary point, I would submit that, in my view, the Court must find of its own motion that the grounds contained in paragraphs 43 to 46 of the judgment under appeal, to which the first and second grounds of appeal refer, are vitiated by defective reasoning.

30. By those grounds, the General Court responded to OHIM's argument that the Board of Appeal is justified in not exercising its discretion where the material submitted out of time is entirely new and not merely supplementary.

31. The General Court finds in this regard that the Board of Appeal refused to admit the document in question 'without examining whether it was new or supplementary' (paragraph 43 of the judgment under appeal) and, furthermore, that that material was not 'entirely new' (paragraph 44 of that judgment). Next, the General Court finds that, 'moreover, whether [the document in question] was supplementary or not', the Board of Appeal still had discretion to admit it (paragraph 45) and dismisses OHIM's argument that that discretion does not extend to new evidence (paragraph 46 of the judgment).

32. I note that the reasoning set out in the judgment under appeal does not make clear in what is the logical order those grounds.

33. Thus, on the one hand, the General Court criticises the Board of Appeal for having refused to admit the document in question without examining whether it was 'new or supplementary', and observes that that document was not 'entirely new' (paragraphs 43 and 44 of the judgment under appeal). On the other hand, the General Court states that, 'moreover', that question is irrelevant because the provisions relied on apply 'whether the document is supplementary or not' and also cover 'new evidence' (paragraphs 45 and 46 of the judgment).

34. Since those two grounds are contradictory, the view cannot be taken that one of them is decisive and the other incidental.

35. The General Court failed to give an unambiguous response to OHIM's argument that the Boards of Appeal have no discretion in relation to new evidence and, therefore, failed to spell out the content of the procedural rule that it intended to apply.

36. I would none the less make the point that the judgment under appeal need not be set aside on account of defective reasoning if the operative part of that judgment appears founded on other legal grounds.[7] In my view, that is the case here.[8]

B – *Infringement of Article 76(2) of Regulation No 207/2009 and the third subparagraph of Rule 50(1) of Regulation No 2868/95 (first and second grounds of appeal)*

37. By its first plea, OHIM submits that the General Court relied on erroneous criteria in finding that the document submitted out of time was not 'entirely new' (paragraphs 43 and 44 of the judgment under appeal). By its second ground of appeal, OHIM criticises the reasoning in the judgment under appeal to the effect that the Board of Appeal had discretion to admit the document submitted out of time, whether it was new or not (paragraphs 45 and 46 of the judgment).

38. I propose to reverse the order of those grounds of appeal and to examine first the issue of whether, in opposition proceedings, the Boards of Appeal have discretion to take account of evidence that is entirely new.

1. Reminder of case-law

39. The exchange of argument and evidence in relation to the first and second grounds of appeal relates in essence to the interpretation of the judgment in *OHIM* v *Kaul*[9] and the case-law resulting from that judgment.

40. In that judgment, the Court held that it follows from Article 74(2) of Regulation (EC) No 40/94,[10] currently Article 76(2) of Regulation No 207/2009, that, as a general rule and unless otherwise specified, the submission of facts and evidence by the parties remains possible after the expiry of the time limits prescribed by that regulation.[11]

7 — Judgments in *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 47) and *Biret International* v *Council* (C-93/02 P, EU:C:2003:517, paragraph 60).

8 — See point 99 of this Opinion.

9 — C-29/05 P, EU:C:2007:162.

10 — Council Regulation of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

11 — Judgment in *OHIM* v *Kaul* (C-29/05 P, EU:C:2007:162, paragraph 42).

41. That provision does not to confer an unconditional right on the party in question, but grants OHIM a broad discretion which it is required to exercise, taking into account, first, the relevance of the evidence and, secondly, the stage of the proceedings and other circumstances surrounding its submission. [12]

42. The failure to exercise that discretion effectively, objectively and in a reasoned manner constitutes an irregularity which may bring about the annulment of the decision. [13]

43. Article 76(2) of Regulation No 207/2009 applies to all the adjudicating bodies within OHIM.

44. It follows from this that the OHIM Boards of Appeal are not, in principle, bound by the time limits set at first instance and may admit evidence submitted out of time by virtue of their discretion under Article 76(2) of Regulation No 207/2009, provided that they exercise that discretion effectively, objectively and in a reasoned manner.

45. In the case of opposition proceedings, that consideration follows explicitly from the third subparagraph of Rule 50(1) of Regulation No 2868/95, according to which the Board of Appeal is to limit its examination of the appeal to facts and evidence presented within the time limits set at first instance, unless it considers that 'additional or supplementary' [14] facts and evidence should be taken into account pursuant to Article 76(2) of Regulation No 207/2009.

46. The judgment in *OHIM* v *Kaul* [15] does not address the question of whether the Board of Appeal may also accept evidence submitted out of time where this constitutes the first offer of evidence, in the sense that no relevant evidence has been adduced within the time limit set.

47. The Court has examined that question in cases relating to (i) proof of use of a trade mark and (ii) proof of the existence, validity and scope of the protection so afforded.

48. With regard to proof of use, the Court held in its judgment in *New Yorker SHK Jeans* v *OHIM* [16] that, when no proof of use of the trade mark in question is submitted within the time limit set, the opposition must automatically be rejected. However, where some relevant evidence has been submitted within the time limit set, the late submission of additional proof is possible and falls within the discretion provided for in Article 76(2) of Regulation No 207/2009.

49. In the judgments in *Centrotherm Systemtechnik* v *centrotherm Clean Solutions* and *Centrotherm Systemtechnik* v *OHIM*, [17] the Court adopted the same interpretation of Article 76(2) of Regulation No 207/2009 in relation to the furnishing of proof of use of the trade mark in the context of revocation proceedings. The Court held that exercise of the discretion at issue is subject to the condition that the evidence is supplementary and adduced by way of complement to the relevant evidence submitted within the time limit set.

12 — Ibid. (paragraphs 43 and 44).

13 — See, inter alia, the judgment in *Centrotherm Systemtechnik* v *OHIM* (C-610/11 P, EU:C:2013:593, paragraphs 110 and 111).

14 — This expression differs significantly from one language version of the regulation to the other; see footnote 26 of this Opinion.

15 — C-29/05 P, EU:C:2007:162.

16 — C-621/11 P, EU:C:2013:484, paragraphs 27 to 30 and 34.

17 — See, with regard to the time limit laid down in the second sentence of Rule 40(5) of Regulation No 2868/95, the judgments in *Centrotherm Systemtechnik* v *centrotherm Clean Solutions* (C-609/11 P, EU:C:2013:592) and *Centrotherm Systemtechnik* v *OHIM* (C-610/11 P, EU:C:2013:593).

50. With regard to proof of the existence, validity and scope of the protection afforded by the trade mark, the Court held, in the judgments in *Rintisch* v *OHIM*, that an OHIM Board of Appeal has the discretion deriving from the third subparagraph of Rule 50(1) of Regulation No 2868/95 and Article 76(2) of Regulation No 207/2009 to decide whether or not to take into account 'additional or supplementary' evidence submitted out of time. [18]

51. It should be noted that, in this regard, the Court did not endorse the proposal put forward in those cases by Advocate General Sharpston, [19] who had highlighted the differences between proof of use of a trade mark, on the one hand, and proof of the existence, validity and scope of protection of a trade mark, on the other. In the case of the latter category, the evidentiary threshold is laid down in Rule 19 of Regulation No 2868/95, which requires in particular that the registration certificate of the earlier trade mark be submitted. Advocate General Sharpston takes the view that, in the case of a document explicitly defined as indispensable in an opposition, there is no scope for debating whether the late evidence is new or supplementary. The document attesting to the earlier trade mark's registration certainly cannot be accepted at the appeal stage.

52. Although it rejected that approach, the Court none the less took into account the particular nature of the category of proof in question, namely the fact that it was constituted by the documents listed in Rule 19(2)(a)(ii) of Regulation No 2868/95.

53. The Court stated that, in the case of the category of proof in question, the discretion provided for in Article 76(2) of Regulation No 207/2009 must be exercised restrictively, with the result that the late submission of evidence may be allowed only if the delay is justified by the circumstances, which it is for the person concerned to demonstrate. [20] In that regard, the Court distanced itself from the approach whereby the admission of evidence under Article 76(2) of Regulation No 207/2009 is not subject to a requirement that the delay be justified. [21]

2. The scope of the discretion available to the Boards of Appeal in relation to evidence that is entirely new

54. According to settled case-law concerning proof of use of a trade mark, Article 76(2) of Regulation No 207/2009 does not allow the Board of Appeal to take account of entirely new evidence submitted out of time where no relevant evidence has been furnished within the time limit set.

55. I take the view, as OHIM submits in the present appeal, that the provision in question should be interpreted in the same way in relation to proof of the existence, validity and scope of protection of a trade mark.

56. That approach seems to me to be justified primarily by the scheme of the relevant provisions.

57. After all, Article 76(2) of Regulation No 207/2009 contains a rule which applies horizontally within the scheme of that regulation, inasmuch as it applies irrespective of the nature of the proceedings concerned.

58. I see no reason to draw a distinction based on the nature of the proof concerned when it comes to applying that rule.

18 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628, paragraphs 33 and 34); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638, paragraphs 32 and 33); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639, paragraphs 33 and 34).

19 — Opinion of Advocate General Sharpston in *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:311, C-121/12 P, EU:C:2013:312, C-122/12 P, EU:C:2013:313, points 71 to 74).

20 — See, inter alia, the judgment in *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638, paragraphs 40 and 41).

21 — See, inter alia, the judgment in *Centrotherm Systemtechnik* v *OHIM* (C-610/11 P, EU:C:2013:593, paragraph 117).

59. As I see it, there is no relevant difference in this regard between the proof of use of a trade mark referred to in Rule 22 of Regulation No 2868/95 and the proof of the existence, validity and scope of protection of a trade mark referred to in Rule 19(2) of the same regulation.

60. Indeed, there is even a degree of overlap between those two categories of proof when it comes to furnishing proof of a well-known trade mark or a trade mark with reputation as referred to in Rule 19(2)(b) and (c) of that regulation. The evidence attesting to the reputation enjoyed by a trade mark may be identical to that intended to prove the use of the trade mark, a fact which fully justifies the proposition that the two situations should be treated in the same way.

61. Furthermore, the contention that Article 76(2) of Regulation No 207/2009 should interpreted in a uniform manner irrespective of the category of proof seems to me to be fully corroborated by the purpose of that provision.

62. After all, the provision concerned serves a dual purpose. First, it encourages the parties to respect the time limits imposed because, by submitting evidence late, they run the risk that that evidence will be rejected. Secondly, it preserves OHIM's discretion to take account of relevant evidence, albeit submitted out of time, in the interests of legal certainty and sound administration. [22]

63. When exercising that discretion, OHIM must also respect the dual function of procedural time limits, which, on the one hand, serve to ensure that the proceedings are conducted properly and, on the other hand, provide a means of securing respect for the rights of the defence in *inter partes* proceedings.

64. In my view, all of those considerations are equally applicable both to proof of use of a trade mark and to proof of the existence, validity and scope of the protection so afforded.

65. After all, the very possibility of admitting new evidence of the existence, validity and scope of the earlier right at the appeal stage in circumstances where no relevant evidence had been submitted within the time limit initially set for that purpose would significantly detract from the incentive for the party in question to comply with that time limit.

66. What is more, the admission of evidence submitted out of time in such circumstances would bring about a significant imbalance between the parties, since it would enable the opposing party to defer, to the appeal stage, the exchange of argument and evidence relating to the existence, validity and scope of the protection afforded by its earlier right.

67. Thus, other than at the risk of calling into question the system of procedural time limits, which serves inter alia to establish a balance between the parties, evidence that is entirely new cannot, in my opinion, be admitted at the appeal stage.

68. Lastly, it is necessary to examine whether that solution is indeed compatible with the principles underlying the judgments in *Rintisch* v *OHIM*. [23]

69. In those judgments, the Court held that, so far as concerns proof of validity of the earlier trade mark, Article 76(2) of Regulation No 207/2009 gives the Board of Appeal discretion to decide whether or not to take into account 'additional or supplementary' facts and evidence not presented within the time limit set. [24]

22 — See the judgment in *OHIM* v *Kaul* (C-29/05 P, EU:C:2007:162, paragraphs 47 and 48).

23 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

24 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628, paragraph 33); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638, paragraph 32); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639, paragraph 33).

70. The first point I would make is that the version of the judgments in *Rintisch* v *OHIM* [25] in the language of the case, English, like most of the other language versions (with the exception, if I am not mistaken, of the Spanish, French, Romanian and Finnish versions), refers not to 'new or supplementary' but to 'additional or supplementary' facts and evidence. [26]

71. That divergence between the various language versions of the relevant paragraphs of the judgments in *Rintisch* v *OHIM*, [27] which stems from the same divergence between the language versions of the third subparagraph of Rule 50(1) of Regulation No 2868/95, may seem to cast doubt on the proposition that that provision does not allow the Boards of Appeal to admit evidence submitted out of time even where that evidence is entirely new.

72. That is not the case, however.

73. It is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for interpretation. In the event of divergence between the language versions, the provision in question must be interpreted uniformly and by reference to the purpose and general scheme of the rules. [28]

74. In this instance, the third subparagraph of Rule 50(1) of Regulation No 2868/95, which is applicable to opposition proceedings, refers only to Article 76(2) of Regulation No 207/2009. Since it is a provision of an implementing regulation, Rule 50 is not therefore the source of the discretion at issue and cannot expand the scope of the discretion exercised by the Boards of Appeal under Article 76(2) of Regulation No 207/2009.

75. As I have already submitted, taking into account its purpose and its context, that latter provision must be interpreted in a uniform manner, irrespective of the nature of the proof in question.

76. Consequently, the divergence between the language versions of the third subparagraph of Rule 50(1) of Regulation No 2868/95, since it also affects the relevant paragraphs of the judgments in *Rintisch* v *OHIM*, [29] must be resolved to the effect that the discretion enjoyed by the Boards of Appeal under Article 76(2) of Regulation No 207/2009 applies only to the taking into account of supplementary evidence and does not extend to the situation where no relevant evidence had been submitted within the time limit set.

3. Application of that interpretation to the analysis of the second ground of appeal

77. By its second plea, OHIM submits that the General Court committed an error of law in finding, in paragraphs 45 and 46 of the judgment under appeal, that Article 76(2) of Regulation No 207/2009 gave the Board of Appeal a discretion even in relation to new evidence.

78. In the light of my foregoing observations, the position thus adopted by OHIM is well-founded.

25 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

26 — Thus, for example, the versions in German ('zusätzliche oder ergänzende Sachverhalte und Beweismittel'), Spanish ('hechos y pruebas adicionales'), English ('additional or supplementary facts and evidence'), Italian ('fatti e prove ulteriori o complementari'), Lithuanian ('papildomi arba pridėtiniai faktai bei įrodymai'), and Polish ('dodatkowe lub uzupełniające fakty i dowody').

27 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

28 — Judgments in *Cricket St Thomas* (C-372/88, EU:C:1990:140, paragraphs 18 and 19) and *Brey* (C-140/12, EU:C:2013:565, paragraph 74).

29 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

79. Consequently, the judgment under appeal is vitiated by an error in law in so far as the General Court held, in paragraphs 45 and 46 of that judgment, that the discretion at issue is exercisable whether or not the evidence is supplementary and also extends to new evidence.

80. I would recall, however, that, in accordance with settled case-law, if the grounds of a judgment of the General Court disclose an infringement of EU law but the operative part is shown to be well-founded on other legal grounds, such an infringement is not such as to cause the judgment to be set aside. [30]

81. I note in this regard that the General Court did not uphold the first plea in law raised in the application at first instance solely on the basis of the ground at issue, but also relied on the fact that the Board of Appeal had rejected the evidence in question without examining whether it could be regarded as 'complementary' (paragraph 43 of the judgment under appeal).

82. According to the approach I have just outlined, the Board of Appeal, in order to comply with Article 76(2) of Regulation No 207/2009 in the present case, should have examined whether the evidence submitted out of time could be regarded as being supplementary.

83. In so far as it failed to examine whether the late evidence at issue was supplementary, the Board of Appeal infringed Article 76(2) of Regulation 76(2) of Regulation No 207/2009.

84. Accordingly, the General Court's finding to that effect can be confirmed by that ground of pure law, which may be substituted for the ground given in paragraph 43 of the judgment under appeal.

4. Application of that interpretation to the analysis of the first ground of appeal

85. By its first ground of appeal, OHIM submits that the late evidence at issue is not capable of being regarded as supplementary and that the General Court relied on erroneous criteria, in paragraphs 43 and 44 of the judgment under appeal, in order to reach its finding to the contrary.

86. It follows from the judgment under appeal that Mr Grau Ferrer, the opposing party before OHIM, submitted the certificate of registration of his Spanish trade mark within the time limit set for that purpose but that certificate was incomplete because it did not contain the graphical representation of the trade mark and mentioned only its colours. The representation at issue, in black and white, appeared in the statement of grounds of the notice of opposition filed with the Opposition Division. The complete official certificate containing that representation was submitted, out of time, before the Board of Appeal.

87. In paragraph 44 of the judgment under appeal, the General Court held that the official graphical representation, submitted for the first time before the Board of Appeal, was not 'entirely new' given that the black and white representation appeared in the written pleadings before the Opposition Division and the incomplete certificate mentioned the colours.

88. OHIM argues that the geographical representation of the earlier trade mark is a crucial factor in the opposition, since it alone provides a means of identifying the precise object and scope of the protection conferred by the earlier figurative mark (without it, the scope of the protection afforded by that trade mark cannot be determined in a relevant manner).

30 — Judgments in *Lestelle* v *Commission* (C-30/91 P, EU:C:1992:252, paragraph 28) and *FIAMM and Others* v *Council and Commission* (C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 187).

89. In this regard, OHIM states, rightly in my view, that the sign must be officially identified by a document explicitly referred to in Rule 19(2)(a)(ii) of Regulation No 2868/95, in this instance the registration certificate.

90. Consequently, the mere insertion of the graphical representation into the written pleadings submitted to OHIM cannot be regarded as relevant evidence, given that the forms of evidence required for this purpose are explicitly described in Rule 19(2) of Regulation No 2868/95.

91. However, I am not convinced by OHIM's argument that the official graphical representation submitted out of time with a view to supplementing the incomplete certificate could not in any way be regarded as supplementary evidence.

92. It is true that it may be difficult to distinguish between initial proof and supplementary proof in the case of the evidence referred to in Rule 19(2) of Regulation No 2868/95.

93. None the less, in my opinion, in order for the Board of Appeal to be able to exercise its discretion under Article 76(2) of Regulation No 207/2009, it is sufficient for the party concerned to have submitted, within the time limit set, some evidence that is relevant to demonstrating the existence, validity and scope of the protection afforded by the earlier right, in accordance with Rule 19(2) of Regulation No 2868/95, even if that evidence is not sufficient to demonstrate all those elements.

94. That approach appears to be consistent with that followed by the Court of Justice in the cases that gave rise to the judgments in *Rintisch* v *OHIM*,[31] in which the opponent had submitted the certificate of registration of the earlier trade mark but had attached the proof of its renewal only at the appeal stage, with the result that the proof of validity of the trade mark had been furnished out of time.

95. That also includes the situation, drawn from the case-law of the General Court, where the opponent submits the registration certificate but fails to supplement it within the time limit set with proof of transfer of ownership, the proof as to the proprietor of the earlier right having thus been furnished out of time.[32]

96. After all, OHIM itself accepts that evidence which is incomplete — inasmuch as it relates to only one of the elements referred to in Rule 19(2) of Regulation No 2868/95, such as the validity or scope of protection afforded by the trade mark or the opponent's entitlement to file the opposition — may be regarded as relevant. Thus, OHIM notes in its appeal that, in the circumstances material to the judgments in *Rintisch* v *OHIM*,[33] the registration certificates submitted within the time limit set were relevant, at the very least for the purposes of identifying the earlier trade mark and demonstrating the scope of its protection, even though the validity of that trade mark had not been proven.

97. To my mind, that analysis with respect to insufficient but relevant evidence is also applicable in a situation, such as that in the present case, where the opponent has submitted an incomplete registration certificate that does not contain the graphical representation of the trade mark, with the result that the only relevant proof is of the existence of the earlier trade mark, its word element and its proprietor, and the object and the scope of the protection are not demonstrated in a precise and relevant manner.

31 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

32 — See the judgment in *You-View.tv* v *OHIM — YouView TV (YouView+)* (T-480/13, EU:T:2014:591).

33 — Judgments in *Rintisch* v *OHIM* (C-122/12 P, EU:C:2013:628); *Rintisch* v *OHIM* (C-120/12 P, EU:C:2013:638); and *Rintisch* v *OHIM* (C-121/12 P, EU:C:2013:639).

98. That line of reasoning, which may be substituted for the erroneous grounds of the judgment under appeal that are criticised by OHIM, supports the finding that the General Court was right to consider, in paragraph 40 of the judgment under appeal, that the Board of Appeal was not entitled to reject the evidence in question without examining whether it could be regarded as supplementary and, if so, whether it could be admitted out of time, in accordance with Article 76(2) of Regulation No 207/2009.

5. Interim conclusion

99. It follows from all the foregoing considerations that, although the line of reasoning contained in paragraphs 43 to 46 of the judgment under appeal is erroneous, the conclusion reached by the General Court in paragraph 40 of that judgment, to the effect that the Board of Appeal erred in its application of Article 76(2) of Regulation No 207/2009, must be confirmed.

100. I therefore propose that the first and second grounds of appeal be dismissed.

C – *Infringement of point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009 (third ground of appeal)*

101. Pursuant to point (a) of the second subparagraph of Article 15(1) of Regulation No 207/2009, use of a Community trade mark in a form differing from that registered in elements which do not alter its distinctive character is to be regarded as use of that trade mark.

102. By avoiding imposing a requirement for strict conformity between the form used and that registered, that provision seeks to allow the proprietor of the trade mark, in the commercial exploitation of the sign, to make variations in that sign which, without altering its distinctive character, enable it to be better adapted to the realities of a changing market. [34]

103. Applying that provision, the General Court held in its analysis of the second plea in law in the application at first instance, in paragraphs 82 to 86 of the judgment under appeal, that the signs used by Mr Grau Ferrer to demonstrate the genuine use of the Community trade mark did not alter its distinctive character, since the differences at issue constituted ‘negligible variations’ or were ‘hardly distinctive’ and the signs used were ‘broadly equivalent’ to the trade mark as registered.

104. OHIM submits that the General Court committed an error of law in the application of that provision, in paragraphs 83 to 85 of the judgment under appeal, inasmuch as it classified certain elements of the signs compared as negligible, did not examine whether the modification of the individual elements entailed an overall alteration of the registered trade mark and did not therefore conduct a global assessment of the signs used.

105. I note that the findings contained in paragraphs 83 to 85 of the judgment under appeal, in which the General Court compared the overall impression created by each of the signs used with that of the registered trade mark, taking into account the distinctive elements, constitute assessments of fact.

106. OHIM’s argument is therefore inadmissible in so far as it claims that the Court should substitute its own assessment of the facts for that carried out by the General Court, without alleging that there has been a distortion of the facts and evidence. [35]

34 — See the judgment in *Specsavers International Healthcare and Others* (C-252/12, EU:C:2013:497, paragraph 29). See, by analogy, the judgment in *Rintisch* (C-553/11, EU:C:2012:671, paragraphs 21 and 22).

35 — See, inter alia, the judgments in *Rossi* v *OHIM* (C-214/05 P, EU:C:2006:494, paragraph 26) and *Alcon* v *OHIM* (C-412/05 P, EU:C:2007:252, paragraph 71).

107. The position would be different if the view could be taken that the General Court, while having drawn attention to the requirement to assess the signs on the basis of the overall impression created by them, did not actually carry out a global assessment. [36]

108. That possibility must be interpreted strictly in order to preserve the practical effect of the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, which does not allow the General Court to be sanctioned in relation to its sovereign assessment of the facts.

109. I accept that, on the basis of an examination of the signs reproduced in paragraph 66 of the judgment under appeal, which are inserted below, it would be reasonable to question the accuracy of the conclusion drawn by the General Court in paragraph 86 of the judgment under appeal to the effect that the signs used are 'broadly equivalent' to the registered trade mark:

Signs used	Registered trade mark
	

110. The fact remains, however, that OHIM's arguments do not, to my mind, support the finding that the General Court, despite the explicit wording of the judgment under appeal, did not actually carry out a global analysis of the signs on the basis of the overall impression created by them, and might thus have committed an error of law.

111. The General Court's examination of the question of whether the variations of the registered trade mark alter its distinctive character cannot be regarded as an interpretation of the law and cannot therefore be called into question in the context of appeal without encroaching upon the jurisdiction of the General Court to establish the facts.

112. Consequently, I propose that the third ground of appeal be dismissed as inadmissible and, therefore, that the appeal be dismissed in its entirety.

113. Since OHIM has been unsuccessful in its grounds of appeal and the other parties to the proceedings before the General Court have not set out the forms of order that they seek, I propose that OHIM be ordered to bear its own costs, in accordance with Articles 184(1) and 138(1) of the Rules of Procedure of the Court.

VII – Conclusion

114. In light of all the foregoing, I propose that the Court dismiss the appeal and order the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) to bear its costs.

36 — Judgment in *OHIM* v *Shaker* (C-334/05 P, EU:C:2007:333, paragraphs 37 to 43).