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# European Court of Justice: Proof of Genuine Use

By [John Margiotta](#)

*Reber Holding GmbH & Co. KG v. OHIM, Case C-141/13 P, July 17, 2014*

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In August 2005, Austrian company Weld & Hofman (“W&H”) filed an application for WALZER TRAUM for “coffee; instant coffee; decaffeinated coffee; sugar” in Class 30. German company Reber, the owner of a German registration for the word mark WALZERTRAUM for “bakery products, confectionery, chocolate and sugar confectionery” in Class 30, opposed the application on the basis of their earlier rights, claiming a risk of confusion.

W&H put the earlier mark to proof of use. Reber responded with the following evidence: A written statement of Reber’s manager, dated January 2007, detailing use; two undated photographs displaying Reber confectionery; copies of the chocolates’ monthly sales from March 2001-December 2002; and excerpts from Reber’s website, displaying different kinds of chocolate marketed by the company, dated March 30, 2004 and January 23, 2007. The relevant period for purposes of this action were February 13, 2001 to February 12, 2006. The Opposition Division of the OHIM found this evidence sufficient to demonstrate requisite (genuine) use of the mark and ruled in favor of Reber on the ground of risk of confusion. W&H appealed this decision to the Fourth Board of Appeal of OHIM (the “Board”), which

found that Reber's mark had not, in fact, been put to genuine use for the goods covered by the WALZERTRAUM registration, in part because some of the evidence fell outside the relevant period, and, significantly, because the purported use that did fall within the requisite period was insufficient to be considered "genuine" under CTM practice.

Reber appealed this decision to the General Court, arguing that (1) the Board erred in denying that there had been genuine use of its WALZERTRAUM mark, given the volume of the sales and the number of sale points, and (2) it was treated unequally; namely, citing the principle of equal treatment, Reber alleged that measuring its use by the level of use expected of a multinational company was unfair. The General Court, however, upheld the Board's conclusion concerning genuine use and rejected the claim of unequal treatment.

Reber appealed to the ECJ, which upheld the General Court's decision. Noting that use is considered "genuine" when it is directed at creating or maintaining a market share in the sector concerned for the subject goods and services, the ECJ pointed out, among other things, that Reber's mark was registered for chocolates in general, and not specifically for handmade chocolates or pralines (for which it had submitted proof of use). Accordingly, taking the relevant market share into account, the sales level of 40-60 kilos of handmade chocolates during the March 2001-December 2002 period did not rise to the level of genuine use. In rejecting the equal treatment argument, the ECJ pointed out that the relevant market share, and not the size of a company, is what guides the determination of whether a mark was put to genuine use.

This case further demonstrates the difficulties, and factors that can be taken into account, in proving genuine use of a mark, even where the proffered use is not just "token" use. Based on this case, it appears that owners of marks used for "niche" products in particular could face special problems in demonstrating genuine use. Accordingly, for such marks, it would appear prudent to craft specifications of goods and services that clearly reflect the anticipated actual use of a mark, not simply in general terms, but also in more specific terms.