

JUDGMENT OF THE GENERAL COURT (Third Chamber)

6 July 2022 (*)

(EU trade mark – Revocation proceedings – EU word mark BALLON D’OR – Genuine use of the mark – Partial revocation – Article 51(1)(a) of Regulation (EC) No 207/2009 (now Article 58(1)(a) of Regulation (EU) 2017/1001) – Proof of genuine use – Assessment of the evidence – Classification of the services)

In Case T-478/21,

Les Éditions P. Amaury, established in Boulogne-Billancourt (France), represented by T. de Haan and M. Laborde, lawyers,

applicant,

v

European Union Intellectual Property Office (EUIPO), represented by M. Chylińska and J. Crespo Carrillo, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of EUIPO, intervener before the General Court, being

Golden Balls Ltd, established in London (United Kingdom), represented by M. Hawkins, Solicitor, and T. Dolde and V. Pati, lawyers,

THE GENERAL COURT (Third Chamber),

composed of G. De Baere, President, G. Steinfatt and S. Kingston (Rapporteur), Judges,

Registrar: E. Coulon,

having regard to the written part of the procedure,

having regard to the fact that no request for a hearing was submitted by the parties within three weeks after service of notification of the close of the written part of the procedure, and having decided to rule on the action without an oral part of the procedure, pursuant to Article 106(3) of the Rules of Procedure of the General Court,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Les Éditions P. Amaury, seeks annulment of the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 7 June 2021 (Case R 1073/2020-4) (‘the contested decision’).

Background to the dispute

- 2 On 24 December 2004, the applicant filed an application for registration of an EU trade mark with EUIPO in respect of the word sign BALLON D’OR.

- 3 The goods and services in respect of which registration was sought are in, inter alia, Classes 14, 16, 38 and 41 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 14: ‘Precious metals and their alloys other than for dental purposes; jewellery, precious stones; horological and chronometric instruments, watches, clocks, alarm clocks, chronometers, brooches (jewellery), sundials, medals, figurines (statuettes) of precious metal, cigar cases, cigarettes cases and cigarette lighters of precious metal, ashtrays of precious metal, cigarette cases of precious metal, key rings (trinkets or fobs)’;
 - Class 16: ‘Paper and cardboard (unprocessed, semi-finished or for stationery); printed matter; bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists’ materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); wrapping paper; sacks, bags and sheets for packaging in paper or plastics; printers’ type; printing blocks, newspapers, books, magazines’;
 - Class 38: ‘Telecommunications; transmission of images, sound and data by telephone, by computer terminals, a global communications network (the Internet) or local communications network (an intranet), satellite and electronic mail; processing, monitoring, broadcasting and reception of data, signals, images and information processed by computers or by telecommunications apparatus and instruments; transmission of information contained in databanks and image banks; dissemination of information by electronic means, news agencies; communications by fibre-optic networks; radio, telephone or telegraph communication services; broadcasting of television programmes; radio broadcasting; television broadcasting, sending of telegrams; radio broadcasting; satellite transmission; data transmission; cable television broadcasting’;
 - Class 41: ‘Education; providing of training; entertainment; sporting and cultural activities; timing of sports events, organisation of sports competitions and awarding of trophies; club services (entertainment), sports club services, radio and television entertainment, providing sports facilities, amusement parks, providing recreational facilities; publication of books, magazines and newspapers, production of radio and television programmes, rental of sports equipment (except vehicles); arranging and conducting of conferences, forums and colloquiums; gymnastic instruction, amusement parks, organisation of competitions (education or entertainment), production of shows, sports camp services, film production, rental of stadium facilities’.
- 4 On 26 September 2017, the intervener, Golden Balls Ltd, filed an application with EUIPO for revocation of the mark in question on the basis of non-use. The ground relied on in support of the application for revocation was that set out in Article 58(1)(a) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1).
- 5 On 24 April 2020, the Cancellation Division revoked the contested mark for all the goods and services in respect of which it had been registered, with the exception of ‘sporting activities, namely organisation of sports competitions and awarding of trophies’ in Class 41.
- 6 On 23 June 2020, the applicant filed a notice of appeal with EUIPO against the Cancellation Division’s decision in so far as it revoked the contested mark in respect of the goods and services referred to in paragraph 3 above.
- 7 By the contested decision, the Board of Appeal upheld the appeal in part, namely in so far as concerns ‘printed matter; books, magazines’ in Class 16, and dismissed the appeal as to the remainder. In essence, the Board of Appeal found that the evidence adduced by the applicant showed genuine use of the contested mark in connection with ‘books’, ‘magazines’ and ‘printed matter’ in Class 16, but not in connection with the other goods and services in respect of which the Cancellation Division had revoked the contested mark.

Forms of order sought

8 The applicant claims that the Court should:

- annul the contested decision in part;
- order EUIPO and the intervener to pay the costs, including those incurred before the Board of Appeal;

9 EUIPO and the intervener contend that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

Preliminary observations

Subject matter of the dispute

10 In paragraph 1 of the application, the applicant claims that the Court should annul the contested decision ‘at least’ in so far as it dismissed the appeal in respect of the following services:

- Class 38: ‘broadcasting of television programmes’, ‘television broadcasting’, ‘satellite transmission’, ‘data transmission’ and ‘cable television broadcasting’;
- Class 41: ‘entertainment’, ‘television entertainment’, ‘publication of books, magazines and newspapers’, ‘production of television programmes’, ‘organisation of competitions (entertainment)’, ‘production of shows’ and ‘film production’.

11 EUIPO argues that the action could be found inadmissible as regards the other goods and services not expressly listed in paragraph 10 above in respect of which the contested mark was revoked, for lack of clear identification of the subject matter of the action.

12 In that regard, it should be noted that, in paragraph 29 of the application, the applicant specified that the action was limited to the services in Classes 38 and 41 referred to in paragraph 10 above. Furthermore, in support of its action, the applicant only raises complaints concerning the Board of Appeal’s assessment of genuine use of the contested mark in connection with the services referred to in paragraph 10 above.

13 Consequently, the action must be regarded as being brought solely against the contested decision in so far as that decision revoked the contested mark in respect of the services in Classes 38 and 41 referred to in paragraph 10 above.

The applicable law ratione temporis

14 Given the date on which the application for revocation at issue was filed, namely 26 September 2017, which is decisive for the purposes of identifying the substantive law applicable, the present dispute is governed by the substantive provisions of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1) (see, to that effect, judgments of 6 June 2019, *Deichmann v EUIPO*, C-223/18 P, not published, EU:C:2019:471, paragraph 2, and of 3 July 2019, *Viridis Pharmaceutical v EUIPO*, C-668/17 P, EU:C:2019:557, paragraph 3).

15 Consequently, in the present case, as regards the substantive rules, the references made by the Board of Appeal in the contested decision and by the parties in their respective written pleadings to Articles 18 and 58 of Regulation 2017/1001 must be understood as referring to Articles 15 and 51 of Regulation No 207/2009, the wording of which is identical.

16 Furthermore, since, in accordance with settled case-law, procedural rules are generally held to apply on the date on which they enter into force (see judgment of 11 December 2012, *Commission v Spain*, C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited), the dispute is governed by the procedural provisions of Regulation 2017/1001. It should be noted, however, that, as regards proof of genuine use of the contested mark, pursuant, in particular, to Article 82(2)(d), (f) and (i) of Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 supplementing Regulation 2017/1001, and repealing Delegated Regulation (EU) 2017/1430 (OJ 2018 L 104, p. 1), the dispute is governed by the provisions of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Council Regulation (EC) No 40/94 on the Community trade mark (OJ 1995 L 303, p. 1).

Substance

17 In support of its action, the applicant relies on a single plea in law, alleging infringement of Article 51(1)(a) of Regulation No 207/2009. The applicant disputes the Board of Appeal's assessment of the relevant facts and evidence which led it to conclude that the contested mark had not been put to genuine use either in connection with the services in Class 38 (first part) or in connection with those in Class 41 (second part).

18 It should be noted that, under the first subparagraph of Article 15(1) of Regulation No 207/2009 (now the first subparagraph of Article 18(1) of Regulation 2017/1001) and Article 51(1)(a) of that regulation, the rights of the proprietor of an EU trade mark are to be declared to be revoked, on application to EUIPO, if, within a continuous period of five years, the trade mark has not been put to genuine use in the European Union in connection with the goods or services in respect of which it is registered, and there are no proper reasons for its non-use.

19 In the present case, both the Cancellation Division and the Board of Appeal found that the period between 26 September 2012 and 25 September 2017 was the five-year period for which the applicant was to prove genuine use of the contested mark, a finding which the parties do not dispute.

20 Under Article 51(2) of Regulation No 207/2009 (now Article 58(2) of Regulation 2017/1001), where the grounds for revocation of rights exist in respect of only some of the goods or services for which the EU trade mark is registered, the rights of the proprietor are to be declared to be revoked in respect of those goods or services only.

21 The rationale for the requirement that a mark must have been put to genuine use in order to be protected under EU law is that EUIPO's register cannot be regarded as a strategic and static depository granting an inactive proprietor a legal monopoly for an unlimited period. On the contrary, that register must faithfully reflect what companies actually use on the market to distinguish their goods and services in economic life (see judgment of 11 April 2019, *Fomanu v EUIPO – Fujifilm Imaging Germany (Representation of a butterfly)*, T-323/18, not published, EU:T:2019:243, paragraph 22 and the case-law cited).

22 In accordance with settled case-law, there is genuine use of a trade mark, within the meaning of Article 51(1)(a) of Regulation No 207/2009, where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark (see judgment of 3 July 2019, *Viridis Pharmaceutical v EUIPO*, C-668/17 P, EU:C:2019:557, paragraph 38 and the case-law cited). Moreover, the condition relating to genuine use of the trade mark requires that the mark, as protected in the relevant territory, be used publicly and outwardly (see judgment of 4 April 2019, *Hesse and Wedl & Hofmann v EUIPO (TESTA ROSSA)*, T-910/16 and T-911/16, EU:T:2019:221, paragraph 29 and the case-law cited).

23 When assessing whether use of the mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial use of the mark in the course of trade is real, particularly the practices regarded as warranted in the relevant economic sector as a means of maintaining or creating market shares for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the

mark (see judgment of 8 July 2004, *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)*, T-203/02, EU:T:2004:225, paragraph 40 and the case-law cited).

24 In addition, genuine use of a trade mark cannot be proved by means of probabilities or presumptions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (judgments of 12 December 2002, *Kabushiki Kaisha Fernandes v OHIM – Harrison (HIWATT)*, T-39/01, EU:T:2002:316, paragraph 47, and of 6 October 2004, *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)*, T-356/02, EU:T:2004:292, paragraph 28).

25 In that regard, under Rule 22 of Regulation No 2868/95 (now Article 10(3) and (4) of Delegated Regulation 2018/625), applicable to revocation proceedings in accordance with Rule 40(5) of Regulation No 2868/95 (now Article 19(1) of Delegated Regulation 2018/625), the proof of use of a mark must concern the place, time, extent and nature of use of the mark and is, in principle, to be confined to the submission of supporting documents and items such as packages, labels, price lists, catalogues, invoices, photographs, newspaper advertisements, and statements in writing as referred to in Article 76(1)(f) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1) (which became Article 78(1)(f) of Regulation No 207/2009, now Article 97(1)(f) of Regulation 2017/1001).

26 It is in the light of those principles that the two parts of the single plea raised by the applicant are to be examined.

The first part of the single plea, relating to the services in Class 38

27 In the first part, the applicant claims that the Board of Appeal failed to carry out a concrete assessment of the facts and evidence adduced when it concluded that the contested mark had not been put to genuine use in connection with the following services in Class 38: ‘broadcasting of television programmes’, ‘television broadcasting’, ‘satellite transmission’, ‘data transmission’ and ‘cable television broadcasting’.

28 In particular, the applicant submits that the Board of Appeal erred in asserting that, since the applicant did not maintain a telecommunications network that could be used by others, genuine use of the contested mark for all the services in Class 38 had not been established.

29 The applicant maintains that, since the Explanatory Note to Class 38 of the Nice Classification states that the services in that class mainly include services that allow at least one party to communicate with another ‘as well as’ services for the broadcasting and transmission of data, the Board of Appeal’s assertion that the services in Class 38 must allow at least one party to communicate with another should not have been applied to services for the broadcasting and transmission of data, which are separate.

30 According to the applicant, use of the contested mark in connection with the broadcasting, in all Member States, on television and on the internet of the ‘Ballon d’Or’ competition demonstrates genuine use of that mark in connection with the services in Class 38 referred to in paragraph 10 above.

31 EUIPO and the intervener dispute the applicant’s arguments.

32 In that regard, it should be noted that, in paragraph 42 of the contested decision, the Board of Appeal stated that, according to the Explanatory Note to Class 38 of the Nice Classification, the services in that class mainly include services that allow at least one party to communicate with another, as well as services for the broadcasting and transmission of data. The Board of Appeal added that, according to that Explanatory Note, those services include neither content nor subject matter that may be contained in the communications activity nor services conducted using telecommunications connections nor the production of radio and television programmes. In paragraph 43 of the contested decision, the Board of Appeal found that nothing in the file allowed the conclusion to be reached that the applicant maintained a telecommunications network which could be used by others. In paragraph 44 of the contested decision, the Board of Appeal concluded that genuine use of the contested mark for the services in Class 38 was not established.

- 33 In order to answer the first part of the single plea raised by the applicant, it is necessary, in the first place, to clarify what the services in Class 38 of the Nice Classification cover.
- 34 In accordance with case-law, the list of goods and services in respect of which a trade mark is registered and with regard to which proof of genuine use has been requested must, for the purpose of ascertaining the extent of the protection of that mark and settling the issue of its genuine use, be interpreted in the most coherent manner, in the light of its literal meaning and its grammatical construction, but also, if there is a risk of an absurd result, of its context and the actual intention of the mark's proprietor as regards its scope (judgments of 17 October 2019, *Alliance Pharmaceuticals v EUIPO – AxiCorp (AXICORP ALLIANCE)*, T-279/18, EU:T:2019:752, paragraph 50, and of 1 September 2021, *Bimbo Donuts Iberia v EUIPO – Hijos de Antonio Juan (DONAS DULCESOL)*, T-697/20, not published, EU:T:2021:526, paragraph 28).
- 35 To that end, it should be borne in mind that the scope of protection of an EU trade mark is always defined by the natural and usual meaning of the terms chosen (see judgment of 1 September 2021, *DONAS DULCESOL*, T-697/20, not published, EU:T:2021:526, paragraph 29 and the case-law cited).
- 36 Furthermore, while it is true that the Nice Classification is purely administrative, reference should, however, be made to it in order to determine, where necessary, the range or the meaning of the goods and services in respect of which a mark has been registered (judgment of 10 September 2014, *DTM Ricambi v OHIM – STAR (STAR)*, T-199/13, not published, EU:T:2014:761, paragraph 35).
- 37 In the present case, it is apparent from the heading of Class 38 of the Nice Classification in its eighth edition, dating from 2001, which was in force at the date of the application for registration of the contested mark, that that class covers 'telecommunications' services.
- 38 According to the Explanatory Note to that edition, Class 38 includes 'mainly services allowing at least one person to communicate with another by a sensory means'. The Explanatory Note states that 'such services include those which: (1) allow one person to talk to another, (2) transmit messages from one person to another, and (3) place a person in oral or visual communication with another (radio and television)'. It is also stated that 'this Class includes, in particular: – services which consist essentially of the diffusion of radio or television programmes' and that it 'does not include, in particular: – radio advertising services (Cl. 35)'.
- 39 In the light of the description of the services in Class 38 provided in the Explanatory Note to the eighth edition of the Nice Classification, it is apparent that most of those services must allow at least one person to communicate with another by a sensory means, and that the diffusion of radio or television programmes is understood as a service which places a person in oral or visual communication with another. Thus, the applicant's argument that the Board of Appeal erred in finding that all the services in Class 38 are services which allow at least one party to communicate with another must be rejected. The services consisting in 'broadcasting of television programmes', 'television broadcasting', 'satellite transmission', 'data transmission' and 'cable television broadcasting' referred to by the applicant cannot be regarded as separate from the other telecommunications services in Class 38. The Board of Appeal could therefore legitimately rely on the fact that the applicant had not demonstrated that it maintained a telecommunications network that could be used by others in order to find that there was no proof of genuine use of the abovementioned services.
- 40 In the second place, to prove genuine use of the contested mark in connection with the relevant services in Class 38, the applicant claims to have produced numerous documents showing use of the contested mark in connection with the broadcasting in the European Union, both on television (via satellite) and on the internet, of the 'Ballon d'Or' event (exhibits Nos 3.2.1 to 3.2.5). It states that the name of the programme that is broadcast is BALLON D'OR, which guarantees the quality of the show and the origin of the producer. The BALLON D'OR logo is also used for special broadcasts before or after the event's award ceremony. The BALLON D'OR television programmes are thus immediately recognisable thanks to the BALLON D'OR sign which always appears in the bottom-left corner of the screen (exhibit No 3.8). As regards television broadcasting, the applicant states that it receives substantial royalties from the broadcasting in the European Union of the 'Ballon d'Or' event (exhibit

No 3.1a). As regards broadcasting on the internet, the applicant maintains that it demonstrated before the Board of Appeal that the 'Ballon d'Or' event was broadcast annually on the www.lequipe.fr website, run by its licensee. According to the applicant, making television programmes available online should also be regarded as a broadcasting service falling within Class 38.

41 In that regard, it should be noted that, in accordance with case-law, the fact that an undertaking is responsible for the content of its television channels, for how its logo and trade marks appear on those channels and for the advertising which is broadcast there does not lead to the conclusion that it provides television and radio broadcasting services in Class 38 where it adduces no evidence to show that it actually provides services enabling it to broadcast the channels in question by its own means during the relevant period and, on the contrary, acknowledges that it is third-party companies which broadcast that content to their subscribers (see, to that effect, judgment of 13 July 2018, *Star Television Productions v EUIPO – Marc Dorcel (STAR)*, T-797/17, not published, EU:T:2018:469, paragraph 49).

42 Thus, the evidence adduced by the applicant before the Board of Appeal, showing that the 'Ballon d'Or' event is broadcast on television within the European Union on various channels and that the applicant receives significant royalties for the broadcasting of the event on those channels, does not prove that the applicant actually provides services enabling it to broadcast the 'Ballon d'Or' event on television by its own means or, a fortiori, uses the contested mark to provide such services. On the contrary, it is apparent from the material before the Court that it is third-party television broadcasting companies which broadcast the 'Ballon d'Or' event by paying the applicant royalties for the right to do so.

43 Furthermore, as regards the broadcasting of the 'Ballon d'Or' event online on the www.lequipe.fr website run by L'équipe 24/24, a company which belongs to the same group of companies as the applicant and to which a licence to use the contested mark has been granted, it should be noted that, while the broadcasting of television programmes on the internet has become commonplace today and a trade mark could, for example, be used as an internet domain name to provide access to various television content on the internet, as a service in Class 38 (see, to that effect, judgment of 22 May 2008, *Radio Regenbogen Hörfunk in Baden v OHIM (RadioCom)*, T-254/06, not published, EU:T:2008:165, paragraph 50), there is no evidence in the file to demonstrate that the applicant provides such a service under the contested mark. Conversely, it is apparent that the BALLON D'OR sign is used as the name of the television programme broadcast on the internet, by means of a broadcasting service provided not by the applicant but by a third party.

44 Accordingly, the Board of Appeal did not err in finding that the applicant had not established genuine use of the contested mark in connection with the relevant services in Class 38.

45 The first part of the single plea must therefore be rejected.

The second part of the single plea, relating to the services in Class 41

46 In the second part, the applicant submits that the Board of Appeal failed correctly to assess the facts and evidence submitted in order to prove genuine use of the contested mark in connection with the following services in Class 41: 'entertainment', 'television entertainment', 'publication of books, magazines and newspapers', 'production of television programmes', 'organisation of competitions (entertainment)', 'production of shows' and 'film production'.

47 The second part is divided into three complaints.

48 As regards the first complaint, relating to 'entertainment', 'television entertainment' and 'organisation of competitions (entertainment)' in Class 41, the applicant submits that the Board of Appeal erred in concluding that genuine use of the contested mark had not been established for those services, finding that an award ceremony such as that organised by the applicant does not come within the definition of 'entertainment'.

49 To prove genuine use of the contested mark in connection with the services in Class 41, the applicant claimed that each year it organised an event to reward the best professional footballer of the season. It stated that it had made significant financial investments in the organisation and production of the

‘Ballon d’Or’ competition with a view to its being broadcast on television and on the internet (exhibit No 3.1). The applicant also stated that it provided details of the amounts it had received by way of royalties for broadcasting the ‘Ballon d’Or’ competition on television channels within the European Union (exhibit No 3.1a), press articles proving that the ‘Ballon d’Or’ competition received media coverage (exhibits Nos 3.5.1 to 3.5.3) and, lastly, television viewing figures for the competition (exhibits Nos 3.2.1 to 3.2.5) and internet viewing figures.

50 EUIPO and the intervener contest the first complaint.

51 In that regard, it should be observed that the Cancellation Division found that the contested mark had been put to genuine use in connection with ‘sporting activities, namely organisation of sports competitions and awarding of trophies’, but not in connection with the other registered services in Class 41. The Board of Appeal upheld that determination by dismissing the appeal in that regard.

52 In accordance with the case-law cited in paragraph 35 above, the Board of Appeal determined the scope of protection of the contested mark on the basis of the natural and usual meaning of the terms chosen to designate the services in respect of which registration was sought.

53 Thus, in paragraph 50 of the contested decision, the Board of Appeal relied on the usual meaning of the term ‘entertainment’ given by the Collins dictionary, namely as ‘consist[ing] of performances of plays and films, and activities such as reading and watching television, that give people pleasure’.

54 It should also be noted that, in accordance with case-law, entertainment services are directed at the public at large (see, in the context of the comparison of goods and services made in opposition proceedings, judgment of 13 June 2012, *Hotel Reservation Service Robert Ragge v OHIM – Promotora Imperial (iHotel)*, T-277/11, not published, EU:T:2012:295, point 54).

55 Lastly, it is apparent from the Explanatory Note to the eighth edition of the Nice Classification, relied upon by EUIPO, that Class 41 includes, in particular, ‘services having the basic aim of the entertainment, amusement or recreation of people’.

56 In the present case, it cannot reasonably be disputed that the main objective of organising an award ceremony such as that of the ‘Ballon d’Or’ competition is entertainment. The public of the ‘Ballon d’Or’ event witness, in the venue where the ceremony is held, on television or on the internet, a moment of celebration during which a person’s sporting performance is rewarded. The ‘Ballon d’Or’ event is not limited to the award of the trophy as such. As the applicant submits, throughout the ceremony, speeches are given by personalities from the football world and video footage of remarkable football moments is shown. The applicant also correctly stated that it invested considerable sums in the organisation of the competition and in the recording (filming) of the ceremony with a view to its broadcasting on television and on the internet, which is intended to reach a wide audience. Thus, as the applicant submits, a show such as that provided by the applicant on the market under the contested mark falls within the scope of entertainment.

57 It is therefore necessary to reject EUIPO’s argument that, since the ‘Ballon d’Or’ competition concerns the field of sport because one of the purposes of the event is to reward a person’s football performance by awarding that footballer the trophy for the best player of the year, the basic aim of the competition cannot be the entertainment, amusement or recreation of people.

58 The fact that a service intended to entertain the public is provided in the form of a competition, which includes the award of a trophy to reward a person’s sporting performance, does not deprive it of its basic recreational and entertaining nature.

59 Accordingly, the Board of Appeal erred in finding that an award ceremony such as that of the ‘Ballon d’Or’ competition did not fall within the definition of entertainment.

60 In those circumstances, the first complaint must be upheld.

61 In the second complaint, relating to ‘production of television programmes’, ‘production of shows’ and ‘film production’ in Class 41, and in the third complaint, relating to ‘publication of books, magazines

and newspapers' in the same class, which it is appropriate to examine together, the applicant submits that the Board of Appeal erred in finding that those services necessarily had to be provided to third parties and not for itself.

- 62 According to the applicant, the fact that it invests and assumes the financial risks in the making of television programmes under the contested mark is sufficient to preserve trade mark protection for 'production of television programmes', 'production of shows' and 'film production'. Similarly, the fact that the applicant published books and magazines, as, moreover, the Board of Appeal acknowledged, should have been sufficient to preserve the protection conferred by the EU trade mark for 'publication of books, magazines and newspapers', services which are likewise in Class 41.
- 63 EUIPO and the intervener contend that the second and third complaints should be rejected.
- 64 In paragraph 52 of the contested decision, the Board of Appeal stated that the relevant services in Class 41 had to be rendered to third parties, who would have to pay remuneration for those services. This means, the Board of Appeal stated, that a third party must ask the applicant to render the services concerned. In paragraph 53 of the contested decision, the Board of Appeal found that, in the present case, while books were published about award winners in the 'Ballon d'Or' competition, they were books about the event itself and there was nothing in the file to support the conclusion that the applicant had published books on behalf of others. The Board of Appeal added that the same held true with respect to the 'production of radio and television programmes', the applicant having proved that it did produce a show, but for itself and not for third parties.
- 65 In that regard, it should be noted that, in accordance with the case-law cited in paragraph 22 above, the condition relating to genuine use of the mark requires that the mark be used to create or preserve market outlets and that it be used publicly and outwardly. In this respect, it has been pointed out, in case-law, that services for which trade mark protection may be sought are generally offered independently to third parties and supplied for economic consideration (see, to that effect, judgment of 30 September 2016, *Alpex Pharma v EUIPO – Astex Pharmaceuticals (ASTEX)*, T-355/15, not published, EU:T:2016:591, paragraph 37).
- 66 In the present case, so far as concerns, in the first place, 'production of television programmes', 'production of shows' and 'film production' in Class 41, case-law has made clear that services consisting in the editing and production of television programmes and the production of shows are directed at professionals in the audiovisual sector (see, in the context of the definition of the relevant public in opposition proceedings, judgment of 24 May 2011, *Space Beach Club v OHIM – Flores Gómez (SpS space of sound)*, T-144/10, not published, EU:T:2011:243, paragraph 34; see also order of 19 June 2014, *Cartoon Network v OHIM*, C-670/13 P, not published, EU:C:2014:2024, paragraph 39, and judgment of 4 May 2005, *Chum v OHIM – Star TV (STAR TV)*, T-359/02, EU:T:2005:156, paragraph 29) and, as regards production services in particular, they are directed at, amongst others, writers and directors of films (see, in the context of the comparison of goods and services in opposition proceedings, judgment of 2 October 2013, *Cartoon Network v OHIM – Boomerang TV (BOOMERANG)*, T-285/12, not published, EU:T:2013:520, paragraph 32).
- 67 The evidence submitted by the applicant does not show that it provided or offered such production services on the market under the contested mark.
- 68 The applicant's production of the 'Ballon d'Or' event with a view to its being broadcast on television and on the internet does not as such mean that genuine use of the mark was established in connection with services consisting in the 'production of television programmes', 'production of shows' and 'film production' rendered on the market for those services. Contrary to what is required by the case-law referred to in paragraph 22 above, the contested mark was not offered to third parties on the market for those services in order to create outlets in the context of the public and outward use of that mark. Rather, as EUIPO has stated, producing the 'Ballon d'Or' event is an act of exploitation of the service rendered by the applicant, which consists in organising that competition.
- 69 In that regard, it is necessary to reject the applicant's argument that the Board of Appeal erred in finding that the applicant produced the 'Ballon d'Or' competition's award ceremony for itself since

that assessment conflicts, inter alia, with the fact that that ceremony is made accessible to the general public on television and on the internet.

70 That line of argument is based on a misinterpretation of the contested decision. In stating that the applicant produces a show for itself, the Board of Appeal considered not that the show was intended to be broadcast internally within the applicant's company, but that the applicant produced its show itself and did not render a service for the production of shows under the contested mark for third parties.

71 It is also necessary to reject the applicant's argument that the Board of Appeal added a further requirement to the definition of the relevant services in Class 41 in stating that third parties must pay remuneration for those services, as well as the applicant's assertion that, in any event, even if such a requirement existed, it would be satisfied in the present case, since each year television broadcasters purchase the broadcasting rights relating to the 'Ballon d'Or' event from the applicant.

72 The Board of Appeal's statement in question, to the effect that the services are provided to third parties for remuneration, was intended, above all, to explain that a third party had to approach the trade mark proprietor as provider of those services, which is consistent with the case-law cited in paragraph 65 above, in accordance with which the contested mark must be put to use publicly and outwardly in order to create market outlets. In any event, as EUIPO has stated, even if it were to be found that the Board of Appeal added a remuneration requirement contrary to the case-law, the applicant's argument would still be ineffective, since, in the present case, it has not established that the contested mark was used in connection with production services provided to third parties, regardless of whether they were provided for remuneration.

73 In the light of the foregoing considerations, it must be concluded that the Board of Appeal did not err in finding that genuine use of the contested mark in connection with services consisting in the 'production of television programmes', 'production of shows' and 'film production' in Class 41 had not been established.

74 In the second place, as regards the 'publication of books, magazines and newspapers' in Class 41, it should be noted that, as EUIPO has stated, a mark used in connection with those services does not concern the content of the publication, but the production and promotion of any book or content in order to create or preserve outlets on the market for those services, in accordance with the case-law cited in paragraph 22 above. In that context, the recipients of those services are the authors or agents who want their work to be published.

75 The applicant relied, before the Board of Appeal, on the fact that it was the author of *60 ans de Ballon d'or* and *50 ans de Ballon d'or* and that it had collaborated with Les Éditions Solar to have those books published (exhibits Nos 5.1 to 5.4). It also produced special editions of the *France Football* magazine dedicated to the 'Ballon d'Or' competition (exhibits Nos 3.6.1 to 3.6.6). However, it produced no evidence to show that it had provided or offered publication services to third parties on the market.

76 Thus, although that evidence may have been sufficient to show use of the mark in connection with 'books', 'magazines' and 'printed matter' in Class 16, as the Board of Appeal decided, the Board of Appeal was entitled to find that that evidence did not show that the applicant offered services consisting in the 'publication of books, magazines and newspapers' under the contested mark.

77 In that regard, it should be pointed out that, in accordance with the case-law cited in paragraph 34 above, the list of goods and services in respect of which a mark is registered and with regard to which proof of genuine use has been requested must be interpreted in the most coherent manner, in the light of its literal meaning and its grammatical construction, but also, if there is a risk of an absurd result, of its context and the actual intention of the mark's proprietor as regard its scope. As EUIPO has stated, if the applicant's argument were upheld, the Nice Classification would not distinguish between the book publication services in Class 41 and the books or magazines in Class 16.

78 In the light of the foregoing considerations, the Board of Appeal did not err in finding that genuine use of the contested mark in connection with services consisting in the 'publication of books, magazines and newspapers' in Class 41 had not been established.

- 79 Consequently, the second and third complaints in the second part of the single plea must be rejected.
- 80 It follows from all of the foregoing that the first complaint in the second part of the single plea must be upheld and, accordingly, the contested decision must be annulled in so far as it upheld the Cancellation Division's decision to revoke the contested mark as regards the following services in Class 41: 'entertainment', 'television entertainment' and 'organisation of competitions (entertainment)'.
- 81 The action is dismissed as to the remainder.

Costs

- 82 Pursuant to Article 134(3) of the Rules of Procedure of the General Court, the parties are to bear their own costs where each party succeeds on some and fails on other heads. However, if it appears justified in the circumstances of the case, the General Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.
- 83 In the present case, since the applicant has been unsuccessful in its claims in respect of the 'broadcasting of television programmes', 'television broadcasting', 'satellite transmission', 'data transmission' and 'cable television broadcasting' in Class 38, and the 'publication of books, magazines and newspapers', 'production of television programmes', 'production of shows' and 'film production' in Class 41, and EUIPO and the intervener have been unsuccessful in their claims in respect of 'entertainment', 'television entertainment' and 'organisation of competitions (entertainment)' in Class 41, each party should be ordered to bear its own costs.
- 84 In addition, since the applicant has also applied for EUIPO and the intervener to be ordered to pay the costs relating to the proceedings before the Board of Appeal, it should be borne in mind that, under Article 190(2) of the Rules of Procedure, costs necessarily incurred by the parties for the purposes of the proceedings before the Board of Appeal are to be regarded as recoverable costs.
- 85 In that regard, it will be for the Board of Appeal to decide, in the light of the present judgment, on the costs relating to those proceedings (see judgment of 4 October 2017, *Gappol Marzena Porczyńska v EUIPO – Gap (ITM) (GAPPOL)*, T-411/15, not published, EU:T:2017:689, paragraph 209 and the case-law cited).
- 86 Since, in the contested decision, the Board of Appeal confined itself to analysing the evidence as to the criterion relating to the nature of the use to which the earlier mark was put in connection with the entertainment services in Class 41, and since it erred in that context in considering that an award ceremony did not fall within the definition of entertainment, as has been found by the Court in response to the first complaint in the second part of the single plea, it will be for the Board of Appeal to assess the evidence as to the criteria relating to the place, time and extent of the use made of the earlier mark while giving due effect to the present judgment.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Annuls the decision of the Fourth Board of Appeal of the European Union Intellectual Property Office (EUIPO) of 7 June 2021 (Case R 1073/2020-4) in so far as it upheld the decision of the Cancellation Division to revoke the mark in respect of the following services in Class 41 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: 'entertainment', 'television entertainment' and 'organisation of competitions (entertainment)';**
- 2. Dismisses the action as to the remainder;**

3. Orders each party to bear its own costs.

De Baere

Steinfatt

Kingston

Delivered in open court in Luxembourg on 6 July 2022.

E. Coulon

S. Papasavvas

Registrar

President

* Language of the case: English.