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Never underestimate the importance of DUNGEONS in Dungeons & Dragons

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- **Wizards of the Coast opposed the registration of DUNGEONS in Classes 9, 28 and 41 based on its earlier mark DUNGEONS & DRAGONS, covering the same classes**
- **The EUIPO found that there was a likelihood of confusion and the General Court agreed**
- **The decision confirms that the likelihood of confusion should be assessed in respect of the public which displays the lowest level of attention**

It is commonly accepted that the first element of a mark is the one that attracts dominance in the eyes of the consumer; it is the initial part of the mark which is “liable, according to settled case-law, to attract the consumer’s attention both visually and phonetically”. This principle has recently again been confirmed in a judgment of the General Court ([Case T-700/18](#)) dated 10 October 2019. The decision also confirms that the likelihood of confusion should be assessed by taking into account the public with the lowest level of attention.

Background

The General Court upheld decisions of both the Opposition Division and the Fourth Board of Appeal of the EUIPO confirming an opposition brought by Wizards of the Coast LLC on the basis of its earlier mark DUNGEONS & DRAGONS against an application filed by Kalypso Media Group GmbH (‘the applicant’) for the mark DUNGEONS, covering identical (or, at least, similar) goods and services in Classes 9, 28 and 41, in particular in respect of games and computer games.

Following the decision of the Fourth Board of Appeal, the applicant appealed to the General Court, claiming, among other things, that, whilst it acknowledged that the marks share the element ‘dungeons’, there was only a “certain degree of similarity” between the marks due to the different lengths of the marks at issue. The applicant also claimed that the inherent distinctiveness of the mark DUNGEONS & DRAGONS is “significantly below average”, and that, although the words ‘dungeons’ and ‘dragons’ are not “purely” descriptive of the goods and services covered by the signs at issue, they remain very “allusive” because they inform consumers that “games, computer games and associated goods and services constitute games taking place in dungeons where the player is confronted with dragons”.

Decision

The General Court confirmed that the Board of Appeal had correctly held that there was a likelihood of confusion within the meaning of Article 8(1)(b), having regard to:

- the identity and similarity of the goods and services covered by the signs at issue;
- the strong visual and phonetic similarity and the conceptually average similarity of the signs;
- the average level of attention of the relevant public; and
- the average inherent distinctiveness of the earlier mark.

The signs at issue were held to be highly similar visually and phonetically because the 'dungeon' element in the earlier marks is in a position which is more liable to attract attention from the relevant public, and that element is identical to the sole element which makes up the mark applied for, DUNGEONS. The meaning of the term 'dungeon' would be understood by the relevant English-speaking public in the context of both marks and, as such, the signs were moderately similar conceptually.

The General Court clarified that the inherent distinctiveness of the earlier mark is only one factor to consider when assessing the likelihood of confusion. A finding of low distinctive character for the earlier mark does not, in itself, prevent a finding that there is a likelihood of confusion. In any event, the General Court held that the earlier mark DUNGEONS & DRAGONS has a distinctive character which is, at the very least, normal.

Turning to the relevant public and its level of attention, assuming that games and computer games are to be regarded as intended for both a specialised public and the general public, even if the specialised public has a high level of attention, the level of attention attributed to the general public is "average at best". The General Court confirmed the Board of Appeal's findings that games and computer games are easily accessible to all, including those without special knowledge. They are no longer luxury or niche products, or sold merely on "focused markets", but have gone "mainstream". Accordingly, in view of the development of the market for such goods, the likelihood of confusion must be assessed in respect of the public which displays the lowest level of attention, namely consumers whose level of attention is "average at best".

The General Court therefore dismissed the claim brought by the applicant. It established that there was a likelihood of confusion and confirmed that the application for the DUNGEONS should be refused.

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TAGS

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This article first appeared on *WTR Daily*, part of *World Trademark Review*, in *Nov 2019*. For further information, please go to www.worldtrademarkreview.com.