

Bit v. Bud: Fighting Over Names For Beer

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[1] In a recent decision, the *Bundesgerichtshof* (BGH [Federal Court of Justice]) had to determine whether names of beers produced by the American Brewery *Anheuser Busch* and by the German Brewery *Bitburger* were likely to be confused, thereby necessitating the protection of trademark law. The case emerged as Anheuser Busch began to distribute its products in Germany after registering the marks "Anheuser Busch Bud" and "American Bud" for protection with the *Deutsches Patent- und Markenamt* (German Patent and Trademark Authority). Thereafter, Anheuser Busch brought a suit against the German Brewery Bitburger, which holds long-standing rights to the trademarks "Bit", "Bitburger" and "Bitte ein Bit" (*Please, one Bit*). Anheuser Busch sought a ruling from the courts establishing that its newly registered trademarks did not violate Bitburger's rights. Bitburger replied in the suit by alleging that the marks employed by its American competitor bore the risk of confusing the consumer who would be likely to mistake the Anheuser Busch products for those produced and marketed by Bitburger. Anheuser Busch countered that there was no such risk.

[2] Both the *Landgericht* (Regional Court) and *Oberlandesgericht* (Higher Regional Court) rejected the claims of Anheuser Busch, holding that the American firm's marks violated Bitburger's rights with respect to its marks. The *Oberlandesgericht* (Higher Regional Court) held that in daily use a short version of a product's name would likely be used (in this case, "Bud") and that this short version, and purely on the level of sound, risked being mistaken for the Bitburger product (in this case, "Bit").

[3] The Federal Court of Justice granted Anheuser Busch's appeal from the decisions of the lower courts only with regard to the trademark "Anheuser Busch Bud", holding that in daily use the abbreviated use would most likely be "Anheuser" instead of "Bud", and that, for this reason, there was no risk of mistaking the American for the German beer "Bit". With regard to the mark of "American Bud", the Federal Court of Justice affirmed the lower courts' decisions, which held that the mark would likely be shortened to "Bud" in daily use, a form which would create the risk of being confused with the German brewery's trademark "Bit". The Federal Court of Justice found the word "American" to be a mere geographical indicator and therefore likely to be neglected. The Court focused mainly on the popularity of the mark "Bit", for which it found a greater claim to protection against appropriation. Finally, the Court pointed to the fact that both marks related to or signified the same kind of product, that is beer, and that this, ultimately, made it difficult to deny the risk of confusion.

[4] This decision should be seen in the context of a number of other cases pending in the courts of other European nations; suits like Anheuser Busch's against the Czech brewery Budejovický Budvar. The Czech brewery, which was, until 1918, called Budweiser, distributes beer by this very name ("Budweiser"), and the American brewery and its Czech competitor are fighting over the right to use the mark of the American firm's flagship product, the beer called "Budweiser".

[5] Anheuser Busch had previously distributed its products in several European markets with the exception of Germany, raising questions about the reasons for the firm's decision to do so at this point. The decision of the Federal Court of Justice appears to bear some protectionist tendency in that it flatly regards the American firm as an outside entrant into a market that allegedly already knows (all) its producers, (all) its products and (all) its product names. Yet, these very assumptions and standards are an accepted part of this field of competition law. Still, a disinterested observer of the Federal Court of Justice decision might be struck by the thought that the Court failed to acknowledge the fact that German consumers have a considerable *de facto* knowledge of and familiarity with Anheuser Busch's beer, even if it is, *de jure*, new to the German market. It seems, when one thinks on the corner-Kneipe (pub) or Hotel sports bar, almost absurd to suggest that the average German beer drinker would mistake the homegrown "Bit" and for its heavily marketed American competitor "Bud". That a German court felt compelled to act to protect one of the products with which Germany is most strongly identified from "competition" from and "confusion" with a (in this Journal's opinion) weaker American product almost, embarrassingly concedes too much. Thus, the decision of the Federal Court of Justice reveals *ein bit* of the ambiguity and subjectivity that persists in the field of trademark law, by its very nature: it is, at some level, a hostage to the informed guesses asserted by the plaintiff's and defendant's counsel (as represented by their arguments) and finally the judges (as represented by the courts' decision) regarding how well-known a product is and at what point it deserves or does not deserve protection from a similarly named competitor. The message delivered by the Court with its beer decision, more than an unnecessary nod to American beer, is also not likely to make the norms that control this field of law look any less subjective than the claims of the parties themselves.

For more information: Decision of the Federal Court of Justice of April 26, 2001 - I ZR 212/98 (not yet published).