

# Czech This Registration At the Door, Bud

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Scott J. Slavick

*Inside Counsel*

In recent months, in several pieces on likelihood of confusion cases at the Trademark Trial and Appeal Board, I've alluded to my conviction that one or both of the parties might have bolstered their argument by introducing into evidence the findings of consumer surveys.

Such surveys are often used in inter-party disputes to prove or disprove likelihood of confusion. They are not used as often, however, in proceedings at the TTAB.

Maybe they should be. A recent precedential case, *Anheuser-Busch, LLC v. Innvopak Systems Pty. Ltd.*, allowed court watchers the relatively rare opportunity to see how the Board feels about consumer surveys. More importantly, the opinion sheds much needed light on the Board's thoughts on criticisms of such surveys.

The Board sustained Anheuser-Busch's opposition to Innvopak's effort to register the mark *Winebud* for "alcoholic beverages except beers; wines and still wines and sparkling wines; beverages containing wine, namely, sparkling fruit wine and still fruit wine; [and] ready to drink alcoholic beverages except beers."

Perhaps predictably, the Board found that the applied-for mark was likely to cause confusion with the famous *Bud* mark, which is registered for beer. It held that the parties' marks were highly similar, that the applied-for and registered goods were related, and that the channels of trade and classes of consumers overlapped. The Board decided that the parties' goods were both purchased by ordinary consumers who are unlikely to exercise extra care in purchasing decisions. Importantly, too, it held that Anheuser-Busch's consumer survey supported its decision.

The Board began its opinion by stating that Anheuser-Busch's evidence established the fame of its *Bud* and *Budweiser* marks. To briefly summarize, Anheuser-Busch began using its Budweiser mark in 1876, and its beer has been referred to and known by the nickname Bud since approximately 1895. Since that time, the brewer has heavily advertised its products and has long been a major sponsor of high-profile sporting events; its products also have frequently been the subject of unsolicited media attention. Oh, and Bud Light is the best-selling beer in America.

As I and many others have noted, fame is a double-edged sword: desirable sometimes, and sometimes irksome. When fame is attested in a trademark infringement case, it often plays a dominant role in determining likelihood of confusion in accordance with the DuPont factors. Fame alone is not enough to establish a likelihood of confusion between two marks, but it carries significant weight. In this case, the Board was quick to point out that a finding of fame puts a heavy thumb on Anheuser-Busch's side of the scale.

Notably, and perhaps wisely, Innvopak did not dispute whether Budweiser or Bud were famous marks. Instead, when it came to analyzing the parties' marks, it argued that Winebud was a fanciful compound noun formed from the nouns wine and bud, an analogy to horticultural words such as rosebud. Innvopak went on to argue that wine drinkers would perceive the latter

half of the applicant's mark as connoting the bud of a vine, not as a reference to Budweiser beer or the Bud family of marks.

According to Innvopak, then, the word *Bud* referred to the beer Budweiser; but the word *Budweiser* referred to someone or something from Budweis, the former name of eské Bud jovice, a small town in the Czech Republic.

The Board, not surprisingly, was not persuaded. It held that there was absolutely no evidence that consumers would associate the mark Budweiser with a geographical location. Likewise as to the mark Bud, which is the more relevant mark here, there was no evidence that consumers would make a geographical connection between it and a small town in what formerly was known as Czechoslovakia.

Moreover, the Board held that there was no evidence that *Winebud* has any meaning whatsoever. In fact, the Board held that consumers were likely to see wine as the generic name for the beverage, and *Bud* as the source-identifying portion of the mark, precisely because of the fame of Anheuser-Busch's marks. The dominant portion of the applied-for mark was *Bud*, the Board felt, and therefore the mark *Winebud* and *Bud* were highly similar.

Next, the Board addressed the question of whether beer and wine should be considered related. This question was rather easy to settle, because neither party could find a single case in which beer and wine were found to be unrelated for purposes of a likelihood of confusion rejection. Anheuser-Busch submitted six registrations for marks that covered both beer and wine, which provided some support for its case. In addition, the Board noted that beer and wine are often sold in many of the same trade channels, that neither beverage is inherently expensive, and that inexpensive products may be purchased without great care.

Thus, it did not take long for the Board to conclude that beer and other alcoholic beverages, including wine, should be considered related. Although Anheuser-Busch had never sold wine under the Bud brand, the fame of the Bud mark made it likely, according to the Board, that purchasers seeing a similar *bud* mark on wine would think that Anheuser-Busch has expanded its product line to include wine.

Finally, and for our purposes, most interestingly, the Board discussed Anheuser-Busch's survey, which found that 24 percent of respondents believed that a wine sold under the *Winebud* mark would be put out by, affiliated or connected with, or approved or sponsored by Anheuser-Busch.

Innvopak alleged various flaws in the survey, presenting no fewer than five arguments, but the Board rejected each one.

First, Innvopak protested, Anheuser-Busch's survey expert had never conducted a survey involving a wine trademark. However, the Board felt that there was nothing to suggest that such a survey would differ significantly from any other survey, and found Anheuser-Busch's expert to be qualified. Moreover, it felt the general design of the survey was appropriate, following the Eveready model.

Second, Innvopak argued that a 24 percent rate of confusion was insufficient to support a finding of likelihood of confusion. But the Board rejected that argument as well, noting that courts have often found survey results probative even when they suggested far less than 50 percent confusion. A 24 percent level of confusion, the Board concluded, if representative of the potential rate of confusion of the appropriate universe of potential purchasers, was properly supportive of Anheuser-Busch's claim.

Third, Innvopak criticized Anheuser-Busch's survey because it was conducted online. The Board noted that all survey methods have inherent advantages and disadvantages and that the applicant had offered no convincing reason why Anheuser-Busch's survey should be given reduced weight or no weight at all simply because it was conducted online.

Fourth, the applicant contended that Anheuser-Busch's expert could have used a mock-up visual of a wine bottle bearing a label, rather than the word Winebud in capital letters on a blank background. The Board found no problem with the survey expert's approach, though, since the applicant was seeking a standard character registration, and any particular presentation on a bottle or container would have unnecessarily restricted the survey to that presentation.

Finally, the applicant argued that the size of the survey sample (400 respondents) was too small to provide meaningful results. The Board observed that a well-designed and conducted survey using a representative sample can permit valid inferences to be drawn about a very large population by studying only a relatively small fraction of it. Thus, the opinions of several hundred people might indeed be probative of the opinions of millions.

After having rejected all of Innvopak's criticisms, the Board went on to conclude that use of Winebud on wine and other alcoholic beverages was indeed likely to cause confusion with Anheuser-Busch's Bud mark for beer.

In light of the Board's holding in this case, and more importantly, on its rejections of various criticisms of the consumer survey, these surveys may become more prevalent going forward in TTAB proceedings, both in inter-party and ex parte proceedings.

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