

Bose bodes well for trademark owners

“We are going to see far fewer trademark cases with claims or counterclaims of fraud,” said Susan Hightower, a senior associate of Pirkey Barber, in a session on fraudulent procurement of copyrights, trademarks and patents yesterday.

Hightower helped to draft AIPLA’s *amicus* brief in the breakthrough *In re Bose* ruling of the Federal Circuit in August this year. The case was an appeal of the TTAB’s 2007 decision to cancel Bose’s Wave mark

because the company had stopped using the mark for all of the goods specified in its trademark renewal application.

Many trademark practitioners had criticized the Board’s criteria for establishing fraud since its 2003 decision in *Medinol v Neuro Vasx*, which the Federal Circuit ruling overturned.

Hightower added that the TTAB has already issued its first precedential opinion denying a motion for summary judgment on the ground of fraud.

Linda McLeod of Finnegan, who also helped draft AIPLA’s *amicus* brief, told the *AIPLA Daily Report* that the Board’s October ruling in *Enbridge Inc v Excelerate Energy Ltd Partnership* “signals the end of the TTAB’s strict rule of fraud under *Medinol* and underscores that post-Bose, a claim of fraud must be proven by the rigorous clear and convincing standard.”

At the session, Hightower said that uncertainty over the definition of fraud remained. In particular, the Federal Circuit did not con-

sider the element of fraud defined in AIPLA’s brief as “intent to deceive or, at least, a state of mind so reckless as to the consequences that it is held to be the equivalent of intent.”

“It’s really anybody’s guess when a case on recklessness will come up before the TTAB or the Federal Circuit,” she added. Overall, she said that lawyers should still apply the same standards for good faith and duty of candor they used before the *Bose* decision: “The bottom line is: keep doing what you’re doing in terms of being careful with applications.”

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Back to the future



Professor F. Scott Kieff of George Washington University Law School gave a thought-provoking speech yesterday on patent reform, arguing that reformers should look to history for inspiration. “Patents are not all about incentives to invent,” he told a packed room. “They are about getting inventions put to use and facilitating transactions. Patents help people interact with each other; they are not just about new technologies but also new business models.”

In a talk spanning patent and antitrust law, Kieff criticized conventional wisdom about patent reform, such as the need for flexibility and the call for post-grant oppositions, as well as recent Supreme Court cases such as *MedImmune* and *Quanta*. “*Quanta* says the sale of a slice of bread means you have transferred the whole loaf. If you have to sell whole loaves, that is more expensive and interferes with deal-making,” he said. “Changes are well motivated but they are the wrong changes.”

The effect of recent developments, he added, is that settlement negotiations are based primarily on the cost of fighting, rather than the real business or the technology: “In mediation, all we’re talking about is the cost of litigation. That’s not an IP system.” He argued that reform should not weaken patents, but lead to more predictable enforcement, encourage deal-making and add symmetrical mechanisms to deal with abusive litigation.