

On August 31, 2009, the United States Court of Appeals for the Federal Circuit reversed a finding of the Trademark Trial and Appeal Board (TTAB) and held that "a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly made a false, material representation with the intent to deceive the PTO." In *re Bose Corporation*, No. 2008-1448 (Fed. Cir. August 31, 2009). This decision ends the negligence standard for fraud on the PTO first imposed by the TTAB in the seminal decision in *Medinol v. Neuro Vasx, Inc.*, 67 USPQ2d 1205 (TTAB 2003). Now, to succeed on a claim of fraud relating to an inaccurate declaration of use, a challenger will have to show that the declaration was filed with the intent to deceive.

In the context of an opposition counterclaim, Bose's registration for WAVE was cancelled for fraud because Bose was no longer manufacturing all of the goods covered by the registration (specifically tape recorders and players) at the time a declaration of continued use was made in support of the registration. The declarant, however, had executed the declaration believing that Bose's continued servicing of its previously manufactured tape recorders and players qualified as use in commerce. On appeal, the Federal Circuit made a distinction between false representations and fraudulent representations, with the latter involving intent to deceive and warranting a finding of fraud on the PTO. The Court, while agreeing with the TTAB that servicing tape recorders and players did not constitute use in commerce sufficient to support ongoing registration for those goods, disagreed with the TTAB's finding that the declarant's belief was unreasonable, held that the challenger had not supplied sufficient evidence of deceptive intent to establish fraud, and vacated the TTAB's order cancelling the registration.

The *In re Bose* decision marks a turning point in PTO fraud jurisprudence in that intent to deceive will apparently no longer be inferred from a misstatement made in a declaration of use. Challengers will now need to show deceptive intent by an applicant or registrant to prevail on a claim of fraud. Until future cases define what constitutes sufficient evidence of deceptive intent for fraud, however, it is unclear exactly what impact *In re Bose* will have on the trademark landscape, and mark owners should continue to diligently review filings with the PTO for accuracy. At the very least, it appears that an honest mistake or good-faith adoption of a legal position that the TTAB later rejects no longer equates to fraud on the PTO.

For additional information, please contact RatnerPrestia's Trademark Center.

Rex Donnelly: 302-778-3460 • [radonnelly@ratnerprestia.com](mailto:radonnelly@ratnerprestia.com)  
John McGlynn: 302-778-3467 • [jwmcglynn@ratnerprestia.com](mailto:jwmcglynn@ratnerprestia.com)