So if you vote for H.R. 1, you are cutting student aid. If you vote for H.R. 1, you are going to slash job training programs. The House bill that came over, H.R. 1, completely eliminates Federal funding for adult training, dislocated worker assistance and youth training programs, completely eliminates it. These programs provide job training and reemployment services to about 8 million Americans every year, 8 million. They just do away with it.

If you vote for H.R. 1, you are voting to slash the community services block grant. Well, they cut about $305 million from that. That provides services to some of our lowest income people and elderly. If you vote for H.R. 1, you are voting to cut investments in infrastructure, highway funding, sewer and drinking water funds, and rural economic development funding because H.R. 1 slashes community development block grants by 62 percent.

Now, I say go out and talk to your mayors, talk to your city council, talk to your boards of supervisors in your counties. Ask them if they can take a 62-percent cut in their community development block grants and what it is going to mean to them.

Well, I cannot help but also speak to my own constituents in Iowa about what this means for my own State. If H.R. 1, the House bill which passed the House, if it were to be passed and enacted into law—well, I mentioned about the cuts that we are having in the Job Corps. It would basically kill the Denison, IA, Job Corps Center, which employs 163 people. It provides training to 450 at-risk students each year, and we have a new Job Corps Center just being built, just being opened in Ottumwa. That will probably just come to a screeching halt. It is supposed to be opening later this year.

It would shut down at least the community health center in Centerville, IA. That is H.R. 1. H.R. 1 would be cutting down the community services block grant and would shut down the Red Rock Community Action Agency serving Boone, Jasper, Warren, Marion, and rural Polk County.

H.R. 1, as I mentioned, would completely eliminate funding for job training programs, which assisted more than 35,000 Iowans in the last year. As I mentioned, it would slash Pell grants for our kids who go to all of our colleges in Iowa, the private not-for-profits and our Regents institutions. Two thousand low-income Iowa kids who now attend Head Start would be cut off.

Lastly, it is not only just the cuts and the slashes to these vital programs which will increase unemployment and send us back into another recession, there are riders in this bill, what we call legislative riders, that are pernicious. They do terrible damage to our country.

For example—just one—there is a rider in the bill that says no money can be used or spent to continue the implementation of the health reform bill that we passed last year. Well, what does that mean? Well, that means right now, in law, because of the Affordable Care Act we passed last year, kids can stay on their parents' policy until they are age 26. That would be gone. The question would be, the ones who got on before this, will they be able to stay on? But I can tell you, no new kids would ever be allowed to stay on their parents' policy until they are age 26.

We put in—and as you know, it is in law right now—that an insurance company cannot impose a lifetime limit on individuals. That was in the bill last year. That would be gone. They can start reinstituting lifetime limits and annual limits.

Also we had a provision in the bill that provided for a medical loss provision. Let me try to explain that.

In our bill we said insurers and health insurance companies have to pay at least 80 cents of every dollar of premium they collect on health care rather than profits, bonuses, overhead, fancy buildings, and corporate jets and all of that. They had to pay—80 cents of every premium dollar has to go for health care. It is done away with under H.R. 1. We cannot enforce that at all.

So, again, for those who have seen benefits to themselves from the health care bill we passed, whether it is keeping their kids on their policy or elderly people now who get free mammograms and free colonoscopies and a free health checkup every year with no copays, no deductibles, that ends. That ends with H.R. 1.

So the bill passed by the House is just, as I said, bad policy, and it is bad values. It is not the values of our country, and I hope the Senate will resoundingly—resoundingly—defeat H.R. 1, consign it to the scrap heap of history, the history of ill-advised ideas, of ill-advised programs. There have been a lot of them that have come along in the history of this country.

Fortunately, I think the Congress in most instances has turned them down, and we moved ahead. We can't afford to go backward. H.R. 1 would do that. It would take this country back. We would lose jobs. It would cut kids out of getting an education, close down Head Start centers. It would widen that gulf between the rich and the poor. We can't continue to go down that road. We don't want to wind up another Third World country where we have a few at the top and everybody at the bottom and nobody in between. The middle class built this country, and we cannot continue to erode the middle class. That is what H.R. 1 would do, erode the middle class and widen the gulf between the rich and poor.

I hope the Senate will recognize H.R. 1 for what it is, a detriment, a body blow to our recovery efforts. I hope the Senate will resoundingly defeat it.

I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. LEAHY. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

PATENT REFORM ACT OF 2011—Continued

Mr. LEAHY. Mr. President, since the Senate began this debate on the American Invents Act more than a week ago, I have talked about American ingenuity and innovation. As this debate comes to a close, I want to emphasize that this is legislation that should promote innovation, help create jobs, and help energize the economy as we continue our recovery. This legislation can be a key part of a jobs agenda. We can help unleash innovation an promote American invention, all without adding a penny to the deficit. This is commonsense, bipartisan legislation.

Innovation has been a cornerstone of the American economy from the time Thomas Jefferson examined the first patent to today. The Founders recognized the importance of promoting innovation. A number were themselves inventors. The Constitution explicitly grants Congress the power to ''promote the progress of science and useful arts, by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries.'' The discoveries made by American inventors and research institutions, commercialized by American companies, and protected and promoted by American patent laws have made our system the envy of the world. The President has spoken all year about the need to win the future by out innovating our competition. This bill can play a key role in that effort.

Yesterday, I commended Austan Goolsbee, the chair of the President's Council of Economic Advisers, for his white board presentation this week on the importance of patent reform to help America win the global competition and create jobs. The creation of more than 220,000 jobs in the private sector last month, the creation of 1.5 million jobs over the last 12 months, and the unemployment rate finally being reduced to 8.9 percent are all signs that the efforts we have made over the last 2 years to stave off the worst recession since the Great Depression are paying off and the economic recovery is taking hold. The almost full percent point drop in the unemployment rate over the last 3 months is the largest decline in unemployment since 1983. Despite interruptions of economic activity in many parts of the country caused by winter weather over the last months and in recent days, despite the extraordinary rise in oil

prices, the Dow Jones industrial average has climbed back to over 12,000 from a low point of 6,500. Passage of the America Invents Act should help bolster our economic recovery and keep us on the right path toward business development and job creation.

As we began this debate, I referred back to the President's State of the Union address and his challenge to the Nation to out-innovate, out-build and out-educate our global competitors. Enacting the America Invents Act is a key to meeting this challenge. Reforming the Nation's antiquated patent system will promote American innovation, create American jobs, and grow America's economy. I thank the President and his administration for their help and support for the Leahy-Hatch-Grassley America Invents Act. Commerce Secretary Locke has been a strong partner in our efforts, and Director Kappos of the Patent and Trademark Office has been an indispensable source of wise counsel.

The America Invents Act will keep America in its longstanding position at the pinnacle of innovation. This bill will establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs, while making sure no party's access to court is denied.

The America Invents Act is the product of eight Senate hearings over the last three Congresses. Our bill is the product of years of work and compromise. The Senate Judiciary Committee has reported patent reform legislation to the Senate in each of the last three Congresses, this year, unanimously. And the House has seen efforts over the same period led by Congressmen LAMAR SMITH of Texas and HOWARD BERMAN of California. The legislation we are acting on today, in fact, is structured on the original House bill and contains many of the original provisions.

From the beginning, we recognized the need for a more effective and efficient patent system, one that improves patent quality and provides incentives for entrepreneurs to create jobs. A balanced and efficient intellectual property system that rewards invention and promotes innovation through high quality patents is crucial to our Nation's economic prosperity and job growth. That is how we win the future—by unleashing the American inventive spirit. This bill, the America Invents Act, will allow our inventors and innovators to flourish.

It is important to our country's continued economic recovery, and to our successfully competing in the global economy. America needs a 21st century patent system to lead. The last extensive reform of our patent system was nearly 60 years ago. It is time.

While the Congress debates spending and budget measures in an often too partisan manner, the American people are craving—and the American economy is demanding—bipartisan legislation that can create jobs and help our economy through common sense measures. That is what this bill can do. It relies on not one dollar of taxpayer money. Let me emphasize, not a dime in taxpayer money is spent on the Patent and Trademark Office, PTO, reforms. They are all funded by patent fees, not taxes.

Innovation drives the Nation's economy, and that entrepreneurial spirit can only be protected by a patent system that promotes invention and spurs new ideas. We need to reform our patent system so that these innovations can more quickly get to market. A modernized patent system—one that puts American entrepreneurs on the same playing field as those throughout the world—is a key to that success. This is an idea that cuts across the political spectrum.

During Senate debate over the last week our bill has been improved by a number of Senators who have contributed amendments. Senators BENNET, COONS, SCHUMER, MENENDEZ, PRYOR, STABENOW, BAUCUS, BINGAMAN, COBURN and KIRK have all contributed, and I thank them for working with us. Senator CARDIN attempted to offer germane amendments, and I regret that these were blocked.

I thank our ranking Republican on the committee and the comanager of this measure, Senator GRASSLEY, and his staff, Kolan Davis and Rita Lari, for their dedication to this effort. I commend Senator HATCH for sticking with it for these many years, and Senator KYL for helping get this done.

I also extend my personal thanks, as well, to Senator KLOBUCHAR of Minnesota who was active during committee consideration and helped manage this legislation effort in the Senate. She has been outstanding.

The Senate's action today could not have been accomplished without the hard work of many dedicated staffers. I would like to thank in particular the steadfast work of Aaron Cooper of my Judiciary Committee staff. Aaron has spent countless hours in meetings and briefings, with Members, other staff, and interested parties, working to help me ensure that the America Invents Act preserved the meaningful reforms we have been working toward since 2005. I would also like to thank Ed Pagano, my chief of staff, and Bruce Cohen, my chief counsel, who have worked on this issue since the start, as well as Susan Davies who served as my chief Intellectual Property counsel through the formative stages of this legislative effort. Erica Chabot, Curtis LeGeyt and Scott Wilson of my Judiciary Committee staff also deserve thanks for their committed work on this legislation.

I also commend the hardworking Senate floor staff, Tim Mitchell and Trish Engle, as well as Dave Schiappa, and the staffs of other Senators, including Tim Molino, Joe Matal, and Matt Sandgren, for their dedicated efforts.

I also thank the many individuals, companies, associations and coalitions that have helped with this effort. This legislation has been supported by both business and labor, including the National Association of Manufacturers, the United Steelworkers, the AFL–CIO, the Association of American Universities, the American Bar Association, the Association of Public and Land-Grant Universities, the Association of American Medical Colleges, the Association of University Technology Managers, the American Council on Education, the Council on Government Relations, PhRMA, BIO, the Intellectual Property Owners Association, the American Intellectual Property Law Association, the Coalition for 21st Century Patent Reform, the Association for Competitive Technology, the Coalition for Patent and Trademark Information Dissemination, IBM, General Electric, Eli Lilly and Company, Bose Corporation, Johnson and Johnson, 3M, General Mills, Honeywell, Monsanto, Motorola, Cargill, Inc., Caterpillar, Enventys, Abbott, Astra Zeneca, AdvaMed, Air Liquide, Bayer, Beckman Coulter, Boston Scientific, BP, Bridgestone American Holdings, Inc., Bristol-Myers Squibb, the California Healthcare Institute, the Colorado BioScience Association, Cummins, The Dow Chemical Company, DuPont, Eastman Chemical Company, ExxonMobil, Genentech, Genzyme, GlaxoSmithKline, the Healthcare Institute of New Jersey, Henkel Corporation, Hoffman-LaRoche, Illinois Tool Works, International Game Technology, Kodak, Medtronic, Merck & Co., Inc., Millenium Pharmaceuticals, Milliken and Company, Northrop Grumman, Novartis, PepsiCo., Inc., Pfizer, Procter & Gamble, SanDisk Corporation, Sangamo BioSciences, Inc., United Technologies, USG Corporation, the Virginia Biotechnology Association, Weyerhaeuser, the American Institute for CPAs, the American Institute of Certified Public Accountants, the Tax Justice Network USA, the New Rules for Global Finance, the American College of Tax Counsel, Consumer Action, The American College of Trust and Estate Counsel, the Partnership for Philanthropic Planning, Global Financial Integrity, the International Association for Registered Financial Consultants, the National Association of Enrolled Agents, USPIRG, the Certified Financial Planner Board of Standards, the Financial Planning Association, the American Association of Attorney-Certified Public Accountants, the Citizens for Tax Justice, the National Treasury Employees Union, the Independent Community Bankers of America, and numerous other organizations and companies representing all sectors of the patent community that have been urging action on patent reform proposals for years.

The America Invents Act will accomplish 3 important goals, which have been at the center of the patent reform debate from the beginning: It will improve and harmonize operations at the

PTO; it will improve the quality of patents that are issued; and it will provide more certainty in litigation. In particular, the legislation will move this Nation's patent system to a first-inventor-to-file system, make important quality enhancement mechanisms, and provide the PTO with the resources it needs to work through its backlog by providing it with fee setting authority, subject to oversight. The America Invents Act provides the tools the PTO needs to separate the inventive wheat from the chaff, which will help business bring new products to market and create jobs.

Innovation has always been at the heart of America and American success. From the founding of our Nation, we recognized the importance of promoting and protecting innovation, and so the Constitution explicitly grants Congress the power to ''promote the progress and science and useful arts, by securing for limited times to . . . inventors the exclusive right to their respective . . . discoveries.'' The patent system plays a key role in encouraging innovation and bringing new products to market. The discoveries made by American inventors and research institutions, commercialized by our companies, and protected and promoted by our patent laws have made our system the envy of the world.

High quality patents are the key to our economic growth. They benefit both patent owners and users who can be more confident in the validity of issued patents. Patents of low quality and dubious validity, by contrast, enable patent trolls who extort unreasonable licensing fees from legitimate businesses, and constitute a drag on innovation. Too many dubious patents also unjustly cast doubt on truly high quality patents.

After 6 years of debate and discussion, more than a dozen hearings and mark up sessions, and countless hours of member and staff meetings with two presidential administrations and interested parties across the spectrum, the Senate is finally acting to make the first meaningful, comprehensive reforms to the nation's patent system in nearly 60 years. The Senate debate has now extended for more than a week. Passage of the America Invents Act demonstrates what we can accomplish when we cast aside partisan rhetoric, and focus on working together for the American people and for our future.

It has been almost 6 years since Chairman SMITH and Congressman BERMAN introduced the first version of patent reform legislation in 2005, but the structure and guiding principles of the legislation remain the same. The bill will speed the process by which the Patent Office considers applications and should improve the quality of patents it issues.

Innovation and economic development are not uniquely Democratic or Republican objectives, so we worked together to find the proper balance for America—for our economy, for our inventors, for our consumers. Working together, we can smooth the path for more interesting—and great—American inventions. That is what this bipartisan, comprehensive patent reform bill will do. No one claims that ours is a perfect bill. It is a compromise that will make key improvements in the patent system. Having coordinated with the leaders in the House through this process, I hope that the House will look favorably on our work and adopt this measure so that it can be sent to the President without delay and its improvements can take effect in order to encourage American innovation and promote American invention.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. REID. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, I ask unanimous consent the Reid amendment No. 152 be withdrawn; that the Reid amendment No. 143 be modified with the changes at the desk; the Senate proceed to vote on the amendment, as modified, with no amendments in order prior to the vote; that there then be 30 minutes of debate equally divided between the two managers or their designees; that S. 23 be read a third time; that a budgetary pay-go statement be read; the Senate then proceed to a vote on passage of the bill, as amended; and the motions to reconsider be considered made and laid upon the table with no intervening action or debate.

Further, I ask unanimous consent that at 12 noon Wednesday, March 9, the Senate proceed to the consideration of Calendar No. 14, H.R. 1, the Defense appropriations long-term continuing resolution for fiscal year 2011; that there be 3 hours of debate on H.R. 1 and the Democratic alternative, the Inouye substitute amendment No. 149, with the time equally divided between the two leaders or their designees prior to a vote on passage of H.R. 1; that the vote on passage be subject to a 60-vote threshold; that if the bill achieves 60 affirmative votes, the bill be read a third time and passed; that if the bill does not achieve 60 affirmative votes, the majority leader be recognized to offer the Inouye substitute amendment No. 149; the Senate then proceed to a vote on the substitute amendment; that the substitute amendment be subject to a 60-vote threshold; if the substitute amendment achieves 60 affirmative votes, the substitute amendment be agreed to; the bill, as amended, be read a third time and passed; if the substitute amendment does not achieve 60 affirmative votes, H.R. 1 be returned to the calendar; that no motions or amendments be in order to the substitute amendment or to the bill prior to the votes; further, that all of the above occur with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, with this agreement, I ask unanimous consent that the cloture vote with respect to the motion to proceed to H.R. 1 be vitiated.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. Mr. President, even though there have been a few turns in the road, we are at the place where we need to be. We need to be able to show the American people where we are on these two measures. I express my appreciation to my friend, the Republican leader. As I said, things don't always work smoothly around here, but they usually work. Now we are at a point where we can vote on these two measures which is what we need to do.

The PRESIDING OFFICER. Under the previous order, amendment No. 152 is withdrawn.

Under the previous order, amendment No. 143 is modified with the changes at the desk.

The amendment, as modified, is as follows:

(Purpose: To include public institutions of higher education in the definition of a micro entity)

On page 93, before line 18, insert the following:

''(d) STATE INSTITUTIONS OF HIGHER EDUCATION.—

''(1) IN GENERAL.—For purposes of this section, a micro entity shall include an applicant who certifies that—

''(A) the applicant's employer, from which the applicant obtains the majority of the applicant's income, is a State public institution of higher education, as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002); or

''(B) the applicant has assigned, granted, conveyed, or is under an obligation by contract or law to assign, grant, or convey, a license or other ownership interest in the particular application to such State public institution.

''(2) DIRECTOR'S AUTHORITY.—The Director may, in the Director's discretion, impose income limits, annual filing limits, or other limits on who may qualify as a micro entity pursuant to this subsection if the Director determines that such additional limits are reasonably necessary to avoid an undue impact on other patent applicants or owners or are otherwise reasonably necessary and appropriate. At least 3 months before any limits proposed to be imposed pursuant to this paragraph shall take effect, the Director shall inform the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate of any such proposed limits.''.

The PRESIDING OFFICER. The question is on agreeing to amendment No. 143, as modified.

The amendment (No. 143), as modified, was agreed to.

Mr. COBURN. I wish to express my opposition to Reid amendment No. 143, as modified. I do not believe public institutions of higher education, or any entity, should be carved out of the definition of micro entity in the underlying legislation. Had a rollcall vote occurred, I would have voted no.

Mr. LEAHY. Mr. President, I suggest the absence of a quorum, with unanimous consent that the time be equally divided.

The PRESIDING OFFICER. Without objection, it is so ordered.

The clerk will call the roll.

The assistant bill clerk proceeded to call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

CHECK 21 ACT PATENTS

Mr. PRYOR. I would like to clarify some concerns I have about the Schumer-Kyl program that was included in the managers' amendment to the America Invents Act, adopted on March 1. I am specifically concerned that this provision revives an amendment that had been included in previous versions of the bill—that amendment specifically targeted patents related to the Check 21 Act and eliminated the ability of the holder of such patents to collect damages. Is that the purpose of the Schumer-Kyl language?

Mr LEAHY. No, the amendment is entirely different from the 2008 amendment related to patents that place on tax on implementation of the Check 21 Act. The Schumer-Kyl program addresses certain business method patents and does not target any specific patents. The Schumer-Kyl program is intended to provide a cost-effective alternative to litigation to examine business-method patents.

Mr. PRYOR. Am I correct then that the Schumer-Kyl program is simply trying to address the problem of business method patents of dubious validity that are commonly associated with the Federal Circuit's 1998 decision in State Street Bank v. Signature?

Mr. LEAHY. That is correct. It is still unclear whether the subject matter of these patents qualifies as patentable subject matter under current law. Patents of low quality and dubious validity, as you know, are a drag on innovation because they grant a monopoly right for an invention that should not be entitled to one under the patent law.

Mr. PRYOR. Can the Senator describe how the program would work in practice?

Mr. LEAHY. Certainly. If a petitioner provides evidence to the PTO and the PTO determines that the patent is on a ''covered business method patent'' then the PTO would institute a post-grant review of that patent. In this review, the PTO could consider any challenge that could be heard in court.

Mr. PRYOR. Is it correct then that the Schumer proceeding would only have an effect if the PTO determines it is more likely than not that a claim of the patent is invalid and, even then, the proceeding would have no effect on a patent unless the petitioner can demonstrate that under current law the patent is not valid?

Mr. LEAHY. That is correct. The proceeding has a higher threshold than current reexamination before the PTO will even undertake a review of the patent. So as a practical matter, a patent without any serious challenge to its validity would never be subject to a proceeding.

Mr. PRYOR. Would the Senator agree that in a case in which the validity of the patent has been upheld by a district court but the case remains on appeal, that this amendment would likely not affect the pending appeal?

Mr. LEAHY. I would. The patent may still be subject to the proceeding, but since the court did not hold the patent invalid or unforceable, it would not likely have an effect on the pending appeal.

Mr. SCHUMER. Mr. President, I want to take the opportunity to explain further a few elements of the Schumer-Kyl provision in the patent bill. The Transitional Program for business method patents addresses a critical problem in the patent world, and it is crucial that it be administered and implemented appropriately by both the Patent and Trademark Office and the courts.

Business method patents are the bane of the patent world. The business method problem began in 1998 with the U.S. Court of Appeals for the Federal Circuit decision in State Street Bank & Trust Co. v. Signature Financial Group, Inc. State Street created a seachange in the patentability of business-methods, holding that any invention can be patented so long as it produces a ''useful, concrete, and tangible result'' and meets other requirements of the patent laws.

State Street launched an avalanche of patent applications seeking protection for common business practices. The quality of these business method patents has been much lower than that of other patents, as Justice Kennedy noted in his concurring opinion in eBay Inc. v. MercExchange. Justice Kennedy wrote about the ''potential vagueness and suspect validity'' of some of ''the burgeoning number of patents over business methods.'' Commentators like Rochelle Dreyfuss have also lamented ''the frequency with which the Patent Office issues patents on shockingly mundane business inventions.'' Malla Pollack pointed out that ''[M]any of the recently-issued business method patents are facially (even farcically) obvious to persons outside the USPTO.''

One of the main reasons for the poor quality of business method patents is the lack of readily accessible prior art references. Because business methods were not patentable prior to 1998 when the State Street decision was issued, the library of prior art on business method patents is necessarily limited—as opposed, say, to more traditional types of patents for which there can be centuries of patents and literature about them for the PTO to examine. Furthermore, information about methods of conducting business, unlike information about other patents, is often not documented in patents or published in journals. This means a patent examiner has significantly less opportunity than he might with a traditional patent to weed out undeserving applications. Unfortunately, that means the burden falls on private individuals and an expensive court process to clean up the mess.

The ability to easily obtain business method patents without a rigorous and thorough review in the Patent Office has created a flood of poor quality business method patents and a cottage industry of business method patent litigation. The Federal courts have recognized this problem, and indeed even the Supreme Court has begun to address it. In KSR Intl Co. v. Teleflex, Inc. and Bilski v. Kappos, the Court articulated a new standard for obviousness and made clear that abstract business methods are not patentable. While these legal developments are important, the leave in limbo the many patents that were issued by the PTO since State Street that are not in fact valid.

Litigation over invalid patents places a substantial burden on U.S. courts and the U.S. economy. Business-method inventions generally are not and have not been patentable in countries other than the United States. In order to reduce the burden placed on courts and the economy by this back-and-forth shift in judicial precedent, the Schumer-Kyl transitional proceeding authorizes a temporary administrative alternative for reviewing business method patents.

It is important to clarify two elements of the Schumer-Kyl program's operation in particular. First, there is the issue of how a district court should treat a motion for a stay of litigation in the event the PTO initiates a pilot program. Second, there is the issue of how the Federal circuit will treat interlocutory appeals from stay decisions. Finally, there is the issue of which patents should be considered to be covered business method patents.

The transition program created by the Schumer-Kyl amendment is designed to provide a cheaper, faster alternative to district court litigation over the validity of business-method patents. This program should be used instead of, rather than in addition to, civil litigation. To that end, the amendment expressly authorizes a stay of litigation in relation to such proceedings and places a very heavy thumb on the scale in favor of a stay being granted. It is congressional intent that a stay should only be denied in extremely rare instances.

When Congress initially created ex parte reexamination, it did not expressly provide for a stay of litigation pending the outcome of an ex parte reexamination proceeding. Rather, Congress relied on the courts' inherent power to grant stays and encouraged courts to liberally grant stays. However, relying on the courts' inherent

power to grant stays did not result in courts liberally granting stays. For example, one commentator who surveyed the grant rates on motions for stay pending reexamination, Matthew A. Smith, found that numerous district courts granted stays less than half the time. In fact, Eastern District of Texas grants stays only 20 percent of the time. Due to low grant rates for stays in several jurisdictions, this amendment instructs courts to apply the four-factor test first announced in Broadcast Innovation, L.L.C. v. Charter Communications when evaluating stay motions.

The amendment employs the Broadcast Innovation test, rather than other multifactor tests employed by other district courts, because this test properly emphasizes a fourth factor that is often ignored by the courts: ''whether a stay will reduce the burden of litigation on the parties and on the court.'' Too many district courts have been content to allow litigation to grind on while a reexamination is being conducted, forcing the parties to fight in two fora at the same time. This is unacceptable, and would be contrary to the fundamental purpose of the Schumer-Kyl amendment to provide a cost-efficient alternative to litigation.

Absent some exceptional circumstance, the institution of a business-methods proceeding—which requires a high up-front showing and will be completed in a relatively short period of time—should serve as a substitute for litigation, and result in a stay of co-pending district court litigation.

By adopting this four-factor test, rather than one of the three-factor tests used by other courts, the amendment also precludes the use of additional factors that are not codified here and that have occasionally been used by some district courts. For example, a few courts have occasionally employed a different de facto fourth factor: whether the challenger offers ''to forgo invalidity arguments based on prior art patents and/or printed publications considered during an ex parte reexamination process.'' The proceeding authorized by this amendment, at subsection (b)(1)(D), sets its own standard for determining what issues may still be raised in civil litigation if a patent survives PTO review. By codifying the exclusive set of factors that courts are to consider when granting stays, the amendment precludes courts from inventing new factors such as extra-statutory estoppel tests.

Several unique features of this proceeding further make it appropriate to grant stays in all but the most unusual and rare circumstances. These proceedings will only be instituted upon a high up-front showing of likely invalidity. The proceeding is limited to certain business method patents, which, as noted above, are generally of dubious quality because unlike other types of patents, they have not been thoroughly reviewed at the PTO due to a lack of the best prior art. And the proceeding will typically be completed within 1 year.

In summary, it is expected that, if a proceeding against a business method patent is instituted, the district court would institute a stay of litigation unless there were an extraordinary and extremely rare set of circumstances not contemplated in any of the existing case law related to stays pending reexamination. In the rare instance that a stay is not granted, the PTO should make every effort to complete its review expeditiously. We encourage the PTO Director to promulgate regulations to this effect to ensure that petitioners know that in extreme circumstance where a gay is not granted, the PTO will complete its review in a compressed timeframe, such as within 6 months.

To ensure consistent and rigorous application of the Broadcast Innovation standard, the amendment also allows the parties, as of right, to have the Federal Circuit closely review the application of this test in a manner that ensures adherence to these precedents and consistent results across cases. As such, either party may file an interlocutory appeal directly with the Federal Circuit. Because this amendment provides an automatic right to an interlocutory appeal, the district court does not need to certify the appeal in writing, as it would ordinarily need to do under 28 U.S.C. §1292(b). Also, unlike the discretion typically afforded an appellate court under 28 U.S.C. §1292(b), under this amendment the Federal Circuit may not decline to hear an interlocutory appeal.

Since the denial of a stay pending post-grant review under this amendment is an extraordinary and extremely rare circumstance, the filing of an interlocutory appeal should result in the stay of proceedings in the district court pending the appeal. Staying the lower court proceedings while the Federal Circuit reviews the question of whether the case should be stayed pending the post-grant review will help ensure that requests to stay are consistently applied across cases and across the various district courts.

On appeal the Federal Circuit can and should review the district court's decision de novo. It is expected that the Federal Circuit will review the district court's decision regarding a stay de novo, unless there are unique circumstances militating against a de novo review, such as subsequent requests for an interlocutory appeal in the same case. A de novo review is central to the purpose of the interlocutory appeal provision in the Schumer-Kyl amendment, which is to ensure consistent application of standards and precedents across the country and to avoid one particular court with a favorable bench becoming the preferred venue of business method patent plaintiffs.

The definition of covered business method patents in the transitional program was developed in close consultation with the PTO to capture all of the worst offenders in the field of business method patents, including those that are creatively drafted to appear to be true innovations when in fact they are not.

The amendment only applies to ''covered business method patents.'' If the PTO determines that a patent is a ''covered business method patent''—and the other applicable requirements of this amendment and Chapter 32 are met—the patent will be subject to post-grant review under this amendment regardless of whether the patent has been through prior PTO proceedings, such as ex parte reexamination, or current or prior litigation.

The definition of a ''covered business method patent'' includes ''a method or corresponding apparatus.'' The phrase ''method or corresponding apparatus'' is intended to encompass, but not be limited to, any type of claim contained in a patent, including, method claims, system claims, apparatus claims, graphical user interface claims, data structure claims—Lowry claims—and set of instructions on storage media claims—Beauregard claims. A patent qualifies as a covered business method patent regardless of the type or structure of claims contained in the patent. Clever drafting of patent applications should not allow a patent holder to avoid PTO review under this amendment. Any other result would elevate form over substance.

Not all business method patents are eligible for PTO review under this amendment. Specifically, ''patents for technological inventions'' are out of scope. The ''patents for technological inventions'' exception only excludes those patents whose novelty turns on a technological innovation over the prior art and are concerned with a technical problem which is solved with a technical solution and which requires the claims to state the technical features which the inventor desires to protect. It is not meant to exclude patents that use known technology to accomplish a business process or method of conducting business—whether or not that process or method appears to be novel. The technological invention exception is also not intended to exclude a patent simply because it recites technology. For example, the recitation of computer hardware, communication or computer networks, software, memory, computer-readable storage medium, scanners, display devices or databases, specialized machines, such as an ATM or point of sale device, or other known technologies, does not make a patent a technological invention. In other words, a patent is not a technological invention because it combines known technology in a new way to perform data processing operations.

The amendment covers not only financial products and services, but also the ''practice, administration and management'' of a financial product or service. This language is intended to

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