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II

101ST CONGRESS
2D SESSION

S. 2326

To amend title 35, United States Code, with respect to patents on certain processes.

IN THE SENATE OF THE UNITED STATES

MARCH 22 (legislative day, JANUARY 23), 1990

Mr. DECONCINI (for himself, Mr. HOLLINGS, Mr. LAUTENBERG, Mr. CRANSTON, and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 35, United States Code, with respect to patents on certain processes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PATENTABILITY OF CERTAIN PROCESSES.

Section 103 of title 35, United States Code, is amended by adding at the end the following new paragraph:

"A process of making a product shall not be considered obvious under this section if an essential material used in the process is novel under section 102 and otherwise nonobvious under section 103.".

HeinOnline -- 2 An Act to Amend Title 35, United States Code, with Respect to Patents on Biotechnological Processes, Pub. L. No.104-41, 109 Stat. 351 1 1995

SEC. 2. IMPORTATION PROHIBITION; INFRINGEMENT BY IMPORTATION, SALE, OR USE.

(a) AMENDMENT TO TARIFF ACT OF 1930.—Section 337(a)(1)(B) of the Tariff Act of 1930 (19 U.S.C. 1337(a)(1)(B)) is amended—

(1) in clause (i) by striking "or" after the semicolon;

(2) in clause (ii) by striking out the period at the end and inserting "; or"; and

(3) by adding at the end the following:

"(iii) are made, produced, or processed under, or by means of, the use of an essential biotechnological material (as defined under section 154(b) of title 35, United States Code) covered by a valid and enforceable United States patent.".

(b) AMENDMENTS TO TITLE 35, UNITED STATES CODE.—

(1) INFRINGEMENT.—Section 271 of title 35, United States Code, is amended by adding at the end the following new subsection:

"(h) Whoever without authority imports into the United States or sells or uses within the United States a product which is made by using an essential biotechnological material (as defined under section 154(b)) which is patented in the United States shall be liable as an infringer if the importa-

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tion, sale, or use of the product occurs during the term of such patent.".

(2) CONTENTS AND TERM OF PATENT.—Section 154 of title 35, United States Code, is amended—

(A) by inserting "(a)" before "Every";

(B) by inserting "(1)" after "in this title,";

(C) by striking "and, if the invention" and inserting "(2) if the invention";

(D) by inserting after "products made by that process," the following: "and (3) if the invention is an essential biotechnological material used in making a product, of the right to exclude others from using or selling throughout the United States, or importing into the United States, that product,"; and

(E) by adding at the end the following:

"(b) For purposes of this section, the term 'essential biotechnological material' means a biologically engineered organism that is essential for the production of a product. Such term includes any host cell, DNA sequence, or vector.".

SEC. 3. EFFECTIVE DATE.

(a) SECTION 1.—The amendment made by section 1 shall apply to all United States patents granted before, on, or after the date of the enactment of this Act and to all applications for United States patents pending on or filed after such

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date of enactment, including any application for the reissuance of a patent.

(b) SECTION 2.—(1) The amendment made by section 2(a) shall apply only to articles imported, or sold for importation, on or after the date of the enactment of this Act.

(2)(A) Subject to subparagraph (B), the amendments made by section 2(b) shall take effect on the date of the enactment of this Act.

(B) With respect to any article which is imported before the date of enactment of this Act, and which, but for the amendment made by section 2(b), could be sold or used within the United States, no person shall be liable for infringement under section 271(h) of title 35, United States Code, for such sale or use.

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27)

HeinOnline -- 2 An Act to Amend Title 35, United States Code, with Respect to Patents on Biotechnological Processes, Pub. L. No.104-41, 109 Stat. 351 [xlviii] 1995

HeinOnline -- 2 An Act to Amend Title 35, United States Code, with Respect to Patents on Biotechnological Processes, Pub. L. No.104-41, 109 Stat. 351 [xlix] 1995