Intellectual Property

2011 SPRING BULLETIN

Getting the Prescription Right for Patenting Personalized Medicine Innovations

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"Personalized medicine" refers to the use of patient-specific information to better inform medical care. Even now, certain DNA sequence information and measures of various "biomarker" levels are used to guide diagnostic or treatment decisions. For example, the life-saving drug Herceptin® can be used as a powerful weapon in the fight against breast cancer. However, its benefits are limited to treating tumors that have a specific genetic anomaly. A simple test detects this anomaly and determines whether Herceptin® therapy will benefit the patient.

Another current example of personalized medicine comes from the cardiovascular field. At the end of 2010, Palo Alto-based CardioDx, a pioneer in the field of cardiovascular genomic diagnostics, announced that Corus™ CAD, the company's blood-based gene expression test, was honored as one of Time magazine's "Top Ten Medical Breakthroughs of 2010." Corus™ CAD is the first and only clinically-validated blood-based test to help clinicians confidently identify which of their stable symptomatic patients are likely to need further assessment for obstructive coronary artery disease.

The list goes on to include tests that determine disease progression in rheumatoid arthritis (Crescendo Bioscience), risk of developing diabetes (Tethys Biosciences), risk of transplant rejection (XDx – Expression Diagnostics), tests to assess breast and ovarian cancer risk (Myriad Genetics), and those used to guide treatment decisions for breast and colon cancer patients (Genomic Health).

As evolving DNA sequencing technologies drive down costs, we can soon imagine a world that includes a patient's complete genomic sequence as part of an electronic medical record. Incorporating individualized genomic information into medical practice moves us into what Lee Hood refers to as "P4" paradigm, *i.e.,* predictive, preventive, personalized, and participatory medicine. However, much work remains to translate this promise into a new reality. Development, validation, approval, and reimbursement of new diagnostic tests that translate this information into useful indicators of an individual's disease risk, or an optimal treatment approach, requires private sector investment in nascent personalized medicine companies.

Such investments are protected by our patent system. Patents provide companies with time-limited exclusive rights to exploit their inventions and recoup a reasonable return on the considerable investment needed to develop these tests and bring them to market.

Patent protection for personalized medicine inventions is currently in a state of flux. The majority of disputes are over the eligibility of personalized medicine inventions for patent protection under 35 U.S.C. § 101. In one recent case, *Prometheus Labs., Inc. v. Mayo Collaborative Servs.,* 628 F. 3d 1347 (Fed. Cir. 2010), *petition for cert. filed, (U.S. Mar. 17, 2011) (No. 10-1150),* the claims at issue were directed to methods of optimizing therapy for specific drugs (6-Mercaptopurine and azathioprine) by

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determining whether specific metabolite levels were above or below a threshold. Levels exceeding the threshold indicate that dosing should be adjusted downward, and vice versa. All claims recite determining the level of metabolite. Some claims also recite administering the drug prior to the determining step.

The case was before the U.S. Court of Appeals for the Federal Circuit the first time in 2009. Applying the machine or transformation test that the court had articulated in its decision in *In re Bilski,* 545 F. 3d 943 (Fed. Cir. 2008), the court decided that both administering a drug to a patient and determining metabolite levels satisfied the transformation prong of the machine or transformation test. The court reasoned that the body is transformed by administering the drug, and that the sample is transformed by the processes used to determine metabolite levels. Mayo Collaborative appealed this decision to the U.S. Supreme Court, which remanded the case back to the Federal Circuit in light of *Bilski v. Kappos,* 130 S. Ct. 3218 (which held that the machine or transformation test provides an "investigative tool" to patentability, but is not a necessary condition for patentability).

On remand, the Federal Circuit affirmed its previous *Prometheus* decision, confirming that the claims at issue are patent eligible. For those claims including a drug administering step, the court stated, "[t]he transformation is of the human body and of its components following the administration of a specific class of drugs and the various chemical and physical changes of the drugs' metabolites that enable their concentrations to be determined. We thus have no need to separately determine whether the claims also satisfy the machine prong of the test." As for claims that did not include "administering" the Court reiterated its position that the metabolite determining step "necessarily involves a transformation." Quoting a Prometheus expert, the court noted that, "at the end of the process, the human blood sample is no longer human blood; human tissue is no longer human tissue."

Mayo argued that the claims at issue were assay-and-correlate-style *LabCorp* claims (based on simple correlations between two substances inherently resulting from underlying physiology) and cast the claims as an improper attempt to patent a natural phenomena (*i.e.*, the underlying physiology). It is important to note that the claims at issue in *LabCorp* were not analyzed for patent eligibility under 35 USC § 101. *LabCorp of Am. Holdings v. Metabolite Labs, Inc.*, 584 U.S. 124 (2006). In an opinion dissenting from the Supreme Court's dismissal of certiorari for *LabCorp* Justice Breyer suggested that he found such "assay-and-correlate" claims to be an impermissible attempt to patent a natural phenomena.

The Court addressed arguments that drug transformation into a metabolite is merely a reflection of a natural phenomenon. "As Prometheus points out, quite literally every transformation of physical matter can be described as occurring according to natural processes and natural law. Transformations operate by natural principles. The transformation here, however, is the result of the physical administration of a drug to a subject to *transform—i.e.,* treat—the subject, which is itself not a natural process."

The court also addressed the issue of pre-emption. Mayo had argued that Prometheus's claims "preempt all practical use of naturally occurring correlations between metabolite levels and drug efficacy and any machine or transformation present in the claims is merely insignificant post solution activity." The court answered that "Prometheus's claims are drawn not to a law of nature, but to a particular application of naturally occurring correlations, and accordingly do not preempt all uses of the recited correlations between metabolite levels and drug efficacy or toxicity." The court pointed out that the claims include limitations drawn to specific disease, drugs and metabolites. These are key facts supporting the patent-eligibility of the claims under a pre-emption analysis.

We had previously reported that the Supreme Court's *Bilski* decision suggested that advanced medical diagnostics, such as those that use information derived from multiple genetic variations or biomarker expression levels, fall within the scope of patentable subject matter. The Federal Circuit's remand decision in *Prometheus* provides additional support for the patentability of diagnostic inventions, including those whose claims do not require administering of a drug prior to performing a diagnostic test.

Further clarity will hopefully come in the court's decision in *Classen Immunotherapies, Inc. v. Biogen IDEC.* In a non-precedential opinion of 69 words issued before the Supreme Court's *Bilski* decision, the Federal Circuit found the claims at issue in *Classen* not to be patent eligible. 304 Fed. Appx. 866 (Fed. Cir. 2008). The Supreme Court then remanded the case back to the Federal Circuit; a decision is expected this year. 130 S. Ct. 3541 (2010).

Classen's claim 1 is to a method of determining whether an immunization schedule affects the incidence or severity of chronic-immune-mediated disorders and is similar to the claim at issue in *Prometheus* in that it recites administering an immunogen and optionally determining a level of a marker of a disorder. It is however not limited to a particular immunogen, class of immunogens, disorder, class of disorders or marker or class of markers. Should the Federal Circuit find this claim patent-eligible in its remand decision, it would provide even greater scope for patentability of diagnostic claims. However, we predict that the court will draw a line between the Prometheus claims, which recited a particular disorder, particular drugs and particular metabolites, and claims like Classen's claim, which are not so limited. Thus, we recommend keeping an eye on how pre-emption analysis develops in the 101 case law, and when drafting claims, to include claims likely to survive such analysis because they meaningfully restrict scope and so avoid §101's "natural phenomenon" exception.

Uniloc v. Microsoft: Federal Circuit Rules on Reasonable Royalty Damages Issues

BY TODD R. GREGORIAN

On January 4, 2011, the Federal Circuit in *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F. 3d 1292, made two significant rulings on recurring issues in the area of patent damages: (1) It eliminated the criticized 25 percent "rule of thumb" frequently used as a baseline for determining reasonable royalty damages, and (2) It clarified that evidence of entire market value calculations—where the plaintiff attempts to tie the reasonable royalty to the full value of a product containing the patented invention—will not be permitted in absence of clear economic justifications.

Uniloc is another installment in the trend marked by the recent *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010) decision where the Federal Circuit pronounced that plaintiffs in patent cases "must carefully tie proof of damages to the claimed invention's footprint in the market place."

In *Uniloc*, the plaintiff asserted U.S. Patent No. 5,490,216, relating to anti-piracy software registration. Uniloc accused Microsoft's product activation feature for Windows XP and Word 2003 of infringement of the '216 patent. At trial, the jury found one claim of the '216 patent valid and infringed, and awarded Uniloc $388 million.

Uniloc's damages theory was based on an internal Microsoft document ascribing a $10 to $10,000 value to product keys. From that document, the expert took the lowest "isolated" value of Microsoft's product activation feature, $10, and then applied the 25 percent "rule of thumb" as a baseline royalty rate. This rule, which the expert invoked based on its past "accept[ance] by Courts as an appropriate methodology in determining damages," allocates 25 percent of product value to the inventor and 75 percent to the licensee.

The expert then considered the factors outlined in *Georgia-Pacific Corp. v. U.S. Plywood Corp.,* 318 F. Supp. 1116 (S.D.N.Y. 1970), to determine whether they necessitated any adjustments to the presumptive rate and concluded they did not. Multiplying $2.50 (25 percent of the $10 "isolated" product activation value) by 225,978,721, the total number of licenses for the accused products, the expert arrived at a total damages figure of more than $564 million. Finally, the expert performed what he termed a "reasonableness check" on the ultimate damages figure—because it was "a significant amount of money"—by multiplying the total number of accused product licenses by their average sales price. The jury was presented with a demonstrative comparing the proposed damages award with this total revenue figure, $19.28 billion.

Following the jury verdict, the district court granted a new trial on damages on the basis that the jury had been improperly presented with entire market value calculations, noting that the "$19 billion cat was never put back into the bag," but rejected Microsoft's contention that the expert's use of the 25 percent rule of thumb also warranted a new trial.

The Federal Circuit observed that it had not squarely addressed the admissibility of the 25 percent rule previously, but had "passively tolerated its use where its acceptability has not been the focus of the case." Relying on other recent Federal Circuit decisions, which require evidence of a reasonable royalty to be closely tied to the technological area under discussion, the court noted more generally that there must be a basis in fact to associate royalty rates used in prior licenses to the particular hypothetical negotiation at issue. The "25 percent rule of thumb as an abstract and largely theoretical construct fails to satisfy this fundamental requirement," because it does not provide evidence of what would happen in a particular hypothetical negotiation or a particular technological area. In the illustrative example

provided by the court, the 25 percent rule makes the same royalty rate prediction for a negotiation involving a portfolio of foundational patents over hard drives as it would for a single patent to a small improvement in film emulsion. Accordingly, the court concluded:

> This court now holds as a matter of Federal Circuit law that the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation. Evidence relying on the 25 percent rule of thumb is thus inadmissible under *Daubert* and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the facts of the case at issue.

The court went on to hold that the use of the *Georgia-Pacific* factors to adjust the rate could not remediate the underlying error of using the 25 percent rule.

The court also ruled that evidence of entire market value calculations should be inadmissible when the entire market value rule is not applicable. The entire market value rule provides that, where a patented component is the basis for consumer demand of a larger product, the revenues for that larger product may properly be used as the royalty base when determining a reasonable royalty. Here, the entire market value rule was unavailable: the Microsoft product activation feature is not what drives demand for Microsoft's word processing software or operating systems. Nonetheless, Uniloc had presented the jury with Microsoft's $19 billion revenue figure as a "check" on its damages calculation. The Federal Circuit agreed with the district court that this was inappropriate. In particular, it criticized the cross-examination of defendants' damages expert using the $19 billion figure and effective royalty rate of 0.000035 percent. It noted that these numbers "cannot help but skew the damages horizon for the jury, regardless of the contribution of the patented component to this revenue."

Uniloc and the other recent Federal Circuit damages cases place significant pressure on patent plaintiffs. Now that *Uniloc* prevents a patent plaintiff from relying on a case-independent presumption about bargaining behavior, one would expect to see greater reliance on comparables to meet the burden to prove damages. However, the court's simultaneous insistence both on the date of the hypothetical negotiation as a cutoff for relevant evidence, and a close relationship between comparables and the technology at issue, may well leave many plaintiffs with a dearth of available evidence to prove damages. Regardless, patent cases will see an increased use of economists to give a grounded assessment of the incremental value contribution of the patent in suit, and, at least in the short term, an increase in *Daubert* motions to weed out bad damages theories.

In *Uniloc,* the court did not find the 25 percent rule improper because it was empirically inaccurate. Rather, the court found use of the rule improper because it was inadequately tied to the facts of the case. This reasoning has clear application to any presumption about behavior in the hypothetical negotiation that is not based on record evidence, and thus threatens many other types of damages presentations that do not rely on the 25 percent rule.

One example is the use of the Nash bargaining solution to determine the outcome of the parties' behavior at the hypothetical negotiation. The Nash bargaining solution is essentially a framework to solve a two-sided bargaining problem by using a set of conditions reasonable to any bargaining situation. Experts have used the Nash bargaining solution to argue for a 50-50 split of the incremental contribution of the patent to the licensee's product.

The Nash bargaining solution, however, has many of the same characteristics underlying the court's rejection of the 25 percent rule: it is a presumption about bargaining behavior to be applied *in absence* of any case-specific knowledge about the parties, the technology, or any other factor affecting leverage in the hypothetical negotiation. It should not matter that the Nash bargaining solution has better theoretical grounding than the 25 percent rule; it still fails to satisfy the fundamental requirement that there be a basis in fact to associate the royalty outcome to the particular hypothetical negotiation at issue, and barring further refinements of *Uniloc*, its use should be limited.

So far, however, the only court to confront the issue has limited the *Uniloc* holding to the 25 percent rule, refusing to extend its reasoning to the use of the Nash bargaining solution. (*See Sanofi-Aventis Deutschland GmbH v. Glenmark Pharms., Inc., USA*, No. 07-cv-05855 (D.N.J. Feb.3, 2011)).

The recent passage of the Patent Reform Act of 2011 (S. 23) shows that Congress is similarly attuned to problems with patent damages methodologies. The Act purports to provide a new "procedure for determining damages," instructing that:

> The court shall identify the methodologies and factors that are relevant to the determination of damages, and the court or jury shall consider only those methodologies and factors relevant to making such determination.
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> ***
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> Prior to the introduction of any evidence concerning the determination of damages, upon motion of either party or sua sponte, the court shall consider whether one or more of a party's damages contentions lacks a legally sufficient evidentiary basis. . . . [T]he court shall identify on the record those methodologies and factors as to which there is a legally sufficient evidentiary basis, and the court or jury shall consider only those methodologies and factors in making the determination of damages under this section.

From the language of the Patent Reform Act itself, this new "procedure" does not look substantially different from a *Daubert* motion directed to an expert's damages methodology. Further, the Patent Reform Act only specifies that the parties outline their damages theories to the court by the date of the final pretrial order, meaning that, in many cases, the parties will have already used the *Daubert* procedure to make their challenges to damages methodology. At any rate, courts determining patent damages will now likely do so in a new statutory context.

Uniloc marks another important step towards requiring patent plaintiffs to rigorously prove damages with facts logically connected to the value of the patented invention. Going forward, because of the clear pronouncements from the Federal Circuit in *ResQNet*, *Lucent* and now *Uniloc*, it is expected that district courts will more strictly scrutinize patent damages evidence and will be more likely to exclude material not directly tied to a sound damages theory.

Quick Updates

Could *Lime Wire* Plaintiffs Make the *Oracle* Jury Award Look Like Small Potatoes? Nope, Says SDNY Judge in Statutory Damages Ruling

Was the record-breaking jury verdict in *Oracle Corp. v. SAP AG*, 566 F. Supp. 2d 1010 (N.D. Cal. July 3, 2008) a modest damages award? By the legal standard proposed by plaintiffs in *Arista Records LLC v. Lime Group LLC,* No. 06-cv-05936, 2011 U.S. Dist. LEXIS 24455 (S.D.N.Y. March 10, 2011) (*Lime Wire*), it was.

In November 2010, a jury awarded Oracle a "modest" $1.3 billion under a controversial "fair market value" license theory. But the *Lime Wire* statutory damages theory could have generated a damages award in the trillions.

In the Southern District of New York file-sharing case, plaintiffs tried to use secondary liability theories to side-step the Copyright Act's limit on statutory damages. 17 U.S.C. § 504(c) allows plaintiffs to elect a single damages award of between $750 and $30,000 (up to $150,000 for willful infringement) "for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally."

Plaintiffs argued that each of the many thousands of individuals who used Lime Wire to make illicit copies would be liable for only one such award per downloaded song – but that Lime Wire itself was jointly and severally liable for *all* of those potential damages awards. Up to $150,000 x 10,000 songs x thousands of copies per song = well upwards of $1,500,000,000,000.

Defendants argued that such an award would amount to "more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877."

District Judge Kimba Wood nixed the plaintiff's theory, stating that it "offend[ed] the 'canon that we should avoid endorsing statutory interpretations that would lead to absurd results.'"

The court distinguished *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.,* 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds sub nom*, *Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340 (1998), holding it "inapplicable to situations involving large numbers of infringements." Judge Wood held that "the most plausible interpretation of § 504(c) is one that authorizes only a single statutory damage award per work against a secondarily liable defendant, particularly in the context of the mass infringement found in the context of online peer-to-peer file sharing."

Spoliation of Evidence in a Trade Secrets Case

The Fifth Circuit Court of Appeals recently provided a warning to defendants against spoliation of evidence. The dispute, in *Union Pump Co. v. Centrifugal Technology, Inc., No. 10-30040,* 2010 U.S. App. LEXIS

25761 (5th Cir. 2010), began when industrial pump manufacturer, Union Pump, purchased American Pump Company, which was partially owned by the individual defendants. Union Pump then began selling the American Pump line of pumps, and the individual defendants worked at a Union Pump plant until Union Pump announced closure of that plant and instructed the defendants to send all American Pump design drawings to another location. Soon afterward, the defendants founded a competing company, Centrifugal Technology. When Union Pump realized that a large number of American Pump drawings were missing, they sued the defendants, alleging violation of the Louisiana Uniform Trade Secrets Act (LUTSA), among other claims. The district-court appointed computer expert discovered that the defendants had deleted electronic information on certain hard drives after the court had entered a protective order prohibiting destruction of data. The jury returned a verdict in favor of Union Pump for bad faith trade-secret misappropriation and intentional spoliation of evidence, among other findings. The district court refused Union Pump's request to be awarded attorney's fees, and Union Pump appealed this refusal. Centrifugal also appealed, arguing against the damages award and arguing several evidentiary errors by the court.

On appeal, Union Pump asserted that the district court erred in declining to use its inherent powers to award attorney's fees in view of the spoliation finding. The appellate court stated that "[t]here can be no dispute that these are serious charges, which, if true, would constitute particularly deplorable conduct on the part of the defendants that would justify the imposition of sanctions." However, the court's inherent power to sanction "is not a broad reservoir of power, ready at an imperial hand, but a limited source," so the appellate court concluded that the district court had not abused its discretion in failing to award attorney's fees.

The appellate court concluded that the damages award to Union Pump was appropriate given all of the evidence against the defendants. Thus, the appellate court affirmed the district court's judgment, providing a reminder of the importance of preserving evidence to avoid spoliation charges.

Patent Reform Legislation Progresses in Congress

On March 8, 2011, the United States Senate voted overwhelmingly to pass the America Invents Act (Senate Bill S. 23, previously called the Patent Reform Act of 2011), a bill sponsored by Senators Patrick Leahy (D-Vt.), Orrin Hatch (R-Utah) and Chuck Grassley (R-Iowa). The bill passed with a vote of 95-5 and received an endorsement from the White House. The passage of the bill is the latest step in the long process of patent reform. Under Republican leadership in the House of Representatives, the House Judiciary Committee is moving forward with its own version of patent reform legislation. Whether the House will make passage of a bill a priority, and how different its version will be, remains to be seen.

One aspect of the Senate bill that is likely to be included in the House version is a transition of the U.S. patent process to a "first-to-file" system. Representative Lamar Smith of Texas is the Republican Chairman of the House Judiciary Committee and will introduce the legislation. Senator Leahy's office noted in a statement that the America Invents Act incorporates the core provisions included in the original Patent Reform Act introduced by Rep. Lamar Smith and Rep. Howard Berman of California in 2005. The transition to a first-to-file system, which would put the U.S. patent process in line with the rest of the world, is supported by large technology and pharmaceutical companies.

The Senate bill would eliminate the current U.S. "first-to-invent" system, which allows an inventor to claim priority over earlier art if the inventor can show earlier conception of the claimed invention and reasonably-diligent reduction to practice. Instead, the first-to-file system of the America Invents Act would provide patent applicants with an "effective filing date" (*i.e.*, the date a patent application claiming the invention was filed), and priority would be judged based on this date. Under the proposed amendments to 35 U.S.C. § 102(a), invalidating prior art would be art that is patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention. The "effective filing date" would also be the date used to determine whether the invention would be obvious to one of ordinary skill in the art through a combination of prior art references.

Other provisions of the Senate bill include: (1) a provision allowing the U.S. Patent and Trademark Office (USPTO) to set and keep its own fees, (2) a new "derivation proceeding" under which the patent application could be challenged by a non-applicant asserting the invention is derived from another inventor's work, (3) a new Pre-Issuance Third-Party Submissions provision under which a third party could submit previously published patents, applications, and other publications to the USPTO while the application

is being examined, including a description of how the submitted publications are relevant to the examination of the application, (4) limitations to parties that can bring claims for false marking, (5) elimination of certain tax-strategy patents, and (6) the removal of failure to disclose the best mode as a means to invalidate an issued patent.

While the transition to a first-to-file system would reduce the cost and uncertainty of litigation over priority, some individual inventors and small companies argue that it unfairly advantages large companies that can afford to rapidly patent new inventions. Granting the USPTO more control over fees will reduce the growing patent application backlog by increasing the number of examiners. Interests on all sides of patent reform legislation are sure to make their opinions known to Congress while the House considers its version of patent reform legislation.

Proposals for Enhancement of Enforcement of Copyright Rights — A Balanced Approach or a Step Too Far?

In March of this year, the Obama administration released a report with its legislative recommendations for enhancing the enforcement of intellectual property rights. Notably, the recommendations focus on and emphasize *criminal* copyright enforcement, including: (1) making it a felony offense to stream infringing content, (2) increasing the penalties for repeat copyright infringers, (3) targeting copyright infringement by organized criminal enterprises/gangs, (4) severely penalizing trade secret theft and "economic espionage," and (5) giving the FBI wiretapping authority to obtain evidence of criminal copyright (and trademark) offenses. The report also authorizes more direct cooperation between copyright holders and enforcement authorities (e.g., permitting copyright holders to inspect devices alleged to violate the Digital Millennium Copyright Act's anti-circumvention restrictions).

In addition to the criminal enforcement efforts, the report also includes a proposal to create a right of public performance for sound recordings transmitted by over-the-air broadcast stations, which would increase the substantive rights of copyright holders in this regard. Opponents of this recommendation view such a right essentially as a way of taxing radio stations for advertising music, which would have severe repercussions for the radio industry. This is, of course, an issue that has been the subject of controversy for decades and seems oddly out of place in the report.

With its focus on criminal activity, the report lacks any substantive recommendations for improving civil copyright enforcement by copyright holders. This shift in emphasis towards criminal enforcement by the government can be seen in another bill pending before Congress, Senator Patrick Leahy's Combating Online Infringement and Counterfeits Act (COICA). COICA proposes to authorize the U.S. Attorney General to bring *in rem* actions against domain names found to be dedicated to infringement. Upon obtaining an order for injunctive relief, the registrar of, or registry affiliated with, the infringing domain in question would be compelled to suspend the operation of and to lock the domain name. Some groups have expressed concern that COICA lacks the procedural safeguards necessary to protect against abuses that could lead to internet censorship by the government.

So far there has been mixed reaction to the administration's report, and much controversy can be expected as Congress moves to take action based thereon. Naturally, copyright owners welcome the recommendations, branding them as thoughtful and sensible, particularly the clarifications on illegal streaming. However, elsewhere in the blogosphere, commentators are concerned that the report goes too far. It warns that the report's suggested clarifications on what constitutes a "crime" must be carefully considered, when the time for implementation comes, to avoid sweeping into the criminal justice system behavior that is commonly not considered criminal. One very relevant example for most consumers of online content is the recommendation to clarify that illegal streaming is a felony. Is the felon the operator of the streaming service or the end user engaged in the streaming? How would this potentially affect the behavior of everyday internet users?

It will be interesting to monitor which of the recommendations will be taken on by Congress. The report can be found here - http://www.whitehouse.gov/sites/default/files/ip_white_paper.pdf.

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