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Intellectual Property Rights (IPR) and International Trade

Background

What is intellectual property (IP), and how is it protected? IP is a creation of the mind embodied in physical and digital objects. Intellectual property rights (IPR) are legal, private, enforceable rights that governments grant to inventors and artists. IPR generally provide time-limited monopolies to right holders to use, commercialize, and market their creations and to prevent others from doing the same without their permission (acts referred to as infringements). IPR are intended to encourage innovation and creative output. After these rights expire, other inventors, artists, and society at large can build on them.

Examples of IPR

Patents protect new innovations and inventions, such as pharmaceutical products, chemical processes, new business technologies, and computer software.

Copyrights protect artistic and literary works, such as books, music, and movies.

Trademarks protect distinctive commercial names, marks, and symbols.

Trade secrets protect confidential business information that is commercially valuable because it is secret, including formulas, manufacturing techniques, and customer lists.

Geographical indications (GIs) protect distinctive products from a certain region, applying primarily to agricultural products.

What is the congressional interest? The congressional role in IPR and international trade stems from the U.S. Constitution. Congress has legislative, oversight, and appropriations responsibilities in addressing IPR and trade policy. Since 1988, Congress has included IPR as a principal trade negotiating objective in trade promotion authority (TPA). The context for congressional interest may include policy concerns such as: the role of IPR in the U.S. economy; the impact of IPR infringement on U.S. commercial, health, safety, and security interests; and the balance between protecting IPR to stimulate innovation and advancing other public policy goals.

What is IP's role in the U.S. economy? IP is considered important to U.S. economic growth and a comparative advantage internationally. A range of U.S. industry relies on IPR protection. A subset of the most IP-intensive industries were estimated to account for approximately 30% of U.S. direct employment and 52% of U.S. merchandise exports, and in 2012, about 12.5% of U.S. private services exports (2014 Department of Commerce data). Yet, lawful limitations to IPR, such as “fair use” copyright exceptions for media, research, and teaching, may also add value.

What is the extent of IPR infringement? IPR infringement is difficult to quantify, given its illicit nature,

although some estimates of trade in counterfeit and pirated goods are in the hundreds of billions of dollars per year worldwide. Innovation can be costly and time-consuming, but IPR infringement often has relatively low risk and potentially high profit. The digital environment heightens such challenges. In a 2012 International Trade Commission survey, about 10% of digitally intensive U.S. firms reported experiencing at least one “cyber incident” harming their network data systems’ confidentiality, integrity, or availability. In FY2017, U.S. Customs and Border Protection reported seizing \$1.2 billion of IPR-infringing goods at U.S. borders, with China the largest source.

Trade Policy Tools for IPR

How are IPR and international trade related? Goods and services traded are increasingly IPR-related. Developed countries traditionally have been the source of IP (see **Figure 1**), but emerging markets also are becoming innovation centers. The use of trade policy to advance IPR internationally emerged with the North American Free Trade Agreement (NAFTA) and World Trade Organization (WTO) 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). These agreements build on IPR treaties, dating to the 1800s, administered by the World Intellectual Property Organization (WIPO).

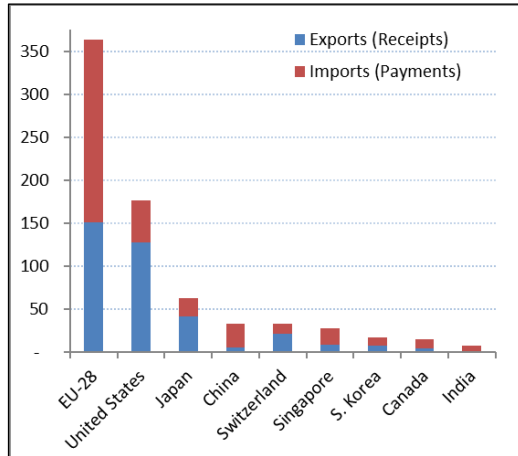
“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive Right to their respective Writings and Discoveries” and “To regulate Commerce with foreign Nations” - *U.S. Constitution*, Article I, Section 8, stipulating powers of Congress

What is the WTO TRIPS Agreement? The TRIPS Agreement sets minimum standards of protection and enforcement for IPR. It includes provisions on:

- WTO nondiscrimination principles;
- application of the WTO’s binding dispute settlement mechanism for IPR disputes;
- a balance of rights and obligations between protecting private right holders and securing broader public benefits; and
- flexibilities for developing countries in implementation and for pharmaceutical patent obligations—extended in November 2015 for least developed countries (LDCs) until January 2033 or until they are no longer LDCs, whichever is earlier.

The 2001 WTO “Doha Declaration” committed members to interpret TRIPS to support public health and access to medicines.

Figure 1. IPR Trade for Selected Countries, 2017
billions of U.S. dollars



Source: World Trade Organization, 2016.

Note: Charges for use of IP include proprietary rights and licenses.

What are U.S. IPR trade negotiating objectives? Since the advent of TRIPS in 1995, U.S. IPR trade negotiating objectives have been to ensure that U.S. FTAs “reflect a standard of protection similar to that found in U.S. law” (“TRIPS-plus”), and to apply existing IPR protection to digital media through adherence to the WIPO “Internet Treaties.” These objectives have evolved through Trade Promotion Authority (TPA), renewed in June 2015 (P.L. 114-26). The 2015 TPA largely incorporates the 2002 TPA’s IPR objectives, as well as includes new objectives on addressing cyber theft and protecting trade secrets and proprietary information. While the 2015 TPA has an objective of ensuring that agreements negotiated “foster innovation and access to medicines,” it does not specifically include the pharmaceutical provisions of the so-called May 10, 2007 Understanding, which modified, in part, patent provisions to enhance access to medicines in then-pending U.S. FTAs with Peru, Panama, and Colombia.

What IPR issues are on the U.S. trade negotiating agenda? The United States has 14 FTAs with 20 countries in force with protections that exceed TRIPS. In January 2017, President Donald Trump announced his intent to withdraw from the Trans-Pacific Partnership (TPP), signed in February 2016, upon taking office, which would have achieved a higher level (WTO-plus) of IPR commitments. Similar provisions are in the proposed United States-Mexico-Canada (USMCA) trade agreement, such as:

- pharmaceutical patent protections, with measures to protect public health, consistent with TRIPS;
- data exclusivity periods for biologics—USMCA provides a 10-year period, less than the 12 years granted in U.S. law (higher than the TPP);
- copyright protections, penalties for circumventing technological protection measures, online intermediary liability limitations (“safe harbor”), and “fair use” goals;
- enhanced trademark protection and disciplines for GIs, with measures to ensure that widely used geographic terms are available for generic use; and
- enforcement through civil, criminal, and border measures, including new criminal penalties for trade secret cyber theft, clarification that criminal penalties apply to infringement in the digital environment, and *ex officio* authority for customs agents to seize counterfeit and pirated goods.

The United States may seek to negotiate IPR provisions in the proposed bilateral talks with Japan, the European Union (EU), and, depending on the outcome of Brexit, the United Kingdom. While these countries have generally comparable IPR standards, the United States has potential issues with each. For example, U.S. negotiators may seek to address the differing U.S. and EU approaches on GIs and trademarks. In addition, all three potential partners may seek to address trade secret theft.

What are other trade policy tools to support IPR?

- The “Special 301” report, by the Office of the U.S. Trade Representative pursuant to the Trade Act of 1974 as amended, identifies countries with inadequate IPR regimes on “watch lists.” Trade secret theft, including through cybercrime, is a growing focus.
- Section 337 of the amended Tariff Act of 1930 authorizes the International Trade Commission (ITC) to prohibit U.S. imports that infringe on U.S. IPR. Section 337 cases have been largely patent-focused.
- Under U.S. trade preference programs, such as the Generalized System of Preferences (GSP), the United States may consider a developing country’s IPR policies and practices as a basis for offering or suspending duty-free entry to certain products from the country.

Issues for Congress

Why are IPR trade issues actively debated? U.S. trade policy promotes IPR. Yet, IPR and trade issues involve a range of stakeholder interests. Some view IPR as beneficial to countries of all economic levels, while others argue that stringent IPR policies may limit economic growth in less advanced countries. IPR provisions in the proposed USMCA and other trade negotiations can spark debate on the role of patents and data exclusivity in incentivizing innovations and supporting affordable access to medicines. As digital trade grows, copyright issues intersect with debates about ISP liability, cross-border data flows, data privacy, and cyber theft of trade secrets, which the United States has sought to incorporate its latest trade agreements.

How effectively are IPR commitments enforced? The Trump Administration is committed to strengthening enforcement of existing IPR obligations. For example, the Administration imposed Section 301 tariffs on China in part due to China’s lack of respect for IPR and forced technology transfer obligations. Congress may consider whether this is an effective strategy to address IPR issues.

How should the United States address IPR issues with emerging economies? Emerging economies, such as China, India, and Brazil, present significant IPR concerns. U.S. Section 301 action with regard to China is one way to address this issue. In other emerging markets, the United States has sought bilateral and multilateral engagement to revise TRIPS; other trade policy tools (e.g., bilateral investment treaty negotiations, Special 301) to further encourage IPR-related reforms; and greater trade enforcement in the WTO. See CRS Report RL34292, *Intellectual Property Rights and International Trade*.

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