Congressional Research Service
Informing the legislative debate since 1914

IN FOCUS

July 22, 2015

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 (GI) 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 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 comparative advantage internationally. A range of U.S. industries rely on IPR protection. According to the Department of Commerce, in 2010, a subset of the most IP-intensive industries were estimated to accounted for nearly one-fifth of U.S. direct employment and two-thirds of U.S. merchandise exports, and in 2007, nearly one-fifth of U.S. private services exports. At the same time, lawful limitations to IPR, such as "fair use" exceptions in copyright law for media, research, and teaching, also may have economic benefits.

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 FY2014, 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).

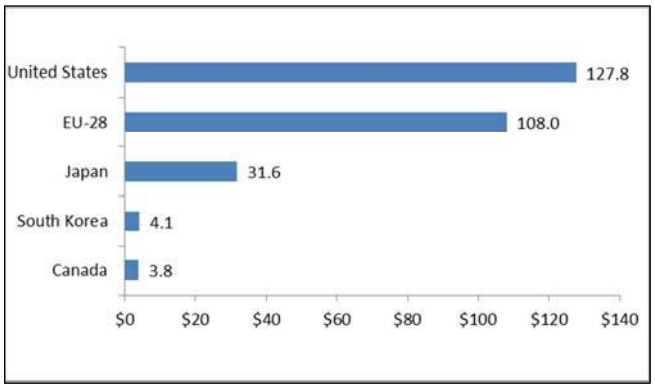
> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" and "To regulate Commerce with foreign Nations" - *U.S. Constitution*, Article 1, Section 8, stipulating powers of Congress

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

- WTO non-discrimination 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.

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

Figure 1. Exports (Receipts) of Royalties and License Fees for Top Countries, 2013 (billion $)



Source: World Trade Organization, 2014.

What are IPR issues in U.S. FTA negotiations? Since the advent of TRIPS in 1995, U.S. IPR trade negotiating objectives are to ensure that U.S. FTAs "reflect a standard of protection similar to that found in U.S. law" ("TRIPS-plus" standards), and to apply existing IPR protection to digital media through adherence to the WIPO "Internet Treaties." Negotiating objectives have evolved through Trade Promotion Authority (TPA). The United States has 14 FTAs with 20 countries. IPR issues feature prominently in the ongoing Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (T-TIP) negotiations. Key IPR issues in these negotiations include:

- copyright enforcement, including liability for Internet Service Providers (ISP) and criminal penalties;
- pharmaceutical patents and implications for access to medicines, including flexibilities for developing countries (e.g., optional patent term extensions);
- data exclusivity for pharmaceuticals and biologics (restrictions on using test data given for market approval);
- digital trade issues, including copyright enforcement, cross-border data flows, and "forced" localization barriers to trade;
- trade secret protection to combat cybertheft; and
- treatment of GIs, and their effect on market access.

These proposed FTAs could lead to common approaches for addressing IPR issues of mutual interest about countries not party to these FTAs, as well as through the WTO.

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 and 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 view stringent IPR policies as an obstacle to economic growth in less advanced countries. IPR in trade negotiations can raise complex issues. For example, patents provide incentives for medical innovations, but raise questions about effects on goals to provide affordable access to medicines. As digital trade grows, copyright issues intersect with debates about ISP liability, cross-border data flows, data privacy, and cybertheft of trade secrets.

What are U.S. IPR trade negotiating objectives? On June 29, 2015, the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, was enacted to reauthorize TPA (P.L. 114-26). The new TPA is in effect until 2021, unless Congress passes an extension disapproval resolution in 2018. In addition to largely incorporating the IPR objectives from the 2002 TPA, the new TPA includes new objectives on addressing cybertheft and protecting trade secrets and proprietary information. It also includes the objective of ensuring that agreements negotiated "foster innovation and access to medicines." At the same time, it does not specifically include the pharmaceutical provisions of the so-called May 10, 2007 Understanding, which modified, in part, some patent provisions to further promote access to medicines in then-pending U.S. FTAs with Peru, Panama, and Colombia.

How effectively are IPR commitments enforced? The extent to which U.S. FTA partners and WTO members are upholding their IPR commitments is of interest. Are U.S. trade policy tools such as "Special 301," bilateral consultations, or WTO/FTA dispute settlement effective in bringing countries into IPR compliance? Are Special 301 designations balanced in assessing countries' IPR regimes?

How should the United States address IPR issues with emerging economies? Emerging economies such as China, India, and Brazil present significant IPR concerns, but are not a part of current U.S. FTA negotiations. To advance IPR goals, the United States could encourage these countries to join current FTA negotiations; engage them in multilateral negotiations to revise TRIPS; use trade policy tools (e.g., bilateral investment treaty negotiations) to further encourage IPR-related reforms; and seek greater trade enforcement in the WTO. See CRS Report RL34292, *Intellectual Property Rights and International Trade*.

Shayerah Ilias Akhtar, siliasakhtar@crs.loc.gov, 7-9253
Ian F. Fergusson, ifergusson@crs.loc.gov, 7-4997

IF10033