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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 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).

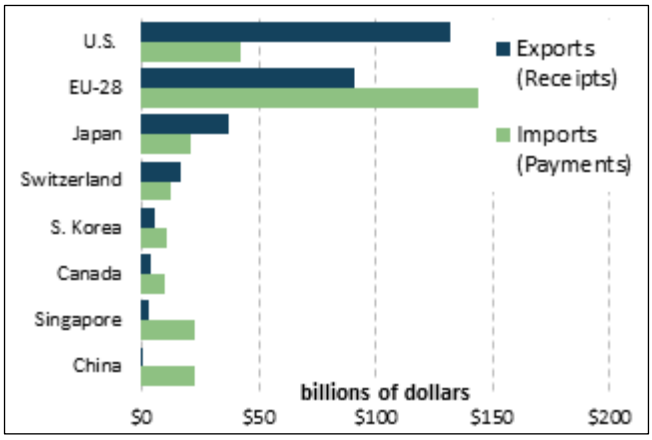
> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" and "To regulate Commerce with foreign Nations" - *U.S. Constitution*, Article 1, Section 8, stipulating powers of Congress

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

- WTO 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, 2014



Source: World Trade Organization, 2014.
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 cybertheft 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 are IPR issues in the current U.S. trade agenda? The United States has 14 FTAs with 20 countries in force with protections that exceed the WTO TRIPS Agreement. The Trans-Pacific Partnership (TPP), concluded in October 2015, includes IPR provisions (with transition mechanisms for developing countries) such as:

- pharmaceutical patent protections, with measures to protect public health consistent with TRIPS;
- data exclusivity periods for biologics—either eight years, or at least five years with additional periods to achieve a "comparable market outcome";
- copyright protections, penalties for circumventing technological protection measures, safe harbor measures for Internet Service Providers (ISPs), 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 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.

Similar IPR issues also are prominent in the ongoing U.S.-EU Transatlantic Trade and Investment Partnership (T-TIP) negotiations. Areas of interest include differing U.S. and EU approaches on issues such as GIs and opportunities for cooperation on addressing 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 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 argue that stringent IPR policies limit economic growth in less advanced countries. IPR in trade negotiations can raise debates, such as 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 cybertheft of trade secrets.

How does the current trade agenda address U.S. IPR trade negotiating objectives? Should Congress consider implementing legislation for TPP, it may evaluate whether the concluded TPP fulfills U.S. IPR trade negotiating objectives in the 2015 TPA. Congress also may monitor whether T-TIP negotiations and the broader U.S. trade agenda support U.S. IPR trade negotiating objectives.

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 and balanced in bringing countries into IPR compliance?

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 examine their suitability to join current FTAs; engage them multilaterally 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*.

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