



Updated January 22, 2021

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), a time-limited authority that Congress uses to establish trade negotiating objectives and procedures to consider implementing legislation for trade agreements.

“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

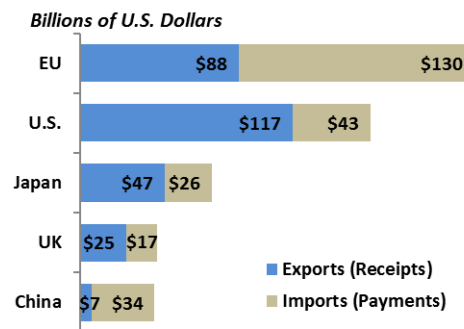
The context for congressional interest may include policy concerns such as: the role of IPR in the U.S. economy; the impact of IPR infringement on U.S. commercial, health, safety, and security interests; and the balance between protecting IPR to stimulate innovation and advancing other public policy goals.

What is IP’s role in the U.S. economy and trade? IP is considered important to U.S. economic growth and a

comparative advantage internationally. A range of U.S. industry relies on IPR protection. Yet, lawful limitations to IPR, such as “fair use” copyright exceptions for media, research, and teaching, can also add value. Many traded goods and services are IP-based, and the licensing and fees generated from the use of IP specifically form a component of services trade.

Developed countries traditionally have been the source of IP, but emerging markets also are becoming major providers of IP. Globally, by country, the United States is the largest trader in IP charges for the use of IP, while the EU, as a bloc, is the largest (see **Figure 1**).

Figure 1. IPR Trade for Selected Countries, 2019



Source: WTO, 2019 data in 2020 statistical review.
Note: Charges for use of IP include proprietary rights and licenses. EU reflects extra-EU trade for current EU membership.

Historically, the United States has been the top filer of patents under the World Intellectual Property Organization (WIPO) Patent Cooperation Treaty (PCT) system. In 2019, China (58,990 applications) overtook the United States (57,840) for the first time as the top filer (total global filings of 265,800), but analysts raise questions about the indicators of innovation and China’s patent quality.

What is the extent of IPR infringement? Quantifying IPR infringement is difficult, 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 FY2019, U.S. Customs and Border Protection reported making 27,559 seizures of IPR-infringing goods at U.S. borders valued at \$1.5 billion, with China the largest source.

Trade Policy Tools for IPR

How are IPR and international trade related? The use of trade policy to advance IPR internationally emerged with the 1994 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, which WIPO administers. Newer treaties also have been concluded under WIPO, notably the “Internet Treaties,” which addresses IPR issues in the online environment that TRIPS does not.

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.

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 in 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. The 2015 TPA also has an objective of ensuring that agreements negotiated “foster innovation and access to medicines.”

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, upon taking office, withdrew from the proposed Trans-Pacific Partnership (TPP), signed in February 2016, which would have expanded (WTO-plus) IPR commitments. Similar provisions are in the United States-Mexico-Canada Agreement (USMCA), such as:

- pharmaceutical patent protections, with measures to protect public health, consistent with TRIPS;
- 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 Biden Administration may seek to negotiate IPR provisions in the trade negotiations it may undertake, including with the United Kingdom (UK) and the European Union (EU). While these economies 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? Congress may use a possible renewal of TPA, which expires on July 1, 2021, to reaffirm and or change U.S. trade negotiating objectives on IPR for future U.S. trade agreements. U.S. trade policy generally promotes expansion of IPR. Yet, IPR and trade involve a range of stakeholder interests. IPR provisions in USMCA and other trade negotiations sparked debate on the role of patents and data exclusivity, for example, in incentivizing innovations and supporting affordable access to medicines. The ongoing Coronavirus Disease 2019 (COVID-19) pandemic has heightened some of these concerns. As digital trade grows, copyright issues intersect with debates about ISP liability, cross-border data flows, data privacy, and cyber theft of trade secrets creating potential sources of controversy.

How should the United States strengthen and enforce IPR commitments in emerging markets? Emerging economies, such as China, India, and Brazil, present significant IPR enforcement concerns. For example, the Trump Administration imposed Section 301 tariffs on China in part due to China’s lack of respect for IPR and forced technology transfer obligations; the U.S.-China “phase one” trade agreement, signed in January 2020, includes some Chinese commitments to strengthen IPR but does not address most U.S. concerns. 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. The Biden Administration and Congress may consider what combination of measures form an effective strategy to address IPR issues. See CRS Report RL34292, *Intellectual Property Rights and International Trade*.

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