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# Intellectual Property Rights (IPR) and International Trade

Protection and enforcement of intellectual property rights (IPR) are longstanding key components of U.S. trade policy. Congress has a constitutional responsibility to legislate on and oversee IPR matters in U.S. trade policy, which have evolved over time. The growing importance of emerging markets has introduced new views on IPR and challenges to enforcement. New technologies present distinct challenges to combating counterfeiting and piracy. Most recently, the Coronavirus Disease 2019 (COVID-19) pandemic is renewing debates about the role of IPR protections in providing global access to medicines.

## Background

IP is defined as a creation of the mind embodied in physical and digital objects. Governments grant time-limited legal rights to creators to prevent others from making, copying, selling, or otherwise using their creations. Known as IPR, these rights can take different forms, such as patents, copyrights, trademarks, undisclosed data (trade secrets), and geographical indications (GIs). IPR generally aim to encourage innovation and creative output by allowing inventors to recoup expenses and benefit from their creations exclusively for a period of time and/or negotiating payment in return for others using them (e.g., royalties, licensing fees). IPR also aim to encourage broader benefits by allowing inventors, artists, and society at large to build on innovations after their IPR expire.

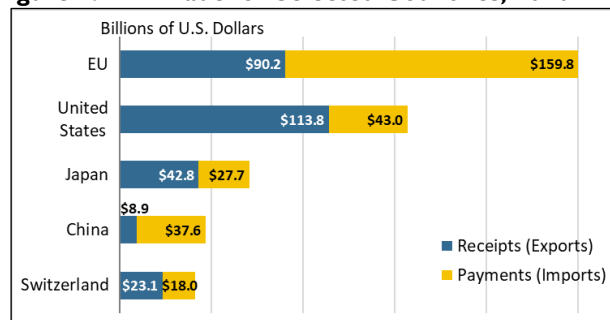
**IP and Economic Impact.** IP is considered important to U.S. innovation, economic growth, and comparative advantage internationally. A range of U.S. industries rely on IPR protection. Yet, lawful limitations to IPR, such as “fair use” copyright exceptions for media, research, and teaching, can also further innovation and add value. Many traded goods and services are IP-based. Licensing and fees generated from the use of IP are part of services trade.

Developed countries traditionally have been the primary source of IP, but emerging markets also are becoming major providers. Globally, by country, the United States is the largest exporter of IP, while the European Union (EU) bloc is the largest importer (see **Figure 1**). Historically, the United States has been the top filer of patents under the Patent Cooperation Treaty (PCT) system, administered by the World Intellectual Property Organization (WIPO). In 2019, China overtook the United States for the first time in international filings; China remained ahead of the United States in 2020, respectively, with 68,720 and 59,230 filings (total global filings of 275,900). Some analysts have questioned the quality of China’s patent filings and whether its filing numbers accurately indicate innovation levels.

**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 may see relatively low risk of penalties and high profits. The digital environment heightens enforcement challenges. In FY2020, U.S. Customs and Border Protection (CBP) reported making 26,503 seizures of IPR-infringing goods valued at \$1.3 billion, with China as the largest source.

**Figure 1. IPR Trade for Selected Countries, 2020**



**Source:** WTO, 2020 data in *World Trade Statistical Review 2021*.

**Note:** Charges for the use of IP include the use of proprietary rights and for licenses to reproduce or distribute IP; licensee payments can take various forms, such as royalties and fees. EU=Extra-EU trade.

**U.S. Trading Partners’ IPR Protection.** While many U.S. trading partners have strengthened IPR laws and enforcement, some aspects of their regimes continue to pose trade and investment barriers for U.S. firms. The Office of the U.S. Trade Representative (USTR) has cited as among key concerns: lax border and criminal enforcement against counterfeits, including in the digital environment; high levels of digital piracy, including cybertheft of trade secrets; and gaps in trade secret protection and enforcement. China and India, for instance, present significant challenges in their forced technology transfer and other industrial policies, which may disadvantage U.S. IP holders in these markets. Among developed economies, the European Union (EU) approach to GIs, for example, may limit market access for U.S. exporters of products that are common food names.

## Trade Policy Tools for IPR

The use of trade policy to advance IPR internationally emerged prominently 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). As IPR took on a greater role in trade, differences in countries’ IPR regimes led to frictions in global commerce. The establishment of common rules on IPR in the international trading system aimed to bring more certainty and to address IPR-related disputes more systematically.

**Multilateral IP Rules.** The TRIPS Agreement established minimum standards of protection that most WTO members

must provide to patents, copyrights, trademarks, GIs, undisclosed data, and other IP. These standards incorporate core WTO non-discrimination principles. TRIPS also set out civil, administrative, and criminal enforcement procedures and remedies, as well as border measures. TRIPS obligations are subject to enforcement under the WTO dispute settlement mechanism. TRIPS has certain exceptions and flexibilities. It allows compulsory licensing for patents in specific circumstances, and exempts least-developed countries from most obligations until July 1, 2034, and pharmaceutical-related obligations until January 1, 2033. In the 2001 WTO “Doha Declaration,” WTO members agreed to interpret TRIPS to support WTO members’ right to protect public health, particularly to promote access to medicines.

Other IPR treaties, dating back to the 1800s and which TRIPS builds on, are administered by WIPO, a specialized U.N. agency. Newer treaties also have been concluded under WIPO, notably the “Internet Treaties,” that address digital IPR issues that are not in TRIPS.

TRIPS has elicited debate among some stakeholders about how it seeks to balance innovation and other public policy objectives. A major, ongoing WTO debate centers on how best to provide global access to COVID-19 vaccines and therapeutics, and whether to “waive” or offer greater flexibilities for TRIPS obligations. The Biden Administration has voiced support for the concept of a limited IPR waiver for COVID-19 vaccines—a position which divides Members of Congress.

**U.S. IPR Trade Objectives.** Since 1988, Congress has included IPR protection as a principal negotiating objective in trade promotion authority (TPA). The 2015 TPA (P.L. 114-26), which expired on July 1, 2021, directed the executive branch to ensure that U.S. free trade agreements (FTAs) “reflect a standard of protection similar to that found in U.S. law” (“TRIPS-plus”), and apply existing IPR protection to digital media through the WIPO “Internet Treaties.” It added new objectives to address cyber theft, protect trade secrets and proprietary information, and “foster innovation and access to medicines.”

**IPR in U.S. Trade Agreements.** Since NAFTA, U.S. FTAs have included IPR obligations, often TRIPS-plus. The United States-Mexico-Canada Agreement (USMCA) contains the most recent set of IPR commitments in a U.S. FTA. Some USMCA commitments are new or updated, compared to other U.S. FTAs, including on criminal penalties for trade secret theft, IPR enforcement in the digital environment, and enhanced disciplines for GIs. Other trade agreements also feature IPR commitments. In the U.S.-China “phase one” agreement in January 2020, China committed not to require technology transfer and to strengthen IP enforcement, but most U.S. concerns about technology transfer and IP theft remain unresolved.

**Other Trade Policy Tools.** The U.S. government also has other IPR-related trade authorities:

- USTR identifies countries with inadequate IPR regimes in its annual “**Special 301**” report, pursuant to the Trade Act of 1974, as amended. In 2021, USTR identified nine “priority watch list” countries (Argentina, Chile, China, India,

Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela), and 23 “watch list” countries of concern. USTR reviews online and physical “notorious” markets involved in IPR infringement in a separate annual report. It can also investigate and enforce U.S. IPR through Section 301 of the Trade Act of 1974 (as USTR did with China in 2018).

- **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. If the ITC finds a violation, it may issue an exclusion order or cease and desist order. Section 337 cases have been largely patent-focused, though the number of trade secrets-related cases have been growing.
- CBP enforces IPR at U.S. borders by seizing goods that infringe on U.S. copyrights and trademarks, and enforcing Section 337 exclusion orders. Interested parties may report suspected violations through CBP’s e-Allegations program.
- Under the **U.S. Generalized System of Preferences (GSP)**, a developing country’s IPR policies and practices may be an eligibility criteria for duty-free benefits of U.S. imports from such country. Some bills to renew GSP, which expired at the end of 2020, are pending in the 117<sup>th</sup> Congress.

## Issues for Congress

**Trade Policy Priorities.** Congress may use potential TPA renewal to reaffirm or modify U.S. trade negotiating objectives on IPR. U.S. trade policy generally has promoted expansion of IPR, but some stakeholders have debated this approach. IPR provisions in USMCA sparked debate on the role of patents and data exclusivity in incentivizing innovation and supporting access to medicines. The growth of digital trade also poses issues for online intermediary liability of infringing content, cross-border data flows, data protection, and cyber theft of trade secrets.

**Remedies for U.S. IP Holders.** Congress may evaluate the timeliness of U.S. IPR trade remedies. The ITC may take up to 18 months to reach a final determination in Section 337 investigations. CBP may face particular challenges assessing risk, given high volumes of low-value shipments, which constitute a large share of IPR seizures.

**Trading Partners’ IPR Commitments.** Congress may consider which measures may be most effective in strengthening global IPR protections. Options include to:

- enhance U.S. trade monitoring and enforcement, such as through “Special 301,” and with trading partners under existing trade agreements, as well as work with allies in these efforts, where effective;
- direct the Administration to pursue new trade agreement negotiations that prioritize IPR issues; and
- examine whether current U.S. trade policy tools to advance IPR require changes to increase their effectiveness and how to best balance such efforts with other public policy objectives.

**Multilateral Issues.** Congress may continue to oversee and shape the executive’s engagement on IPR issues in the WTO and WIPO. Issues of interest may include TRIPS and COVID-19 responses, and enforcement of IPR obligations in WTO dispute settlement. Congress also may examine the implications of IPR actions for future broader U.S. trade policy and priorities. See CRS Report RL34292, *Intellectual Property Rights and International Trade*.

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