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 IPR 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

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 counterfeiters, 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, GI, 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 117th 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.

Shayerah I. Akhtar, Specialist in International Trade and 
Finance

https://crsreports.congress.gov
Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS’s institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.