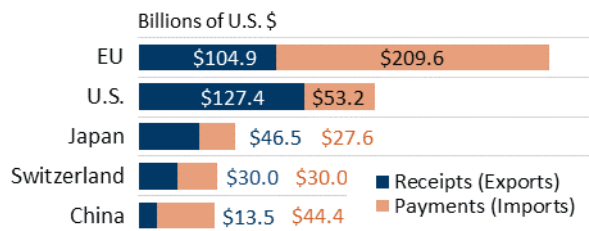




Intellectual Property Rights (IPR) and International Trade

Intellectual property rights (IPR) protection and enforcement are key components of U.S. trade policy, and the United States plays a leading role in global IPR trade (Figure 1). Congress has a constitutional responsibility to legislate and oversee IPR matters in U.S. trade policy. Since 1988, Congress has included IPR protection as a principal objective in U.S. free trade agreement (FTA) negotiations (P.L. 100-418). Debates over IPR issues have intensified with China and other emerging markets’ growing role in the global economy, the emergence of new technologies and digital trade, and issues posed by the COVID-19 pandemic about global access to medicines.

Figure 1. IPR Trade for Selected Countries, 2022



Source: WTO, *World Trade Statistical Review 2023*. Figure, CRS.
Note: Preliminary estimates for 2022. 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.

Background

IPR are time-limited legal rights granted by governments to creators to prevent others from making, copying, selling, or otherwise using their creations. IPR include patents, copyrights, trademarks, undisclosed data (trade secrets), and geographical indications (GIs). IPR generally aim to foster innovation and creative output by permitting IPR holders to benefit from the creations exclusively for some time and/or negotiate payment for the use of intellectual property (IP) by others (e.g., royalties), allowing holders to recoup expenses (e.g., R&D). After the IPR expire, others can build on the innovations. The exclusivity granted to IPR holders may raise prices or limit access to protected goods. Some Members of Congress and stakeholders have debated the validity of the arguments behind these rationales, such as how IPR protections can affect access to medicines.

IP and Economic Impact. The U.S. government generally assesses IP to be important to U.S. innovation, economic growth, and comparative advantage internationally. A range of U.S. industries rely on IPR protection. Lawful limitations to IPR (e.g., “fair use” copyright exceptions for media, research, and teaching) can also further innovation and add value. IP licensing and use fees comprised 14% of U.S. services exports and 8% of U.S. services imports in 2022.

In 2019, China overtook the U.S. historical lead to become the top patent filer under the Patent Cooperation Treaty

(PCT) system, administered by the World Intellectual Property Organization (WIPO). China and the United States comprised, respectively, 25.2% and 21.2% of total PCT application filings (278,100) in 2022. Some analysts have noted that patent filings are one of several indicators of innovation levels and that patents may vary in quality.

IPR Infringement. Given its illicit nature, IPR infringement can be difficult to quantify. Innovation can be costly and time-consuming, but IPR infringement may incur relatively few penalties and high profits. The digital environment heightens enforcement challenges, given the growth of online piracy and other factors. Globally, trade in counterfeit and pirated goods reached an estimated \$464 billion, or 2.5% of global trade in 2019 (Organization for Economic Cooperation and Development/European Union [EU]). In FY2022, U.S. Customs and Border Protection (CBP) reported seizing 20,812 shipments of IPR-infringing goods, with an estimated value of nearly \$3 billion. China, which historically has been home to a robust counterfeit goods trade, remained the largest source of such seizures.

U.S. Trading Partners’ IPR Regimes. 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 key concerns some trading partners’ lax border and criminal enforcement against counterfeits, including in the digital environment; high levels of digital piracy; and gaps in trade secret protection and enforcement. For instance, China’s technology transfer and other industrial policies may disadvantage U.S. IP holders in these markets. Among developed economies, the EU approach to GIs, for example, may limit market access for U.S. exporters of products that are common food names, and EU approaches to regulation of the digital economy and artificial intelligence affect U.S. IP (e.g., addressing illegal sharing of copyrighted content, transparency obligations for online platforms with respect to content moderation).

Trade Policy Tools for IPR

The use of trade policy to advance IPR internationally emerged prominently with the former 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. International trade rules governing IPR aimed to bring more certainty and address IPR-related disputes more systematically.

Multilateral IP Rules. TRIPS established minimum standards of IP protection that most WTO members must provide, based on core WTO nondiscrimination principles. It set civil, administrative, and criminal enforcement

procedures and remedies, and border measures. TRIPS obligations are subject to WTO enforcement.

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. TRIPS has elicited some stakeholder debate about how it seeks to balance innovation and other aims.

COVID-19 “TRIPS Waiver

A major WTO debate has centered on how best to provide global access to COVID-19 vaccines and therapeutics, and whether to “waive” or offer greater flexibilities for TRIPS obligations. In 2022, WTO members approved a five-year “TRIPS waiver” of patent-related obligations for COVID-19 vaccines. The Biden Administration’s support for the waiver divided Members of Congress. WTO members are now debating whether to extend the waiver to COVID-19 diagnostics and therapeutics.

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

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 in 2021, directed the executive to ensure that U.S. FTAs “reflect a standard of protection similar to that found in U.S. law,” 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 that build on TRIPS. The United States-Mexico-Canada Agreement (USMCA), the most recent U.S. FTA, contains new or updated IPR commitments, 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. Some limited trade deals also have IPR commitments. For example, in the 2020 U.S.-China “phase one” agreement, 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. IPR does not appear to be a top focus of current Biden Administration trade initiatives, such as in the Indo-Pacific, but may come up as it relates to digital trade negotiations.

Other Tools. U.S. IPR-related trade tools also include:

- **“Special 301” of the amended Trade Act of 1974:** USTR identifies countries with inadequate IPR regimes in its annual statutorily required “Special 301” report. 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:** Per this law, the U.S. International Trade Commission (ITC) may ban 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.
- **Seizures:** CBP enforces IPR at U.S. borders by seizing goods that infringe on U.S. copyrights and trademarks, and enforcing Section 337 exclusion orders.
- **U.S. Generalized System of Preferences (GSP):** Under this program, the President considers a developing country’s IPR policies and practices when extending duty-free benefits on U.S. imports from such country. A bill to renew GSP, which expired at the end of 2020, is pending in the 118th 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 IPR expansion, but some stakeholders have debated this approach. USMCA sparked debate on the role of patents and data exclusivity in incentivizing innovation and supporting access to medicines, a debate renewed by the COVID-19 pandemic. The growth of digital trade also poses issues for online intermediary liability, cross-border data flows, data protection, and cyber theft of trade secrets.

Remedies for U.S. IP Holders. Congress may evaluate the timeliness of longstanding U.S. IPR trade remedies. The ITC takes an average of 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. Tracking IPR infringement in e-commerce shipments and supply chains poses further challenges. Congress also may monitor the implementation of new IPR remedies (e.g., P.L. 117-336, which authorizes sanctions for theft of U.S. trade secrets by certain foreign actors).

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 of trading partners’ IPR obligations; direct the Administration to pursue new FTA negotiations that prioritize IPR issues; and expand the scope of ongoing executive trade initiatives to include IPR. Congress also may examine whether to change existing U.S. trade tools to advance IPR to increase their effectiveness or balance with other public policy objectives.

Multilateral Issues. Congress may continue to oversee and shape U.S. multilateral engagement on IPR. A key issue may be the TRIPS COVID-19 waiver; questions remain over the effectiveness of this approach to promote global COVID-19 treatments access; its implications for U.S. technological competitiveness (e.g., vis-à-vis China); and the role of Congress in changing U.S. obligations under international IPR rules. See CRS Report RL34292, *Intellectual Property Rights and International Trade*.

Shayerah I. Akhtar, Specialist in International Trade and Finance

Liana Wong, Analyst in International Trade and Finance

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