CRS Issue Statement on Intellectual Property Rights

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Intellectual property (IP) law is an umbrella term that encompasses several major disciplines, including copyright, patent, and trademark. IP laws grant limited monopoly rights in particular subject matter, created by the human mind and embodied within physical objects, including the following types: artistic and literary works (protected by copyrights), innovations or inventions (patents), and commercial symbols and commercial names (trademarks). Changes in science, technology, and global commerce continuously transform the IP marketplace and may, in some cases, necessitate adjustment to its underlying legal structure. In defining the scope of legally enforceable rights in the grant of a patent, copyright, or trademark, Congress balances competing interests among IP creators/owners and the public. IP owners must be protected against violations of their rights, in the form of unauthorized use, piracy, and counterfeiting. But, in many cases, their economic interests must yield to countervailing legal and social imperatives, such as freedom of speech, affordable access to medicine, homeland security, or international humanitarian medical assistance.

IP-based industries, such as pharmaceuticals, information technology, and entertainment, account for a significant share of the domestic economy. Because the U.S. is a world leader in the creation and export of intellectual property and IP-related products, U.S. exports depend on some form of IP protection. Protecting IP rights (IPR) in global transactions presents challenges separate from enforcement of IP rights domestically.

Patent Law

Omnibus Patent Law Reform. Congressional interest in patent law reform has increased as the patent system has become more significant to U.S. industry. This heightened interest has also been accompanied by persistent concerns about the fairness and effectiveness of the current system. Several studies, including those by the National Academy of Sciences and the Federal Trade Commission, have recommended legal reform to address perceived deficiencies in the operation of the patent regime. Other experts maintain that major alterations in existing law are unnecessary and that the patent process can, and is, adapting to technological progress. Legislation before the 111th Congress would address a broad range of topics, including reform to litigation procedures, damages, and substantive patent doctrines.

Tax Strategy Patents. The recently recognized phenomenon of patents on methods that individuals and enterprises might use in order to minimize their tax obligations has been the subject of congressional interest. While some observers believe that tax patents lead to socially deleterious consequences, including unequal treatment of similarly situated taxpayers and the encouragement of undesirable tax avoidance activities, others suggest that these concerns are overstated and further assert that tax strategy patents may result in positive social benefits. Legislation before the 111th Congress would disallow tax strategy patents.

Follow-On Biologics. Biologics, which are also known as biopharmaceuticals or biotechnology drugs, have begun to play an increasingly important role in U.S. health care. Although a number of patents pertaining to certain biological products will expire in the near future, some congressional concern has been voiced over the possibility that these patent expirations may not be accompanied by the introduction of competing, lower-cost biologics in the marketplace. The 111th Congress is considering legislation that would create an expedited marketing approval pathway for follow-on biologics. This legislation also establishes specialized patent dispute resolution proceedings and periods of exclusive marketing rights with respect to follow-on biologics.

Copyright Law

Sound Recording Performance Rights. Under existing law, over-the-air AM/FM radio stations need not pay royalties to sound recording copyright holders (such as recording artists, musicians, and record labels) when broadcasting sound recordings; they only pay the copyright holder of the underlying musical work (the composer of the song, or the music publisher). However, entities that transmit music digitally, such as Internet, cable, and satellite broadcasters, must pay a sound recording performance fee in addition to the royalties for the songwriter. Recording artists, labels, and musicians argue that the "terrestrial broadcast exception" denies them appropriate compensation for the use of their copyrighted works, while digital radio broadcasters assert that the disparity unfairly disadvantages them in the competition for listeners. Terrestrial broadcasters claim that a symbiotic, mutually beneficial relationship has existed between the broadcaster and recording artist for 80 years, that adequately supports musicians by giving free promotion of their sound recordings through the radio. The 111th Congress is considering legislation that would eliminate the long-standing royalty exemption that applies to traditional radio stations and attempt to bring parity to the sound recording performance royalty system.

Orphan Works. Orphan works are copyrighted works whose owners are difficult or impossible to identify or locate, for a potential user attempting to obtain permission to use them. Orphan works are perceived to be inaccessible to the public because of the risk of infringement liability that a good-faith user might incur if and when a copyright owner subsequently appears. Supporters of allowing expanded use of orphan works argue that it will encourage the creation of derivative works incorporating the orphan work, permit libraries and museums to make available much culturally and historically significant work to the public, and allow certain "private" uses such as the reproduction of an old family photograph when the photographer or photography studio can no longer be found. However, several copyright owner groups (including small businesses, visual artists, graphic designers, and textile manufacturers) are concerned about the impact of any legislative solution upon their rights. The 111th Congress may consider legislation similar to bills introduced in the last two Congresses to address the orphan works problem; such measures had taken the approach of limiting the remedies for the copyright owner who subsequently sues the user, if that user had satisfied certain statutory requirements for using an orphan work.

Music Licensing Reform. The technological advances in digital delivery of music to the public through internet radio services and online music stores have contributed to the blurring of distinctions between the reproduction, distribution, and performance rights of copyright owners. Music content creators/owners desire to be fairly compensated for use of their work in the digital age, and they also express concern about the adequacy of protection against unauthorized reproduction, redistribution, or retransmission of their work. Online music stores and digital music services are also interested in having a more streamlined process through which permission may be obtained from music publishers and record labels to license their songs and recordings. Any effort at music licensing reform may need to ensure that protecting the rights of music copyright holders does not stifle innovation in technologies that allow consumers to enjoy music in new and convenient ways.

Public Access To and Use of Digital Content. Technology enhances the ability and, frequently, the need for content owners to protect or "lock up" digital content. And it offers new ways for content users to acquire and use creative material. Content owners traditionally press for greater tools to protect content and prosecute copyright infringement. Content users challenge the legitimacy of extending the copyright holder's monopoly in the interest of protection. Whether copyrighted material is protected by encryption, posted on the Internet, or subject to digital

scanning, the question over the extent to which others may legally use it is far from settled. The statutory and judicial doctrine of "fair use" ensures that the public has some access to protected material, but its parameters in a digital context are only just evolving. Courts grapple with issues involving the right of online search engines to display thumbnail and cached images, or to scan books to permit digital text searches. Past Congresses have considered proposals to clarify and/or expand the rights of information users in a digital environment.

International IPR Protection

International Trade Policy and IPR. As intellectual property rights have gained increasing significance for U.S. economic and trade interests, Congress has become involved in issues concerning global enforcement and harmonization of IPR. Through oversight of the Office of the U.S. Trade Representative (USTR) and possibly through legislative action on trade policy, Congress may respond to a lack of compliance by certain trading partners with enforcement standards under the Trade-Related Intellectual Property Rights (TRIPS) Agreement of the World Trade Organization (WTO) and various free trade agreements (FTAs). Congress exercises oversight and implementation for U.S. involvement in further harmonization of IPR standards through the WTO TRIPS Agreement, FTAs, and agreements under the World Intellectual Property Organization (WIPO). The Obama Administration currently is negotiating an Anti-Counterfeiting Trade Agreement (ACTA), a proposed plurilateral agreement between the United States and nearly 40 other countries, primarily developed nations, that would build on the minimum standards of IPR protection and enforcement set in the TRIPS Agreement. Some Members of Congress have raised concerns about the transparency of the negotiations and the scope of the proposed agreement.

Access to Medicines for Developing Countries With Public Health Emergencies. The issue of access to affordable medicines is one of great concern to developing countries whose health-care systems are often overwhelmed by HIV/AIDS, tuberculosis, malaria, and other infectious diseases. In 2005, the WTO amended TRIPS to make it easier for developing countries without manufacturing capability to obtain generic drugs through the use of compulsory licensing (which overrides patent rights of pharmaceutical drug companies) to fight public health epidemics. However, there is no legislation to provide domestic authority to grant compulsory licenses for exporting patented pharmaceutical products pursuant to this decision.

U.S.-China Dispute Over IPR Protection. The United States has pressed China for a number of years to improve its IPR laws, boost IPR enforcement, and expand market access for U.S. IPR-related goods and services. Many business groups contend that, while China has made progress towards improving its IPR regime, significant problems remain, including a lack of effective and deferent penalties for IPR violators (especially criminal penalties for copyright piracy), extensive trade barriers, discriminatory government procurement and regulatory rules that favor domestic IPR firms over foreign ones (in an attempt to promote domestic innovation), and lack of transparency in the development of technology standards. U.S. IPR industries contend that China has some of the highest piracy rates in the world, which cost U.S. firms billions of dollars in lost sales.

The United States has brought two IPR-related cases against China in the WTO. In April 2007, the USTR initiated a WTO case against China for failing to enforce its IPR laws consistent with its obligations under the TRIPS Agreement, namely in terms of trading rights and distribution services. In January 2009, a WTO panel ruled that China failed to protect IPR works under review by the government for content and in regards to the disposal of seized pirated products.

However, the panel stated that it needed more evidence on the issue of thresholds for criminal prosecutions of IPR piracy before a determination could be made. In August 2009, another WTO panel ruled that a number of China's restrictions on trading rights and distribution of IPR-related products (including reading material, audiovisual home entertainment products, sound recordings, and films for theatrical release) were inconsistent with WTO rules, specifically discriminatory regulations on distribution services in China (where foreign firms are treated less favorably than domestic firms) and rules that designate only state-owned monopolies as entities that can import such products. However, the WTO panel did not address whether China's censorship policies violated WTO rules, nor did it consider China's limits on the number of foreign films that can be imported each year. China has appealed the decision.

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