

An Analysis of the Economic/Legal Literature On the Effects of IP Rights as a Barrier to Entry

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AUTHORSHIP

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I. RESEARCH MISSION

In connection with the World Intellectual Property Organization (WIPO) project on Intellectual Property and Competition Policy, WIPO commissioned the Center on Law and Information Policy at Fordham University School of Law (CLIP) to undertake a review of relevant literature in order to analyze the role of intellectual property (IP) rights as a barrier to entry. **In particular, WIPO sought information on literature that addressed developing countries and that was empirical in nature. WIPO further hoped that the study would reveal literature that identified factors in the use of IP rights as exclusionary measures.** And, lastly, WIPO sought information on whether additional empirical studies will be feasible and/or necessary to better understand how and how much IP rights can be used to bar or delay the entry of competitors.

II. FINDINGS

The literature review produced approximately 460 relevant publications that examine IP as a barrier to market entry. From this sample several large trends were noted.

First, the majority of the literature in this field is not truly empirical. Most of the literature is descriptive or theoretical. Empirical studies of IP as a barrier to market entry are rare, emerging mostly in the context of patent rights.

Second, the CLIP team noted that certain substantive rights were examined in the literature more frequently than others. A large number of articles focus exclusively on patent rights while a substantially smaller number examine copyright, trademark and trade secret. Another large group of articles examine IP rights generally rather than focus on a single specific substantive right.

Third, a large number of articles discuss IP and competition issues generally without focusing on specific problems or issues. Notably, the CLIP team identified a number of publications that comment generally on how competition law and IP law overlap and impact each other without more specific focus.

Fourth, although much of the literature appears to be broad in scope and focus, some subject matter trends did appear. All of these trends are identified below with respect to (A) literature generally discussing IP rights; (B) literature examining patent law; (C) literature focused on copyright law; (D) literature focused on trademark law; and (E) literature addressing trade secret doctrine.

A. IP Generally

The CLIP research team identified 192 publications that examine IP rights and market entry generally. These sources addressed broad IP issues associated with market access and development. These articles can be grouped and are analyzed below according to a set of trends: (1) IP rights scope and market entry barriers; (2) corporate IP strategies and markets; (3) licensing and markets; (4) IP litigation and its effects on market entry; (5) information, communications and technology sector (ICT); (6) geographic case studies; (7) IP protection as a barrier to international trade; and (8) linkage between international IP protection standards and economic development.

... 6. Geographic Case Studies

A number of articles examine how IP rights impact market entry in specific countries or geographical regions. Many of these studies focus on broad geographic regions, while others are more narrowly focused on individual countries. Regions with more robust coverage are Asia,²⁸ Europe generally,²⁹ and Central and Eastern Europe.³⁰ Many of the regional studies compared IP rights between high income and developing regions. Country specific studies explored IP rights in Egypt,³¹ Brazil,³² Australia,³³ Argentina,³⁴ Japan,³⁵ Nigeria,³⁶ Vietnam,³⁷ and Taiwan,³⁸ among others.

These articles focus on specific geographic regions to test theories or demonstrate certain themes. Themes explored in this group include the TRIPS regime and its effects on developing countries, the impact of TRIPS on foreign direct investment (FDI), the role of IP rights in the transition of a country's economy to a service-based economy, and technological advancement as a catalyst for changes in IP regimes.

The articles related to TRIPS tend to focus on developing countries.³⁹ These articles point out that while the requirements set out under TRIPS may be optimal for Western countries, they may not be appropriate for developing countries for both economic and cultural reasons. Through specific country case studies, these articles suggest that in order for the promises of TRIPs to be realized in developing countries, IP laws should be narrowly tailored to each country based on its unique culture and characteristics. It is also noted in many of these articles that Western conceptions of IP rights may not be in line with the cultural and political circumstances of developing countries.⁴⁰

Other articles use a geographic focus to explore the impact of TRIPS on foreign direct investment (FDI).⁴¹ Some of these articles study the interplay between TRIPS and FDI in the pharmaceutical industry within a specific geographic area.⁴² These articles explore how strong IP rights create a market-friendly enabling environment that will encourage FDI.⁴³

⁴¹Czub, Kimberly A., "Argentina's Emerging Standard of Intellectual Property Protection: A Case Study of the Underlying Conflicts between Developing Countries, TRIPS Standards, and the United States," *Case Western Reserve Journal of International Law* 33 (2001): 191; Kogan, Lawrence A. "Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth," *International Journal of Economic Development* 8(1-2) (2006): 15; Adams, S., "Intellectual Property Rights, Investment Climate and FDI in Developing Countries," *International Business Research* 3(3) (2010): 201-209.

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