

Amending TRIPS

Protecting Property Rights and
Public Health

Submission to the DFAT review of the TRIPS
and Public Health Amendment

Tim Wilson

Institute of Public Affairs
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Introduction

The Department of Foreign Affairs and Trade is currently seeking input into the “TRIPS and Public Health” Amendment to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of the World Trade Organisation. This amendment is currently being considered for adoption by WTO members, including Australia.

It is recognised that the proposed amendments are merely the formalisation of existing waivers to the Agreement on the grounds of public health concerns. However, this should not ignore the central role that intellectual property rights play in the promotion of solutions to public health concerns.

The importance of Intellectual Property Rights

Intellectual Property rights should be treated akin to all other property rights; they should be recognised and enforced. Any relaxing of property rights law comes to the detriment of all property rights and the lack of security property owners can place in their property. While these property owners suffer from direct risk to their property, it should not be ignored that society at large also suffers.

The pharmaceutical industry provides a very good demonstration of this. The pharmaceutical industry relies heavily on an intangible good for its ongoing existence, its intellectual property. Undermining their intellectual property rights directly undermines the ongoing viability of their business to create life preserving and enhancing medicines. Their intellectual property provides them with an asset to raise capital from the marketplace to invest into the research and production of goods that promote public health.

While the short term benefits of addressing immediate public health crises can be alleviated by undermining intellectual property, this alleviation is short term gain for long term pain. It comes at the expense of the long term sustainability of the industry’s development of new medicines for diseases that have not yet been cured or that have not yet impacted on society.

Protecting Public Health and Intellectual Property Rights

The proposed amendment attempts to balance out the public health challenges that flow from intellectual property protection and the suggested need for parallel imports for patented pharmaceuticals where a country does not have the manufacturing capacity in a public health crisis; while also recognising the need for protection of intellectual property rights for patent holders.

The proposed amendment reasonably addresses this balance. In particular the requirements for parallel imports produced under a compulsory license should be branded in a different form than patented medicines to minimise its trade on the black-market. It is also essential that compensation be paid to the patent holder under a compulsory license regime for the use of their patented material.

It is also too often ignored that many pharmaceutical companies engage in voluntary licensing to assist with public health problems removing the need for compulsory licensing. This is always preferable to compulsory licensing and the interference of Government in the licensing arrangements of patents.

While these amendments will help to secure the alleviation of public health concerns that arise out of intellectual property rights protection, it should not be used as a method for developing countries to obfuscate their responsibilities. The pharmaceutical industry has been abused for too long for the public health problems in developing countries. Any person with a reasonable understanding of public health problems in developing countries is aware that the availability of patented medicines is a minor problem in comparison to other public health challenges; including the availability of qualified health professionals and facilities, distribution methods for goods, corruption and access to clean drinking water.

The campaign against Property Rights

Since the establishment of the WTO and TRIPS there has been an ongoing campaign against pharmaceutical companies to blame them for public health challenges in developing countries. Concurrently too little attention has been given to these simple problems that would have a much greater impact on improving public health in developing countries.

This campaign has been run by professional anti-property rights, anti-market activists. They are merely

using this campaign as part of an incremental step in a long-term campaign against free markets and intellectual property rights. This runs contrary to Australia's national interest and the interest of addressing many of the real public health concerns throughout the developing world.

In addition, there has been a paucity of effort made by developed countries to recognise the important role and success these companies have had in promoting public health. They have allowed the impression to build in the media and other avenues of public commentary that pharmaceutical company's are coveting their IP like a spoilt child with a bag of lollies; rather than recognising the significant role they play in research and development of life saving and preserving medicines.

Summary Comments

Regardless, Australia should accept the proposed amendment to the TRIPS Agreement; but it should be done in concert with ensuring developed and developing countries address the real challenges facing developing country public health.

Institute of Public Affairs

Level 2, 410 Collins St,
Melbourne VIC 3000

t: +61 3 9600 4744

f: +61 3 9602 4989

e: ipa@ipa.org.au

w: <http://www.ipa.org.au>