

Policymakers dealing with contemporary intellectual property issues increasingly find the need to understand economic concepts and analytical methods employed by economists, while also making greater use of empirical findings in assessing policy options. The WTO Secretariat, in undertaking technical cooperation activities relating to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), has found a real need among diverse stakeholders for clarity on key economic concepts, and for brief explanations on the economic analysis of contemporary policy issues relating to intellectual property and trade. This series of primers has been prepared as an informal guide to support technical assistance in this field, but does not represent an authoritative or official view of the WTO on any of the issues outlined.

Intellectual property (IP) can be defined broadly as creations of the human mind. Intellectual property rights (IPRs) are legal rights that protect these creations. Unlike rights over physical property, an IPR generally gives its owner only the time-limited right to exclude others from making use of their property, that too conditional upon certain criteria.

IPRs can be divided into two broad categories of according to their economic purpose or function. One set of IPRs aim to stimulate creativity and inventiveness so that society benefits from new or improved products, services or creative works. This category comprises of IPRs such as patents, copyright, industrial designs and various specialized IPR regimes such as the protection of plant varieties or layout-designs of integrated circuits. The second set of IPRs comprise of distinctive signs, such as trademarks and geographical indications, whose economic function is to maintain the integrity of the market place by correcting information asymmetries between the buyer and the seller of a good or service. There are some forms of protection that prevent unfair competition, such as passing off or the protection against the theft of trade secrets that could be inclu







Thus trademarks work better to help consumers assess quality when the goods are not what Phillip Nelson calls "search" goods, for which the quality is readily discernible (for example, red and firm tomatoes), but are "experience" goods, where the consumer has to purchase the product to know its attributes (for example, canned fish)(Nelson, 1970). Brand advertising expenditures are consequently higher for experience goods than for search goods (Nelson, 1974).

Trademark law, which evolved from the common law doctrines of passing off and unfair competition, prohibits others from using confusingly similar trademarks in a way that misleads the consumer as to the true origin of the goods or services. In common law jurisdictions, trademark rights accrue to those who are the first to use their distinctive mark in the market place. Registration is an option that generally makes the trademark owner's claim stronger, and helps clarify and confirm the rights of one trader against those of commercial rivals. When enforced properly, trademarks save the consumer a vast amount of "search" and "experience" costs and thus benefit consumers. This law also benefits producers as they have the incentive to build up their reputation and invest in high quality since otherwise consumers could "retaliate" by shunning the brand. Trademarks help recoup such investment because others cannot "free ride" by using the same or similar marks. Trademark law also supports franchising which can result in the mark being used over vast geographical spreads rapidly.

Well-known trademarks have a higher level of protection in that, once registered in the jurisdiction, others can be prevented from using them even on dissimilar goods and services in that jurisdiction, even though there is lesser likelihood of confusion. Here the producer suffers losses due to the dilution of the mark, which weakens the association between the mark and the product in question. This is especially true for what could be termed as "Giffen goods", where the higher the price the higher the demand for the product. For example, while the person who buys an imitation of an expensive watch may be fully aware that it is an imitation, consumers may no longer wish to buy the genuine product as it is not so rare any more. In the TRIPS Agreement, geographical indications for wines and spirits must be accorded additional protection by prohibiting the use of accompanying epithets such as "kind", "type", "style" or "imitation", even where the true origin of the product is clear.

While trademarks do not generally block entry into a market of other identical products with different marks, trademarks that take away descriptive terms from the public domain could obstruct fair competition by forcing potential rival companies to incur higher marketing costs in making the description or essential attributes of their products known to the consumer. Trademark law uses certain policy levers to balance the costs to society. The distinctiveness-acquired-through-use doctrine for descriptive or geographical terms prevents unwarranted obstruction of competition. Similarly the requirement to use trademarks within a certain period after their registration (at least three years, according to the TRIPS Agreement)

