

The Economics of Enforcement

*The Global Regime for Enforcement of Intellectual
Property Rights*

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Context - General comments

- Use of economic concepts by legal scholars
- Chapter 3 out of 14, of the *Global Regime for Enforcement of Intellectual Property Rights* , on the general, systemic, normative and institutional aspects of enforcement
- Response to the needs of public authorities entering into new agreements
- Response to the perception that more research is needed

Need for differentiation between IP and *enforced* IP

- 1st part: literature review (scale and impact of IP infringement) + methodological concerns
- Most of the analyses approach IP as a single body of primary norms: IP is equated to effectively *enforced* IP:
 - Little differentiation between substantive aspects and enforcement aspects of the IP system
 - Enforcement seems to be considered a neutral activity. However, in a globally harmonized substantive regime the economic impact would vary across countries...
 - The differentiation may be difficult: enforcement norms may radically alter the value of the substantive right

Industry	Consumers	Governments	Economy
sales (volume and prices)	health	tax revenues	investment
brand value and firm reputation	safety risks	expenditures	innovation
royalties	effects arising from the (low) quality of the goods	lower risks to supply chains with national security or safety implications	wealth creation
incentives to innovate			criminal activities
			environment
			employment
<div style="border: 2px solid blue; padding: 5px; display: inline-block;"> POSITIVE EFFECTS OF IP PROTECTION </div>			trade

Positive effects of infringement?

- Controversial, uneasiness among institutions... but unavoidable question
- Do law and economics give different answers to this question?
 - It would seem that law is more conservative: if law does not properly work, it has to be changed rather than disregarded
 - Economics would probably give a more pragmatic answer
- Examples: consumer surplus, jobs created, network economies, related economic activities...

“Although about 3 million computers get sold every year in China, people don't pay for the software. Someday they will, though: as long as they're going to steal it, we want them to steal ours. They'll get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade”

Bill Gates, University of Washington, 1998.

Public investment

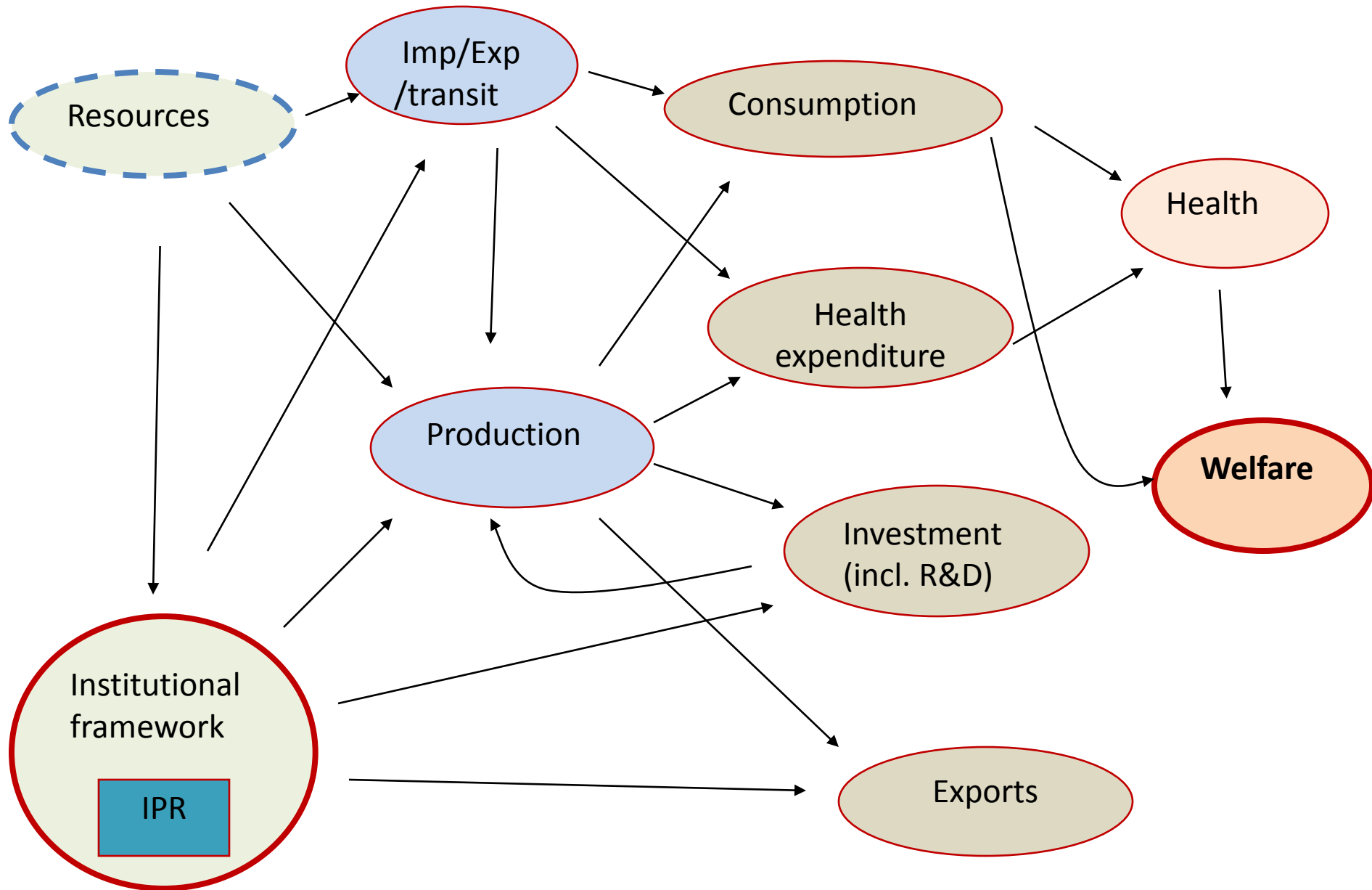
- Studies on the economic impact of IP generally neglect the public investment or expenditure necessary to enforce IPR
- This chapter maps IP enforcement activities and investment items
 - Identification of the infringement
 - Storage
 - Adjudication
 - Disposal
 - Imprisonment

ENFORCEMENT ACTIVITY	AREA OF ENFORCEMENT	INVESTMENT ITEMS
Identification of the infringement	Civil, border, criminal	<ul style="list-style-type: none"> Personnel: judges, clerks, border authorities, police Infrastructure: judicial, police and customs facilities Technical means: needed for conducting a civil search or criminal raid
Storage	Border, criminal	<ul style="list-style-type: none"> Personnel: border authorities, police, workers in warehouses Infrastructure: warehouses, free zones Technical means: machinery, trucks
Adjudication	Civil, border, criminal	<ul style="list-style-type: none"> Personnel: judges, police, prosecutors Infrastructure: courts and judicial facilities Technical means: forensic means
Destruction and disposal (recycling, open-air burning, shredding, crushing, burying in landfill sites)	Civil, border, criminal	<ul style="list-style-type: none"> Personnel: judges, police, prosecutors, technicians in the field of disposal and recycling Infrastructure: open air facilities, factories, warehouses, incineration plants Technical means: specialised machinery, means of transport, air pollution filtering mechanisms
Imprisonment	Criminal	<ul style="list-style-type: none"> Personnel: judges, police, prosecutors, prison wardens Infrastructure: courts, prisons, means of transport Technical means: security devices

Negative socioeconomic impact

- High levels of enforcement in one country may have an economic and social impact in global trade and in the national situation in third countries
 - Limit between substantive rights and enforcement: right to control transit is not among patent owners rights
 - No economic estimation on the impact of enhanced border control on third countries
- “Chilling-effect” - overdeterrence
 - Legal competitors refrain from entering into the market because of litigation costs, injunctions, damages...
 - How to estimate the economic impact of not having undertaken activities which were legal?

Resource implications of the enforcement of IPR



Economic significance of enforcement mechanisms

- What is economic significance of intellectual property institutions *per se*?
- There is very little research on the independent value or economic impact of specific enforcement mechanisms
- No attention at all to (research agenda on?):
 - *Civil enforcement*: evidence, preservation of evidence, right of information, disposal
 - *Border enforcement*: no economic studies on the impact of controlling importation, exportation, transit... no studies on the impact of controlling specific IP categories (not to mention the combination of both)
 - *Criminal enforcement*: some research, but still a largely unexplored field. Many questions... chilling effect of criminal enforcement? Effects of criminalizing patent infringement? Any economic guidance on imposing prison sentences?

- Enforcement is a very important field of research for law & economics scholars. The little research so far may be due to
 - Conceptual challenges in the legal domain
 - Methodological difficulties to estimate independent value of enforcement
 - Novelty of the field (in terms of international demands)
 - Lack of resources to conduct studies that, in the short run, may seem to run against the interest of rightholders
 - Little attraction of procedural law