

**UNITED STATES
PATENT AND TRADEMARK OFFICE**



Policy and International Update

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Office of Policy and International Affairs

Thursday, July 26, 2018

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**European Union
General Data Protection Regulation
(EU GDPR)
&
WTO Panel Report - Tobacco**

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What is the GDPR?

- The GDPR is EU legislation that creates major changes to how data protection is treated in the EU
- The GDPR, while passed in 2016, took full effect on May 25, 2018
- GDPR can apply anywhere because it applies to processing of personal data:
 - By controllers/ processors established in EU regardless of where the processing takes place
 - By controllers/processors not established in EU if involves processing of personal data of data subjects residing in EU related to offering goods or services to those data subjects

USPTO Equities

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graph TD; A[USPTO Equities] --> B[Continued Access to the ICANN WHOIS Database containing domain name registrant contact information which is critical for IP rights online enforcement.]; A --> C[EU national personal data collection and processing by the USPTO or third party contractors in order to provide patent and trademark applicant services.];
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Impact on the WHOIS Database

- **What is WHOIS:** publicly available domain name registration data collected by ICANN registrars/registries. Used by law enforcement and IP rights holders to identify “who is” the domain name registrant.
- **Impact on WHOIS:** personal data, i.e., any data related to a specific individual, is now restricted, resulting in less (or no) domain name registrant contact information publicly available to interested parties.
- **Impact on IP Rights:** pre-GDPR, the information was publicly available and easily accessible, critical for IP rights holders’ online enforcement efforts. Now, access to the information is in doubt and negotiations to define access are underway.
- **What is USPTO’s Role:** working with U.S. Government colleagues and IP right holders to ensure any new ICANN WHOIS model provides maximum access to enforce IP rights.

EUIPO's GDPR Policy

- EUIPO does not appear to be making any major changes to current data collection practices in light of GDPR going into effect.
- EUIPO only processes personal data for the performance of tasks carried out in the public interest on the basis of EU regulations or in the legitimate exercise of official authority vested in the EUIPO or in a third party to whom the data is disclosed.
- The Office will publish the personal data included in applications and registrations (name and address of the applicant or proprietor and of its representative).
- Unless specified differently, all natural persons providing personal information to the EUIPO by means of paper or electronic form are deemed to have unambiguously given their consent for the subsequent processing operations.
- Data subjects are entitled to access and request the correction of their data by sending a written request to the EUIPO.

WTO Panel Report – Tobacco

- The WTO Panel Report in the Australian Tobacco Plain Packaging dispute issued on June 28, 2018.
- The Panel found in favor of Australia on all claims, upholding the consistency of the Australian tobacco restrictions with WTO obligations.

Key Claim: TRIPS Article 20

- **The use of a trademark in the course of trade**
- **shall not be unjustifiably**
- **encumbered by special requirements,**
 - such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

Key Findings on Article 20

- The Panel found that:
 - The Australian plain packaging regulations are special requirements that encumber the use of trademark;
 - The bar in Article 20 against unjustifiable encumbrances on the use of trademarks applies not only to product packaging, as Australia had argued, but to advertising and promotion as well;
 - A measure is unjustifiable if there is no justification or reason that sufficiently supports the resulting encumbrance. Australia's measures were justified because: Its system of tobacco control was comprehensive in nature; the measure contributed to the objective of improving public health; and there is an emerging, global public health policy in favor of trademark restrictions; and
 - While the Panel did not read a "right to use" into the TRIPS Agreement, it did take into account the trademark owner's "legitimate interest" in using the mark.

