

Trademarks off-world: a new frontier or lost in space?

With space exploration travelling further than ever before and celestial vacations on the horizon, a rudimentary framework for Earth's orbit, the moon and Mars is no longer light years away

It is time. Trademarks in the cosmos have been debated for decades but nothing has been done. However, with multiple countries now travelling into outer space and Earth-orbit hotels, together with moon and Mars cities, planned for the near future, a trademark regulatory structure needs to be implemented now in order to avoid chaos off-world.

This article explores the current legal situation, as well as the principles and parameters for a working model, based on existing national and international law.

Current state of play

Outer space is already a crowded place. The originators of space travel – Russia and a few of its Commonwealth of Independent States allies (formerly the Union of Soviet Socialist Republics), as well as the United States – first ventured into the unknown in the famous Space Race of the late 1950s and 1960s. They have since been joined by China, the European Space Agency (ESA), India, Israel and Japan, among others. Meanwhile, new space programmes are being developed in countries such as Egypt, Indonesia, Iran, Malaysia, North and South Korea, Pakistan and Saudi Arabia. Moreover, private sector flights are only a few years away – from Virgin Galactic, SpaceX and Amazon CEO Jeff Bezos' Blue Origin to intergovernmental efforts such as the International Space Station (ISS). There was even a Red Bull Stratos jump from the edge of space in 2012 and a new space nation, Asgardia (www.asgardia.space), founded in 2016. Soon, the ISS may have a companion,

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Aurora Station, an orbiting luxury hotel scheduled to launch in 2021.

Whereas old films have offered glimpses of brands in space – most notably PAN AMERICAN (PAN AM) in *2001: A Space Odyssey* (1968) or HILTON and MARS TODAY (a play on USA TODAY) in *Total Recall* (1990) – the very near future promises a flood of trademarks off-world.

Existing international approaches to outer space

The legal status of physical property (eg, spaceships or satellites) in outer space has been a recurring topic in UN agreements, bilateral and multilateral agreements, proclamations of nations and intergovernmental organisations, international commission initiatives and studies by non-government bodies. Although there has been no international consensus concerning the status of intellectual property specifically, intangible rights have routinely featured on the periphery of initiatives dealing with rights, activities and international cooperation off the Earth's surface. It is clear that more attention will focus on this area in the coming years in response to recent patent and copyright claims to inventions and coding created or used in outer space in conjunction with ISS activities.

Recent analysis has emphasised the lack of harmony between the concept of proprietary rights in activities outside of the Earth's atmosphere and the fundamentals of existing international agreements, which promote the exploration and use of outer space for "the benefit

and in the interests of all countries” as the “province of all mankind” (Ninth UN Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 1967). However, technological advances, increased government activities and private initiatives indicate that issues of ownership in property – including intellectual property – are becoming more important than ever before. Whatever happens, it is highly unlikely that human IP activity off-world will be a free for all where piracy runs rampant.

The limited international attention that has been dedicated to IP issues in outer space has been in response to increases in private investments for potential recreational activities. As an example, in 1996 the United Nations issued a formal declaration delineating the need for contractual agreements to recognise IP rights. While the following year’s UN workshop proposal to include IP issues as a topic for exploration by a dedicated legal sub-committee failed to gain the votes necessary to proceed, the Office for Outer Space Affairs continues to shine the spotlight on such matters.

Certainly, the legal sub-committee of the UN Commission on the Peaceful Uses of Outer Space has discussed the potential creation of a third sub-orbital territory to complement the existing demarcation between Earth’s sky and outer space. This potential new territory could assist with governing activities and IP-related assets connected with sub-orbital space tourism and zero-gravity flights. Nevertheless, the concept of a third sub-orbital territory remains in its infancy – the internationally recognised demarcation line between Earth and outer space remains the Kármán Line, a demarcation set at 100km (62 miles) above the Earth’s mean sea level. However, this notion of treating Earth and outer space separately has not been universally

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International laws and customs concerning the high seas are often cited as an ideal model for regulating outer space activities

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accepted. The United States has consistently refused to recognise any such borders and recently extended its legislation to govern certain outer-space invention activities as those that take place within the United States in its patent law (see 35 USC §105).

Existing UN treaties

1967 Moon Treaty

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 1967 was written to address the exploration and research activities of independent states. Its collective spirit is shared by later treaties concerning outer space; therefore, parameters for private property ownership and territorial governance have been absent from such agreements.

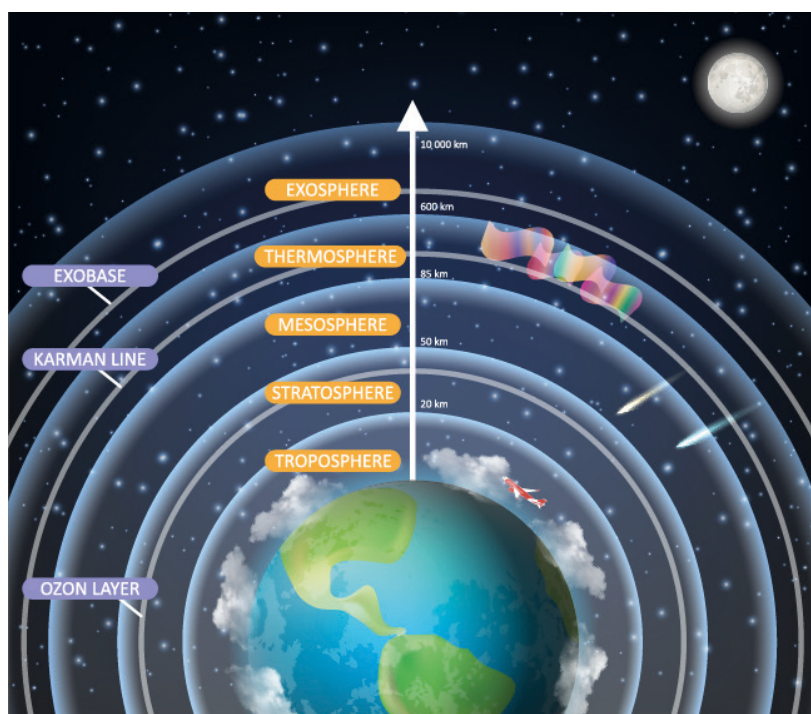
Although this treaty specifies that outer space is not subject to national appropriation by a claim of sovereignty (ie, by use, occupation or other means), it nevertheless includes the following provisions that could assist in managing future trademark ownership claims:

- The activities of non-government entities in outer space will require authorisation and continuing supervision by an appropriate state party to the treaty.
- While present in outer space, objects will remain under the jurisdiction of their registry state (often the location of their launch or the state that procures the launching – see also the 1972 Liability Convention and 1975 Registration Convention below). In addition, any personnel of such objects will be under that same jurisdiction.
- All participating nations retain the right to access stations, installations, equipment and space vehicles on the basis of reciprocity – a clause that signals the United Nations’ intention to encourage free exchange and movement.
- Mechanisms for addressing future conflicts arising from activities carried out by international government organisations in their exploration and use of outer space – specifically, an allowance that states parties to the treaty should resolve such questions by either engaging the international organisation directly or electing to engage one or more state members of that organisation.

It could be fairly simple to extend several of these principles to trademarks.

1968 Rescue Agreement

The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 was ratified by the United Nations in order to ensure that persons or property of one state will be returned to that state if located by another



participating member state. While the agreement is mostly designed to ensure the safe return of astronauts, it also includes provisions mandating the return of property that may:

- be rescued from outer space;
- fall from outer space and land in the territory of another state; or
- fall from outer space and be found at sea.

These provisions essentially retain the original jurisdiction over space objects that may be recovered by another state following an accident or mishap. Provided that an original state of jurisdiction can supply reasonable identifying information, the rescue state must return that property.

1972 Liability Convention

The Convention on International Liability for Damage Caused by Space Objects 1972 contains distinct dispute resolution provisions concerning physical property, which could provide groundwork for an IP enforcement system to govern outer-space activities. Specifically, the agreement ties liability to applicable launching states and specifies that states can claim launching state rights based on:

- the identity of the state that launches or procures the launching of a space object; and
- the territory or facility from which a space object was launched.

It allows for multiple states to be classified as a 'launching state' for a single object based on shared connections to a particular launch and permits for claims of joint and several liability as well as claims for contribution that resemble traditional common law tort damage mechanisms. States are also free to mitigate or plan for potential damages through contractual arrangements of their own.

This agreement contains detailed dispute resolution mechanisms that could conceivably be extended to future outer-space trademark claims. The following provide

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Private sector flights – ranging from Virgin Galactic, SpaceX and Amazon CEO Jeff Bezos' Blue Origin to intergovernmental efforts such as the International Space Station – are only a few years away

a detailed structure that could assist in addressing trademark disputes:

- an option to present claims through diplomatic channels;
- rights to damages due to gross negligence;
- a one-year statute of limitations;
- the establishment of a claims committee to review disputes and an arbitration panel composed of three arbitrators selected by the states that are party to the dispute (ie, one selected by each state and a third selected by the two states mutually);
- the reserved freedom for states to form their own bilateral agreements to resolve future disputes;
- the reserved rights for states to seek remedies in their own courts and the specification that such local remedies are not a prerequisite for the use of other dispute resolution channels; and
- a prohibition on obtaining double damages by seeking remedies for the same damages simultaneously through both national courts and the dispute resolution options provided in the agreement.

Arbitration enthusiasts are likely to find common ground with these mechanisms, as they resemble structures followed by internationally recognised bodies such as the London Court of International Arbitration, the Singapore International Arbitration Centre and the New York International Arbitration Centre. However, the Liability Convention's free-form interpretations of jurisdiction and liability may be difficult to apply in IP disputes because multiple states can qualify as a 'launching state' under this structure. What is more, the interpretation of damages is not limited to activities in outer space but includes damages that may be encountered on Earth (eg, that may result from a spacecraft's interim flight or be sustained on the Earth's surface).

1975 Registration Convention

The Convention on Registration of Objects Launched into Outer Space 1975 provides some clarification on



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The legal status of physical property such as satellites in outer space has been a recurring topic in UN agreements, bilateral and multilateral agreements, proclamations of nations and studies by nongovernmental bodies

jurisdiction by establishing a formal recordation system for physical objects launched into space. Specifically, it requires that eligible launching states:

- maintain their own registry systems to document objects launched into space; and
- inform the UN secretary general of the establishment of such a system.

‘Space objects’ are defined as the objects themselves, their component parts and any launch vehicles (along with their component parts). Details of registration requirements include the names of the states acting as the launching states, a designator (eg, a registration number), the date of launch, orbital parameters, the nodal period, inclination, apogee, pedigree and a general description of the space object’s function. The obligations also apply to intergovernmental organisations, provided that a majority of states involved in the organisation are party to this treaty. All parties to the treaty are required to inform the United Nations once they become aware that a particular object has become inactive or has left orbit; there is also a requirement to inform the secretary general of a designator or registration associated with any objects that may be marked at the time of their launch.

It would be relatively straightforward to complement this treaty with trademark registration requirements, thereby generating a civil law-style deposit registration system for trademarks. However, conflicts about state claims could still arise due to the broad parameters permitted for qualifying as a launching state. In addition, states could conceivably incorporate trademark registration requirements in their national deposit systems for state objects. Because a launching state retains jurisdiction of its objects in outer space under the 1967 treaty, it could be argued that the registration and use of a trademark associated with that object should be governed by its national laws. In fact, the United States has affirmatively stated this interpretation in its own national statute dedicated to outer space activities (see 35 USC §105).

1979 Moon Agreement

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies 1979 reiterates the non-proprietary themes of the Outer Space Treaty – namely, that exploration and use “shall be the province of all mankind” and “carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development” and specifies that the moon is not subject to national appropriation by any claim of sovereignty (by use, occupation or other means).

These recurring themes are designed more to ensure freedom from political claims of sovereignty (ie, claiming Mars for Country X by planting a flag on the surface) than the protection of personal property, whether physical or intellectual. The agreement mirrors the jurisdictional aspects of the Outer Space Treaty by specifying that parties retain jurisdiction and control over personnel, space vehicles, equipment, facilities, stations and installations on the moon specifically, and the presence of such property on the moon will not affect any state’s ownership rights. The Moon Agreement also contains a clause encouraging the free exchange and movement of

property, specifies a right of states to access property on the moon and prohibits states from conducting activities that would interfere with the activities of other states.

This treaty could provide the framework for regulation and control over the flow of goods or services on the moon should such trade ever arise. As an example, jurisdiction would be confirmed on export (departure from one state’s moon facility) and import (delivery to another state’s moon facility). Any transitory activities could be approached in a manner resembling the existing international framework for regulating high seas, which are summarised below; however, it should be noted that this framework is not harmonised.

ISS Treaty

The ISS Intergovernmental Agreement 1999 has been signed by the 15 governments that are currently participating in activities conducted within the ISS. It permits participating nations to extend their jurisdiction to the ISS, thereby creating different national zones that correspond to the station’s separate pressurised modules. The ISS Treaty is the first to specify IP protection as a primary objective – it sets out traditional protections for patents, trade secrets and even marking procedures. Jurisdiction is determined by the location of the activity pertaining to the intellectual property – specifically, the pod or particular areas that may be under control of a nation’s ISS activities at a given time.

The ISS Treaty’s progressive approach is somewhat mitigated by UN treaty obligations – namely, adherence to the concept of using space to further the collective benefit of humans. Of course, this reflects the ideal objective for any outer space initiatives and the ISS Treaty therefore obligates parties to exchange technical data and goods “when necessary” to ensure that the station operates effectively. Nevertheless, the treaty provides a solid basis for states to claim control over any trademark creation and use that may result from their activities, since peaceful development of space is not antithetical to IP rights.

Notably absent from the ISS Treaty is any structure regarding dispute resolution. IP claims are deferred to “the parties’ respective national regimes for intellectual property” and any contractual arrangements between parties. The ESA has already mandated a contractual prerequisite for the use of its facilities – namely, that parties using its facilities will agree to a waiver of liability and not pursue their own arbitration claims or lawsuits concerning activities connected to the ISS. As a result, any cooperating parties must agree with the ESA on the applicable law for disputes and arbitration procedures before conducting their ISS activities.

The issue of jurisdiction is likely to become a hot topic in response to the growth of research and commercial activities within the ISS. For instance, European nations that are situated thousands of miles away from Japan on Earth are within a mere spacewalk of one another. Disharmonies in any IP approaches will come into instant conflict, and the ISS Treaty as drafted addresses for such scenarios with the general statement that “[a]ny conflicts of jurisdiction between the Partners may be resolved through the application of other rules and procedures

already developed nationally and internationally”. Appropriately, specific procedures for protecting data and goods within the ISS are currently under discussion within its Multilateral Coordination Board, a body comprising representatives of each participating party.

Examples of national legislation

Australia

Australia was one of the first states to codify its outer-space treaty obligations into its national laws. The Space Activities Act was passed by the Australian legislature in 1998 and the current version includes:

- the key terms of Australia’s treaty obligations under the various UN treaties detailed above; and
- the terms of Australia’s bilateral agreement with Russia concerning cooperation in exploration and the use of outer space for peaceful purposes.

The act applies to space activities carried out in or launched from Australia and binds Australian nationals who may conduct outer space activities from a different launching state.

While the agreement does not iterate a formal stance on the legal status of intellectual property in outer space, it does permit future regulations to codify certain outer-space IP provisions detailed in the country’s 2001 bilateral agreement with Russia.

Article 7 of that bilateral agreement accounts for all intellectual property recognised by the WIPO Convention, including trademarks. It encourages contractual arrangements by permitting the IP agencies of these nations to reach their own separate agreements concerning conditions and principles that will be applied to intellectual property used or resulting from their joint outer space activities.

United States

The United States codified its own outer space legislation in the form of its patent law Section 105, Title 35 of the US Code in 1990. The statute states that any invention

made, used or sold in outer space on a US space object or component thereof will be considered made, used or sold within the United States, subject to international agreements and foreign launching state claims. US legislators conceived authority for Section 105 based on existing so-called ‘flag laws’ that permit US jurisdiction to govern activities that take place aboard US-flagged ships while they are in international waters. The international agreement component may support or prohibit US jurisdiction, while the statute allows for the United States to retain jurisdiction on a foreign space object if provided for in an agreement with a foreign state.

The statute effectively extends all appropriate US federal laws to applicable activities in outer space. US federal trademark law could conceivably be extended under this statute to govern certain commercial activities in space.

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The easiest way to expand trademark registration protection into space would be to use the current WIPO Madrid Protocol

Law of the sea

International laws and customs concerning the high seas are often cited as an ideal model for regulating outer space activities, since the oceans are beyond any one nation’s sovereignty. The most recognised agreement is the UN Convention on the Law of the Sea (UNCLOS) 1982, which agrees to:

- specify sea ‘territories’ based on concepts of internal waters;
- territorial waters (ie, state jurisdiction over the initial 12 nautical miles from its coastline);
- further contiguous zones for enforcing certain tax, immigration, environment and customs laws; and
- the hotly contested concept of 200-nautical mile exclusive economic zones for the use of natural resources.

The organised regime of UNCLOS provides an appealing method for regulating shared zones of outer space. However, practical issues remain concerning how to measure and govern outer-space territories; UNCLOS is littered with an abundance of independent state declarations and reservations. Disharmonies in state views regarding the fundamentals of international sea governance have been illustrated by recent fishing rights disputes, state disputes concerning rites of passage and broad claims to land rights that can include reefs and atolls.

How do we extend trademark protection off-world in future?

Given that there is such a wide body of existing outer-space physical property law in the form of UN agreements and declarations, as well as national government agreements and legislation, these could provide the foundation for outer-space trademark regulation and could even be combined with national laws, international custom, international treaties and dedicated international organisations to establish norms and processes.

PICTURE: ELENA11 /SHUTTERSTOCK.COM



The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies could provide the framework for regulation and control over the flow of goods or services on the moon, should such trade ever arise

Expand current national and international law to off-world issues

One approach that could come into being immediately would be for earthbound judges and arbitration panels to assume jurisdiction now, whether in a contract choice-of-law and venue clause or merely on common-law principles. If there is a trademark franchise agreement for a fast-food restaurant in an orbiting hotel and this was breached by the franchisee, action could be taken back on Earth with no need for an orbiting court to decide the matter. Such situations would become more complicated if there was no contract, for example, if a third party used a competitor's trademark in the orbiting hotel without consent. However, even this would not be impossible to solve. As mentioned, the United States has made it clear that it intends to apply its interstate commerce principles to invention activities governed by Section 105 of 35 USC; thus, it may be a clear next step for national trademark rights to extend to US-claimed space property (a principle that could apply to any country or trading bloc such as the European Union). For these avenues to work, interested trademark owners should amend their contracts now and start testing these trademark theories in court in order to build a body of extraterritorial jurisdiction case law, much as was done for the Internet in the 1990s with regard to the use of trademarks on so-called 'active' or 'passive' websites.

Action item: Include such clauses in all agreements currently under negotiation, regardless of whether there are immediate plans to use the trademark off-world. Trademark recognition and enforcement can be controlled by contract to some extent until the off-world enforcement infrastructure is created. For example, a franchisee can recognise a franchisor's rights in a trademark in Earth's orbit regardless of whether they are registered and agree to an earthbound conflict resolution framework.

Extend the Madrid Protocol to off-world issues

The easiest way to expand trademark registration protection into space would be to use the current WIPO Madrid Protocol, which has 106 members covering 122 countries. A new protocol could be added to the treaty (which would need to amend the accession process set out in Article 14 to allow these areas to become jurisdictions) in order to expand protection to Earth's orbit, the moon and Mars, which each member could either accept or reject. Another way to extend the protocol would be to have Earth members state that their protection extends off-world (eg, India would declare that its Madrid Protocol rights extend to an orbiting Indian hotel). A clear distinction should be made between whether a registration can be extended to these areas and whether the registration can be enforced there. Enforcement would probably lag behind extension, but that should not be a reason to delay establishing a system whereby rights are claimed and notice of these claims is given to third parties. For example, if the ABC trademark is extended to the moon by the Madrid system, a competitor would likely think twice before using ABC on the moon even if the lunar enforcement infrastructure

is not yet created. These rights may also be helpful in corporate due diligence schedules and financial balance sheets, and in establishing a larger trademark portfolio for possible security interests or licensing.

Action item: Start to lobby governments, WIPO and professional associations worldwide to add outer space to this treaty. Amending any treaty takes time and even with best efforts, changes are unlikely to come into force before 2025.

Use new or amended treaties to protect trademarks off world

One obvious path is to create a new bilateral, plurilateral or multilateral treaty specifically for intellectual property, similar to the IP sections of the ISS Treaty, or else to amend current treaties to include trademarks off-world. A new treaty could fully develop the exact scope of protection for trademarks (and other intellectual property) and provide enforcement mechanisms, such as court or arbitration panel review. Several of the treaties discussed here already protect physical property and would not need to be freshly negotiated – this would be necessary for the amendments only. An example of a good working arbitration system with no physical presence is the current WIPO UDRP for domain names, in which a virtual online panel with no specific country jurisdiction other than "cyberspace" decides the fate of disputed domain names. This system is based on contractual rights emanating from domain name contracts but could be adapted to the off-world environment. However, any such treaty approach would take years if not decades to achieve, lagging far behind commercial reality in space.

Action item: As for approach two, start now to actively discuss this extension of rights with the relevant decision makers and thought leaders. Such a treaty may take longer – perhaps even to 2030.

Comment

As we enter the new roaring '20s of the 21st century, we will need to establish at least a rudimentary trademark framework for Earth's orbit, the moon and Mars. Such a structure could expand current Earth-based legal jurisdiction, use the existing Madrid Protocol or create a new treaty to regulate trademarks off-world to deal with this important issue. How the countries of the world will unite behind any plan is likely to be a hot political issue. However, just as ICANN has succeeded in using the multi-stakeholder/grassroots approach to deal with internet domain name issues in cyberspace, there is hope that legal protection for trademarks in outer space should not be that contentious. Certainly, all nations stand to benefit from balanced, well-organised mechanisms for the protection and enforcement of such trademark rights, while still cooperating for the mutual development of off-world benefits for all of humanity. **WTR**



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