

Life on Mars?

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It is time. Trademarks off-world have been debated for decades, but nothing has yet been done, despite humans being in space for 63 years. However, with multiple countries now traveling into outer space, and 'low Earth orbit'¹ (LEO) 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 the home planet.

Existing international approaches to outer space

The legal status of physical property such as spaceships or satellites in outer space (usually defined by the so-called 'Kármán Line', a demarcation set at 100km – 62 miles – above the Earth's mean sea level), has been a recurring topic in UN agreements, the UN Commission on the Peaceful Uses of Outer Space (COPUOS), bilateral and multilateral agreements, proclamations of nations and intergovernmental organizations, international commission initiatives and studies by non-government bodies. However, there has been no international consensus concerning the status of intellectual property (including trademarks): specifically, intangible property.

Existing UN treaties that might be expanded to trademarks

1967 outer space 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), addresses the exploration and research activities of independent states.

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 UN to ensure that persons or property of one state will be returned to that state if located by another participating member state.

1972 space 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. Arbitration enthusiasts are likely to find common ground with these mechanisms.

1975 registration convention

The Convention on Registration of Objects Launched into Outer Space (1975) provides some clarification on jurisdiction by establishing a formal recordation system for physical objects launched into space.

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”.

Even though non-proprietary in intent, this treaty could provide the framework for regulation and control over the flow of goods or services on the moon (including trademarks) should such trade ever arise.

International Space Station treaty

The International Space Station (ISS) Intergovernmental Agreement (1999) was 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.

Example of national legislation

United States

The US codified its own outer space legislation in the form of 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 US, 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.

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). The organised regime of UNCLOS provides an appealing method for regulating shared zones of outer space.

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

Current national and international law and contracts

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, arbitration online or on Earth, or merely on common-law principles.

Madrid protocol trademark treaty

The easiest way to expand trademark registration protection into space would be to use the current World Intellectual Property Organization (WIPO) Madrid Protocol trademark registration treaty, 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 LEO, the moon and Mars. Another way to extend the protocol would be to have Earth members state that their protection extends off-world.

New treaties

One obvious path is to create a new treaty specifically for intellectual property, similar to the IP Article 21 of the ISS Treaty, or else to amend current treaties to include trademarks off-world including jurisdiction-free arbitration.

An example of a good working arbitration system with no physical presence is the current WIPO Uniform Domain Name Dispute Resolution Policy (UDRP), in which a virtual online panel with no specific country jurisdiction other than “cyberspace” decides the fate of disputed domain names.

Summary

As we enter the new ‘Roaring ‘20s’ of the 21st century, we will need to establish at least a rudimentary trademark framework for LEO, the moon and Mars.

Certainly, all nations stand to benefit from balanced, well-organised mechanisms for the protection and enforcement of trademark rights in outer space.

Footnote

¹An Earth-centric orbit within 2,000km (1,200 miles above the surface of the Earth), although most orbiting spacecrafts are lower. The boundary with ‘outer space’ is the ‘Karman Line’ (100km / 66 miles) above the surface of the Earth.

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