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Admiralty trademarks

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Floating in the mid-Pacific, the record-breaking Academy Award-winning film enlightens the dark deck of the cruise ship. Door prize merchandise multiplies the festive merriment--T-shirts, sunglasses, and towels all displaying the famous film trademark. But for intellectual property investigator, Mark Trade™, it was a dark and stormy night: the film and the merchandise were counterfeits, unauthorized by the copyright and trademark owners.

Infringement was clear, jurisdiction was murky. Intellectual property rights are generally territorial. In the United States trademark rights are based on use, with the first to use gaining priority. Obtaining a federal trademark registration creates constructive use as of the application filing date. In many foreign nations, trademark rights accrue to the first to file; if you have no national registration then few trademark rights are enforceable.

How to protect against intellectual property infringements on cruise ships, airplanes, and for the future-thinking, outer space? By

looking at the developed admiralty law. (For a general overview see Grant Gilmore and Charles L Black, Jr., *The Law of Admiralty*, 2nd ed, 1975).

Early international law extended national jurisdiction about three miles into the ocean (some say related to cannonball range), thereafter national sovereignty ended. The Outer Continental Shelf Lands Act of 1953 (43 USC 1331-1356) defined the Outer Continental Shelf as all submerged lands lying seaward of State coastal waters (three miles offshore) which are under US jurisdiction, extending national jurisdiction for artificial structures to about 200 miles. Beyond 200 miles, the ship's law applies.

A ship is considered part of the nation for which the ship is registered. Just as many US businesses are incorporated in Delaware for its perceived favorable corporate laws, many ships serving the United States are registered in foreign nations, such as Liberia and Panama.

United States laws generally have no extra-territorial reach. However, if activity within the United States enables foreign infringement, US jurisdiction may ensue. *Leatherman Tool Group Inc v Cooper*

Industries Inc, 47 USPQ2d 1045 (D OR 1997) . (Extra-territorial injunction granted where prior trade dress rights established and some effect on Commerce); *Los Angeles News Service v Reuters Television International Ltd*, 149 F3d 987, 47 USPQ2d 1349 (9th Cir. 1998) (Extraterritorial infringement, US defendants enabled foreign copyright infringement and are liable).

Demand and complaint can readily be served on the ship's US corporate representatives. But did an infringement of a US registered trademark occur on a foreign registered ship in international waters? Arguments could be made for each side. Another resolution is to obtain trademark registrations from the jurisdictions that often register cruise ships.

Fly me to the moon. Aircraft are nationally licensed. In the US, the Federal Aviation Administration regulates aircraft. Airplanes over the United States are generally subject to the state law below and pre-empting federal law. Consider the citizenship and medical malpractice issues for an assisted birth over diverse states and nations. Over international waters, choice of law and jurisdictional issues similar to ships apply.

Above about fifty miles, traditional admiralty principles shift into space law. (It would be very confusing for moon law to change as national perpendiculars slipped with rotating moon and earth.) The 1967 Outer Space Treaty provides that "[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation,

or by any other means." (Id., Article 2). Space objects are registered with the United Nations under The Convention on The Registration of Space Objects Launched into Outer Space, Open for Signature, January 14, 1975, 28 U.S.T. 695, T.I.A.S. No. 8480, 1023 U.N.T.S. 15. The space launch site may also have contributory liability. Imagine an in rem copyright infringement action against a communications satellite or a contributory infringement action against a launch site.

In rem actions. Admiralty law is also the home of in rem proceedings, against the offending property rather than the owning party. An early trademark case that established the admissibility of survey evidence was in rem. *United States v 88 Cases*, 187 F2d 967 (3rd Cir. 1950), cert. denied, 342 U.S. 861 (1951). Misbranding cases by the Food and Drug Administration, which may be in rem, have strong similarities to trademark confusion issues. Kegan & Lidman, *United States Federal Food and Drug Administration May Consume Food Trademarks*, 87 Trademark Reporter 199, March-April 1997. The Anticybersquatting Consumer Protection Act, effective November 29, 1999, now permits in rem actions against infringing or diluting Internet domain names. 15 USC 1125(d)(2)(A).

An in rem action against multiple offending Internet domain name registrations achieved initial but short-lived judicial approval. *Porsche Cars North America Inc. v Porsch.com* (ED VA 99-0006-A, June 9, 1999). Unlike other sections of the Lanham

Act and the Tariff Act, which specifically authorize actions against goods imported in violation of the US trademark laws, the Federal Trademark Dilution Act only directly addresses remedies against persons. Citing *Shaffer v Heitner*, 433 US 186 (1977), the district court decided in rem jurisdiction without constitutionally-permissible in personam jurisdiction over persons with an interest in the res would be improper. Also see *Sterling Consulting Corp. v Indian Motorcycle Trademark*, 44 USPQ2d 1959 (D CO 1997) (In rem trademark complaint dismissed, due process jurisdiction also difficult).

Most of the Porsche-related domain name registrants in the case were known. The court held that due process required at a minimum some distinction between registrants who can be identified and those who cannot. See *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306 (1950). Plaintiff Porsche had not made such a showing. Since the currency and depth of Internet domain registrant identification varies with differing national domain registrars, a successful in rem action against a domain name registration may yet be decided.

Ahab is old, the Internet and space shuttles new. The Internet now dominates older fishnets. But investigator Mark Trade and his counsel Patrick Copee Wright™ may be ageless as they fight for truth, justice, and intellectual property rights.

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