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9-17-2020

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Space Force: Battle of the Trademarks

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In 2018, President Trump shocked millions of Americans when he announced his intention to establish a sixth branch of the Armed Forces known as the United States Space Force.¹ Describing space as “the world’s newest war-fighting domain,” the President declared that it was not enough to simply have an American presence in space, “we must have American dominance in space.”² In response to the announcement, Netflix quickly greenlit production for a new comedy series also titled “Space Force,” and began working to secure all the legal rights that come with the use of the name.

This article addresses two issues: whether Netflix can enjoin the U.S. Government from using the term “Space Force,” and whether the U.S. Government can stop Netflix from doing the same under U.S. trademark law.

Under the Lanham Act, trademark ownership is acquired not through state or federal registration, but rather from actual use in commerce.³ Trademark infringement occurs when a trademark’s “senior” user is able to show that another’s subsequent use of the mark is likely to cause confusion in the minds of consumers about the source or sponsorship of goods or services

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¹ *Trump Announces New Military Space Force*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/video/politics/wireuters/trump-announces-new-military-space-force/2018/06/18/fd0c54f2-7315-11e8-bda1-18e53a448a14_video.html.

² *Id*; Merrit Kennedy, *Trump Created the Space Force. Here’s What It Will Actually Do*, NPR (Dec. 21, 2019), <https://www.npr.org/2019/12/21/790492010/trump-created-the-space-force-heres-what-it-will-do>.

³ “The term ‘trademark’ includes any word, name, symbol, or device, or any combination thereof used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” 15 U.S.C. §1127 (2018);

“Under the Lanham Act, trademarks that are ‘used in commerce’ may be placed on the ‘principal register,’ that is, they may be federally registered.” *Matal v. Tam*, 137 S. Ct. 1744, 1752 (2017).

offered.⁴ It is priority of use—the first person to begin using a trademark—which governs who is the senior user of a mark.

Could Netflix enjoin the U.S. Government from using the name Space Force? It seems likely that it could. As early as January 2019, Netflix began advertising that it was filming the new comedy Space Force,⁵ and secured global trademark rights in Europe, Australia, and Mexico.⁶ This was almost an entire year before the law establishing the United States Space Force was officially signed.⁷ Thus, a court would likely find that Netflix has priority of use over the name Space Force because it began actual use in commerce of the mark by advertising the T.V. series before the U.S. Government did. The announcement by President Trump in 2018 is not enough to secure legal rights over the Space Force Trademark because such a proclamation is not a “use in commerce.”⁸ Prior to 1999, the U.S. Government had been entitled to sovereign immunity from trademark lawsuits, and any infringement of a mark by the federal government was considered a “taking” under the Fifth Amendment.⁹ As a result, a senior mark owner could only sue for monetary damages via the Court of Federal Claims.¹⁰ Luckily, this is no longer the case, and if Netflix chose to seek injunction of the U.S. Government’s use of the term Space Force in court, it could, and it has a favorable argument for doing so. However, Netflix may face an uphill battle in proving that consumers are likely to be confused by the U.S. Military’s use of the term, and mistakenly associate it with its comedy series.

⁴ 15 U.S.C. §§ 1114(1), 1125(a)(1)(A) (2018).

⁵ *Coming: Netflix Comedy Series ‘Space Force’ With Steve Carell*, WBBM NEWSRADIO (Jan. 16, 2019), <https://www.radio.com/wbbm780/articles/space-force-netflix-series-coming>.

⁶ Sam P. Israel, *Space Force and Netflix – A Lesson in Securing IP Rights*, BLOOMBERG LAW (July 7, 2020), <https://news.bloomberglaw.com/ip-law/insight-space-force-and-netflix-a-lesson-in-securing-ip-rights>.

⁷ 10 U.S.C. § 9081 (2019).

⁸ *Blue Bell, Inc. v. Farah Mfg. Co.*, 508 F.2d 1260, 1265 (5th Cir. 1975) (“The exclusive right to a trademark belongs to one who first uses it in connection with specified goods . . . and even a single use in trade may sustain trademark rights if followed by continuous commercial utilization”).

⁹ Trademark Remedy Clarification Act, Pub. L. No. 102–542, 106 Stat. 3567 (codified at 15 U.S.C. §§ 1122, 1125(a)).

¹⁰ 15 U.S.C. § 1122(a) (2018); 28 U.S.C. § 1491(a) (2012).

It also seems unlikely that the U.S. Government would be able to enjoin Netflix from using the term Space Force for its television series. Even if a court were to somehow find that the Armed Forces began using the mark in commerce before Netflix, Netflix would have a First Amendment right to continue using the Space Force name for its comedic parody of a fictional “space force.” Courts have continually upheld the use of identical terms when employed as parody, as long as the use is found to not cause a likelihood of confusion.¹¹ In fact, clever people throughout the nation are already parodying the “official” U.S. Space Force with the Netflix Series.¹² The U.S. Government might also argue that by filing an intent-to-use trademark application in March 2019, that it secured priority use over the mark. Typically, one who has not yet used a trademark in commerce but has a good-faith intention to do so in the future may secure priority use over the mark by filing an intent-to-use application with the U.S. Patent and Trademark Office.¹³ However, this argument also falls flat because Netflix began its actual use of the name Space Force in January 2019 when it began airing commercials for the television series, nearly three months before the U.S. Government filed its intent-to-use application.¹⁴

So, what does all this mean with regards to the use of the Space Force trademark by both Netflix and the U.S. Government? Maybe nothing,

¹¹ See *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460 (9th Cir. 1993) (holding that “VCR-2” input label on video receiver to which two videocassette recorders could be attached did not infringe the plaintiff’s “VCR-2” trademark for two-deck videocassette recorders, because the defendant’s use was merely descriptive of its own product).

¹² See Tenga, *Someone put Steve Carell’s picture over commander of US Space Force at Air Force museum*, 13WTHR (May 21, 2020), <https://www.wthr.com/article/news/entertainment-news/someone-put-steve-carells-picture-over-commander-us-space-force-air-force-museum/531-97e0077f-4aae-42d7-814d-e46805b2561e>.

¹³ *Trademark Applications – Intent-to-Use Basis*, UNITED STATES PATENT & TRADE OFFICE (Aug. 27, 2018), <https://www.uspto.gov/trademarks-application-process/filing-online/intent-use-itu-applications>.

¹⁴ “Contingent on the registration of a mark . . . the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person except for a person whose mark has not been abandoned and who, prior to such filing has used the mark.” 15 U.S.C. § 1057(c)(1) (2018).

unless the user with priority can prove a likelihood of confusion.¹⁵ Two separate entities are thus able to have rights to the same mark when operating within the confines of two separate industries.¹⁶ It doesn't seem likely that people will confuse a branch of the military with the Netflix sitcom starring Steve Carrell, and under the Lanham Act, where marks are sufficiently dissimilar, no infringement occurs.¹⁷ However, a potential legal issue does arise if and when both Netflix and the U.S. government attempt to sell brand merchandise boasting the same branding.¹⁸ This situation is one that would likely result in infringement. Currently, neither Netflix nor the U.S. Government has expressed an intention to pursue this matter in court. Only time will tell what the future holds for the brand name Space Force.

Edited by Ben Davisson

¹⁵ 15 U.S.C. §§ 1114, 25 (2018).

¹⁶ 15 U.S.C. § 1052 (2018).

¹⁷ See 15 U.S.C. § 1125(a)(1)(A).

¹⁸ 15 U.S.C. § 1052(d).