“Due Regard” for the Bootprints?  Heritage and the Future of Property in Space

Today we rely on the concept of “due regard” to protect our assets – and heritage – in space. Ensoenced in Article IX of the Outer Space Treaty “due regard” has no legal definition. Nor has its breadth or scope been tested in court or in any public diplomatic disputes. And so, we blithely promise each other to conduct all activities in space “with due regard to the corresponding interests of others. Meaning we pursue our activities with the fervent hope that no one will interfere, whether accidentally or intentionally. This is an untenable state of affairs. Especially with respect to our cultural heritage on the Moon. Humanity’s historic lunar landing sites don’t deserve “due regard,” they deserve protection. For All Moonkind is working to obtain that protection.

The first landing sites on the Moon, in particular, are treasures that are universally significant and valuable. These were humanity’s first steps off our Earth. They represent the dawn of our evolution into a space-faring species. They could even be considered the cradle of a soon-to-come Moon community. The sites memorialize achievements unparalleled in history; built on the backs of centuries of science from all corners of the world. What’s more, the landing sites, the crewed Apollo sites as well as the robotic sites that preceded and followed, are an archaeologist’s dream. They extend and confirm humans as an exploratory, migratory species. They are the first archaeological sites with human activity that are not on Earth, and they bear witness to some of the most important technological developments in human history. Moreover, they are frozen in time, preserved by the vacuum of space – and by the fact that no human, and only a handful of rovers, has returned to the Moon since 1972.

However, as archaeologists and anthropologists worked to refine and pursue this new sub-field of space archaeology, they shed light on an inconvenient truth: the treaty regime guiding outer space activities is silent with respect to the management, conservation and preservation of our human and cultural heritage in outer space. Indeed, not only do the treaties provide little clarity, their provisions raise more questions than they address. It is an unfortunate state of affairs in particular because there is little doubt humanity is headed back to the Moon.

But we have an unprecedented opportunity. This is the first time in human history that we can preserve our human heritage before destruction or abuse. This is also the ideal time to start laying the groundwork for our future in space. In creating the system that preserves our heritage we cannot work in a bubble. We must also lay the groundwork for other aspects of space law including resource extraction, environmental protection, planetary protection and property ownership.

The legal path to preservation is not simple. As a matter of first instance, it is commonly agreed that any artifacts in space or on a celestial body, from the Lunar Module to the remains of the Soviet Union’s Luna 2, remain the property of the State that put them there. Reliance for this fact is placed on Article VIII of the Outer Space Treaty which indicates that a “State Party . . . on whose registry an object launched into outer space is carried shall retain jurisdiction and control
over such object.” But what if a State fails to place the item on its registry? Is ownership forfeited?

Article IX of that same treaty requires all activities in outer space be conducted with “due regard to the corresponding interests of all other States Parties,” which, arguably, suggests that States should not interfere with or otherwise despoil the objects of another. But what is “due regard” and what is a “corresponding interest?”

Article VII of the Treaty, and the following Liability Convention, impose fault-based liability on a State Party that damages the space object of another State. But how do you quantify damage to an artifact?

Article V of the Return and Rescue Agreement is clear that a “space object” that is “returned to Earth” should be returned to the “launching authority.” Thus, if a return mission brings an object back from the Moon, presumably the nation who sponsored the mission – or in the case of a nongovernmental actor, the nation of citizenry of that actor – must return it to its original owner. But the research value of the landing sites requires that the objects within their bounds be observed and scrutinized in situ. Which raises a whole different slew of issues. Leaving the objects in situ essentially results in perpetual occupation of the surface upon which they rest. Certainly, this violates both the spirit and the letter of Article II of the Outer Space Treaty which states clearly that “outer 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.”

Finally, the sites themselves – the first footprints – have no protection at all. And while it may be difficult to imagine a nation or commercial actor intentionally erasing or otherwise disturbing a footprint or rover track, the fact is that history has shown time and time again that not everyone has an appreciation for preservation.

This presentation will: 1) summarize the reasoning behind universal heritage in outer space; 2) analyze the current legal framework, looking at both multilateral treaties as well as the so-called soft law that govern activities in outer space; 3) evaluate proposals that have been made to address current efforts to find an internationally accepted balance between freedom of exploration and restrictions on that freedom to conserve history and protect operational activities; 4) describe For All Moonkind’s proposed universal heritage program as well as the research and development methodology utilized to assure the program is balanced, effective and well-received by the international community; and 5) describe how these efforts will provide the foundation needed for the international community to address the concept of property in outer space.

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to preserve humankind’s universal heritage in outer space. A Permanent Observer to the United Nations Committee for the Peaceful uses of Outer Space, For All Moonkind is the only organization in the world dedicated to this mission. As a direct result of the group’s early efforts, the United States Senate unanimously passed the One Small Step to Protect Human Heritage in Outer Space Act in July 2019.