

Can Patents be considered part of the Common Heritage of Mankind?

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INTRODUCTION

Patents, e.g. on inventions of environment friendly mining methods and/or devices, may stand in the way of an exploitation of the ocean floor and subsoil without hindrance from individual interests. The presentation examines whether it would not be appropriate to accord respective patents a status commensurate with the one given to the Area, namely Common Heritage of Mankind, even if innovation in sustainable mining would deserve substantial encouragement and thus call for “full patent strength”.

Challenging the signature feature of the patent as a monopoly, the presentation starts out by examining several examples of reduced patent strength in other areas, where, as it seems, the public expects freedom unimpeded by patents, such as open source software (OSS); fair, reasonable and non-discriminatory (FRAND) obligations to license patents on generally recognized publicly backed standards (e.g. cellphone); freedom of the high seas preventing acts of national legislation (which also may be patent enforcement).

Going on to take a closer look, the author notes that each of these examples, rather than allowing full freedom of action, comes with a set of rules which must nevertheless be complied with to enjoy the “freedom”. A view into how the applicable (and pending) regulatory frameworks, such as UNCLOS, the ISA draft exploitation rules, or even the BBNJ ILBI, deal with patents in the DSM context, reveals some reluctance to decide: Having the “established practices” govern patent use, may include a lot of different approaches.

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The author takes the view that given the high concern for environmental safety accompanying the emergence of DSM, the creator of innovative solutions in this field should be substantially incentivized. Deviating from existing models, the solution is offered to allow the patent holder full enforceability of his patent in this field, as far as he can serve the markets and maintains the (always national) patent protection. However, for markets he probably cannot reach, it is proposed that he be obligated to grant royalty-free licenses to him who proves he can, and that only if the holder develops this capability later, he may charge a (FRAND) royalty from his competitor.

Keywords: Deepsea Mining, Common Heritage, Intellectual Property, Patents, Licenses, FRAND, UNCLOS, ISA draft Rules on Exploitation of Mineral Resources in the Area

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Andreas Kaede is a German lawyer (Rechtsanwalt), based in Gerlingen near Stuttgart, Germany. Born 1956, he studied law in Bonn and received his degrees in 1982 and 1985. After postgraduate assignments at the institutes of international law at the Bonn and Kiel universities (which latter first brought him in touch with the law of the sea) he started a career as corporate lawyer in a large Stuttgart based multinational company. For 27 years he worked predominantly in the field of intellectual property contract drafting, negotiation, and litigation, be it licensing, technical co-operation, or mergers and acquisitions. Since 2008, Andreas Kaede was head of the corporate licensing department of the company, managing and overseeing its IP contract practice on a worldwide basis, yet always keeping an eye on UNCLOS and the régimes codified by it. Retiring from the industry function in 2015 he has established private practice in co-operation with the Stuttgart based law firm of Haver & Mailaender Partnerschaft mbB. His present main fields of activity include IP contracts and related strategic consulting, as well as the law of the sea, more specifically deep-sea mining, where for the last three years he has been closely following the process toward regulation of the exploitation of minerals from the ocean floor. Moreover, he has given presentations in recent years on matters such as technology transfer in the deep-sea mining context on several occasions such as the Deepsea Mining Summit and WOC Sustainable Ocean Summit conferences. Andreas Kaede is a member of the Stuttgart bar association, the Licensing Executives Society (LES), the German-American Lawyers' Association (DAJV), and the World Ocean Council (WOC).

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