

Can Patents be Considered Part of the Common Heritage of Mankind?



Rechtsanwalt Andreas Kaede
Lammstrasse 6
D-70839 Gerlingen
Germany

Tel. +49 7156 433 100-103
Cell: +49 173 928 70 20
Mail: andreas.kaede@t-online.de
Web: www.kanzlei-kaede.de

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1.1 Introduction – The Concept Conflict

Our general objective must be to create conditions in the marine environment that will be of benefit to all countries!



Sanya, Sept. 24, 2019

The patent system added the fuel of interest to the fire of genius!



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1. Introduction

- 1.1 Concept Conflict: CHM vs. Patent
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High Seas,  Ocean Floor?

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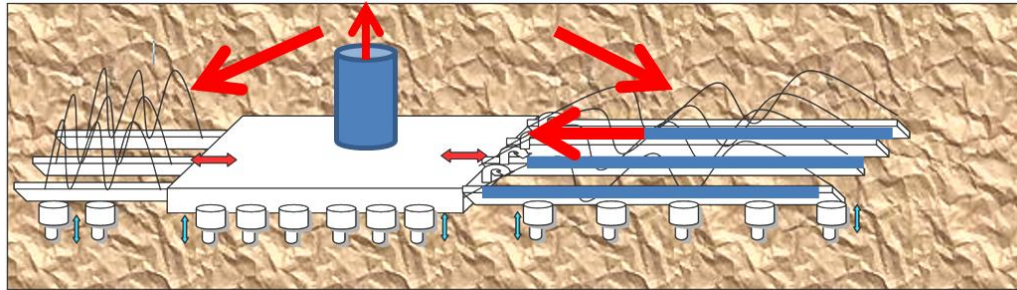
5. Conclusions & Proposal

- 5.1 Patents no "toothless tiger" under CHM
- 5.2 A "Split Approach"

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1.2

Introduction – An Example



Another old friend: the – fictitious - „harvester“!

- Patented for its sustainability-friendly „walking plus collecting “ mechanism.
- Inventor disallows others to copy the mechanism – detrimental to the preservation of the ocean floor. **Should he be allowed to do this?**

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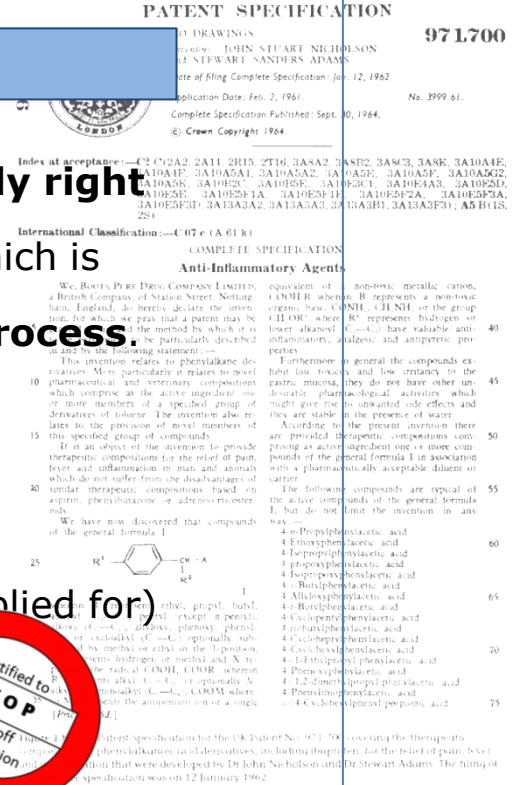
2.1

Definitions & Properties – the Patent

Definition: The patent is a state guaranteed **monopoly right** to exploit, by own use or licensing, a **technical solution** which is **novel** and **inventive**, be it as a (part of) a **product** or a **process**.

Properties:

- rewarding the inventor and motivating him to innovate
- time limited (20 years in most jurisdictions)
- territorial (valid only in the state(s) where having been applied for)
- dependent on payment of fees
- tradeable as an asset
- but always - if properly handled - : **a monopoly**.



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2.2

Definitions & Properties– Common Heritage Principle



Definition: no uniformly applicable one. However some common denominator:

- subject matter **in need** of stewardship and **important for mankind** as such, not states/individuals
- if under national jurisdiction, then **with obligation** on state towards international community to **protect and preserve**
- if outside such jurisdiction, then
 - **Uncoordinated** unilateral exploitation/acts of sovereignty **prohibited**
 - **jointly** managed protection, administration and exploitation (where applicable) **in the interest of all mankind, present and future**



Properties:

- principle of international law. For LOS purposes: codified in UNCLOS Arts. 136 *et seq.*
- In LOS, necessary „collateral effects“ on matters outside the Area
- high positive connotation in the era of sustainability, cf SDG 14
- not generally industry averse

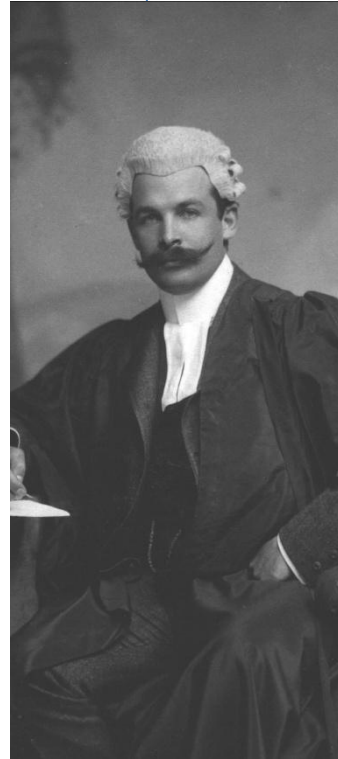


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3. Patent Strength Challenged

Now, what if....

- as given in the example, a mining co. possesses a patent covering an environment preserving harvester construction;
- there is no viable technical alternative;
- Mining co. fires off „cease-and-desist“-letters to competitors (states, industries) under way to copy this innovation;
- the aroused public and NGOs strongly criticize those (few) who go ahead with a less sustainable method of extraction;
- Critics maintain towards the granting Patent Office that (a) mining co. will not be able to cover all prospective mining, and (b) thus the patent will jeopardize the CHM principle both by denying the SIS/LDC their share in seafloor wealth, and by forcing other miners into environment-hostile methods of extraction? Consequently -
➤ **Should not the CHM Principle govern the invention thus patented?**



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3.1 Patent Strength Challenged – Compulsory Licensing

- If states are bound by the CHM principle, could they not force holders to license patents blocking its implementation?
- Compulsory Licensing is a known (and often disputed) remedy of the state, e.g. in case of live saving patented drugs.
- TRIPS Agreement (Art. 31) supposes that Members may enact compulsory licensing legislation, and sets limits for the such legislation.
- except in the case of Art 31 *bis* (concerning pharmaceuticals and introduced in the 2001 Doha round to GATT), TRIPS permits compulsory licensing predominantly for the serving of the **domestic market** of the enacting state (Art. 31 f).
- Thus **no leverage for the DSM** case, targeting most probably markets in excess of the domestic one.



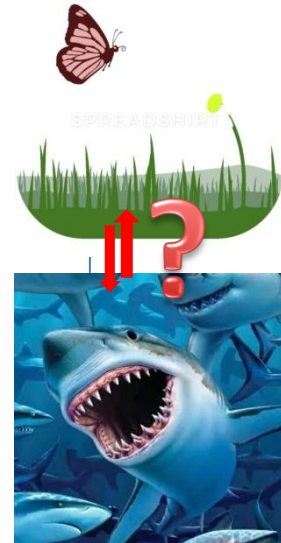
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3.2 Patent Strength Challenged – With the Holder Involved?

Searching for further „mandatory licensing“ concepts from other areas...

Open Source Software (OSS):

- „free software“ (which does not mean free of conditions!) in some aspects compares with subject matter under the CHM principle, in that the subject matter should work for the **benefit of all** („we wish to avoid the special danger that patents applied to a free program could make it effectively proprietary“ GPL v3, preamble).
- Consequently, receiver of the program (or „covered work“ as it is called) obtains a **royalty free license** under necessarily used patent claims of any contributor just by the act of receiving the work (expl. GPL v3, sect. 11).
- Patent license **terminates** along with a termination of the GPL **if receiver breaches** obligations (expl. GPL v3, sect. 8).
- The protected good here is „free software“, because it is good for the people.
- **Yet, the concept contemplates software, which the harvester is not, and much DSM equipment will not be.**



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3.2

continued

Standardization:

- **IP Policies of various standardization organizations** (e.g. ETSI) demand that a member must declare patent applications essential for implementation of the standard and be ready to license them against fair, reasonable and non-discriminating conditions („**FRAND**“ terms).
- Likewise, antitrust law in major jurisdictions tends to hold blocking a standard favorable for the enduser market with an essential patent as **abuse of a dominant market position**, requiring the holder to grant a FRAND license.
- The **protected goods may be comparable** in relation to the patent as a monopoly: The „standards“ approach intends to protect free commerce in the interest of the end user, while CHM protects access to sustainable methods in the interest of mankind.
- Yet, a specific application would presuppose the harvester being **standardized** or otherwise absolutely without alternative (which it may or may not be). Much of what comes under CHM will not be standardized.



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3.3

Self-Challenge? The Territoriality Principle in Patents

1. Patents are only valid and enforceable in the country or countries, in which they have been applied for and granted.
2. The Area, object of the CHM principle in our study – and the place where the „harvester“ operates - , is per definitionem outside of national jurisdiction.
3. So are the High Seas, on which the ship swims which launched the „harvester“ in the first place.
4. What law applies on that ship while on the High Seas? That of the Flag State.
5. And on the „harvester“, 3 miles below? The same – well, it depends.
6. May the Flag State send in the executor to seize the infringing harvester? No, see above 2 (or 3, depending on where it is then). But it may adjudicate the infringement at home when the ship is back.
7. By the way, which will be the Flag State of that ship – and consequently the law applicable? The seat state of the company running the operation? Most likely not.
8. Shall we close the Pandora's box? We do.



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3.

Interim Conclusions

- **Patents are powerful tools** to foster individual commercial initiative.
- **CHM** principle intended to **protect mankind from effects of unilateralism**.
- Examples from other fields of activity show that patent protection may be qualified where community interests in free pursuit of the subject are valued. Thus if you so wish: pertinent patents would be part of them.
- As yet, none of these seems easy to directly transpose into the CHM environment, however, their existence encourages further research.
- In none of the settings scrutinized can there be detected a casewise **weighting of interests** between the individual quest and the collective concern.
- In the case of DSM, there is at least the **conflict between high invest** and risk readiness on the inventor side, and the **need to proceed in a sustainable and socially balanced fashion** on the other.
- How then do the LOS rules deal with this conflict?

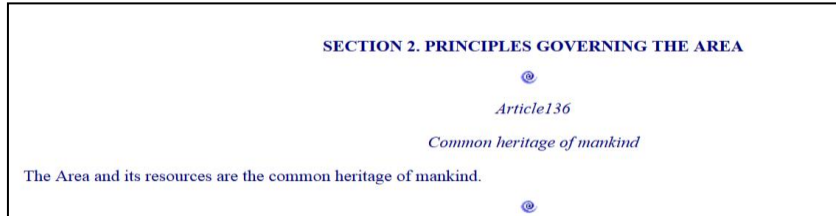


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4.1

Regulatory Responses - UNCLOS

- The **most prominent body** of Law of the Sea Rules.
- The convention whose negotiation was spurned by **invocation of the CHM principle**
- One of the few legal instruments **incorporating the CHM principle verbatim**:



- UNCLOS history gives a fine example how to deal with the conflict of interests:
 - The original Agreement (**Annex III, Art 5**) prescribed **mandatory FRAND** licensing
 - industrialized states **refused to ratify** on account inter alia of this strict régime, costing UNCLOS about 10 years of missed effectiveness.
 - Annex, Sect.5 of the 1994 Amendment mollified this to „**the Authority may request.**.“ The missing ratification instruments were promptly provided.

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4.1

continued

UNCLOS' key motive regarding technology is **collaboration** to the benefit of the common good, and always short of a binding obligation:

Art. 244

... transfer of knowledge resulting from marine scientific research, especially to developing States ...

Art. 144

, transfer of technology to the Enterprise and to developing States with regard to activities in the Area..

Art. 266

.... promote the development of the marine scientific and technological capacity of particularly developing States, including land-locked and geographically disadvantaged States...



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4.2

ISA draft Exploitation Regulations

- Latest version: [DOC ISBA/25/C/WP.1](#), discussed in Council session 15-19 Jul. 2019 („draft 2019“); however, the rules cited here have been included in earlier drafts as well -
- **Draft 2019, Regulation 1, No. 7:** „**These regulations are subject to the provisions of the Convention and the Agreement and other rules of international law not incompatible with the Convention.**“ = Rules of UNCLOS, i.e. also those on technical co-operation, **incorporated by reference.**
- **Draft 2019, Regulation 89, No. 6:** „**Nothing in these regulations shall affect the rights of a holder of intellectual property.**“ = Whatever is said about technical co-operation (which in fact implies licensing also of patents), the holder of a patent may employ against an infringer all means of enforcement available under the applicable patent law.



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4.3

The „BBNJ ILBI“

- Quotes from an advance version of pending [UN DOC A/CONF.232/2019/6](#) – („BBNJ draft“) highlights by author -
- Instrument intended to supplement UNCLOS with obligations of sustainable treatment of Marine Genetic Resources in areas beyond national jurisdiction.
- Although CHM not expressly invoked, BBNJ Draft wording suggests this status.

BBNJ Draft Art. 7: the objectives of this part are to....

- (b) [(b)Promote the **generation of knowledge and technological innovations**, including by promoting and facilitating the development and conduct of marine scientific research in areas beyond national jurisdiction, in accordance with the Convention;
- (d) Promote the development and transfer of marine technology [, **subject to all legitimate interests, including, inter alia, the rights and duties of holders**, suppliers and recipients of marine technology];



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4.3

Continued

BBNJ Draft Art. 12

- (1) [.States Parties shall implement this Agreement in a manner **consistent with the rights and obligations** of States under the relevant agreements concluded under the auspices of the **World Intellectual Property Organization and the World Trade Organization.**.]
- (2) States Parties shall cooperate to ensure that **intellectual property rights** are **supportive of and do not run counter to the objectives** of this Agreement [, and that no action is taken in the context of intellectual property rights that would undermine benefit-sharing and the traceability of marine genetic resources of areas beyond national jurisdiction].]
- (3) [**Marine genetic resources** [accessed] [utilized] in accordance with this Agreement **shall not be subject to patents** except where such resources are modified by human intervention resulting in a product capable of industrial application.] (:::)



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4.4

Continued

- BBNJ ILBI is in an early stage of drafting (though there have been preparatory works for a number of years);
- The tide of sustainability at present runs higher than the tides of post-colonial wealth redistribution, demilitarization and newly born environment awareness – influencing the UNCLOS negotiations – ever ran;
- The BBNJ Draft as presently written offers the strongest intervention in patent right holders' position of all three instrumentalities.
- However, draft wording in context shows that – at least presently – the world community wants to eat the cake and have it.
- Not to be excluded that the need for industry's participation and high investment may influence the drafting process as happened in UNCLOS.

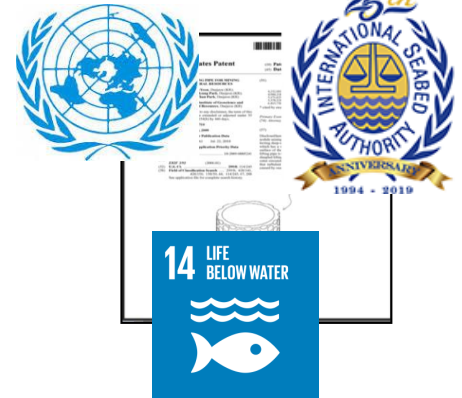


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5.1

Conclusions

- The patent is a strong and important legal concept, not easily to be challenged by competing community interests.
- While neighboring concepts such as standardization and OSS absorb some of the strength of patents relevant to them by requiring, or even actually effecting, a license to keep their subject free from its monopolistic influence....
-Law of the Sea seems to shrink back from this approach - maybe prompted by the UNCLOS drafting experience.
- BBNJ – driven by the strong motivation of sustainability to safeguard the future of the planet – as yet is more ambitious.
- It may happen – but should be avoided – that the present regulation concept fully shares the fate of ist UNCLOS predecessor, as...
- ...there might be alternatives....



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5.2

Proposal

- Directed at the ISA Exploitation Rules
- Only applicable to patents which cannot be circumvented to achieve a technical solution which brings a significant advantage (in availability of minerals or cost of same to customer) to the minerals market ---
- **A holder will not automatically be required to license, however for markets / projects it provably cannot reach with own production, he shall be required to license capable third parties at FRAND conditions.**