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How Far Offshore Does U.S. Patent Law Reach? An Offshore Patent Loophole Big Enough to Sail a (Survey) Ship Through

By Tom Adolph, Mike Locklar and Gabriel Markoff

As the deepwater drilling trend continues, the question of how far offshore U.S. patent law can reach is becoming a significant issue. In a recent case, U.S. Judge Keith Ellison of the Southern District of Texas was asked to rule on whether U.S. patent law extends 100 miles into the Chukchi Sea off the northwestern coast of Alaska to cover marine seismic streamer devices towed behind a survey ship under the Norwegian flag. The issue in *Westerngeco* required analysis of three different laws concerning the Chukchi Sea – the law of the high seas, the Presidential Proclamation that created the exclusive economic zone (EEZ) of the United States, and the Outer Continental Shelf Lands Act (“OCSLA”). Judge Ellison held that U.S. patent law did not cover the specific seas or activities in the case. *Westerngeco L.L.C. v. Ion Geophysical Corp.*, No. 4:09-cv-1827 (S.D. Tex. Mar. 2, 2011).

The High Seas and EEZ are not “Within the United States”

Judge Ellison held that neither the high seas nor the EEZ are “within the United States” for U.S. patent law.

The high seas are sometimes defined as seas outside the territorial seas, *i.e.*, more than 12 miles out, and sometimes defined as any seas not included in the U.S. territorial seas or the EEZ. Under either definition, Judge Ellison held that U.S. patent law had no application on the high seas because the United States has no sovereignty over those waters.

The EEZ extends 200 nautical miles from the coast. The Presidential Proclamation that created the EEZ claimed U.S. sovereign rights to those waters for the limited purpose of exploring natural resources and also claimed jurisdiction over installations and structures within that zone. Judge Ellison recognized that one can argue that the U.S. sovereign rights over the EEZ for resource exploration suffice to allow the EEZ to be “within the United States” for the purposes of patent law, at least with respect to exploration-related patents. However, Judge Ellison held that U.S. patent law did not extend to the EEZ: (1) because the Presidential Proclamation stated that the EEZ remained outside U.S. territory, (2) because the Presidential Proclamation extended jurisdiction only to installations and structures, rather than floating vessels, and (3) because the court should not extend the reach of patent law in the absence of Congressional action.

Unattached Vessels Over the OCS are not “Within the United States”

Judge Ellison also held that the OCSLA did not extend U.S. patent

law to a survey ship that is not permanently or temporarily attached to the seabed. Without some physical connection to the seabed, the alleged infringement did not occur "within the United States" under the OCLSA.

What comes next?

The plaintiff has filed a motion for reconsideration of Judge Ellison's conclusions on the EEZ. It will be interesting to see future actions in this case and in other cases on the following issues:

1. Will Judge Ellison reconsider the EEZ holding?
2. Will other courts agree with Judge Ellison's rationale?
3. Can infringement be avoided for vessels and structures that attach to the seabed in the OCS but detach to perform otherwise infringing activities?

Jackson Walker has strong experience in patent infringement litigation, as well as all other facets of intellectual property acquisition and protection, and we would be pleased to help you in this area. Feel free to contact **any member of our intellectual property group** for your intellectual property needs.

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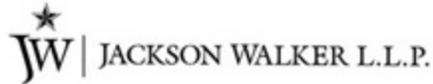
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