

Schlich 2001: Softwarepatente ohne Grenzen?

<http://swpat.ffii.org/papri/grur-schoelch01/index.en.html>

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In 2000 the 10th Senate of the German Federal Court of Justice (BGH/10) published the verdicts “Sprachanalyse” (Language Analysis) and “Logikverifikation” (logic verification) and with them a new doctrine that makes anything patentable that can be described as a “program-technical device”. The BGH/10 overruled decisions of another court that had rejected the same patent applications due to lack of technicality (technical character). The 17th Senate of the Federal Patent Court (BPatG/17) had applied the “core theory”, i.e. differentiated between new and old technology and demanded that the new and inventive part (i.e. the core of the invention) be in the “technical” realm, i.e. that it contribute a “teaching in the area of applied natural science”, outside the scope of the list of exclusions on §1(2) PatG aka Art 52(2) EPC. The new verdict will on the contrary admit any claims even if only a non-inventive periphery is within the “technical sphere”. Applied to organ building this would mean that not only a new way to build organ pipes would be considered a technical invention, but also a new piece of music played on the organ, as the author of this article observes. Günter Schölch, who is confronted with dubious software patents every day in his work at the German Patent Office, finds the BGH/10 decision unconvincing and warns that they will lead to a flood of harmful patents. Schölch also reviews the process of patent inflation (gradual expansion of the scope of patentability) during the last decade and warns about dangerous social consequences.

*<http://lists.ffii.org/mailman/listinfo/traduk>

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1 Annotated Links

- **Gnther Schlch 2000: Stellungnahme zur EU-Konsultation zu Softwarepatenten²**

An examiner of the German Patent Office points out that the EU patent department's consultation paper uses a meaningless concept of technical character and sticks to a shoddy reasoning that dates back to the EPO caselaw of the Sohei decision (1986). It is this sophistry which has created the legal insecurity in Europe, and perpetuating this sophistry just perpetuates legal insecurity. If we want to tackle the legal insecurity, we need to break with this sophistry, delete the much-abused 'as such' clause (Art 52(3) EPC) and reestablish clear and consistent definitions of what is a technical invention. It is not enough that the claims contain technical features. Not the claim wording but the invention must be technical. The EPO's approach is to compare even non-technical problem solutions with with non-technical closest prior art and then deciding whether any technical feature is contained in the difference. This is illogical and circular. Such approaches, as proposed also in the consultation paper, are apparently using the "technical character" doctrine only as a cover-up for their real purpose, which is to make anything man-made under the sun patentable, like in the US. However this could have even graver consequences in Europe than in the US, given that the EPO and European courts tends to apply formalistic rules that favor the patentee and make claims have a broader effect than the same claims would have in the US. On the whole it can be said that the adventure of expanding patentability to all ideas constitutes a rupture of occidental civilisation and a course into a brave new world whose outline is just gradually appearing on the horizon in the US. This adventure is undertaken in spite of strong scientific evidence in its disfavor, supported only by the irrational belief of a well entrenched lobby in the universally beneficial effect of property rights.

¹<http://localhost/swpat/papri/index.en.html#GRUR>

²<http://localhost/swpat/papri/eukonsult00/angumema/index.en.html>

- **Dr. Swen Kiesewetter - Kbinger 2000: ber die Patentprfung von Programmen fr Datenverarbeitungsanlagen³**

Ein Patentprüfer zeigt die Ungereimtheiten der Prüfung von Software-Anmeldungen auf. In ihrem Bemühen, ein Gesetz umzuinterpretieren, welches unmissverständlich die Patentierung von Datenverarbeitungsprogrammen verbietet, hat die Rechtsprechung im Laufe der Jahre Funktionsansprüche zugelassen, die es dem Anmelder erlauben, ein Programm zu verkleiden. Aber diese Funktionsansprüche stellen eher Probleme als Lösungen dar, und die Lösung zu diesen Problemen besteht in einem (nicht patentierbaren) Datenverarbeitungsprogramm (als solchem). Probleme zu patentieren ist aber noch weniger zulässig und in seinen Auswirkungen noch bedenklicher als Programme zu patentieren.

³<http://localhost/swpat/papri/grur-skk01/index.de.html>