

Gert Kolle and Software Patents

<http://swpat.ffii.org/players/kolle/index.en.html>

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2003-09-18

As a young scholar in the 70s, Gert Kolle quickly became the leading German theoretician on the limits of patentability with respect to computer programs. Kolle wrote his doctoral thesis at the Max-Planck Institute and Patent Law on this subject and published several deep-searching articles in GRUR from the early 70s to the early 80s. These articles confirmed and refined the view of the courts that there is no room for patenting computer programs if the notion of technical invention is taken seriously. Kolle's works were often cited by German courts as a foundation for their refusal to grant software patents. Later Kolle became an official at the European Patent Office. Currently he is their head of diplomacy, and he occasionally gives talks where he explains and justifies the current software patenting policy of the EPO.

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On 2001-01-17 Kolle declared at a conference about "Protection of Software" at INRIA (institute for research in applied informatics) in Paris that there were no longer any significant differences between the practise of the EPO and that of the USPTO concerning computer programs. The EPO, Kolle explained, views practically all programs/algorithms as "computer-implemented inventions", which are not considered to be programs/algorithms as such.

- **Gert Kolle 1977: Technik, Datenverarbeitung und Patentrecht – Bemerkungen zur Dispositionsprogramm - Entscheidung des Bundes-**

gerichtshofs¹

Gert Kolle, today in charge of the EPO's international affairs department, was in the 1970s the leading law scholar on questions of patentability of computer programs. He acted as a "scientific adviser and rapporteur of the German delegation" at various patent legislation conferences of the 1970s. He always strove to interpret the current jurisdiction in a scholarly and systematic manner, far from what he called "ideological petrification of the software patentability debate" even in those days, and in this article of 1977, published in the leading German IP law journal, he explains, why computer programs cannot be considered to be "technical", and why any attempt to "naively or willingly" open up the patent system for computer programs would inevitably lead to unlimited patentability and to dangerous monopolisations of the sphere of pure reason, which, although thinkable under the EPC, go far beyond what a responsible judge may be allowed to decide. Kolle says that conservatism on this matter is a virtue, and a judge should be proud to wear the label "stuck in 19th century thinking", that software patentability proponents of the 1970s were eager to post onto their critics.

¹<http://swpat.ffii.org/papers/grur-kolle77/index.de.html>

- **Gert Kolle: Der Rechtsschutz von Computerprogrammen aus nationaler und internationaler Sicht²**

This two-part article was written in 1973, shortly before the Munich conference on the institution of a european patent examination system. It describes the legal traditions and dominant opinions of the various european countries concerning the question of the appropriate property regime for software. It appears from this that Continental europe and Australia prefer an approach where software is largely kept outside the scope of the patent system, while the the United Kingdom is the world leader in unlimited patentability and the United States have been swinging back and forth, with the most recent swing, the *Benson v. Gottschalk* decision, again drifting to the european continental position. While in France, Holland, Switzerland, Austria and several other countries computer programs, even those used for telecommunications and certain industrial processing tasks, are considered to be purely mental creations, Germany is torn between two positions: the mainstream position which agrees with France et al, and the position of the Federal Patent Court which conforms to the British view that any automated process is technical and patentable. Kolle seems to favor an intermediate position but estimates that the Diplomatic Conference will vote in favor of the continental (French-led) position, which is according to his view very rigidly against software patents, as reflected in the French patent law of 1968 and a Cour de Paris verdict of 1973.

²<http://swpat.ffii.org/papers/grur-kolle73/index.de.html>