



Study Question

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Protection of graphical user interfaces

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I. Current law and practice

Patents

1 Can GUIs generally be protected by patents?

If no, please answer questions 1.1, if yes, please go to question 2

Yes

Please Explain

Further see question 2

1.1 If GUIs cannot be protected by patents per se, are any types or aspects of GUIs protectable by patents?

2 If any type or aspect of GUIs are protectable by patents, under what conditions and to what extent are those types or aspects of GUIs considered to be within the scope of patentable subject matter?

1. Graphical user interfaces in general may be protected by patents, provided that technical elements are present in the claims. This applies even if such technical elements are of secondary importance.

In the Netherlands, the Court of Appeal of The Hague has applied this rule of decision T 0154/04 of the EPO in the case of Rovi vs. Ziggo [1]. In short this case concerned a patent on a method (and an apparatus) for accessing information about television programmes. In determining an inventive step the Court of Appeal stripped the claims of their non-technical features and considered only the remaining technical features. When assessing inventive step, the court specifically held that 'merely presenting information' should not be taken into account while 'displaying further information based on user input and stored information' should be taken into account. In this particular case, an inventive step was not found to be present in view of the prior art cited.

In one of the cases between Apple and Samsung [2], a GUI patent – on swiping of pictures, known as the rubber-band patent – also played a role. However, in that case there was little debate as to validity of the patent; at least not in the decision. The patent was held to be valid.

Footnotes

1. [ECLI:NL:GHDHA:2013:CA 3887; IEF 12806;
http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20Hof%20Den%20Haag%2025%20juni%202013,%20zaaknr_%20200_093_512_01%20\(Rovi%20tegen%20Ziggo\).pdf](#)
2. [ECLI:NL:RBSGR:2012:BY4482; IEP12062;
http://www.ie-forum.nl/backoffice/uploads/file/IE-Forum%20Rechtbank%20s-Gravenhage%2024%20augustus%202011%20\(bij%20vervoering\),%20KG%20ZA%2011-730,%20KG%20ZA%2011-731%20\(Apple%20tegen%20Samsung\).pdf](#)

3 If yes, do the statutory provisions, case law or judicial or administrative practice require specific claim formats for any patent protection? If yes, what claim formats are available for protecting GUIs?

No

Please Explain

For claiming graphical user interfaces, no specific claim categories are available. Graphical user interfaces are generally protected by claims in the following categories: method, a carrier for a computer program on which a computer program for executing the method is stored and a device arranged to execute the method.

4 Is any physical feature required in a claim as a pre-requisite for patentability of a GUI?

Yes

Please Explain

As indicated above, a method is allowed as a claim category for claiming a graphical user interface. This claim category does not necessarily have to comprise a physical feature.

5 To what extent does involvement of the user's mental activities in a GUI process affect the patentability of the GUI?

In cases where the GUI design is aimed exclusively at the mental activities of a viewer, in particular at preparing the relevant data for a non-technical decision-making process by the user as the final addressee, no technical contribution has been acknowledged beyond its mere implementation.

More specifically, in decision T 0125/04, the Technical Board of Appeal of the European Patent Office indicates that in that particular case, "this manner has been conceived exclusively with regard to a human being's mental capabilities and with a view to aiding a user to visually analyse data and make decisions on the basis of this analysis. It does not relate to any technical format or structure of the information

processed, nor is it linked to the internal functioning of the system." Hence, no patent was allowed on appeal.

We note that although the Dutch patent court – in first instance and appeal – are not bound by decisions of the European Patent Office, they tend to follow decisions of the Boards of Appeal of the European Patent Office; these decisions are recognised as established case law.

Design rights

6 Can GUIs generally be protected by design rights?

If no, please answer questions 6.1, if yes, please go to question 7

Yes

Please Explain

Visual appearance, in whole or in part, can be the subject of design protection. Graphical symbols and typographic typefaces are also explicitly mentioned as elements that can be protected in both the Benelux Convention on Intellectual Property (trademarks and designs) (BCIP) and European Regulation 6/2002 on Community Designs (the Design Regulation).

6.1 If not, are any types or aspects of GUIs protectable by design rights?

7 If any type or aspect of GUIs are protectable by design rights, under what conditions and to what extent are those types or aspects of GUIs protectable?

The following conditions apply:

7.a In particular is a GUI that temporarily appears on a screen of an electronic device considered a "design" that is protectable by design rights?

Yes

Please Explain

The fact that a GUI is not visible continuously, does not in itself imply that no protection can be obtained. However, both the BCIP and the Design Regulation contain a limitation regarding designs applied to or incorporated into a product which constitutes a component part of a complex product. Such designs will only be considered as new and to have individual character:

- a. if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and
- b. to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

Normal use in this regards means use by the end user, and excludes maintenance, servicing or repair work.

7.b In particular is a GUI protectable by design rights independently from the design of the electronic device itself?

Yes

Please Explain

A GUI can be protectable by design rights independently from the design of the electronic device itself.

7.c In particular are smaller elements included in a GUI (e.g. icons, slide buttons) protectable by design rights independently from the GUI as a whole?

Yes

Please Explain

Smaller elements included in a GUI (e.g. icons, slide buttons) are protectable by design rights independently from the GUI as a whole. See answer to question 6.

7.d In particular are movements or screen transitions in a GUI protectable by design rights?

Yes

Please Explain

Movements or screen transitions in a GUI are protectable by design rights. Animated icons and animated GUIs can be registered by means of snapshots/ a sequence of static images. The sequence needs to be visually related and it is the responsibility of the applicant to number the views in such a way so as to give a clear perception of the movement/progression.^[1]

Footnotes

1. <https://www.tmdn.org/network/documents/10181/20e96f9f-2e5b-431f-9ba5-e429abe7dac8> p. 7

7.e In particular are there any other types or aspects of GUIs protectable by design rights? If so, under what conditions and to what extent?

Yes

Please Explain

Parts / elements of the visual appearance of a GUI that are new and have individual character can in principle be protected as long as no legal limitation applies. The most important limitation in this regard is that a design must not subsist in features of appearance of a product which are solely dictated by its technical function

Copyright

8 Can GUIs generally be protected by copyright?

If no, please answer questions 8.1, if yes, please go to question 9

Yes

Please Explain

In line with European case law (specifically the BSA case), a GUI can, as a work, be protected by copyright if it is the author's own intellectual

creation. Components which are solely dictated by their technical function are excluded from copyright protection as they are not considered original (the idea and expression cannot be dissociated, leaving no room for the author's own intellectual creation).

8.1 If not, are any types or aspects of GUIs protectable by copyright?

9 Does the fact that GUIs shown on screens are computer-generated affect the eligibility of GUIs for copyright protection?

Yes

Please Explain

As long as it can be considered an original work of an author and not merely computer-generated without any human interference (in which case there will not be an author's own creation and what you see on screen is only dictated by its technical function) a GUI can be protected by copyright. It is noted, though, that humans will generally be involved in deciding what a computer generates and, thus, will be creators of what you can see on screen.

10 If any type or aspect of GUIs can be protected by copyright, under what conditions and to what extent are those types or aspects of GUIs protectable?

See Question 8.

11 Can the overall "look and feel" of GUIs be protected by copyright?

If no, please answer questions 11.1, if yes, please go to question 12

No

Please Explain

There is no protection under Dutch copyright law for a certain 'style' of work, so generally a "look and feel" will not be protected as a copyrighted work per se. This also follows from the principle that only the perceivable expression of an idea can be the subject of copyright, not the idea as such. In other words, the object must be sufficiently concrete.

11.1 If not, can individual elements included in a GUI be protected?

Yes

Please Explain

Individual elements included in a GUI will often be sufficiently concrete and can be the subject of copyright protection, provided it meets the standard of originality.

Trademarks

12 Can GUIs generally be protected as trademarks?***If no, please answer questions 12.1, if yes, please go to question 13***

Yes

Please Explain

We note there is no Dutch case law on trade mark protection of GUIs as such. Pursuant to the European Union Trade Mark Regulation No. 2015/2424 (“**EUTMR**”) GUIs may in principle be protected as EU Trade Marks if they are capable of *“being represented on the Register (...) in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor.”* (art. 4 EUTMR). However, there are likely to be obstacles to registration of a GUI as a whole.^[1] It may well be refused on absolute grounds, either because the relevant public is not used to perceiving an entire GUI as a designation of origin and thus, it lacks distinctiveness, or because a GUI is too complex to function as a trade mark. Further, GUIs may be refused registration if they are the result of the nature of the goods or if their characteristics are necessary for obtaining a technical effect (e.g. ergonomic efficiency; easy accessibility of data).

European Union Trade Mark Directive No. 2015/2426 (“**EUTMD**”) has not yet been implemented in the Benelux Convention on Intellectual Property (BCIP).^[2] Currently, the BCIP dictates that in order to be registered as Benelux Trade Marks, signs must be capable of graphic representation. This is likely to be an obstacle to the registration of unconventional marks such as GUIs as a whole.

Specific aspects or parts of a GUI may enjoy trade mark protection; some examples are discussed below.

Icons used in GUIs may be trade mark protected. The requirements applicable to the protections of word-device or device marks apply. In certain cases, proof of acquired distinctiveness may be required, since GUI icons are often somewhat descriptive (e.g. an icon for a notepad) or too simple (e.g. an icon with an abstract phone horn).^[3]

Movements (e.g. swiping movements) can be protected as EU trade marks, but it will be more difficult to represent these marks in the register. Movement marks have been accepted by the EUIPO^[4], even before the entry into force of the EUTMR. The EUIPO’s Guidelines for Examination dictate that the graphic representation must be accompanied by a description. The description of the mark, which may comprise multiple stills depicting the movement, must clearly explain the movement for which protection is sought and must be coherent with what can be seen in the representation of the sign. According to the EUIPO, as from 1 October 2017 (when the new EU Trade Mark Implementing Regulation as well as the substantial amendments to Article 4 EUTMR will enter into force), the applicant may consider filing a new trade mark application containing an electronic file of the movement mark^[5].

As far as we have been able to determine, no movement marks have ever been registered in the Benelux countries.

Furthermore, specific colour schemes used in a GUI could be eligible for trade mark protection; the conditions set out by the CJEU in *Heidelberger Bauchemie*^[6] would also apply to colour schemes in a GUI.

Transitions within a GUI will be difficult to protect as trademarks. The graphic representation of such transition mark, or the application of the new criterion that the mark *must be represented in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor* is likely to cause problems. In addition, applications for registration of transition marks are likely to run into objections that the essential elements of the mark are necessary to obtain a technical result or that the characteristics of the mark result from the nature of the software. In addition, it is likely that transition marks will be regarded as lacking inherent distinctiveness, meaning proof of acquired distinctiveness will be required.

If any type or aspect of GUIs are protectable as trademarks, what conditions must be satisfied and to what extent does the protection apply? For example, is a screen movement or transition in a GUI protectable as a trademark?

Footnotes

1. [^] *Current practice shows unconventional marks are still graphically represented and sometimes, in addition, described.*
2. [^] *End of implementation term: 15 January 2019.*
3. [^] *Fifth Board of Appeal, 7 August 2015, R 2985/2014-5*
4. [^] *EU IPO Absolute Grounds for Refusal — Article 7(1)(a) EUTMR Guidelines for Examination in the Office, Part B, Examination, p. 8: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/trade_marks_practice_manual/WP_1_2017/Part-B/04-part_b_examination_div_4_absolute_grounds_for_refusal/part_B_examination_div_4_chapter_2_EUTM%20definition/part_B_examination_div_4*
5. [^] *Second Board of Appeal, 3 March 2017, R1439/2016-2, para. 25*

6. [Court of Justice EU C-49/02, 24 June 2004, Heidelberger Bauchemie.](#)

2.1 If not, are any types or aspects of GUIs protectable by trademarks?

13 If any type or aspect of GUIs are protectable as trademarks, under what conditions and to what extent can those types or aspects of GUIs protectable?

See the answer to Question 12

3.1 For example, is a screen movement or transition in a GUI protectable as a trademark?

14 Does a GUI need to acquire secondary meaning through use in order to be protected as a trademark?

No

Please Explain

See the answer to Question 12

Other forms of protection

15 Does your Group's current law provide any other means for protecting GUIs that are similar in nature to traditional IP rights?

No

Please Explain

16 If yes, what forms of protection are available, and under what conditions, and to what extent, are such other forms of protection available?

II. Policy considerations and proposals for improvements of your Group's current law

17 Does your law provide sufficient IP rights protection for GUIs? If yes, is that by means of any one or more types of IP rights protection (and if so, which), or by means of combination of those types of IP rights protection?

If no, please answer questions 18, if yes, please go to question 19

Yes

Please Explain

In general design rights and copyright provide IP rights protection for GUIs. However, the options for obtaining patent protection for GUIs are,

in our opinion, not yet sufficient. This is in our view not a matter of national Dutch law, but rather an issue in relation to the general practice of the European Patent Office. The European Patent Office, in our opinion, sets the bar too high for patentability of GUIs. Hence, there is currently not a strong combination of IP rights available.

18 If no, how is your law deficient?

19 Is your law sufficiently clear on whether and to what extent GUIs are protected by various IP rights?

If no, please answer questions 20, if yes, please go to question 21

No

Please Explain

20 If no, how is your law deficient in this regard?

We believe the European Patent Office should communicate clear guidelines on patentability of GUI patents. This could, for example, be similar to the guidance provided by case law on patentability of subgroup/further medical use patents. Furthermore, we feel the European Patent Office should lower the bar on requirements for a feature of a claim to be considered to involve a technical effect, or raise the bar for a feature to be considered to be non-technical.

21 Are there any aspects of your law that could be improved (for example, by strengthening or reducing the extent to which GUIs may be protected)?

Yes

Please Explain

See above - so, yes, the hurdle for inventive step for GUI patents, the point at which technicality of a feature is assessed, could be lowered by the EPO.

III. Proposals for harmonisation

22 Does your Group consider that harmonisation in this area is desirable?

If yes, please respond to the following questions without regard to your Group's current law.

Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

Yes

Please Explain

Yes further harmonisation is desirable

Patents

23 Should GUIs generally be capable of protection by patents?

If no, please answer questions 23.1, if yes, please go to question 23.2

Yes

Please Explain

The Dutch Group believes that the current practice for protection of technical features of GUIs, as applied by Dutch courts, is a proper policy that provides a balanced and equitable level of protection for technology providers. From that perspective, we strongly recommend patent granting authorities to adopt the same or a similar approach on assessment of the requirements for patent protection for GUIs.

23.1 If not, should at least some types or aspects of GUIs be protectable by patents?

23.2 Please explain your reasons.

24 Under what conditions, and to what extent, should GUIs fall within the scope of patentable subject matter?

The technical effects in GUIs, based on technical functionality of technical parts of an inventive concept, should be treated the same as any other inventive concept in, for example, industrial machines, integrated circuits and bottle openers. In none of these three latter fields does the user's mental activity play a role in assessment of patentability. This is for good reason: the mental activity of a person does not constitute patentable subject matter. Yet if a technical effect of a technical feature of an inventive concept results in a reduction in a user's required mental activity, this technical effect is to be considered as contributing to presence of an inventive step.

Therefore, we feel that patent protection for GUIs could be improved by harmonising application of requirements for patentability not only on a geographical scale, but also by handling patent applications for GUIs no differently from how patent applications for any hardware are assessed.

24.1 For example, should involvement of user's mental activities in a GUI process affect the patentability of the GUI?

24.2 Please explain your reasons.

25 Should a physical feature be required in a claim as a pre-requisite for patentability of GUIs?

No

Please explain your reasons

We believe it is correct that a physical claim feature is not considered necessary. This complies with current practice in our jurisdiction.

26 What claim formats should be available for protecting GUIs?

The current claim (method claims, claims involving a carrier for computer code for programming a computer to carry out the method, and devices arranged to carry out the method) provide sufficient opportunities for protection.

Design rights

27 Should GUIs generally be capable of protection by design rights?

If no, please answer questions 27.1, if yes, please go to question 27.2

Yes

Please Explain

Design rights provide a useful additional basis of protection besides other relevant IP rights

27.1 If not, should at least some types or aspects of GUIs be protectable by design rights?

27.2 Please explain your reasons.

28 Under what conditions, and to what extent, should GUIs be protectable by design rights?

The protection of GUI elements should be limited to the extent that from the standpoint of the reasonable observer, they actually create a relevant visual appearance. An element of a GUI which is part of a sequence, which has no visual relation to other elements and is hardly perceived during normal use, will in most cases not create a relevant visual appearance.

28.1 For example, should screen movements or transitions in a GUI be protectable by design rights?

29 Should a GUI be protectable by design rights independently from the design of the electronic device itself?

Yes

Please explain your reasons.

Identical GUIs may be used on different electronic devices.

Copyright

30 Should GUIs generally be capable of protection by copyright?

If no, please answer questions 30.1, if yes, please go to question 30.2

Yes

Please Explain

Yes, GUIs should generally be capable of protection, as a work, by copyright if it is the author's own intellectual creation.

30.1 If not, should at least some types or aspects of GUIs be protectable by copyright?

30.2 Please explain your reasons.

31 Should the fact that GUIs shown on screens are computer-generated affect the eligibility of GUIs for copyright protection?

No

Please explain your reasons.

No, as long as it can be considered an original work of an author, GUIs can be protected by copyright, even though it is computer-generated.

32 Under what conditions, and to what extent, should GUIs protectable by copyright?

See answers to questions 8 -11. The Dutch Group finds that copyright protection granted under Dutch law in this respect is sufficient.

32.1 For example, should the overall "look and feel" of a GUI be protectable by copyright?

Trademarks

33 Should GUIs generally be capable of protection as trademarks?

If no, please answer questions 33.1, if yes, please go to question 33.2

Yes

Please Explain

It seems undesirable that GUIs as a whole deserve trade mark protection. If GUIs or certain functional aspects of GUIs such as transitions are protected as trademarks, this may disproportionately stifle technological development. Obtaining a potentially perpetual monopoly on somewhat functional and technical objects seems contrary to the public interest, especially in today's world where IT applications play a vital role in daily life.

However, certain aspects of GUIs like icons and movements (e.g. swiping) should be (and currently are) able to obtain trade mark protection. Icons do not essentially differ from regular device and word-device marks. In some cases, acquired distinctiveness will need to be proven, because the public may not perceive the icon as designating an app, or a movement on the screen as a trade mark.

33.1 If not, should at least some types or aspects of GUIs be protectable as trademarks?

33.2 Please explain your reasons

34 Under what conditions, and to what extent, should GUIs be protectable as trademarks?

See answer to Question 33.

34.a For example should screen movements or transitions in a GUI be protectable as trademarks?

34.b For example should a GUI be required to acquire secondary meaning through use, in order to be protected as a trademark?

Other forms of protection

35 Should there be other forms of protection for GUIs? If so, what forms of protection should there be?

No

Please explain your reasons

36 Should there be a sui generis right for protection of GUIs? If so, what aspects of GUIs should be protected by such a right, to what extent, and under what conditions?

If yes, please answer questions 37, if no, please go to question 38

No

Please Explain

37 Should there be any exceptions or limitations to a sui generis right in order to ensure an innovative and competitive market? If so, what exceptions and limitations should there be and why?

38 Please comment on any additional issues concerning protection of GUIs that your Group considers relevant to this Study Question

not applicable

Please indicate which industry sector views are included in part "III. Proposals of harmonization" on this form:

Please enter the name of your nominee for Study Committee representative for this Question (see Rule 12.8, Regulations of AIPPI). Study Committee leadership is chosen from amongst the nominated Study Committee representatives. Thus, persons not nominated as a Study Committee representative cannot be in the Study Committee leadership.

Tjibbe Douma