



Study Question

Submission date: May 19, 2017

Sarah MATHESON, Reporter General
Jonathan P. OSHA and Anne Marie VERSCHUUR, Deputy Reporters General
Yusuke INUI, Ari LAAKKONEN and Ralph NACK, Assistants to the Reporter General

Protection of graphical user interfaces

Responsible Reporter: Yusuke INUI

National/Regional Group	Hungary
Contributors name(s)	Gábor FALUDI, Gusztáv BACHER, Marcell KERESZTY, Áron LÁSZLÓ, Zsófia LENDVAI, Éva SOMFAI
e-Mail contact	kereszty@godollepat.hu

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

No

Please Explain

GUIs can not be generally protected by patents per se.

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

Yes

If so, which?

Only technical aspects of GUIs, as a type of computer implemented inventions, are protectable by patents. The Hungarian practice is in line with that of the EPO in this respect.

Art 1 (2) c of Act XXXIII of 1995 on patent protection provides, that the following in particular shall not be regarded as inventions within the meaning of paragraph

(1):...programs for computers.

Computer program is not defined in the Patent Act, but copyright program creations are provided for as an object eligible for copyright

protection in the Copyright Act Art 1 (2) c) of the Copyright Act, (<http://www.wipo.int/edocs/lexdocs/laws/en/hu/hu084en.pdf>). The ECJ held in C-393/09, that GUIs do not qualify as expressions of the computer program creation. As a result GUI cannot be regarded as a computer program (per se) neither from the aspect of patent law protection.

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?

The basic patentability considerations in respect of GUIs are in principle the same as for other subject-matter. Patents cannot be granted for inventions not having a technical character. However, a patent may be granted if the claimed subject-matter of a GUI contains a non-obvious technical contribution to the state of the art. The Examination Guidelines of the Hungarian Intellectual Property Office provide example areas of such technical contributions for computer implemented inventions, also applicable to GUIs: the control of an industrial process, the processing of data representing physical values, the change of internal functioning of the computer itself, influencing the efficiency or security of a process, management of necessary computer resources or increasing the rate of data transfer. In summary, an interaction with the physical reality is generally regarded suitable to establish technical character. These technical aspects of GUIs can be protected by patents, provided the general patentability conditions are met.

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?

Yes

Please Explain

As to administrative practice, the Examination Guidelines of the Hungarian Intellectual Property Office stipulate claim drafting rules (div III.9.4.9, <https://www.sztnh.gov.hu/sites/default/files/files/professional/iiierdemivizsgalatmegadas.pdf>.) and contain acceptable sample claim formats (Annex III.1.) specifically for computer implemented inventions, which are also applicable to GUIs. These sample claim formats as those accepted by the EPO according to the EPO Guidelines. The case law and the judicial practice do not contain rules specifically applicable to claim formats of GUIs.

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

Yes

Please Explain

The normal physical effects of the execution of a program are not in themselves sufficient to lend a computer program a technical character, and a further technical effect, i.e. a physical feature is needed. So, a GUI is excluded from patentability if it is not capable of bringing about, during functioning, a further technical effect going beyond the "normal" physical interactions between the program (software) and the computer (hardware) on which it is run.

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

The user's mental activities are not involved in the assessment of patentability.

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

No

Please Explain

GUIs cannot be generally protected by design rights per se.

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

Yes

If so, which?

However, appearance aspects of GUIs are protectable by design rights. The Hungarian practice is in line with that of the EUIPO to this respect.

Article 1 of Act XLVIII of 2001 on the legal protection of designs (https://www.sztnh.gov.hu/en/English/jogforras/Design_Act_XLVIII_2001_EN.pdf) provides that (1) Design protection shall be granted for any designs which are new and have individual character. (2) Design shall mean the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product itself or its ornamentation.(3) **Product shall mean any industrial or handicraft item.** Products shall include inter alia packaging, get-up, graphic symbols, typographic typefaces and parts intended to be assembled into a complex product. Computer programs shall not be regarded as products.

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?

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

It is noted that GUIs as protectable designs are explicitly mentioned in the Locarno Classification under subclass 14-04.

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

Yes

Please Explain

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

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

Yes

Please Explain

Products with movable parts can be protected by design rights by means of representations showing different mutual positions of the movable parts, e.g. in case of a foldable furniture by photos showing different folding positions. The Hungarian Group is of the view that the same applies to movements or screen transitions in a GUI. The Hungarian Group is not aware of any case law in this respect, however, it is noted that even if photos showing particular states of movements or screen transitions in a GUI are not accepted as a single design, the photos will be accepted as multiple designs within the same application.

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?

No

Please Explain

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

GUI-s can generally be protected under copyright save as computer programs. Since under the ECJ decision C-393/09 GUI-s do not qualify as expressions of computer programs they should meet the general requirements of eligibility for copyright protection. Both the images and icons and the general look and feel of a GUI may be an object for copyright protection (a visual art work). It cannot be precluded either that textual elements of a GUI qualify as literary works. It is also possible that a copyrightable map is shown on the GUI. Audio-visual creations or artistic photos can also appear as parts of a GUI. (Please see the work categories below in bold.)

The applicable law reads as follows:

Article 1

- (1) This Act shall provide protection for literary, scientific and art creations.
- (2) All creations of literature, science and art - **regardless whether or not specified by this Act** - shall fall under copyright protection. Such creations are, in particular:
 - a) **literary works** (for example fictional works, technical works, scientific works, journalistic works etc.),
 - b) speeches delivered in public,
 - c) computer program creations and related documentation (hereinafter referred to as 'software'), whether fixed in source code or object code or in any other form, including application programs and operation systems,
 - d) dramatic works, musico-dramatic works, ballets and mimes,
 - e) musical works with or without words,
 - f) radio and television plays,
 - g) **cinematographic creations** and other audiovisual works (hereinafter jointly referred to as cinematographic creations),

- h) **creations produced by drawing, painting, sculpturing, engraving, lithography or in other like manner, and designs thereof,**
- i) **artistic photographs,**
- j) **maps and other cartographic creations,**
- k) architectural creations and plans thereof, and plans of building complexes and town planning projects,
- l) designs of engineering structures,
- m) applied art creations and designs thereof,
- n) costume and scenery designs, o) industrial design creations,
- p) databases rated as collections of works.

(3) The creation shall enjoy copyright protection based on its individual, original nature originating from the intellectual activity of the author. The protection shall not be subject to any quantitative, qualitative and aesthetic characteristics, or to value judgements relating to the standard of the creation.

There are court cases adjudicating contractual disputes over software development contracts. Although the subject matter of such decisions is not the eligibility of GUI for copyright protection, still it is acknowledged by the parties and the courts that a part of the work to be completed is the development =creation of various GUI-s (e.g. FIT-H-PJ-2015-586./ F?városi Ítéltábla 3.Pf.20.183/2015/4/II.)

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?

No

Please Explain

Please see the answer to Q 32. The Group can also add that the copyright protection of computer games is not disputed. This analogy can well be used. The fact that GUI-s are shown on screens has no impact whatsoever on the eligibility for protection.

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?

Please see the answer to Q 9. Images can be visual art work (graphical works), text may qualify as literary work, the general look and feel can also be protected as a visual art work, or a work that does not fit into the list of the non-exhaustive list of work types.

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

Yes

Please Explain

Please see the answer to Q 8.

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

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

GUIs as such can only be protected under the trademark protection if the GUI in its entirety meets the requirements of the eligibility for trademark protection. After the Apple decision of the European Court of Justice (C-421/13.) it can not be precluded, that if "the look and feel" of the GUI is properly displayed graphically it is eligible for trademark protection in light of the Sieckmann criteria. If the requirement of graphical representation will be abolished, the probability of the eligibility for trademark protection will increase. The guidelines issued by HIPO on the procedure of registration of signs as trademarks (https://www.sztnh.gov.hu/hu/vedjegy/vedj_modszertan/vedjegy_modszertan.pdf) does not refer to GUIs at all. As a result the Group's opinion is an educated guess only.

The applicable law (Act 11 of 1997 on trademarks, https://www.sztnh.gov.hu/sites/default/files/trademark_act_xi_1997_en_20170101_footnoted_0.pdf) reads as follows (before the transposition of the amendment of the EU Trademark Directive):

Trade mark protection shall be granted for any signs capable of being represented graphically provided that these are capable of distinguishing goods or services from those of other undertakings

(2) Signs which may be granted trade mark protection are in particular:

(a) **words, combination of words**, including personal names and slogans, (b) **letters, (c) numerals**, (d) **figures, pictures**, (d) two-or three dimensional forms, including the shape of goods or of their packaging, (e) **colours, combination of colours**, light signals, holograms, (f) **sound signals**, and (g) combination of signs under (a) to (f).

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?

Please see the aspects/elements that may separately be eligible for trademark protection in the answer to Q12.

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

Yes

Please Explain

If the screen movement can be represented graphically and the screen movement is able to distinguish the applicant, the protection cannot be precluded.

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

No

Please Explain

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?

Yes

Please Explain

It is the "passing off" type claim under the "Competition Act" (abbreviated title, Act LVII of 1996). The relevant part of the applicable provision (§ 6) reads as follows: It shall be prohibited to (...) distribute or advertise marketable ... services without the consent of a competitor if these goods (including the services!) **have a characteristic presentation** (...) (...) by which a competitor's (...) services are usually recognised.

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

Please see the part of the statutory provision cited under 15) in bold. The Group is of the view that the "feel and look" as well as the parts of the GUI, if they are characteristic, qualify as a presentation of the service provided "under" the GUI. If the consumers recognize the provider of the service from the characteristic (and not generic!) GUI, the legal protection exists.

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

Protection is provided by means of copyright, patent, design, trademark and competition law (passing off) separately but the protection provided by different IP laws may overlap.

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

Yes

Please Explain

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

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

The interpretation of the Trademark Act (the registration guidelines) could be more precise on the eligibility of the GUIs as trademarks. As stated above under Hungarian Design Act even if representations showing particular states of movements or screen transitions in a GUI are not accepted as a single design, the representations will be accepted as multiple designs within the same application. Under CDR an animated, non-static design is eligible for registration with up to 7 views as one single design (RCD), and also in several European jurisdictions (e.g. Germany) animated designs are eligible for registration with several movements under one single application. Regarding to the EUIPO Guidelines and the CP6, the Hungarian Group is of the view that the Hungarian Legislature should consider amending the Hungarian Design Act allowing to register movable designs not only as multiple designs but as a single design.

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.*

No

Please Explain

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

No

Please Explain

GUIs should not be generally protected by patents per se.

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

Yes

If so, which?

Only technical aspects of GUIs, as a type of computer implemented inventions, should be protectable by patents, as patents are intended to protect technical inventions, and are not intended to protect e.g. presentations of information, being explicitly excluded from patentability.

23.2 Please explain your reasons.

Only technical aspects of GUIs, as a type of computer implemented inventions, should be protectable by patents, as patents are intended to protect technical inventions, and are not intended to protect e.g. presentations of information, being explicitly excluded from patentability.

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

The basic patentability considerations in respect of GUIs should be in principle the same as for other subject-matter. Patents should not be granted for inventions not having a technical character. However, patentability should not be excluded if the claimed subject-matter of a GUI contains a non-obvious technical contribution to the state of the art. These technical aspects of GUIs should be protectable by patents, provided the general patentability conditions are met.

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

No

Please Explain

The user's mental activities should not be involved in the assessment of patentability.

24.2 Please explain your reasons.

The basic patentability considerations in respect of GUIs should be in principle the same as for other subject-matter. Patents should not be granted for inventions not having a technical character. However, patentability should not be excluded if the claimed subject-matter of a GUI contains a non-obvious technical contribution to the state of the art. These technical aspects of GUIs should be protectable by patents, provided the general patentability conditions are met. The user's mental activities should not be involved in the assessment of patentability.

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

Yes

Please explain your reasons

The normal physical effects of the execution of a program should not be in themselves sufficient to lend a computer program a technical character, and a further technical effect, i.e. a physical feature should be needed. Without the requirement that the claimed subject-matter of a GUI shall contain a non-obvious technical contribution to the state of the art, GUIs could serve as a basis of abusing the patent system. Namely, it would open the way to patent presentations of information by an easy inclusion of non-technical computer program feature(s), i.e. features without going beyond the "normal" physical interactions between the program (software) and the computer (hardware) on which it is run. This is clearly avoidable.

26 What claim formats should be available for protecting GUIs?

The Hungarian Group is of the opinion that every technical field has its characteristic, well established claim-types and claim wording practice. Such practices have been developed so as to establish the most practical ways to fulfil the statutory general claim wording requirements.

These general requirements should be applicable for GUIs as well, so no specific requirements are necessary, but explicit guidance about accepted ways of fulfilling the requirements are desirable. Sample claim formats as accepted by the EPO according to the EPO Guidelines are good examples of such a guidance.

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

No

Please Explain

GUIs should not be generally protected by design rights per se.

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

Yes

If so, which?

However, appearance aspects of GUIs should be protectable by design rights, as GUIs are similar to other products, the appearance of which essentially influencing exploitability.

27.2 Please explain your reasons.

GUIs should not be generally protected by design rights per se. However, appearance aspects of GUIs should be protectable by design rights, as GUIs are similar to other products, the appearance of which essentially influencing exploitability.

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

The basic protectability considerations in respect of GUIs should be in principle the same as for other subject-matter, there is no justified reason to treat this type of designs differently. The Hungarian Group is of the view that movements or screen transitions in a GUI should be protectable by design rights just like designs of products with movable parts.

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

Yes

Please explain your reasons.

The Hungarian Group is of the view that movements or screen transitions in a GUI should be protectable by design rights just like designs of products with movable parts.

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

Yes

Please explain your reasons.

A GUI should be protectable by design rights independently from the design of the electronic device itself. For example, design protection of graphic symbols and typographic typefaces are also traditionally accepted, independently from the particular carrying object (e.g. book, newspaper, tablet).

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

GUIs as such should not be excluded from copyright protection since the list protected subject matter of the content protected under copyright is not exhaustive. GUIs should be excluded from copyright protection under the practice of the ECJ as expressions of computer programs only. As a result if a GUI or some elements of a GUI are individual and original and are created in the field of science literature or art they should be protected by copyright.

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

30.2 Please explain your reasons.

GUIs as such should not be excluded from copyright protection since the list protected subject matter of the content protected under copyright is not exhaustive. GUIs should be excluded from copyright protection under the practice of the ECJ as expressions of computer programs only. As a result if a GUI or some elements of a GUI are individual and original and are created in the field of science literature or art they should be protected by copyright.

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.

Not at all. The method and the devices used for the creation are neutral from the aspect of copyright protection. No matter, whether a musical work is created with the help of a computer or is written with a pencil on a music sheet. Similarly, it is neutral, whether GUIs are computer generated or not.

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

Please see the answer under 31. The originality and individuality should be reflected in the expression.

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

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

33.2 Please explain your reasons

GUIs as such and the elements of GUIs listed in the answer to Q 12 are not excluded from trademark protection. In light of the Sieckmann criteria also the requirement of the graphical representation can be fulfilled. Movements should be listed as capable of protection in the trademark act.

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

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

Yes

Please Explain

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

No

Please Explain

Other forms of protection

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

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

No new sui generis rights should at all be introduced. It would be a mission impossible and senseless to prepare a new international instrument with exceptions and limitations and to bring about an international register to protect an object that is subject to extremely frequent changes due to the business demands of internet, and where the protection can easily be circumvented. The existing regulatory framework is satisfactory.

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

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.