



Study Question

Submission date: May 8, 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 | Sweden |
| Contributors name(s) | Erik FICKS, Annie KABALA, Emmy PETTERSSON, Linn ROSENGÅRD, Gustav KYRINGER, Thomas BORGENTFALK |
| e-Mail contact | erik.ficks@roschier.com |

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

Yes, GUIs are patentable if they have a technical effect and also otherwise fulfil the patentability requirements set out by the Swedish Patents Act. However, in practice, GUIs rarely can be protected by patents as a GUI often does not provide a technical effect.

The mere presentation of information is not patentable. Further, computer programs, which may include GUIs, are not patentable as such. Swedish patent law generally follows EPC case law.

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?

General patentability requirements apply to GUIs, i.e. there must be a technical effect and fulfilment of the requirements of novelty and inventive step. It follows from case law and practice that when a claim comprises a mix of technical and non-technical features, a non-technical feature must interact with a technical feature to produce a technical effect in order to contribute to novelty and inventive step

Features of GUIs that could be considered to contribute to providing a technical effect are for example if they are combined with steps of or means for interacting with a user or concern technical information relating to the machine they are used with. A feature which relates to the manner in which content is conveyed to the user on a screen normally does not contribute to a technical solution to a technical problem, unless it can be shown to have a credible technical effect. The graphical aspects such as colour, shape, layout etc. of a GUI are usually not considered technical aspects of a GUI.

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

No, there are no specific claim formats required for patent protection in general or for protecting GUIs. GUIs could in theory be patented as any of the permitted categories of patent claims.

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

No

Please Explain

No, there is no requirement of physical features in the claims, as a GUI could for example be patented as a method. However, a pre-requisite for patentability of GUIs is technical effect, which may be implied by physical features. (As we understand this question, it refers to whether the specific characterizing features in the patent claims must include physical features, and not whether the invention itself would have a physical effect once used.)

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

The mere involvement of mental activities does not on its own prevent patentability. However, a GUI aimed exclusively at the mental activities of the viewer is probably not regarded as providing a technical effect. Swedish law generally follows EPC case law in this regard.

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

Yes, provided that the GUI is considered new and possesses individual character, it (in whole or parts thereof) may be protected by design rights under the Swedish Design Protection Act. Elements which are dictated solely by the technical function of the product to which they relate, are not included in the scope of protection. This may exclude some technical GUI elements which might be more suitable for patent

protection. In practice, it is more likely that individual aspects of a GUI fulfil the requirements for protection, such as icons, menus, type fonts etc., than the whole GUI.

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?

See answer to question 6 as well as clarifications in sub-questions to this question 7 below.

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

Yes, there is no requirement that the design element must be visible for a longer period of time.

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

Yes

Please Explain

Yes, the design right is granted as such and not in relation to a specific product/use.

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

Yes, smaller elements may be eligible for independent protection, provided that they meet the formal criteria of novelty and individual character and are not dictated solely by their technical function.

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

Yes

Please Explain

Yes, movements or screen transitions may be eligible for design protection, provided that they meet the formal criteria of novelty and individual character. In an application, such moving design elements are to be represented by a number of still images, displaying the movement or transition. The images should be visually related and include common details.

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

N/A

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

Yes, provided that the GUI constitutes a literary or artistic work and reaches a threshold of originality under the Swedish Copyright Act. However, in practice it is more likely that individual aspects of a GUI are protected, such as icons, menus, type fonts etc., than the whole GUI.

Commonly, if an aspect of a GUI includes a function it may be regarded as applied art (Sw: brukskonst). Generally, the works of applied art, such as designs on a scroll function, have a narrow scope of copyright protection.

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

Yes, in order for a work to be protected by copyright, the work needs to be created by a human being. If the computer can be regarded to have served as a tool (comparable to e.g. an artist's/painter's brush etc.), the work might be considered to be created by a human being, despite having ultimately been generated by a computer. However, this issue has not been addressed in Swedish law.

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 refer to 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

Yes

Please Explain

Yes, provided that it constitutes a literary or artistic work and reaches a threshold of originality. Please refer to question 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

Yes, provided that a GUI is deemed to have distinctive character. However, in practice, specific aspects of GUIs are more likely to meet the requirements for trademark protection, such as icons, menus, type fonts etc., than the whole GUI, in particular if they have a function of identifying or conveying the source of products or services.

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 be protectable?

Please refer 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

No, however, if a particular GUI is considered too generic to be registered as a trademark, it may nevertheless be protected as a trademark if it has acquired secondary meaning through use.

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

Yes, under the Swedish Marketing Act's provisions on misleading imitations of products.

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

The provisions on misleading imitations prohibit the marketing of products which could easily be confused with another company's products which are well known (i.e. have acquired secondary meaning) and have individual character. The provisions exclude imitations where the design of the product mainly serves to make the product functional.

Thus, the owner of a GUI would have to show that the GUI (as regards the non-functional aspects) is well known and has individual character. These criteria have in case law generally be interpreted in the same way as in trademark law.

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

Yes, through a combination of the protection granted by patent, copyright, trademark, design and unfair marketing law. However, the sufficiency is based on the notion that there should not be a particularly strong protection for whole GUIs as such in ordinary cases. Instead, strong protection for whole GUIs should only be afforded when the GUI may be considered to have acquired the function of identifying or conveying the source of products or services of a specific company through such company's use of the GUI.

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)?

No

Please Explain

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

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

Yes. If the GUI meets the general requirements of patentability, that invention should be protected in the same way as other inventions.

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?

If they have a technical effect and also otherwise fulfil the requirements of patentability.

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 mere involvement of mental activities should not on its own prevent patentability. However, a GUI aimed exclusively at the mental activities of the viewer should generally not be regarded as having a technical effect.

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

No, as it should also be possible to patent GUIs as a method, which does not involve physical features.

26 What claim formats should be available for protecting GUIs?

All claim formats which are available to other patentable inventions.

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

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?

If a GUI meets the general requirements for design protection, the GUI should be protectable by design rights.

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

Yes

Please explain your reasons.

If a GUI meets the general requirements for design protection, the GUI should 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.

Yes. A GUI generally uses the same elements on all electronic devices it is used on.

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

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?

Yes

Please explain your reasons.

Yes, a requirement to obtain copyright protection should be that the GUI is created by a human. If a computer that generates a GUI can be regarded to have served as a tool (comparable to e.g. an artist's/painter's brush etc.), the work should be considered to be created by a human being, despite having ultimately been generated by a computer. However, if the GUI is randomly generated by a computer, lacking human input, it should not be able to obtain copyright protection.

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

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

Yes

Please explain your reasons.

Yes, provided that it constitutes a literary or artistic work and reaches a threshold of originality.

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

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?

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

Yes

Please Explain

Yes, provided that a GUI meets the general requirements for trademark protection.

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

No. However, a GUI which does not meet the general requirements for trademark protection should nevertheless be protected as a trademark if it has acquired secondary meaning.

Other forms of protection

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

Yes

Please explain your reasons

There should be an unregistered industrial protection for GUIs (i.e. apart from unregistered copyright protection), such as (depending on the jurisdiction) protection as an unregistered trademark, unregistered design, and/or under unfair competition/marketing legislation.

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

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.

Erik Ficks