

# DESIGN PROTECTION FOR GRAPHICAL USER INTERFACES (GUIs) WORKING PAPER

## I. INTRODUCTION

Graphical User Interfaces (GUIs) allow users to interact with graphics appearing on electronic devices (e.g. smartphones), typically by clicking on the icons that appear on the screen, in order to execute commands of the program or, in extension, the device.

It is clear that GUIs are more important than ever in the age of the Internet of Things, where they are used to control an ever-increasing number of electronic devices in a very user-friendly way and without the need for complicated instructions or training.

In other words, GUIs are directly connected to user experience, and they have a relevant impact on the consumers' choice of products.

As a result, companies devote significant resources to the development of new GUIs, so it's crucial that they are able to protect their investment.

This means that appropriate IP protection of GUIs is a very important economic issue. If there is value in interacting with GUIs and icons, there is also related value in protecting their visual appearance. Actually, GUIs are designed to be visually appealing and user friendly.

The increasing importance of GUIs has resulted in a dramatic growth in design applications related to their protection. According to recent statistics from WIPO, GUIs are among the fastest-growing areas of design applications.

This document, therefore, aims at identifying some practical issues related to the representation of GUIs in design applications and providing recommendations in this respect.

## II. EXECUTIVE SUMMARY

This paper explains the current state of play of GUIs, accepting that they are not computer programs, confirming that GUIs are eligible for design protection regardless of the possibility to claim copyright protection in some cases. It also focuses on the most relevant challenges users can face when obtaining protection.

The working paper also addresses challenges posed by animated GUIs and the problematic limitation of the number of views when representing designs in applications. Relationship of the GUIs with the physical product to which it is applied is also a key aspect to be considered by users when drafting their representations of the designs in light of the different national requirements in other jurisdictions.

Other practical aspects for design applications for GUIs are highlighted by way of example.

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Particularly, in an international context, special requirements in different jurisdictions should be born in mind when devising a filing strategy in order to obtain protection for GUIs. This is crucial for users when trying to make all priorities compatible in order to reconcile the different formal requirements of the respective IP offices.

## III. COMMENTS

### III.1 Preliminary issue: GUIs are not “computer programs” in the sense of Article 1 (b) of the Directive/Article 3 (b) of the Regulation.

It has been argued in the legal doctrine that GUIs are parts of computer programs and, therefore, not eligible for design protection at all. The draft of the Legal Review on Industrial Design Protection in Europe was silent on the exclusion of computer programs from the definition of “products”.

In the Joint Comments of ECTA, INTA and MARQUES on the [European Commission’s Inception Impact Assessment on the review of the Design Directive and Community Design Regulation \(January 2021\)](#) (hereinafter ‘Joint Comments’), it is stated that such denial of design protection for GUIs would be unacceptable so that clarification is requested (be it by way of recitals or by amending the law) to ensure that GUIs and parts thereof are not “computer programs” in the sense of Article 1 (b) of the Directive/Article 3 (b) of the Regulation.

Besides, graphic symbols and typographic typefaces in the sense of Art. 3 (b) of the Regulation are clearly also “part of a computer program”, but are not excluded from design protection. A GUI is actually only a combination of graphic symbols and typographic typefaces.

The ECJ clearly stated, as regards copyright law, that “a graphic user interface is not a form of expression of that program within the meaning of Article 1(2) of Directive 91/250 and, thus, is not protected by copyright as a computer program under that Directive. Nevertheless, such an interface can be protected by copyright as a ‘work’ by Directive 2001/29 if that interface is its author’s own intellectual creation” (ECJ, BSA, C 393/09, pt 51). It would be incoherent not to apply the same distinction as regards design law.

This position has also been emphasised in the most recent Joint Comments:

*“Accordingly, we would welcome a **clarification (be it by way of recitals or by amending the law) to ensure that GUIs, animated designs, fonts and icons, although derived from computer code, are not “computer programs” in the sense of Articles 1(b) of the Directive/3(b) of the Regulation, and are therefore eligible for design protection. The same should be clarified with regard to interior designs, be they real or virtual.**”*

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## III.2 Issues related to the representation of GUIs and their scope of protection

### III.2.a Representation of animated GUIs

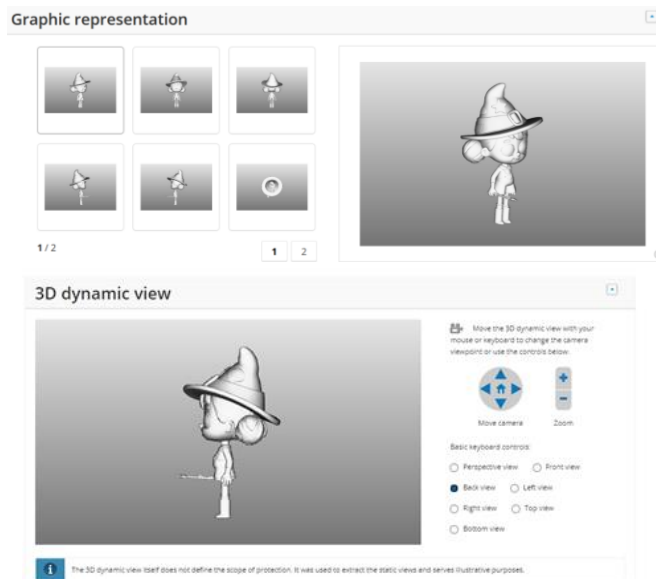
Static GUIs are not problematic, as they can be easily represented through a single image.

Nevertheless, animated GUIs bring several challenges, as the animation itself cannot usually be depicted in the application or in most design databases.

Even in the EU, moving images or 3D computer-animated designs can only be considered as an additional technical means of viewing the design and does not replace the conventional static views.

As a consequence, animated GUIs are normally represented through snapshots, i.e. a short sequence of (maximum 7) views used to show a single animated design at different specific moments in time in a clearly understandable progression.

As an example of best practices, RCD no 005935582-0005 was filed using a combination of static views and a 3D animated design, as shown below:



RCD 005935582-0005

The limitation to a number of 7 views as currently provided for by law is problematic and will limit applicants in their possibilities to properly demonstrate the features of GUIs. Therefore, the limitation to a certain number of views should either be abolished or adjusted in that a higher number of views and dynamic views are allowed.

This would also be in line with what has already been voiced in the recent Joint Comments:

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*“Further, the Evaluation Report concludes that the 7 views limit for Community designs is too low and that an analysis is required as to whether a higher limit or unlimited views should be allowed, also given the option of filing a dynamic representation. **We fully agree and recommend that the 7-view limit be changed to allow a higher number of representations, as many countries already do, to as many representations as may be required to fully disclose the design.** This promotes user choice, and enables designers properly to capture, as they wish, the design they wish to protect. Indeed, for moving designs, it may be that a video file better captures the design than does a series of static representations. Technology now allows it and therefore we consider that video files should be acceptable across the EUIPO and national offices (including the BOIP). Along the same lines, we welcome the enhancement of the possibility of filing **dynamic views** (e.g., 3D digital representations and video files) supported in the Evaluation Report. Similar to trademarks, a design may be represented in any appropriate form using generally available technologies. Indeed, we agree that 3D animated representations are helpful, and increasingly common, and advocate for their acceptance by the EUIPO and the national offices (including the BOIP), possibly through the cooperation projects. For the avoidance of doubt, 3D or dynamic representations of designs should be an **optional representation tool**. It should be the choice of the applicant whether or not to file static or dynamic views, or both, irrespective of the nature of the design. Search tools and databases should be updated accordingly to reflect video or other acceptable representation forms.”*

### **III.2.b Relationship of the GUI with the physical product to which it is applied**

In the EU, GUIs and icons belong to a specific class (14.04 of the Locarno Classification, i.e., *Screen Displays and Icons*) and do not need to be related to a specific product.

Therefore, in the EU, the GUI itself can be registered independently of the specific physical product to which it is applied, which has the advantage of clearly extending the scope of protection to any physical product, as the particular appearance of the device on which the GUI is presented is not a consideration when it comes to the scope of protection of the design.

It should be borne in mind that the scope of design rights does not depend on the nature of the product mentioned (ECJ, C 361/15 P and C 405/15 P). However, the representation of the GUI on a product on the views might have influence on the scope of protection since the product itself could have an impact on the individual character of the design.

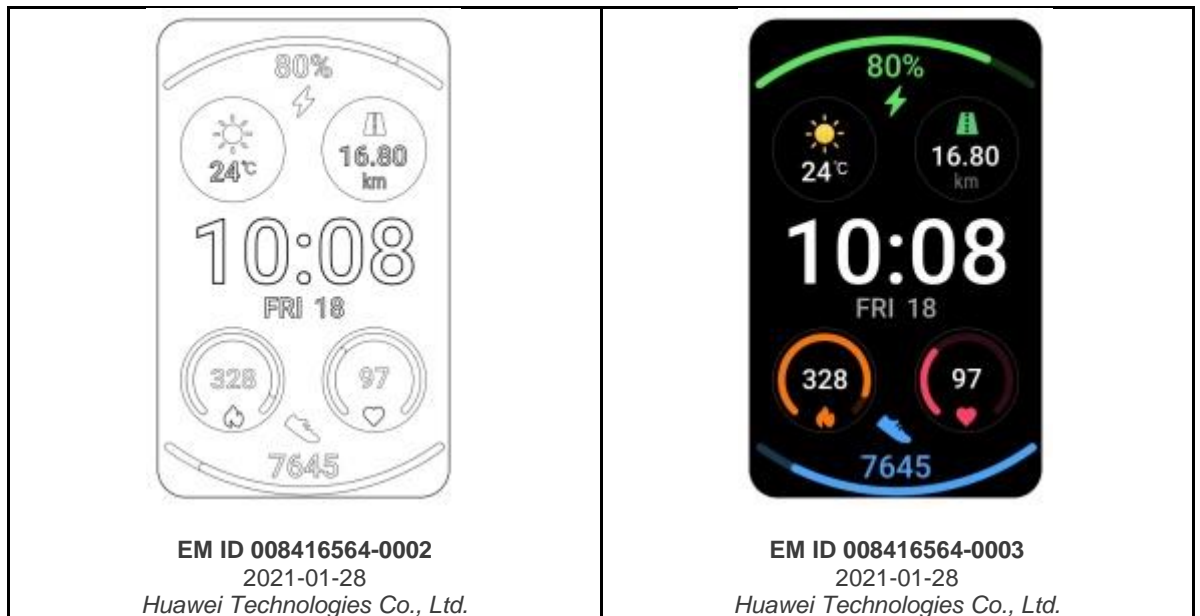
On the contrary, in other jurisdictions (such as the USA, China and Japan), the GUI must always be connected to the physical product in which it is integrated, through graphical

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representation or a description, to the extent descriptions are admissible in such other jurisdictions.

### ***III.2.c Scope of protection of black and white representations of GUIs***

In some jurisdictions, black and white representations cover variations of the GUI in any colour. In other countries, however, black and white representations do not extend the scope to colour designs. In such cases, it could be necessary to file several versions of GUI designs, using both colour and greyscale images, as shown below:



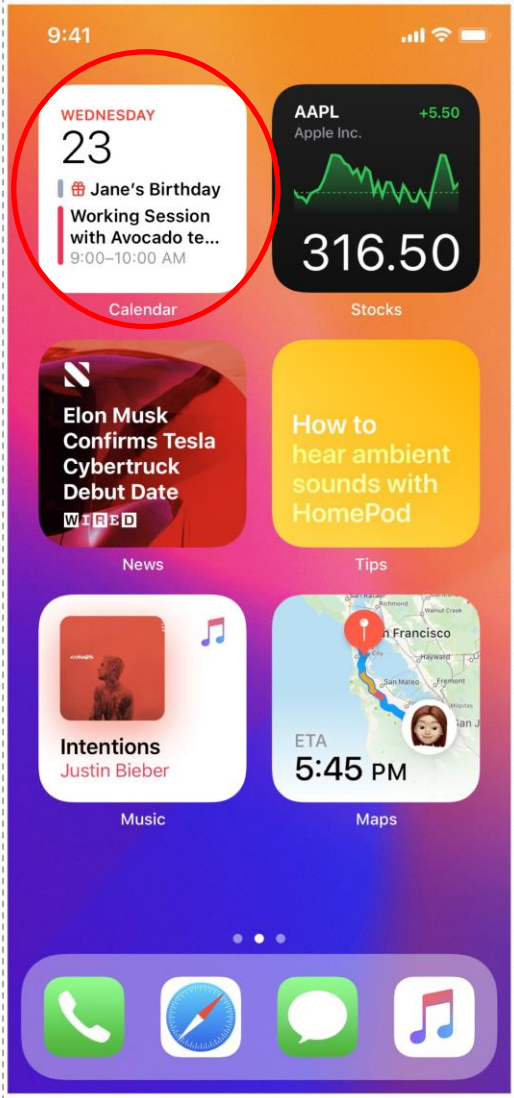

### ***III.2.d GUIs including several smaller elements***

Icons and slide buttons, which are only a portion of the entire GUI, may be significant.

Therefore, there is an issue whether such smaller elements should be protected apart from the GUI as a whole.

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Making separate filings for the layout of GUI elements, the GUI elements themselves, as well as for the whole GUI, can also help to ensure protection for both the setting and its individual components, as shown below:

 <p>The image shows a screenshot of an iPhone home screen. A red circle highlights the calendar widget in the top-left corner. The widget displays 'WEDNESDAY 23' and a calendar event: 'Jane's Birthday Working Session with Avocado te... 9:00-10:00 AM'. Other widgets visible include 'AAPL' stock price at 316.50, a news article about Elon Musk, a tip about HomePod, a music widget for Justin Bieber, and a maps widget showing a route to San Francisco with an ETA of 5:45 PM.</p>	 <p>This is a close-up of the calendar widget highlighted in the previous image. It shows the text: 'WEDNESDAY 23', 'Jane's Birthday Working Session with Avocado te...', and '9:00-10:00 AM'.</p>
<p>EM ID 008353304-0011 2020-12-21 Apple Inc.</p>	<p>EM ID 008352322-0007 2020-12-21 Apple Inc.</p>

It would be interesting to investigate and verify if the practice and the case law followed in other sectors (i.e. protection of trade dress) could also be applied in this sector, to protect new elements with individual character that stand out inside a GUI and that are worth covering by means of an additional design, in the same multiple or separate application.

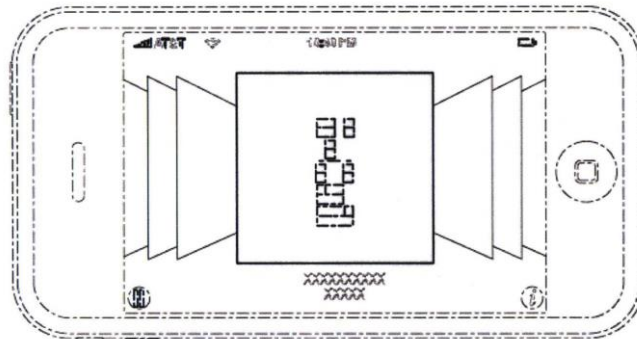
### ***III.2.e Use of written descriptions and disclaimers in relation to GUIs***

In the EU, the graphical representation alone defines the scope of protection of a GUI design. Although written descriptions do not directly influence the scope of protection, they can nevertheless provide a better understanding and broader interpretation of the representation of the design.

Concerning the graphical representation, another significant point is the use of visual disclaimers in relation to elements that are shown in the drawings for context only, but do not actually form part of the claimed design.

The scope of design protection is determined by the drawings filed with the design application, so it is important that the scope of design protection is not unintentionally limited to elements that do not form part of the design.

One solution is to show the context using dotted lines, which are usually considered as not forming part of the scope of protection, as shown below:



RCD 000847017

Dotted lines are helpful when it comes to disclaiming parts of the “outwards” product, such as a TV or a smartphone. For disclaiming parts of the GUI itself (e.g. certain symbols), using blurring or colour shading can be better to help understand the “look and feel” of a GUI.

When making use of the description, it should be borne in mind that the description must relate only to those features appearing in the reproductions of the design in question (Art. 1 (2) a CDIR). A description can, therefore, be used to better explain the representation for the sake of clarification and to avoid objections by the Office, but cannot be used to substitute visual disclaimers or to make statements regarding the scope of protection, be it in

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connection with novelty, individual character or technical aspects. However, we are aware that these developments may change with the Design Law Reform. It is not excluded that description may have a more important role in the future, depending on provisions of the new Regulation.

### ***III.2. Priority claim for GUIs***

When applicants intend to file for protection in various jurisdictions, the first filing should be prepared taking into consideration the requirements for GUI design protection in the other target countries.

For example, if at least some of the targeted jurisdictions require the GUI design to be connected to a physical product, the original GUI design application should have the physical product indicated in dotted lines in the graphical representation.

One might have to consider filing additional variants of the same design in order to cover particular countries with specific requirements.

## **IV. FINAL REMARKS**

For devising global filing strategies, including countries outside the EU, one has to carefully select representations for the design so that they will also comply with legal requirements in countries where protection is sought, especially when claiming priority. This would undoubtedly help users to establish prior strategies regarding the different topics mentioned above to help internationalise protection with guarantees of coverage in all of them.

Indeed, it is important to check before filing how different practices in other countries could impact the possibility of claiming priority. For instance, there are a number of requirements in the USA and Asian countries which are not mandatory in the EU and omitting these elements could jeopardise the priority and the possibility of obtaining design protection all together in these countries.

In particular, the USPTO and many foreign countries in Asia require the representation of the designs to include the product on which the GUI is being used. As a consequence, in the USA and in some Asian countries, filing a design application for a GUI without showing the product on which the GUI is supposed to be used is not admissible. In this regard, the product can generally be shown by means of dotted lines in order to visually disclaim it from the scope of protection. In some countries, it may even be mandatory to mention the product with the GUI design in the title of the application (e.g. “computer monitor with GUI”).

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**ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world.**

ECTA brings together those practicing in the field of IP, in particular, trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.

The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- European Union Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.

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