

## Die Seite der AIPPI / La page de l'AIPPI

### Protection of GUIs under Swiss IP-Law

#### REPORT OF SWISS GROUP\*

##### I. Current law and practice

###### Patents

##### 1. Can GUIs generally be protected by patents (1)? If GUIs cannot be protected by patents per se, are any types or aspects of GUIs protectable by patents (2)? If so, which (3)?

###### Sub-Question 1:

The definition of a GUI in present Section 2 is: "A GUI is an interface which allows users to interact with electronic devices through graphical elements (e.g. icons, menus, scroll bars, windows, transitional animations, dialogue boxes) instead of typing characters." In this context, GUIs cannot generally be protected by patents since the definition of the GUI includes, if not aims, the representation of graphical elements in a GUI and possibly their arrangement or layout. However, graphical elements are considered as aesthetic creations which, according to the Swiss Federal Institute of Intellectual Property (IPI) Guidelines effective April 1, 2017, Chapter 2.1, are excluded from patent protection. In Switzerland, patent protection can also be obtained via the European Patent Convention (EPC). Article 52(2)(b) EPC in a similar way excludes aesthetic creations as such from protection by a European Patent.

###### Sub-Question 2:

According to the IPI Guidelines, an invention requires to technically contribute to the art, and hence, requires technical character which is positively affirmed for a technical solution provided for a technical problem by technical means. In principle, at least one of these is considered as sufficient for proving technical character. For GUIs at the same time representing a computer implemented invention, technical considerations are admitted as additional criterion for proving technical character, again including the clarification in the IPI Guidelines that not necessarily all categories need to be fulfilled at the same time. Accordingly, types or aspects of a GUI may be protected by a patent as long as at least one of a problem, solution, means, or considerations involved is considered technical. Although, finally an overall view on the claimed subject matter is relevant, according to the IPI Guidelines.

###### Sub-Question 3:

By excluding pure graphic representations of a GUI from patent protection, aspects of a GUI potentially patentable rather need to refer to one or more of the interface aspect or the interaction aspect in the above definition of GUIs, or technical information concerned. Interface related aspects may in particular include hard- and/or software for operating the interface on a physical layer, such as touch-screen sensing technology, for example. Interaction related aspects rather include input and/or output behavior, in particular interrelated, as long as technical effects are achieved or technical considerations are acknowledged. However, the more such interaction is related to the technical system behind the GUI rather than to the bare GUI, the better chances are for fulfilling the technical character requirement.

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\* Members of the working group: Peter Bigler, Andreas Glarner (chairman), Andreas Gygi, Andri Hess, Monika Naef, Peter Schramm, Martin Toletti, Marc Wullschleger.

**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?**

While the Swiss Patent Act does not explicitly ask for a technical character of the invention, the IPO Guidelines in this context refer to the consultation of March 24, 1976, wherein the Federal Council submitted draft legislation to the Parliament regarding patent law, wherein it was stated that the Supreme Court shares the view of the IPO in regards to subject matter to be excluded from patentability although not explicitly excluded by the Federal Patent Act (PatA). Excluded subject matter not only refers to aesthetic creations – although it is admitted in the IPI Guidelines that in borderline cases, a design or form may (also) have a technical function such as a cover of a tyre and thus be patentable – but also includes mathematical methods and computer programs as such as well as rules and methods for mental acts. While the exclusion for mental acts is not further elaborated in the IPI Guidelines and case law is very scarce, the exclusion of computer programs as such is specified in a dedicated chapter 2.1.1. For more information, it is referred to the co-pending question on CIIs. The EPC provides the same exclusions from patentability in Article 52(2)(c) EPC, and an additional exclusion in Article 52(2)(d) EPC for the presentation of information. Article 52(3) EPC limits all above exclusions only to subject matter or activities as such. However, although not being bound to EPC case law of the EPO BoA, Swiss courts generally are inclined to follow for harmonization reasons, such that the exclusion of presentation of information as such can also be assumed to be acknowledged in Switzerland. Accordingly, a GUI type or aspect that is not considered as, in combination, an aesthetic creation, a computer program, a method for mental activity, and a presentation of information, each as such, is patentable in Switzerland.

**3. 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.

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

The introduction of a physical feature such as a display or screen in a device claim, or the illustration of content on a display in a method claim, is strongly recommended although not a statutory requirement. In case the term “GUI” is used in a claim it is recommended to define the term in the patent application as an interface of an apparatus including at least display means.

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

Mere instructions to a human mind, in order to instruct the human to behave in a particular manner, are considered not technical and therefore not patentable (BGE 95 I 579).

## Design rights

**6. Can GUIs generally be protected by design rights? If not, are any types or aspects of GUIs protectable by design rights? If so, which?**

Yes. Swiss design law allows the protection of visible forms of a two-dimensional or three-dimensional product characterized through the use of lines, contours, colors, surfaces or materials. Accordingly, Swiss legal doctrine and case law acknowledges the principal protectability of GUIs as sampling of a screen (i.e. not as graphical representation of a computer program) under the Federal Act on the Protection of Designs (DesA)<sup>1</sup>. To be protected by Swiss design law, GUIs must fulfil the requirements for protection as set forth in Article 2 DesA, i.e. it must be “new” and have an “individual character”, i.e. be inherently distinctive from existing designs in significant points. Furthermore, the design of the GUI must be more than just that which would be functionally necessary for the GUI and may be contrary to public morality or law.

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<sup>1</sup> SHK, Art. 1, para. 18.

In determining the individual character of a GUI, aspects predefined by other software (such as a computer's operating system) must be taken into consideration. Regularly, the elements of a GUI that provide the required functionality (menus, scroll bars, buttons etc.) are largely predetermined by the underlying operating system (and therefore lack novelty) and/or technically necessary<sup>2</sup>. Moreover, the design of the GUI may not be the result of the functionality of the respective GUI, i.e. constitute the only and/or most natural way of displaying content.

Finally, GUIs are regularly animated (e.g. contain moving images, transformation, transition, change of colors or other animations). Moving images do not qualify as protectable creations under Swiss design laws<sup>3</sup>. Accordingly, only screenshots of these animations can be submitted for protection (see also Q7 below).

**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? In particular:**

- a) is a GUI that temporarily appears on a screen of an electronic device considered a "design" that is protectable by design rights?

The purpose of such a GUI is to create a certain – even though only temporary – optical effect on a reproductive device. In order to be protectable, the design of such "temporary" GUI must be visibly perceptible to the user, i.e. it must remain on the screen for sufficient time to allow the user to perceive it<sup>4</sup>.

- b) is a GUI protectable by design rights independently from the design of the electronic device itself?

Yes. Most GUIs can be displayed on multiple devices and are as such individually marketable. Accordingly, a GUI is protectable by design rights independently from the design of the electronic design itself. Nevertheless, as Swiss design law allows the protection of only parts of a creation, a design of a GUI could also be registered independently from the electronic device even if inseparably associated with the latter. Finally, a GUI may also be registered in combination with the electronic design.

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

Yes. Swiss design law may grant protection for both entire GUI or individual graphical elements of GUIs, such as icons, slide buttons. If these fulfil the necessary requirements for protection under the DesA, they can qualify for individual protection. In particular, because the appearance of a GUI often constantly changes as a result of user interaction, the protection of specific design elements, which ideally remain on the screen, may provide better design protection compared to registering entire screen-shots.

- d) are movements or screen transitions in a GUI protectable by design rights?

According to Swiss design law, dynamic designs such as movements or screen transitions do not qualify as protectable creations under the DesA<sup>5</sup>. Accordingly, only screenshots of these elements can be submitted for protection. In order to qualify for protection, the respective design elements must furthermore remain on screen for a sufficient time to be visibly perceptible to the user.

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

No.

<sup>2</sup> STRAUB, Rechtlicher Schutz von Software-Entwicklungen, in: Weimann/Münch/Herren, Schweizer IP-Handbuch: Intellectual Property – Konzepte, Checklisten und Musterdokumente für die Praxis, Basel 2013, 292.

<sup>3</sup> SHK, Art. 1, para. 25; HEINRICH, Kommentar DesG, para. 1.75.

<sup>4</sup> SHK, Art. 1, para. 25.

<sup>5</sup> SHK, Art. 1, para. 25.

## Copyright

### 8. Can GUIs generally be protected by copyright? If not, are any types or aspects of GUIs protectable by copyright? If so, which?

Yes. On one hand, GUIs are protectable as literary and artistic intellectual creations with an individual character (Article 2 paragraph 1 Federal Copyright Act (CopA))<sup>6</sup>. In particular, such creations could be protected as graphical<sup>7</sup> (such as images, icons etc.; Article 2 paragraph 2 letter c CopA), visual or audio-visual<sup>8</sup> (Article 2 paragraph 2 letter g CopA) works. On the other hand, the copyright protection regime for computer programs is also applicable to GUIs<sup>9</sup> (Article 2 paragraph 3 CopA).

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

Yes. According to Article 2 paragraph 1 CopA, common works are intellectual creations with an individual character. From this point of view, a merely computer-generated GUI does not fulfil the requirements of a copyright protected work due to the lack of an intellectual creation procedure of a human being<sup>10</sup>. In comparison, computer-generated GUIs may obtain protection if the commands for the generation of GUIs are provided in the source code which is protected as part of a computer program according to Article 2 paragraph 3 CopA<sup>11</sup>.

### 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?

As already indicated in Q8, there are basically two lines of argumentation how GUIs may be protected under Swiss copyright law. (1) A GUI may be considered as a copyrighted work according to Article 2 paragraph 1 CopA if it is a literary and artistic intellectual creation with an individual character. However, this would require that each GUI is subject to a design of an author which does not seem to be the usual *modus operandi* for most GUIs. (2) Accordingly, from a technical point of view, most GUIs seem to be generated with a source code of a computer program and change their appearance depending on the interaction of the user (see also answer to Q6 regarding design). Consequently, these GUIs are integrated in computer programs which are protected according to Article 2 paragraph 3 CopA<sup>12</sup>.

### 11. Can the overall “look and feel” of GUIs be protected by copyright? If not, can individual elements included in a GUI be protected?

According to our understanding, the rather vague term “look and feel” defines the overall handling of a program including the GUIs and pointing devices such as a mouse cursor<sup>13</sup>. As long as these elements in question are part of a computer program or subject to own individual copyright protection, there are no reasons to reject copyright protection. However, “look and feel” does not include the general user experience with GUIs if it is not subject of an individual intellectual creation or part of a protected computer program.

<sup>6</sup> See also EGLI: Softwareentwicklung im Arbeitsverhältnis, ArbR 2007, 20.

<sup>7</sup> BARRELET/EGLOFF: Das neue Urheberrecht, 3rd ed., Bern 2008, URG 2 N 15; BÜHLER, Schweizerisches und internationales Urheberrecht im Internet, Fribourg 1999, 124 ff.

<sup>8</sup> However, in BGE 133 III 273 E. 3.3 “Enter the Matrix” the Swiss Federal Supreme Court left the question open, whether computer games may be also protected under certain circumstances as audio-visual works according to Article 2 paragraph 2 letter g CopA.

<sup>9</sup> BARRELET/EGLOFF, URG 2 N 19 in fine.

<sup>10</sup> HILTY, Urheberrecht, Bern 2011, 84.

<sup>11</sup> See also NEFF/ARN, Urheberrecht im EDV-Bereich, Erster Teil: Urheberrechtlicher Schutz der Software, in: v. Büren/David [Ed.], SIWR, Bd. II/2, Basel 1998, 153, 155.

<sup>12</sup> See Article 2 paragraph 3 CopA; BARRELET/EGLOFF, URG 2 N 24; NEFF/ARN, 147 f., 150 ff.

<sup>13</sup> NEFF/ARN, 148.

## Trademarks

### 12. Can GUIs generally be protected as trademarks? If not, are any types or aspects of GUIs protectable by trademarks? If so, which?

GUIs cannot generally be protected as Swiss trademarks. While the Federal Trademark Protection Act (TmPA, CC 232.11) does not limit the categories of signs that can be protected, a sign must be capable of distinguishing the goods or services of one corporation from those of other corporations in order to be protectable (Article 1 TmPA). Signs are also excluded from protection if they are in the public domain or consist of shapes that are technically necessary (Article 2 lit. a & b TmPA). Signs can only be trademarked if they can be represented graphically (Article 10 Ordinance on the TmPA<sup>14</sup>).

GUIs serve the purpose of facilitating the interaction between a user and a machine. As such, wide parts of a GUI are driven by functionality (inputting data, displaying data, selection options etc.). An ideal GUI is as simple and self-explanatory as possible. This means it will likely contain many elements that are descriptive and/or in the public domain. Furthermore, the elements which provide functionality (menus, scroll bars, buttons etc.) are often largely predetermined by the operating system running the machine and/or technically necessary. The appearance of a GUI is also constantly changing as a result of user interaction.

As a result of this functional and ever-changing nature, GUIs as a whole are unsuitable for trademark protection under the TmPA as they will rarely be noticed by customers as a mean to distinguish one software from another. Also, as all the public domain elements (letters, numerals, words or symbols) must be disclaimed, what remains will not qualify as a protectable sign under the TmPA. That being said, certain aspects of a GUI may be protectable as a trademark, such as app(lication) icons and certain animations (see next question).

### 13. If any type or aspect of GUIs are protectable as trademarks, under what conditions and to what extent are those types or aspects of GUIs protectable? For example, is a screen movement or transition in a GUI protectable as a trademark?

App(lication) icons: The icon is in general the first sign a user notices when interacting with software. Therefore, an icon is inherently suitable for distinguishing the goods or services of one corporation from those of other corporations as required by law. While the shape of the icon itself often is predetermined by the operating system (e.g. the square with round edges in Apple's iOS), the content within that frame can be chosen freely. To be protectable, an icon has to follow the same rules as any figurative mark (Article 1 and 2 TmPA), e.g. be distinguishable and not be descriptive or in public domain (e.g. an envelope for an Email-Application, see also IPI Trademark Guidelines of January 1 2017, Part 5, Sect. 4.8, 136 with respect to pictograms).

Animations: Certain special animations may be protectable as a motion trademark. Besides the standard requirements for any trademark, the application must contain a graphical representation of all animation phases (see for example CH Nr. 574633 – Animated Swisscom AG Logo). In practice, very few animations may be protectable, however. An animation is only protectable if the movement differs substantially from any trivial movement typically used in the concerned segment of goods/services (see IPI Trademark Guidelines of January 1 2017, Part 5, Sect. 4.14, 149). As most animations are determined by the functionality that triggered them (e.g. a loading bar which displays values from 0–100%, moving a GUI element from A to B etc.), only very distinguished animations can be protected.

Other visual elements: Other visual elements (such as specially shaped or decorated buttons etc.) might be protectable as well. But as mentioned above, such visual elements will have to differ substantially from what is typically used for other software to be protectable. Often, this requirement runs essentially against the simplicity/usability demands of a GUI.

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<sup>14</sup> CC 232.111.

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

No, acquired secondary meaning will not allow whole GUIs to be protected. However, it may help to obtain a certain level of protection under the Federal Unfair Competition Act (UCA<sup>15</sup>). But certain parts of a GUI that might not be eligible for trademark protection by themselves (either because they are descriptive or too trivial/in the public domain) may become protectable through acquired secondary meaning (e.g. a colour mark). However, the hurdles to prove acquired secondary meaning in Switzerland are considerable.

**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?**

Under certain circumstances, GUIs may qualify for protection under unfair competition laws, in particular the Unfair Competition Act (UCA) and, in the event the specific GUI is qualified as a commercial or manufacturing secret, even by criminal law (Article 162 of the Federal Criminal Act<sup>16</sup>).

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

Article 3 para 1 lit d UCA allows for remedies in the event a third party takes actions which could lead to confusion in the market regarding the goods, works, services or the business of the owner of a GUI, particularly if these actions are viewed as copy-cat activities or passing-off. The primary goal is to protect consumers from a misjudgement regarding the source of the goods, works or services. Protection is broader than the specific protection under a trade-mark, patent or design right and may also apply to unregistered IPR such as secret know-how contained within the programming or source code of a GUI. However, the original GUI must have obtained a certain level of individuality and distinctiveness as well as renown in the market which will be determined on a case by case basis by the courts for protection under the UCA. Simple forms, signs and basic colours will not be granted protection.

Article 5 para 1 lit c UCA sanctions the outright copying and use of a finished work product by means of technical reproductions in the event the copier does not add any additional work efforts. This could also apply to the copying of both the design and the coding of a GUI. The idea behind the norm is to generally allow copying of IPRs that are not specifically protected, but preventing a distortion in the market by granting an undue advantage.

Article 6 of the UCA prevents the use of business secrets (commercial or manufacturing secrets) which have been obtained by illegal means.

Any breach or threatened breach of the above norms may result in an interim injunction, a cease and desist action and potentially a claim for damages (Articles 9 and 10 UCA).

In addition, criminal sanctions (imprisonment for up to five years or a fine) may be imposed for an intentional breach of Article 3 and 6 of the UCA upon request of the injured party.

As a further means of protection, business secrets (commercial and manufacturing secrets) which must be kept confidential based on a legal requirement or contractual obligation are protected by Article 162 of the Swiss Penal Code. However, this protection only applies if the secret is used on behalf of the perpetrator or a third party and only if the injured party requests prosecution. The sanction is imprisonment of up to three years or a fine.

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<sup>15</sup> CC 241.

<sup>16</sup> CC 311.

## 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?

Yes. Swiss law provides for a broad combination of IP right protection related to GUIs, including design, trademark, copyright, unfair competition, penal sanctions and – partially – patent law. The Group's position is that the current set of regulations are sufficient to provide sufficient IP rights protection for GUIs.

### 18. If no, how is your law deficient?

See answer to question 17) above.

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

Yes. See answer to question 17 above.

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

See answer to question 17 above.

### 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)?

The Group does not see any need to amend the current regulatory situation to provide better IP protections for GUIs.

## 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.

## Patents

### 23. Should GUIs generally be capable of protection by patents (1)? If not, should at least some types or aspects of GUIs be protectable by patents (2)? If so, which (3)? Please explain your reasons.

#### Sub-Question 1:

Assuming that the general protection for GUIs is meant to also include patent protection for the pure graphical representation and layout of icons and other graphical elements, the answer is no in order to properly distinguish from other IP rights.

#### Sub-Question 2 and 3:

Yes. GUIs should be protectable by a patent as long as the aspect to be protected is of technical character.

- 24. Under what conditions, and to what extent, should GUIs fall within the scope of patentable subject matter (1)? For example, should involvement of user's mental activities in a GUI process affect the patentability of the GUI (2)? If so, to what extent (3)? Please explain your reasons.**

**Sub-Question 1:**

In view of technical character being required for patent protection, we believe that the present statutory framework is sufficient to adequately protect relevant aspects or portions of GUIs by patent, insofar as protection is sought for a technical concept rather than for pure graphical representations or for the mere presentation of information.

However, it seems that there is no consistent approach even in the case law of the Boards of Appeal of the European Patent Office (BoA) as to when to admit technical character to a GUI aspect claimed in a patent application. While some BoA decisions appreciate technical effects such as "looking for a more intuitive GUI to facilitate [...] dairy farm system control whilst reducing mistakes during the user's communication with the machine" (T 1715/11, 3.6), other decisions take a more rigid approach and shift a technical effect claimed by the Applicant to the users comprehension: "[...] this reduction in use of resources would be caused by the way the brain of the user perceives and processes the visual information given by a particular way of presenting information." (T1741/08, 2.1.6). And the 2013 edition of the EPO Guidelines stated that "the technical effect [of a graphical user interface] achieved might be a more efficient man-machine interface", while the more recent 2016 edition of the EPO Guidelines do no longer include this statement, but instead claim in G.II.3.7.1 that "features concerning the graphic design of user interfaces do not have a technical effect, because their design is not based on technical considerations, but on general intellectual considerations as to which design is particularly appealing to a user", while at the same time admit that the technical effect may be found in technical information concerned by these features.

The group voted for a more liberal approach, in combination with clear and consistent guidelines.

**Sub-Question 2 and 3:**

As indicated above, mere instructions to a human mind, in order to instruct the human to behave in a particular manner, are considered not technical and therefore not patentable (BGE 95 I 579).

However, insofar as mental activities are addressed as technical considerations in the reasoning pro technical character, such activities should be acknowledged.

- 25. Should a physical feature be required in a claim as a pre-requisite for patentability of GUIs? Please explain your reasons.**

No, as long as the technical character can otherwise be met, for example, by means of sufficient technical considerations.

- 26. What claim formats should be available for protecting GUIs?**

All existing claim formats, i.e. device, method, use, computer program product claims.

**Design rights**

- 27. Should GUIs generally be capable of protection by design rights? If not, should at least some types or aspects of GUIs be protectable by design rights? If so, which? Please explain your reasons.**

Yes. GUIs form an essential part of the interaction of the human user with electronic devices and their design has become an important commercial factor both with regard to marketing and user experience. Accordingly, substantial efforts are being made to create GUIs which requires sufficient protection of the created design elements.

**28. Under what conditions, and to what extent, should GUIs be protectable by design rights? For example, should screen movements or transitions in a GUI be protectable by design rights? Please explain your reasons.**

The design of GUIs with respect to design laws, the current legal framework in Switzerland seems to be sufficient for the protection of GUIs. Screen movements or transitions may be registerable as individual screen-shots to the extent the individual screen designs are visually perceptible to a user (i.e. remain on screen for a sufficient duration of time).

**29. Should a GUI be protectable by design rights independently from the design of the electronic device itself? Please explain your reasons.**

Yes. The GUI regularly does not form part of the screen (and thus the device).

### Copyright

**30. Should GUIs generally be capable of protection by copyright? If not, should at least some types or aspects of GUIs be protectable by copyright? If so, which? Please explain your reasons.**

Yes, there are no reasons to the contrary.

**31. Should the fact that GUIs shown on screens are computer-generated affect the eligibility of GUIs for copyright protection? Please explain your reasons.**

Yes, as far as common works are affected which require that these are literary and artistic intellectual creations with individual character (see Q9). These kinds of creations require an intellectual creation procedure provided by a human being. Accordingly, computer-generated GUIs should only enjoy protection if the creation procedure is part of the source code of a computer program which is subject to own copyright protection.

**32. Under what conditions, and to what extent, should GUIs be protectable by copyright? For example, should the overall “look and feel” of a GUI be protectable by copyright? Please explain your reasons.**

With respect to copyrights, the current legal framework in Switzerland seems to be sufficient for the protection of GUIs. The overall “look and feel” should not be protectable, if this rather vague term includes more than the protection of GUIs and pointing devices (see Q11).

### Trademarks

**33. Should GUIs generally be capable of protection as trademarks? If not, should at least some types or aspects of GUIs be protectable as trademarks? If so, which? Please explain your reasons.**

In general: No. Other IP rights (copyrights, patents) already offer protection for various elements and aspects of GUIs. In addition, the Unfair Competition Act provides software creators with specific legal tools against systematic imitation of design and features by competitors. It is not the purpose of Swiss trademark law to provide protection for functional and changing elements such as GUIs.

Where an element of a GUI (icon, certain animations) has the power to distinguish one software programme from another, a protection is already possible under current law.

**34. Under what conditions, and to what extent, should GUIs be protectable as trademarks? For example:**

a) should screen movements or transitions in a GUI be protectable as trademarks?

Yes, but only in limited cases, where a specialised animation differs significantly from any trivial movement typically used in software. Trademark protection should not allow software creators to monopolize aspects of GUIs (and software in general) which are necessary to provide simple and self-explanatory GUIs.

b) should a GUI be required to acquire secondary meaning through use, in order to be protected as a trademark?

Yes, but only in limited cases. Where it has been proven that certain aspects of a GUI which were not protectable have become distinctive for a certain software or a certain software creator, limited trademark protection should be granted. In order to avoid undesirable monopolization of generic elements of software design, the requirements should be set high.

### Other forms of protection

#### **35. Should there be other forms of protection for GUIs? If so, what forms of protection should there be? Please explain your reasons.**

The Swiss group does not consider it necessary or adequate to introduce additional forms of protection. However, the existing intellectual property rights may need to be adapted where they do not enable and provide adequate protection for GUIs.

#### **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?**

The Swiss group is against introducing a sui generis right for protection of GUIs. The existing intellectual property rights should provide adequate protection, and where this is not the case, it is preferable to amend the existing rights instead of introducing yet another IP right.

#### **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?**

There should not be a sui generis right.

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

The Swiss group does not have comments on any additional issues concerning protection of GUIs.

### Summary

*Swiss law provides for a broad combination of IP right protection related to GUIs, including design, trademark, copyright, unfair competition, penal sanctions and – partially – patent law.*

*Regarding Design Law, GUIs are primarily protected by the Federal Act on the Protection of Designs (DesA). In order to enjoy protection by Swiss Design Law, GUIs must fulfil the requirements for protection according to Article 2 DesA, i.e. they must be “new” and have an “individual character”, i.e. be inherently distinctive from existing designs in significant ways. Furthermore, the design of the GUI must be more than just that which would be functionally necessary for the GUI and may not be contrary to public morality or law. However, protection under the DesA is only guaranteed for non-animated GUIs or screenshots of animated ones, as moving images do not qualify as protectable creations under Swiss design laws.*

*Also, Swiss Copyright Law (esp. the Federal Copyright Act – CopA) protects GUIs as they are considered to be literary and artistic intellectual creations with an individual character, both of which are requirements for protection under the CopA.*

*Under trademark law, GUIs are generally not protected as they are not suitable to distinguish goods or services of two or more companies or enterprises, which in turn is a primary requirement for protection under the Federal Trademark Protection Act (TmPA). However, some GUI such as app(application) icons, certain animations or other visual elements might qualify for protection under the TmPA.*

*While Swiss Patent Law excludes GUIs from patent protection, certain technical or interaction aspects of GUIs – such as touchscreen sensing technology – might enjoy patent protection nonetheless.*

*Finally, GUIs are protected by the Unfair Competition Act (UCA), which allows for remedies in the event a third party takes actions that could lead to confusion in the market regarding the goods, works, services or the business of the owner of a GUI, particularly if these actions are viewed as copy-cat activities or passing-off. Additionally, if they are considered to constitute a commercial or manufacturing secret, they even are protected by criminal law.*

*In the light of the above, it is the Group's view that the current set of regulations is sufficient to provide sufficient IP rights protection for GUIs in Switzerland.*

## **Zusammenfassung**

*In der Schweiz werden grafische Benutzeroberflächen (GUIs – Graphical User Interfaces) durch verschiedene Rechtsbereiche geschützt, insb. durch das Design-, Marken-, Urheber- und Wettbewerbsrecht sowie – teilweise – durch das Patent- und Strafrecht.*

*Im Bereich Designrecht sind GUIs primär durch das Designgesetz (DesG) geschützt. Damit dieser Schutz gewährt wird, müssen GUIs die Voraussetzungen von Art. 2 DesG erfüllen, d.h. sie müssen «neu» sein und einen «individuellen Charakter» aufweisen und sich somit inhärent von bestehenden Designs unterscheiden. Zudem muss das Design des GUI mehr als lediglich funktionell bedingt sein und darf nicht gegen die guten Sitten oder das bestehende Gesetz verstossen. Jedoch wird der Designschutz lediglich nicht-animierten bzw. Abbildern von animierten GUIs gewährt, da bewegte Bilder dadurch nicht geschützt werden.*

*Auch das Schweizer Urheberrecht (insb. das Urheberrechtsgesetz URG) schützt GUIs, da diese als Werk der Literatur und Kunst qualifiziert werden und einen individuellen Charakter haben – beides Schutzvoraussetzungen gemäss URG.*

*Markenrechtlich sind GUIs in der Schweiz grundsätzlich nicht geschützt, da sie nicht dazu geeignet sind, Waren oder Dienstleistungen eines Unternehmens von denjenigen eines anderen zu unterscheiden, was eine Schutzvoraussetzung gemäss Markenschutzgesetz (MSchG) darstellen würde. Jedoch können unter Umständen gewisse GUIs wie App-Icons, gewisse Animationen oder andere visuelle Elemente durch das MSchG geschützt sein.*

*Das Schweizer Patentrecht gewährt GUIs keinen Schutz. Lediglich gewisse technische Aspekte oder Interaktionselemente wie z.B. die Touchscreen-Technologie könnten möglicherweise trotzdem patentrechtlich geschützt sein.*

*Schliesslich sind GUIs im Bereich Wettbewerbsrecht durch das Bundesgesetz über den unlauteren Wettbewerb (UWG) geschützt, welches Rechtsbehelfe zulässt, falls ein Dritter Massnahmen ergreift, die zu Verwirrung auf dem Markt in Bezug auf Waren, Werke, Dienstleistungen oder das Geschäft des Eigentümers einer GUI führen können, insbesondere wenn diese Handlungen als Nachahmungshandlungen oder Weitergabe angesehen werden. Darüber hinaus sind GUIs auch strafrechtlich geschützt, sofern sie als Fabrikations- und/oder Geschäftsgeheimnis qualifiziert werden können.*

## **Résumé**

*Le droit suisse prévoit plusieurs différentes combinaisons de protection contre la propriété intellectuelle liée aux interfaces graphiques (GUI), y compris la conception, la marque, le droit d'auteur, la concurrence déloyale, les sanctions pénales et – partiellement – le droit des brevets.*

*En ce qui concerne le droit du design, les GUI sont principalement protégées par la loi fédérale sur la protection des dessins (LDes). Afin de bénéficier de la protection de la LDes, les interfaces graphiques doivent satisfaire aux exigences de protection conformément à l'art. 2 LDes, c'est-à-dire qu'elles doivent être «nouvelles» et avoir un « caractère individuel», c'est-à-dire être intrinsèquement distinctes des conceptions existantes à plusieurs niveaux. En outre, la conception de l'interface graphique doit être plus que celle qui serait fonctionnellement nécessaire pour l'interface graphique et ne pourrait pas contrarier la moralité publique ou la loi. Cependant, la protection sous LDes est uniquement garantie pour les GUI non-animées ou les captures d'écran d'animées, car les images en mouvement ne qualifient pas comme créations protégées selon les lois de dessin suisses.*

*En outre, la loi suisse sur le droit d'auteur (notamment la loi fédérale sur le droit d'auteur et des droits voisins – LDA) protège les interfaces graphiques car elles sont considérées comme des créations intellectuelles littéraires et artistiques avec un caractère individuel, qui sont toutes deux exigences de protection du LDA.*

*En vertu de la loi sur les marques de commerce, les interfaces graphiques ne sont généralement pas protégées car elles ne conviennent pas pour distinguer les biens ou les services de deux ou plusieurs entreprises, ce qui constitue une exigence principale de protection en vertu de la Loi fédérale sur la protection des marques et des indications de provenance (LPM). Cependant, certaines GUI telles que les icônes d'application, certaines animations ou autres éléments visuels peuvent être protégés sous le LPM.*

*Alors que la loi suisse sur les brevets exclut les GUI de la protection des brevets d'invention, certains aspects techniques ou d'interaction des interfaces graphiques, tel que la technologie de détection tactile, pourraient néanmoins bénéficier d'une telle protection.*

*Enfin, les GUI sont protégées par la Loi fédérale contre la concurrence déloyale (LCD), qui permet des recours dans le cas où un tiers prend des mesures qui pourraient conduire à confusion dans le marché, en ce qui concerne les produits, les travaux, les services ou les entreprises du propriétaire d'une GUI, particulièrement si ces actions sont considérées comme des activités de copie ou de passage. De plus, s'ils sont considérés comme des secrets commerciaux ou industriels, ils sont protégés par le droit pénal.*

*À la lumière de ce qui précède, le groupe estime que le règlement actuel est suffisant pour assurer une protection suffisante des droits de propriété intellectuelle pour les interfaces graphiques en Suisse.*