HOW TO PROTECT GRAPHICAL USER INTERFACES.-

1. TECHNOLOGY AND AESTHETICS

In the 90s technological companies began to worry about the **visual elegance in software and devices to make them more appealing and user friendly for consumers** with no previous technological knowledge. Nowadays we have nice designed devices which have become a trend, sure, each new model improves the last one with new options and utilities but also its looks are important for the consumers who can visually recognize if other people's devices are or not the last ones.

Focusing on the screen, the design of graphical user interfaces (GUI) are an essential part of Smartphones, tablets and PC Software, it can make the difference and strongly contribute to gain market share. Therefore, **graphical interfaces have become a valuable asset worth to be protected.**

2. HOW CAN GRAPHICAL INTERFACES BE PROTECTED?

Graphical users interfaces (GUIs) are computer programs or part of them which provide for the interconnection and interaction between elements of software and hardware. **But they have a visual elements such as colors and dynamic elements (buttons, menus,…),** which are the elements that users "look and feel" when interacting with the devices and that are not related to functional properties.

2.1. GUIs as computer programs

Programs for computers are not regarded as inventions by **European legislation** (European Patent Convention and European national regulations). Nevertheless, since late 90s patents of **computer programs are granted if the claimed subject-matter has a technical character (computer-implemented invention)** on the basis that only it is excluded patentability of computer programs as such (EPO Decision of the Technical

Board of Appeal 935/97 and 1173/97). Therefore, a graphical user interface as a computer program can be patented if when running on a computer or loaded into a computer, brings about or is capable of bringing about a technical effect which goes beyond the "normal" physical interactions between software and hardware. And, of course, if, as any other patentable invention, is new (e.g. touchscreen is not new anymore), involve an inventive step and is susceptible of industrial application.

Computer programs are also, without excluding their patentability, protected by copyright. Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC) establishes the regulations according to which EU Member States shall protect computer programs as literary works. The object of this specific protection is just the **textual element** of the computer program (the source and object code), **graphical user interface** ("look and feel") and **functionality** (what the user expects to get from the computer program) are not included. Notwithstanding that, graphical user interface can be an independent subject-matter of copyright if it fulfills the requirements of general intellectual works (ECJ Judgment December 22th 2010, BSA v. Czech Republic, Case C-393/09). Regarding functionality, actually it is pending resolution a question referred for a preliminary ruling to ECJ by the High Court of Justice, Chancery Division, United Kingdom (**SAS Institute Inc v. World Programming Ltd, Case C-406/10**)[1]

2.2. Outward appearance of GUIs

The "look and feel" of GUIs, i.e. the visual and dynamic elements, can be subject-matter of copyright, industrial property and unfair competition regulations, notwithstanding some limitations exposed hereunder.

[1] According to the Opinion of the Advocate-General, functionality cannot be subject-matter of copyright as such but it can be the means to perform it.

As referred above, **graphical user interface can be subject-matter of copyright as a work independent of the computer program itself (textual element**), which has its own protection under the particular regulations set up by Council Directive 91/250/EEC. Obviously, if the graphical user interface fulfills the requirements of general intellectual works. First of all, it must be its author's own creation and therefore original. Regarding this prerequisite, the European Court of Justice has fixed some guidelines in its Judgment of December 22th 2010 (**BSA v. Czech Republic, Case C-393/09**): i) it must be taken into account "*the specific arrangement or configuration of all the components which form part of the graphic user interface in order to determine which meet the criterion of originality"*, and ii) "*that criterion cannot be met by components of the graphic user interface which are differentiated only by their technical function"*. Depending on the components of the graphical user interface, regulations of plastic works or of audiovisual works would apply to it.

The outward appearance of a GUI could also be subject-matter of a design if it is new, has individual character and constitutes the design of an industrial item (in that case, the screen). To evaluate the novelty and individual character it should be taken into account the degree of freedom of the designer in developing his design in relation to the specific product (the degree of standardization imposed in the particular sector). Nevertheless, regarding GUIs **protection by design has two important limitations**. Firstly, a design only covers the appearance of a product; it cannot protect the function of a product in order to avoid the creation of a captive market, so that a design which covers functionality is invalid (case Philips v. Remington). Secondly, a design only protects static elements, even though lately in some countries this requirement is becoming less strict, for instance, **in Japan, where since august 2011 dynamic designs can be registered if it does not change its functionality from one display to another.**

The outward appearance of a GUI can also be subject-matter of a trademark if identifies the origin of goods and services of one undertaking to differentiate them from those of its competitors **(Apple Inc**. has already registered a Community Trademark with the look of the **iPhone and iPad**, Community Trademark No 009265588). In

relation to the distinctiveness of the look of GUIs, although referred to a three-dimensional shape, the ECJ has considered in its Judgment of June 18th 2002 (**Case C-299/99, Philips v. Remington**) that, where a trader has been the only supplier of particular goods to the market, extensive use of a sign which consists of the shape of those goods may be sufficient to give the sign a distinctive character in circumstances where, as a result of that use, a substantial proportion of the relevant class of persons associates that shape with that trader and no other undertaking or believes that goods of that shape come from that trader. But trademark only protect statics features.

Finally, the outward appearance of GUIs could be protected by unfair competition rules, as long as a competitor imitates its general look of a product and/or other features of its commercialization, in a way similar to those considered illegals by Courts of the USA according to **American trade dress regulations** (e.g. outward appearance of game consoles or of a Tex-Mex restaurants chain). In fact, Apple Inc has sued on April 2011 Samsung Electronics Co. in USA Courts on the basis of illegal imitation of the trade dress of iPhone, iPod touch and iPad GUIs. As regards protection of GUIs by unfair competition and similar regulations, actualizations of the outward appearance and the functional requirements could make difficult to consolidate the association of a particular look and feel to a particular trader.

3. Conclusion

The visual and dynamic elements of a GUI can be synonymous with the branding and image of a company and can become an asset with increasing economic value because of new developments in that field (Smartphones, Tablets, …). As a result, the less possible technological differences between products the more importance of design of **GUIs that could become the unique selling position of a product**.

There is no doubt that design of GUIs can be subject-matter of copyright but traders are seeking for more practical and commercial protection which might be afforded by industrial property rights and unfair competition regulations.

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