Protecting a Company's Graphical User Interface

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The "look and feel" of a software program's graphical user interface, or "GUI" on Internet sites " is the program's front door to the world. Therefore, the owners of these works have a great incentive to protect them from being copied or imitated. Current copyright law, however, may not specifically protect the look and feel of a company's GUI. With respect to software, copyright law may protect individual elements like icons or configurations of those elements, but may not be adequate to protect the dynamic whole of the interface. Companies, therefore have sought alternatives to copyright law to protect the value of these items/works, such as trade dress and design patent protection. To the extent that trade dress is not an effective alternative, design patents may be a valuable means of protecting a company's GUI.

Copyright Protection

Part of the uncertainty over the level of copyright protection afforded to GUIs stems from the varying legal analyses applied by courts over the years. For example, some courts have considered GUIs to be compilations, while other courts have dissected the elements of a GUI in order to determine if the individual elements warrant copyright protection. Still other courts have determined that dissection is inappropriate and the work at issue should be considered as a whole.

In the landmark case of *Lotus Development Corp. v. Borland Int'l Inc.* that dealt with a portion of a GUI, the court held that a menu command hierarchy was a method of operation and could not be copyrighted. The court looked at the menu command hierarchy as a whole and did not abstract the menu to its individual elements.

In perhaps the best known case on the issue of copyright protection for GUIs, *Apple Computer, Inc. v. Microsoft Corp.*, the court dissected the Apple GUI into individual elements. The court identified those elements that were properly licensed or were unprotectable. The court then considered the scope of protection for the remaining elements in order to determine whether the work at issue was entitled to "thin" or "broad" protection. The court held that when the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is "virtual identity".

Recently, in *ILOG Inc. v. Bell Logic LLC*, a district court determined that the addition of certain elements to a computer program was not expression protected by copyright. The court considered the individual elements to be ideas, and in the aggregate, methods of operation. Any expressions of ideas utilized in developing the software were embodied in the operation of the program and were therefore unprotectable. This decision is consistent with *Lotus v. Borland* and with *Apple v. Microsoft*.

Trade Dress Protection

In addition to copyright law, some companies have attempted to obtain protection of GUIs by means of trade dress law. Trade dress encompasses the appearance of the GUI, including the "look and feel". The GUI will only be protected if it is distinctive and nonfunctional. In most federal circuits, a trade dress claim requires a showing that: (i) the claimed trade dress is inherently distinctive or has acquired a secondary meaning; (ii) the claimed trade dress is nonfunctional; and (iii) customer confusion is likely to occur because of the similarity of the plaintiff's and the defendant's trade dress. Recent Supreme Court tests of trade dress infringement may make it more difficult to establish that a product is "nonfunctional" or "distinctive" (see, e.g. *Traffix Devices v. Marketing Displays* and *WalMart v. Samara*). Furthermore, GUIs can be difficult to protect under trade dress law because (i) interfaces might be perceived as operational and functional, and (ii) the fluidity of the Internet implies that a site is less likely to acquire a "secondary meaning" through "look and feel" than a bricks-and-mortar place of business.

Due to the requirement that the trade dress must be nonfunctional and must either be

distinctive or have acquired secondary meaning, trade dress protection may not be available for GUIs when copyright protection cannot be applied. Features that are visually unique and ornamental may receive trade dress protection, but such features would also be protected under copyright law. However, if copyright protection is denied due to lack of originality, trade dress protection may nevertheless be available.

Design Patent Protection

While copyright law protects original works contained in tangible forms of expression, it does not protect a company from others who independently generate the same form of expression. Thus, if a company seeks to protect more than its original expression, it may seek to obtain design patent protection. Recent developments in design patent law were the subject of our April 12, 2002 I.P. Law Alert. Design patents can cover both computer generated icons and type fonts. A patentable design can often be protected by copyright, and design patent drawings may also contain a copyright notice.

According to the guidelines established by the U.S. Patent and Trademark Office, computer generated icons embodied in articles of manufacture are eligible for design patent protection. The drawing of the design patent should depict the icon, embodied in an article of manufacture such as a computer screen, monitor or other display panel. Type fonts may be granted a design patent without an express statement in the application that such design is part of an article of manufacture. Although a typeface design itself may not be copyrightable, a company may hold copyright registrations for computer software used to generate the fonts and may also hold design patents on the resulting fonts.

Summary

Current copyright law may not adequately protect a company's GUI, since many elements may be considered unprotectable and therefore the GUI may be afforded a narrow scope of protection. For additional protection, trade dress may be utilized if the GUI is inherently distinctive and nonfunctional. In addition, design patents may be sought to protect the type fonts and the icon designs which are part of an article of manufacture.

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