

# GUIs: A Hotbed for Design Patents

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In today's fast-paced, global economy, innovative businesses — established and startups — rely heavily on internet storefronts for their virtual survival when selling goods and services. First and repeated impressions via graphical user interfaces (GUIs) are critical when creating the right user experience to attract and keep consumer interest and consumption. As such, GUIs have become invaluable intellectual property (IP) assets, often representing a company's brand identity and goodwill. In this article, we will explore how design patents can uniquely protect GUI assets, making them an important component of any robust IP strategy.

## What Are GUIs & Why They Matter

GUIs are visual ways users interact with electronic devices (e.g., computer, websites, smart device apps, etc.) and include icons/icon sets, fonts, layout, symbols, framing/placement, logos, colors, patterning, animation/movement, among others. The "look and feel" is often both functional and aesthetic, and helps subconsciously nudge or directly guide user behavior and customer engagement by providing eye-pleasing visual experiences that contribute to the overall allure and differentiation of products and services. Without distinct GUIs, companies, like those using generic websites or online marketplaces, inevitably miss the opportunity to promote their brand and even risk devaluing their business in the eyes of consumers.

Further, by the virtue of modern commerce, every GUI is international in nature, which means a menagerie of laws give different and contrasting scopes of protection for any GUI application. One way to manage internationally-desired protections is through the Hague System for the International Registration of Industrial Design. Under the Hague System, one may register up to 100 designs in over 68 territories by filing a single international application, saving time and expense, while also creating notice in the marketplace.

## The Importance of Design Patent Protection for GUIs

Design patents offer unique protection against GUI counterfeits and other third parties whose mimicking designs may cause a likelihood of confusion. They can also increase the value of an IP portfolio and attract investors. To obtain design patent protection, the GUI's ornamental design features must be new and nonobvious, and they can even entwine with functional features so long as the design "is not dictated solely by its function."<sup>[1]</sup>

The breadth of GUI protection available through design patents is impressive, especially if you consider the context of how GUIs are implemented. For example, a well-crafted design patent can cover a GUI theme presented in multiple screen formats. Having an individual application to obtain the design rights for every embodiment of a GUI on any given screen (websites, phones, tablets — including modifications for translation) while possibly ideal, can become financially burdensome. Further, in some countries, design patents can also protect animations relating to a logo or screen that are distinctive to the business or to the function of the GUI.

## Design Patents Vs Trademarks & Copyrights

A strong IP portfolio may include a variety of patents, trademarks, trade dress, and copyrights. For GUIs, design patents offer unique advantages when compared with trademark and copyright protection. Unlike trademarks or trade dress, GUI design patents can include some degree functionality, as long as the ornamental designs are new and nonobvious. Also, trademark protection requires GUI design elements to function as a trademark at the time of sale for goods or in association with services if used or displayed when performing or advertising those services.

In contrast with copyright law, design patent laws do not have exceptions, such as parallel independent creation, that reduce the ability to exclude use by others. Nor does a slightly different expression prevent the infringement of a design patent, which asks whether an ordinary observer sees a substantial similarity between an accused design and a patented design (in light of the prior art) to determine infringement.<sup>[2]</sup> Moreover, as technology advances, unanswered questions arise as to whether a copyright adequately covers new GUI expressions, such as 3D objects rendered in virtual reality or augmented reality settings. In this context, a design patent correlating to the rendering of the claimed design likely provides for a more understandable scope of protection to a judge or jury.

It should be appreciated, however, that design patents are inherently bound to the illustrated design, and thus may be construed more narrowly than the potentially broader substantive scope of trademark or copyright protection. Still, with the precision provided by examined or registered design rights, a rights holder can obtain discrete protection over critical elements of a GUI, including cases where those elements might be rearranged or transposed by an infringer trying to sidestep trademark or copyright barriers.

## Conclusion

For any company that electronically interfaces to connect with its audience, safeguarding its GUIs — the visual face of a company — is crucial to succeed in today's business world. By including design patents as part of their IP strategy, design rights owners can create and maintain enforceable, meaningful IP portfolios that become valuable offensive and defensive business assets.

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<sup>[1]</sup> See e.g., *Lee v Dayton-Hudson Corp.*, 838 F.2d 1186 (Fed. Cir. 1988).

<sup>[2]</sup> See, *Egyptian Goddess Inc. v. Swisa Inc.*, 543 F.3d 665 (Fed. Cir. 2008).