Date	August 31, 2006	Court	Intellectual Property High Court, First Division
Case number	2005 (Ne) 10070		
– A case in which the appellant, who claims to hold copyright (adaptation right) for the software programs installed in a vibration controller, sued the appellee to seek an injunction against the distribution, etc. of the appellee's products and payment of damages; the court ruled that, despite the presumption under Article 61, paragraph (2) of the Copyright Act, the copyright including the adaptation right can be found to have been transferred to the appellee based on the contracts between the appellant and the appellee.			

References: Article 27 and Article 61, paragraph (2) of the Copyright Act

Summary of the Judgment

The appellant alleges that the appellee's act of selling vibration control systems (the "appellee's products") constitutes infringement of the appellant's copyright (adaptation right) for the software programs installed in the vibration controller (the "Programs"). Based on this allegation, the appellant filed this action to seek an injunction against the distribution, etc. of the appellee's products and payment of damages. The court of prior instance dismissed the appellant's claims.

The major issues of the case include: whether or not the Programs are copyrightable; ownership of the adaptation right for the Programs; whether or not the adaptation right for the Programs is retained by the appellant; and whether or not the adaptation right for the Programs has been returned due to the cancellation of the contracts between the appellant and the appellee.

In this judgment, the court found the Programs to be copyrightable and dismissed the appellant's appeal, holding as follows.

(1) The basic contracts and individual contract concluded between the appellant and the appellee are interpreted as providing that even if a program is developed by the appellant through entrustment from the appellee, the appellant shall automatically transfer copyright for the program to the appellee. Consequently, based on these contracts, copyrights for the Programs were automatically transferred from the appellant to the appellee and vested in the appellee.

(2) None of these contracts makes a particular reference to the adaptation right for the Programs as the object of transfer. In that case, said adaptation right is presumed to have been retained by the appellant under Article 61, paragraph (2) of the Copyright Act. However, in light of the negotiation process and the provisions of these contracts, the appellant and the appellee are deemed to have reached an agreement to vest the

adaptation right for the Programs in the appellee.
(3) Even if any grounds for cancellation exist and the appellant effectively manifested the intention to cancel, the cancellation of the contracts by the appellant would not be retroactively effective but would become effective only into the future. Accordingly, the cancellation does not result in nullifying the legal relationship that has already been formed, in which case the right that has been vested in the appellee under the contracts would not be returned to the appellant.

Judgment rendered on August 31,2006

2005 (Ne) 10070, Appeal Case of Seeking Injunction against Copyright Infringement (Court of prior instance: Tokyo District Court 2004 (Wa) 16747) (Date of conclusion of oral argument: May 11, 2006)

Judgment

Appellant: Aisel Kabushiki Kaisha

Appellee: IMV Corporation

Main text

This appeal shall be dismissed.

The appellant shall bear the cost of the appeal.

Facts and reasons

No. 1 Judicial decision sought by the parties

1. Appellant

(1) The judgment in prior instance shall be revoked.

(2) The appellee shall neither reproduce nor distribute vibration control systems, K2 and K2/Sprint, nor advertise nor display them for their distribution.

(3) The appellee shall pay to the appellant 50,000,000 yen and the amount of money accrued thereon at the rate of 6% per annum for the period from August 19, 2004 to the date of completion of the payment.

(4) The appellee shall bear the court costs for the first and second instances.

2. Appellee

The same as the main text.

No. 2 Outline of the case

The appellant alleges that the appellee's act of selling vibration control systems, K2 and K2/Sprint (hereinafter referred to as the "Appellee's Products"), constitutes infringement of the appellant's adaptation rights for the software programs installed in vibration controller F3 (the "Programs"). Based on this allegation, the appellant filed this action against the appellee to seek an injunction against the distribution, etc. of the Appellee's Products under Article 112, paragraph (1) of the Copyright Act as well as the payment of compensation for damage in tort and delay damages accrued thereon at the rate of 6% per annum for the period from the day following the day of service of a complaint.

1. Facts on which the decision is premised (the parties agree on the parts other than the parts for which evidence is cited)

(1) Parties

A. The appellant is a stock company intended for the design, manufacturing, sale, and sale by import of communication devices, electronic measurement devices, and their components as well as the design, manufacturing, sale, and sale by import, etc. of hardware and software for computers and peripheral terminals (devices) for computers.

B. The appellee is a stock company intended for the manufacturing, sale, leasing, and export and import, etc. of electronic, electric, and communication machinery and apparatus as well as components and accessories.

(2) Background to the development of vibration controllers

A. Around 1986, the appellee entrusted the appellant with the development of vibration controller SX-2000. After that, the appellee entrusted the appellant with the development of a software program for a vibration controller and came to sell vibration controllers in which a reproduction of the developed software is installed.

B. G1/G2 Contract

On January 5, 1990, the appellant and the appellee concluded a contract (hereinafter referred to as the "G1/G2 Contract") which provides that the appellant's employees shall be temporarily assigned to the appellee to develop vibration control systems planned by the appellee, whose development code names are "G1" and "G2," respectively. (Exhibit Ko 4)

C. Basic contracts

(A) On February 3, 1992, the appellant and the appellee concluded a contract (hereinafter referred to as the "1992 Basic Contract") which provides for the basic matters that should be commonly applied to contracts for the appellee's entrustment of operations, such as the design, creation, etc. of a software program, to the appellant.

The 1992 Basic Contract included the provisions stated in Attachment 1 (Extract from the Document of the 1992 Basic Contract). (Exhibit Ko 1)

(B) Around April 1994, the appellant and the appellee concluded a contract (hereinafter referred to as the "1994 Basic Contract") which provides for the basic matters that should be commonly applied to contracts for the appellee's entrustment of operations, such as the design, creation, etc. of a software program, to the appellant.

The 1994 Basic Contract included the provisions stated in Attachment 2 (Extract from the Document of the 1994 Basic Contract). (Exhibit Ko 2)

(C) If an individual contract which provides for the specific matters concerning the development of an individual product is concluded between the appellant and the appellee, both the individual contract and the aforementioned basic contracts are applicable under the aforementioned basic contracts.

D. Development under the G1/G2 Contract

Vibration controllers RC-1110, RC-1120, and SC-1000 (all of them fall under the

development code name "G1") were developed under the G1/G2 Contract. One of these controllers, RC-1120, is a digital vibration controller, and, moreover, an integrated and single-axis general-purpose vibration controller, and RANDOM, SINE, SHOCK, and MEASURE were set as application software programs therefor.

This was followed by the development of general-purpose vibration controller F2 (which falls under the development code name "G2"; hereinafter referred to as "F2"), which was equipped with a computer-based single- and multi-axis-compliant multi-degree of freedom vibration control and analysis system, on which MS-Windows 3.1 or Windows 95 can run. (Exhibits Ko 8, 33, and 34)

(3) F3 Contract

A. Conclusion of the F3 Contract

Around August 1997, the appellant and the appellee concluded a contract (hereinafter referred to as the "F3 Contract") which provides that the appellant shall participate in the development of a product, which is a vibration control and measurement system planned by the appellee and whose development code name is "F3" (hereinafter referred to as "F3").

The content of the F3 Contract was as stated in Attachment 3 (Provisions of the F3 Contract). (Exhibit Ko 3)

B. Outline of F3

The development of vibration controller F3 was carried out under the F3 Contract until around December 2000.

F3 was developed based on the idea that a vibration received by an industrial product during transport or use can be simulated by random, shock, or sine waves, as a low-cost and high-performance vibration controller that supports all of the random, shock, or sine wave vibration tests, as a Windows 2000-compliant model made by further evolving the computer base of F2, and as one that is compatible with networks and is also compatible with wide-ranging systems, including the range from small-scale single-axis systems to large-scale multi-axis systems, but can substantially reduce hardware costs. (Exhibit Ko 12)

(4) Development of F3 (in addition to evidence cited in each section, Exhibit Otsu 13 [including its branch numbers])

A. Start of the development

The appellee and the appellant decided procedures, etc. for the development of F3 through mutual consultation, and the appellee lent necessary equipment to the appellant. Thereby, the development of F3 was started.

First of all, until around March 1998, the two sides conducted the development of software programs for the common parts of WIN32 (various kinds of software that serve as common parts for the development of WIN32 software), the common part peculiar to F3 (software that

serves as the common part peculiar to F3 and software for software protection), and single-axis SINE of F3 application.

As the development costs for this period, the appellee paid to the appellant a total of money stated as No. 1 to No. 10 in the amount section in Attachment 6 (List of Payments), specifically, 24,150,000 yen. (Exhibit Otsu 1)

B. Second-period work

On June 30, 1998, the appellant and the appellee agreed that the development of F3 (hereinafter referred to as the "Second-Period Work") would be carried forward continuously even after said date.

A defect arose in hardware in the middle of the Second-Period Work, and the design of a F3 interface repeater substrate was additionally required.

The development concerning the Second-Period Work was completed in October 1999.

As the development costs for the Second-Period Work, the appellee paid to the appellant a total of money stated as No. 13 to No. 26 in the amount section in Attachment 6 (List of Payments), specifically, 87,960,000 yen. (Exhibits Otsu 1 to 6)

C. Development of F3/RANDOM, SOR

On November 4, 1999, the appellant made an estimate for the development of F3/RANDOM. On the 19th of the same month, the appellant and the appellee agreed to carry out the development of F3/RANDOM, SOR (SINE on RANDOM).

After that, the development was carried out, and bugs were removed. The acceptance inspection of F3/RANDOM was completed around the end of September 2000.

In addition, the development of "F3 I/O Unit Exclusively for Small-Scale Systems," which is intended for the development of hardware and software for a lower-cost alternative "F3Lite," and the development of "F3 8 ch Module," which is intended for the development of hardware for increasing F3 input channels, were carried out.

On November 30 of the same year, the appellant sent to the appellee a CD-R in which F3/SOR is stored.

As the development costs for this period, the appellee paid to the appellant a total of money stated as No. 27 to No. 41 in the amount section in Attachment 6 (List of Payments), specifically, 77,566,300 yen. (Exhibit Ko 25-1 and Exhibits Otsu 7 to 9)

D. Programs

The software programs for the operation of F3 stated in Attachment 4 (Software Programs for F3) (incidentally, the diagram of the constructive concept of these software programs is as shown in Attachment 5 [Configuration Diagram of F3]) are installed in the appellee's F3. Out of these software programs, the appellee created (4)(iv) SHOCK execution server and (5)(iii) SHOCK client stated in Attachment 4 while the appellant created all the other software

programs (hereinafter the software programs stated in Attachment 4, excluding (4)(iv) SHOCK execution server and (5)(iii) SHOCK client, are referred to as the "Programs").

As mentioned in A. to C. above, a total of the development costs which the appellee paid to the appellant in relation to the development of the Programs is 189,676,300 yen.

(5) Discontinuation of the development

On July 26, 2000, the appellee sent to the appellant "F3 Requirement Specifications for the Multipoint Version of SINE, RANDOM." On August 18 of the same year, the appellant sent to the appellee an estimate for "F3 Development of Multipoint Parallel Vibration Software," in which the development costs were stated as 61,000,000 yen in total. In response to this, the appellee gave to the appellant a reply that it would not immediately start on the development of F3 multipoint parallel vibration software. In addition, on November 8 of the same year, the appellant requested the appellee to issue an order form for F3 multipoint parallel vibration software at an early date, but the appellee did not comply with the request.

Therefore, on the 22nd of the same month, the appellant informed the appellee that it would close its Kyushu branch, where the development of software for F3 had been conducted, on the 28th of the same month and would return a set of equipment, which it had borrowed from the appellee for the development, to the appellee by the middle of December of the same year. However, on November 27 of the same year, the appellee informed the appellant that it would not accept the closure of the Kyushu branch.

The appellee also pointed out problems with F3 and requested the appellant to correct them even after December of the same year, and the appellant complied with the appellee's such requests, for example, by sending software with bugs fixed on December 18 of the same year. (Exhibit Ko 21 [including its branch numbers], Exhibits Ko 25-2 to 25-11, and Exhibit Otsu 10)

(6) Cancellation in question

With a written notice dated March 22, 2002, the appellant indicated to the appellee its intention to cancel all the contracts between the appellant and the appellee, including the 1992 Basic Contract, the 1994 Basic Contract, and the F3 Contract, on the grounds of the appellee's default, and said document was served to the appellee on the 25th of the same month (hereinafter referred to as the "Cancellation"). (Exhibit Ko 27 [including its branch numbers])

(7) Progress of actions filed in relation to F3

A. Filing of an action to seek an injunction against the reproduction and adaptation of the Programs

On October 25, 2002, the appellant filed an action (Osaka District Court; 2002 (Wa) 10871; hereinafter referred to as the "Osaka Action") against the appellee to seek an injunction against the reproduction and adaptation of the Programs (however, excluding (6)(i) and (ii) in Attachment 4; hereinafter the same applies in this section), alleging that copyrights for the

Programs returned to the appellant due to the Cancellation. The oral argument in said action was concluded on November 11, 2003. (Exhibit Ko 16)

B. Filing of an action to seek compensation for damage

On October 28, 2002, the appellant filed an action (Tokyo District Court; 2003 (Wa) 28884; incidentally, this case number was assigned after the Tokyo District Court ruled that it would transfer the action to the Osaka District Court, but said ruling was revoked through immediate appeal against the ruling, and said action came to be pending at the Tokyo District Court) against the appellee to seek compensation for damage, alleging that there was a default on the payment of manufacturing license fees, etc. for F2, etc.

Said action was closed on June 9, 2004, through establishment of a settlement in litigation with the following content: the appellee will neither manufacture nor sell F3; the appellee will pay to the appellant the settlement money of 20,000,000 yen; and the appellant will withdraw the Osaka Action after the judgment is rendered. (Exhibit Ko 17)

C. Judgment in the Osaka Action and withdrawal thereof

On June 15, 2004, the court rendered a judgment on the Osaka Action to the effect that all of the appellant's claims shall be dismissed. Incidentally, the court held as follows in the reasons for the judgment: Even if all the contracts between the appellant and the appellee are cancelled, copyrights for the Programs that belong to the appellee will not return to the appellant, and the same applies to adaptation rights for the Programs.

The appellant withdrew the Osaka Action on the 16th of the same month. (Exhibit Ko 16)

(8) Sale of the Appellee's Products

The appellee has sold the Appellee's Products, specifically, vibration control system K2 (hereinafter referred to as "K2") and K2/Sprint since around January 2004.

2. Issues

(1) Whether or not the Programs are copyrightable (Issue 1)

(2) Attribution of adaptation rights for the Programs (Issue 2)

(3) Whether or not adaptation rights for the Programs are retained (Issue 3)

(4) Return of adaptation rights for the Programs due to the Cancellation (Issue 4)

(5) Whether or not the Appellee's Products is the adaptation of the Programs (Issue 5)

(6) Amount of damage incurred by the appellant (Issue 6)

(omitted)

No. 4 Court decision

(omitted)

2. Regarding Issue 1 (whether or not the Programs are copyrightable)

(1) According to the facts (4) on which the decision is premised as mentioned in No. 2, 1. above and the facts determined in 1.(4) above, the Programs are recognized as having creativity that is worthy of being protected as works of computer programming.

3. Regarding Issue 2 (attribution of adaptation rights for the Programs)

(1) The appellant alleges that it holds adaptation rights for the Programs by citing the following reasons: [i] the Programs were created with the appellant's employee, P, serving as a project manager; [ii] the appellant and the appellee agreed on substantial changes to the content of the contract concerning the attribution of copyrights by the time of start of the payment of license fees in 1992 at the latest, and thereby, reached the agreement that the appellant holds copyrights for developed programs and that the appellee pays license fees.

In response, the appellee alleges that said allegation falls under the allegations or evidence advanced out of time (Article 157, paragraph (1) of the Code of Civil Procedure) and it also goes against the principle of advancing at an appropriate time (Article 156 of said Act). However, the roles of each of the appellant and the appellee in the development under the F3 Contract and the nature of "percentage development costs" in the F3 Contract, both of which serve as a basis of the appellant's allegation, have been alleged and proven as central issues since the first instance. The aforementioned allegation of the appellant also uses such existing allegations and proof, and does not require new proof. Therefore, said allegation is not immediately recognized as one that delays the conclusion of the action in light of the progress of the action. Consequently, the appellee's allegation that said allegation should be dismissed is unacceptable.

(2) Therefore, considering the aforementioned allegation of the appellant, the appellant's employees, P, etc. (hereinafter sometimes referred to as the "appellant's employees"), engaged in the creation of the Programs in the course of duties and completed it according to the F3 Contract and at the initiative of the appellant, while being entrusted by the appellee. It is thus obvious that the created programs fall under Article 15, paragraph (2) of the Copyright Act. Consequently, copyrights for the programs are granted to the appellant, who is the employer of the appellant's employees who developed the programs, so long as it is not stipulated otherwise.

However, there is a provision that copyright for software developed based on a contract between the appellant and the appellee shall belong to the appellee (Article 16) in the 1992 Basic Contract and the 1994 Basic Contract. In addition, as mentioned in 1.(3)E. above, there is the following provision in the F3 Contract, which is an individual contract concerning the Programs: "Article 7 [Copyright] Those that can be subject to copyright which arise in the course of development of the product shall belong to Party A (note: the appellee)." Taking into account the process of the negotiation leading to the conclusion of the F3 Contract as mentioned in 1.(2) above, this provision

is recognized as providing that even if a program is developed by the appellant through entrustment from the appellee, the appellant shall naturally transfer copyright for the program to the appellee.

Therefore, according to the aforementioned contract, it is obvious that the appellee holds copyrights for the Programs, regardless of the roles played by the appellant's employees and whether the appellee has the development capacity. The appellant's allegation that the copyrights belong to the appellant, which is based on the roles, etc. played by the appellant's employees, is unreasonable without the need for considering the roles played by the appellant's employees.

Incidentally, the appellant alleges that F3 is the appellant's original outcome that was developed based on its original basic technical concept, idea, and technical capabilities. As mentioned above, the appellee holds copyright for a program even if it is developed by the appellant's employees, owing to the contract, although the legal meaning thereof is not necessarily clear. In addition, granting that the appellant alleges that the Programs were developed independently of the appellee, it is the appellee that decides the specifications of the product under the F3 Contract (Article 3), and it is obvious even in light of a memorandum of understanding dated November 19, 1999, that the appellant and the appellee were not in the relationship wherein the appellant independently decides the specifications of a product it develops (1.(4)D. above). Even if the appellant is recognized as having actively cooperated in deciding specific specifications from a technical perspective and for the purpose of creating a better product, the Programs were absolutely developed under the F3 Contract through entrustment from the appellee, and were not developed independently of the appellee.

(3) The appellant alleges that since before the conclusion of the F3 Contract, the appellee had failed to pay to the appellant the development costs for the programs developed by the appellant, and that the appellee had come to pay to the appellant "manufacturing license fees" for the programs developed by the appellant on the premise that the appellant holds copyrights, etc. for the programs. On these grounds, the appellant alleges that the parties reached an agreement that copyrights for programs to be developed would not be transferred from the appellant to the appellee irrespective of the wording of the contract between the appellant and the appellee, by 1992 at the latest; and therefore that copyrights for the Programs, including adaptation rights, belong to the appellant.

However, as mentioned in 1.(2) above, the provisions of the F3 Contract were determined after the appellant and the appellee negotiated about the content thereof and expressed their opinions. In light of such negotiation process, there is no circumstance where the parties reached an agreement that differs from the wording of the contract concerning the provisions on attribution of copyrights, and it is impossible to find any reason for adapting an interpretation that differs from the wording of the contract. In fact, the appellant stated as follows in the negotiation: "F3 is a product which IMV, a manufacturer, owns, …" (1.(2)B. above); "sovereignty of IMV, the owner of the product" (D. of the same). Thereby, the appellant recognized the appellee's sovereignty over the programs it developed

and also made it clear to the appellee in the negotiation process. Therefore, the appellant is recognized as having negotiated with the appellee on the premise that the appellee naturally holds copyrights for said programs and having expressed that effect to the appellee.

Incidentally, it is certainly recognized that the appellee paid money to the appellant in the name of manufacturing license fees for F2 (Exhibits Ko 4 and 61 [including their branch numbers]). The attribution of copyright is not immediately decided based only on the phrase "manufacturing license fees." The G1/G2 Contract of 1990 that provides for the payment of "manufacturing license fees" also clearly provides that the appellee holds copyright for programs (Article 8 in Exhibit Ko 4). The 1992 Basic Contract and the 1994 Basic Contract concluded thereafter also clearly provide that copyright for programs developed through entrustment from the appellee shall belong to the appellee, as mentioned in (2) above. Therefore, the appellant's allegation that is understood as follows conflicts with facts in terms of the time relationship and lacks a premise: There were previously contractual provisions to the effect that the appellee shall obtain copyright for programs developed by the appellant, but subsequently, the appellee started paying license fees and the appellant and the appellee reached a new agreement concerning attribution of copyrights. In general, a "license fee" means money which a licensor, who holds the right for manufacturing, receives. However, as mentioned in 1.(1)B. above, the following can be found in this case: [i] The appellee internally recognized a "license fee" as money which it gives to the appellant in compensation for abandonment of manufacturing; [ii] The appellant also implicitly approved this recognition. The use of the word "license fee" does not lead to a presumptive recognition of the appellant's rights. The appellee's previous payment of "license fees" does not affect the aforementioned determination to the effect that the appellee holds copyrights for the Programs, particularly taking into account the fact that, in the course of negotiations for the F3 Contract, payment of "license fees" became a problem on the grounds that it goes against the actual conditions, and payment of "license fees" was discontinued in the F3 Contract.

(4) Consequently, copyrights for the Programs should be considered to belong to the appellee as they were naturally transferred from the appellant to the appellee based on the 1992 Basic Contract, the 1994 Basic Contract, and the F3 Contract. Therefore, the appellant's allegation that the appellant holds copyrights for the Programs, including adaptation rights, is unacceptable.

4. Regarding Issue 3 (whether or not adaptation rights for the Programs are retained)

(1) As mentioned above, copyrights for the Programs were naturally transferred from the appellant to the appellee based on the 1992 Basic Contract, the 1994 Basic Contract, and the F3 Contract. The 1992 Basic Contract and the 1994 Basic Contract provide for copyrights as follows: "A copyright for software developed under this contract shall belong to Party A (note: the appellee)" (Exhibits Ko 1 and 2). The F3 Contracts also provides for copyrights only as follows: "Those that can be subject to copyright which arise in the course of development of the product shall belong to Party A (note: the

appellee)" (Exhibit Ko 3). The adaptation rights for the Programs are not specially mentioned as the object of transfer. In that case, the aforementioned adaptation rights are presumed to have been retained by the appellant who transferred the copyrights for the Programs pursuant to Article 61, paragraph (2) of the Copyright Act.

(2) The appellee alleges that the adaptation rights for the Programs were not retained by the appellant and were transferred to the appellee together with the copyrights therefor on the grounds that there are facts that reverse the aforementioned presumption. The appellant argues against this allegation. Therefore, this issue is considered below.

A. In interpreting the F3 Contract, firstly looking at the development of negotiations that led to the conclusion of the contract between the appellant and the appellee as mentioned in 1.(2) above, the appellee had the policy of making it possible for itself to subjectively get involved in the products to be developed from the very beginning of the aforementioned negotiation. This was because there was the possibility that the appellee's position as a product planner and manufacturer could not be secured if the person entrusted with development and the one to which the product is delivered are the same person (1.(2)A. above). For example, with the idea that the related and derivative products of F3 are manufactured, the appellee indicated to the appellant the policy that the contract under negotiation is not naturally applicable to such products (C. of the same).

On the other hand, the appellant stated as follows in the proposal of the "percentage development costs": "We wish to continue to make contributions to coping with various problems, such as changes in the market and competing products and requests for further cost reduction, and maintaining and improving the competitiveness of F3 as a product even after the start of sale of the product, as long as F3 exists as a product" (B. of the same). Thereby, the appellant presupposed the improvements of F3 in relation to competing products. Regarding F3, the appellant also stated as follows in relation to the issue of "sovereignty of IMV, the owner of the product": "Basically, 'improvements of the product' must be 'carried out at the IMV's own responsibility'" (D. of the same). Thereby, the appellant stated that improvements should be carried out at the responsibility of the appellee, who is the owner of F3, on the premise that F3 is to be improved.

The appellee basically accepted the appellant's such proposal, and stated that "We wish to confirm as a basic agreement that 'Aisel will actively participate in the work to improve the product, etc. based on its responsibility and obligation as a community of interest.' However, it goes without saying that improvements of the product, etc. are planned and carried out based on the sovereignty of IMV as the owner of the product" (E. of the same). The outline of the F3 Contract was fixed in a manner that the appellant cooperates in improvements on the premise that the appellee carries out improvements. After that, the details, including a calculating formula for the percentage development costs, were ironed out, and the F3 Contract was concluded.

In light of such negotiation process, it is recognized that the appellant and the appellee

considered the following as natural premises in terms of the F3 Contract: [i] the Programs for F3 will also be improved in the future; [ii] the appellant will actively cooperate in such improvements, but the appellee will subjectively take responsibility for the improvements. That is, it is recognized that the parties considered, as a natural premise, that the appellee would adapt the Programs. This can only be understood as having been premised on the appellee's holding the adaptation rights for the Programs.

Therefore, in light of the above, it is reasonable to recognize that the appellant and the appellee agreed, as a natural premise, that the appellee holds the adaptation rights for the Programs, including improvements of the Programs, though the appellant and the appellee did not set any express provision on the attribution of the adaptation rights.

B. In addition, in light of the provisions of the F3 Contract, Article 2 provides for the matter that is stated in 1.(3)B. above as [Basic Agreement]. It should be considered to be a provision providing for the effect mentioned in A. above. It provides that the appellant shall make "contributions that are necessary for maintaining the market competitiveness of the product, following changes in the market and circumstances in terms of parts supply and product manufacturing, even after the completion of the product." Said provision is premised on the possibility of adaptation of the Programs, including improvements thereof, and it provides that the appellant shall make "contributions" to such adaptation. Thereby, it provides that one that carries out adaptation shall be consistently the appellee. Therefore, it can be understood as being premised on the appellee's holding the adaptation rights.

Consequently, it is also recognized that the appellee's holding the adaptation rights for the Programs is considered as a premise in terms of the provisions of the F3 Contract.

C. On these bases, it is reasonable to recognize as follows: Although attribution of the adaptation rights for the Programs is not provided for in express terms in the F3 Contract, there is an agreement between the appellant and the appellee that the aforementioned adaptation rights belong to the appellee, and the copyrights for the Programs developed by the appellant, including the adaptation rights, were transferred to the appellee.

D. The appellant alleges as follows: As long as the actual conditions of the business relationship between the appellant and the appellee in relation to the development of each software in question have substantially changed into the license fee payment contract, the scope of rights should also be considered to be unclear and uncertain in the interpretation of the provision "copyright for software developed under this contract shall belong to the appellee," and therefore, the scope of rights should be interpreted in a limited manner; consequently, the adaptation rights for the Programs are retained by the appellant.

However, as mentioned in 3.(3) above, the F3 Contract is not a license contract that is as alleged by the appellant, which is on the premise that the appellant holds the rights for manufacturing.

Therefore, the appellant's allegation lacks a premise.

E. The appellant alleges as follows: For the Programs, the amount paid as the development costs is less than the amount of the initial cost of the development; on the other hand, the appellee has made huge profits with paying almost no percentage development costs; in addition, the percentage development costs are also compensation for the development of the Programs; therefore, the copyrights, including the adaptation rights, cannot be transferred to the appellee through payment of the development costs alone.

However, even though the appellant internally considered the balance of payments for the development while including the percentage development costs, in the negotiation about the F3 Contract, the appellant itself said to the appellee as follows and thereby proposed the "percentage development costs" as a reward for success depending on the appellee's profits and persuaded the appellee to accept the proposal in response to the appellee's reply to the effect that it can accept the payment of a "reward for success": "The existence of the 'percentage development costs' will lead us to have a strong motivation to do our best to develop products from the IMV's perspective (of making products that contribute to profits)."; "We absolutely consider the 'percentage development costs' as a reward for success, and 'success' means that your company makes profits from F3. Based on such idea, we consider that it is appropriate to calculate the 'percentage development costs' based on the ratio to the gross profit of F3." The appellant did not mention any relationship between the percentage development costs and the development costs (1.(2)B. above). In response to said proposal, the appellant and the appellee reached an agreement. Even looking at the negotiation process thereafter, the nature of the "percentage development costs" has never been interpreted differently from the interpretation in the aforementioned appellant's proposal. Actually, the F3 Contract provides that "For such cooperation provided by Party B (note: the appellant), Party A (note: the appellee) shall distribute to Party B part of the profits, which Party A obtains after bringing the product into the market, in accordance with the method provided in Article 9 [Percentage Development Costs], in addition to the development costs that arise in the early stages." (Article 2). In addition, the amount of payment of the "percentage development costs" in this case depends on the sales quantity and price of F3 (Article 9 of the F3 Contract; 1.(3)F. above). In terms of its nature, the amount is not fixed but can be large or small, and it does not have direct relevance to the amount of the development costs that have already arisen and just has the nature of a distribution of profits.

Furthermore, according to 1.(4) above, during the development period, the development procedure of F3 and costs required for the development, etc. were decided based on an agreement through consultation between the appellant and the appellee. The payment of the development costs by the appellee was made in response to a request for payment which the appellant made roughly every month during the development period. The appellant also asked for the payment of costs that were required for unscheduled development work even if the amount of the payment was small in

terms of the entire amount of payment, and the appellee paid such costs upon the appellant's request. Such methods of deciding and paying the development costs can be considered to be one whereby the appellant can obtain compensation for the development work in order of precedence with the progress of the development of F3.

In light of this, there is no other way but to understand that it was determined that the appellee would pay to the appellant the development costs as costs required for the development during the development period of the Programs and would additionally pay to the appellant the percentage development costs as a distribution of profits in relation to the appellant's special cooperation. This is not affected by the fact that the appellant internally considered the balance of payments for the development while including the percentage development costs. In addition, the same applies even if the appellee calculated the balance of payments while internally considering the percentage development costs as costs.

Therefore, there is no other way but to say that the following appellant's allegation goes against the agreement between the parties in relation to the positioning of the development costs and the percentage development costs: The development costs are less than the initial cost of the development of the Programs by the appellant, and the percentage development costs are also compensation for the development; therefore, the adaptation rights belong to the appellant because of a failure to pay the percentage development costs. Therefore, said allegation is unacceptable as one that lacks a premise, without the need for considering the costs that the appellant actually required for the development.

On the grounds of the value of the Programs, the appellant also alleges that the adaptation rights are retained. However, even if the value is significant, it does not immediately affect the attribution of the adaptation rights. Whether the adaptation rights are retained should be determined in light of the process of the negotiation leading to the conclusion of the F3 Contract and the provisions of the F3 Contract through reasonable interpretation of the parties' intention as mentioned above. Therefore, the appellant's allegation is unacceptable.

F. In addition, the appellant alleges as follows: Transferring the adaptation right to a company, from which a development company receives entrustment of development, is equivalent to transferring superiority, by which the development company can receive exclusive entrustment, and it is impossible in light of common sense.

However, even if the adaptation right for a program is generally important for a program development company, attribution of the copyright for a program, which the program development company developed, or the adaptation right therefor, which is part of the copyright, is related to compensation, etc. for the development and is determined based on an agreement between the parties. There was an agreement between the parties to the effect that the adaptation rights for the Programs were transferred to the appellee, as determined above. Therefore, the appellant's allegation that

transferring the adaptation right for a work of computer programming is almost impossible in light of common sense is unacceptable.

G. Furthermore, the appellant alleges that the adaptation rights are retained by the appellant, on the grounds of the development of the negotiation for the conclusion of the F3 Contract and the wording of the F3 Contract. However, in light of such development of the negotiation and wording of the F3 Contract, the appellant can rather be recognized as having transferred the adaptation rights for the Programs to the appellee, as mentioned in A. and B. above.

(3) On these bases, notwithstanding the presumption set forth in Article 61, paragraph (2) of the Copyright Act, the agreement between the appellant and the appellee to the effect that the adaptation rights for the Programs are transferred from the appellant to the appellee, which differs from the aforementioned presumption, can be recognized in this case based on related evidence. The adaptation rights for the Programs should be considered to be held by the appellee based on this agreement.

(omitted)

6. Conclusion

As mentioned above, the appellant does not hold the adaptation rights for the Programs. Therefore, there is no reason for all of the appellant's claims without the need for making determinations on other issues. The judgment in prior instance that dismissed the claims is reasonable.

Therefore, this appeal shall be dismissed, and the judgment shall be rendered in the form of the main text.

Intellectual Property High Court, First Division

Presiding judge: SHINOHARA Katsumi

Judge: SHISHIDO Mitsuru

Judge: SHIBATA Yoshiaki

Attachment 4 (Software Programs for F3)

The following software programs for vibration controller F3

(1) Device driver

(2) Parts common to the server system and the client system

[i] F3 common part

[ii] Active X control

(3) Libraries common to the server system and the client system

[i] Base Class Library

[ii] Graphical user interface (GUI) library

(4) Server applications

[i] System information server

[ii] SINE execution server

[iii] RANDOM execution server, including software programs for ROR (RANDOM on RANDOM) and SOR (SINE on RANDOM)

[iv] SHOCK execution server

(5) Client applications

[i] SINE client

[ii] RANDOM client, including software programs for ROR (RANDOM on RANDOM) and SOR (SINE on RANDOM)

[iii] SHOCK client

(6) Hardware exclusively for F3 signal input and output device

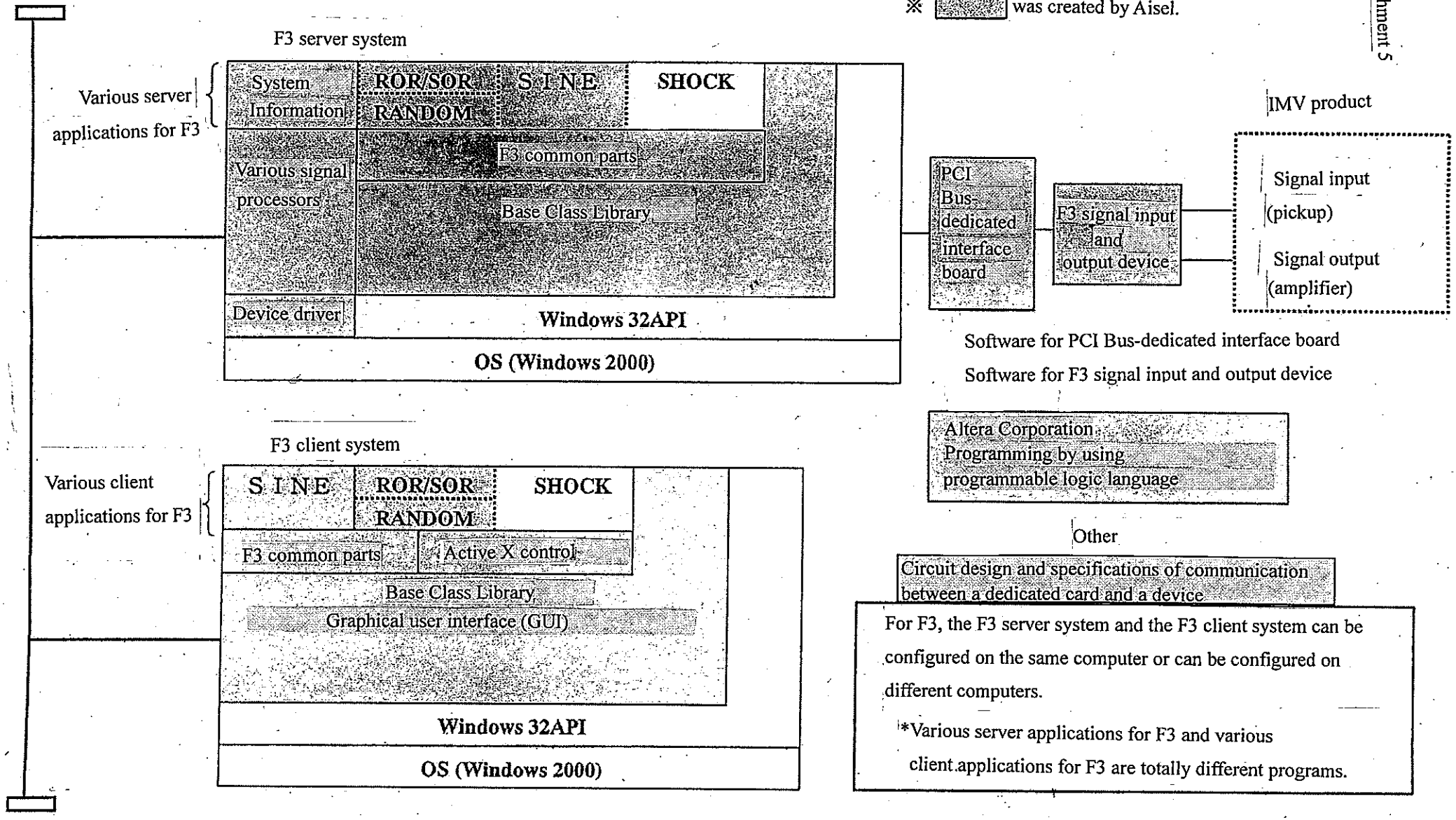
[i] Software for PCI Bus-dedicated interface board

[ii] Software for F3 signal input and output device

Attachment 5

Configuration Diagram of F3

※ [ ] was created by Aisel.



For F3, the F3 server system and the F3 client system can be configured on the same computer or can be configured on different computers.

*Various server applications for F3 and various client applications for F3 are totally different programs.