Date	April 27, 2016	Court	Intellectual Property High Court, Fourth Division
Case number	2014 (Ne) 10059, 10088		
– Criteria for determining whether a computer program work is a reproduction or adaptation – A case in which the court held that the source code of the program falls under the category of "trade secrets" as provided in Article 2, paragraph (6) of the Unfair Competition Prevention Act.			

References: Article 2, paragraph (1), item (i) and item (x)-2, Article 21, Article 27, and Article 114, paragraph (1) of the Copyright Act, Article 2, paragraph (1), item (vii) and item (viii), Article 2, paragraph (6), and Article 4 of the Unfair Competition Prevention Act

Summary of the Judgment

1. Background

The appellee filed this action against Appellant X and Appellant Y seeking compensation for damages based on the following allegation: [i] Appellant X developed the defendant's old contact angle calculation (sessile drop method) program by having Appellant Y reproduce or adapt the plaintiff's contact angle calculation (sessile drop method) program; and [ii] the wrongful disclosure of the plaintiff's source code, which is the appellee's trade secret, by Appellant Y to Appellant X, and the wrongful acquisition thereof by Appellant X, constitute acts that fall under Article 2, paragraph (1), items (vii) and (viii) of the Unfair Competition Prevention Act.

2. The court held as follows in summary and recognized that appellants infringed copyrights and committed an act of unfair competition.

(1) Fulfillment of the definition of reproduction or adaptation

A. "Reproduction" means reproducing a work in a physical form through printing, photography, or replication, by recording its sound or visuals, or in any other way (Article 2, paragraph (1), item (xv) of the Copyright Act), and the Copyright Act is intended to protect creative expressions of thoughts or sentiments (item (i) of said paragraph). Therefore, reproduction of a work is interpreted as the act of producing a work based on an existing work, while maintaining the integrity of the creative expressions thereof, in a way that a person who came across said work would directly perceive the essential characteristics of the expressions of said existing work. Meanwhile, adaptation of a work (Article 27 of said Act) is the act of creating a different work based on an existing work, from which a person who comes across said

new expression can directly perceive the essential characteristics of the expressions of said existing work, through expressing thoughts or sentiments in a new and creative way by making adjustments, additions, deletions, or modifications to the specific expressions, while maintaining the identicalness of the essential characteristics of the expressions (1999 (Ju) 922, judgment of the First Petty Bench of the Supreme Court on June 28, 2001, Minshu Vol. 55, No. 4, at 837).

Accordingly, a work that is created based on an existing work is found to fall under the category of reproduction or adaptation if it maintains the identicalness of the creative expressions of said existing work and if it allows a person who comes across said work to directly perceive the essential characteristics of the expressions of said existing work. Meanwhile, if a work that is created based on an existing work is identical to said existing work only with respect to parts not consisting of expressions per se, but pertaining to thoughts, sentiments or ideas, or facts or events, or to any other parts that do not contain creative expressions, said work is not found to be a reproduction or adaptation.

B. Whether the defendant's program is based on the plaintiff's program

[...] In light of the identicalness between the plaintiff's contact angle calculation (sessile drop method) program and the defendant's old contact angle calculation (sessile drop method) program, the latter is found to be created based on the former.

C. Identicalness of creative expressions

(A) It is not rare that the specific descriptions of computer programs are similar to one another due to the following reasons: [i] due to their nature, computer programs are expressed with a limited number of symbols and they use strict language systems; and [ii] if developers were to pursue the economic and efficient operation of computers, the number of instruction combinations they can use is limited. The Copyright Act aims to protect specific expressions of computer programs and is not intended to protect functions or ideas. If specific descriptions of a program would be almost identical no matter who develops them due to restrictions in expressions or if they are very short or ordinary, such descriptions should be deemed not to involve any creativity as they do not show any unique characteristics of the producer. On the other hand, if it is possible to choose other expressions across the whole program, including the expression, combination and order of instructions, and if the program somehow shows unique characteristics of the producer, such program should be deemed to involve creativity.

(B) The following findings were made regarding the subject part of the plaintiff's contact angle calculation (sessile drop method) program and that of the defendant's old contact angle calculation (sessile drop method) program: [i] most of their program

structures are identical; [ii] the programs that have similar functions correspond to each other on a one-to-one basis, and block structures therein also correspond to each other on a one-to-one basis in terms of their function and sequence; [iii] the source code based on these structures is identical or extremely similar in approximately 86% of the defendant's old contact angle calculation (sessile drop method) program and their sequence of description and combination are also identical or similar. [...]

The descriptions of the source code concerning the subject part of the plaintiff's contact angle calculation (sessile drop method) program that has some identicalness to the defendant's old contact angle calculation (sessile drop method) program are, when they are seen as a whole, found to be creative expressions that show the unique characteristics of the producer because it is duly possible to choose other expressions with respect to the expression, combination and sequence of instructions and because these descriptions are not found to be an ordinary expression.

(C) Hence, the defendant's old contact angle calculation (sessile drop method) program is found to have identicalness in creative expressions with the subject part of the plaintiff's contact angle calculation (sessile drop method) program and it is determined that a person who came across the program would directly perceive the essential characteristics of the expressions of the subject part.

(2) Whether the plaintiff's source code falls under the category of trade secrets

A. Whether it was managed as a secret

[...] As of July 2009, when the development of the plaintiff's program was completed, the computers used by the programmers who were engaged in the development were protected with passwords. In addition, the appellee was storing the source code of the finished program in a folder on the R&D department's network shared folder [...] server. Said folder was protected with a password and its access rights holders were limited. The appellee announced said management system to its employees, warning that the history of unauthorized access to the folder would be recorded and the computer used for such access would be identified. Based on these facts, it should be determined that the plaintiff's source code was managed as a secret by the appellee.

B. Useful and unpublicized information

The plaintiff's program is software that is exclusively used for contact angle calculation and it accounts for the greater part of the sales of the appellee's business, which includes the development, manufacturing and sales of laboratory equipment. Therefore, the plaintiff's source code is technological information useful for the

appellee's business activities that is not publicly known.

C. Based on the findings above, the plaintiff's source code falls under the category of "trade secrets" provided in Article 2, paragraph (6) of the Unfair Competition Prevention Act.

Judgment rendered on April 27, 2016; the original received on the same day, Court Clerk

2014 (Ne) 10059 Appeal case of claiming for damages etc., seeking injunction against infringement of copyright etc., and claiming for damages (counterclaim)

2014 (Ne) 10088 Incidental appeal case

Court of prior instance by Tokyo District Court, 2011 (Wa) 36945 (Case A), 2012 (Wa) 25059 (Case B), and 2013 (Wa) 9300 (Case C)

Date of conclusion of oral argument: February 29, 2016

Judgment

Appellant/Incidental Appellee: NiCK Corporation
(hereinafter referred to as "Appellant NiCK")

Appellant/Incidental Appellee: ASUMI GIKEN, Limited
(hereinafter referred to as "Appellant ASUMI GIKEN")

Appellant/Incidental Appellee: X
(hereinafter referred to as "Appellant X")

Appellee/Incidental Appellant: Kyowa Interface Science Co., Ltd.
(hereinafter referred to as "Appellee")

Main text

1. The appeal filed by the Appellants shall be dismissed entirely.

2. Based on the incidental appeal case filed by the Appellee, matters relevant to the Appellee and the Appellants in the original judgment shall be modified as follows:

(1) Appellant NiCK and Appellant X shall jointly and severally pay to Appellee a sum of 3,049,890 yen together with an amount thereon at the rate of 5% per annum from December 15, 2011 until full payment of such sum shall have been made.

(2) Appellant X shall pay to Appellee a sum of 443,131 yen together with an amount thereon at the rate of 5% per annum from October 20, 2012 until full payment of such sum shall have been made.

(3) Appellee's remaining claims against Appellant NiCK and Appellant X and Appellee's claims against Appellant ASUMI GIKEN shall be dismissed entirely.

(4) The claims made by Appellant NiCK and Appellant ASUMI GIKEN against Appellee shall be dismissed entirely.

3. With regard to the court costs incurred by Appellee and Appellants in the first and second instances (including both the appeal case and the incidental appeal case in

the second instance), Appellant NiCK shall bear two-sixtieths of the costs incurred in the Appellee and one-tenth of the costs incurred in Appellant NiCK, Appellant X shall bear three-sixtieths of the costs incurred in Appellee and one-fifth of the costs incurred in Appellant X, Appellant ASUMI GIKEN shall bear one-sixtieth of the costs incurred in Appellee and one-thirtieth of the costs incurred in Appellant ASUMI GIKEN, and Appellee shall bear nine-tenths of the costs incurred in Appellee, nine-tenths of the costs incurred in Appellant NiCK, four-fifths of costs incurred in Appellant X and twenty-nine-thirtieths of the costs incurred in Appellant ASUMI GIKEN.

4. This judgment shall be executed provisionally to the extent of 2 (1) and (2).

Facts and reasons

I. Claims

1 Appellants' object of the appeal

(1) To reverse the lost part of Appellants in the original judgment.

(2) To dismiss Appellee's claims entirely.

(3) To demand payment of a sum of 1,000,000 yen by Appellee to Appellant NiCK (Appellant NiCK restricted the claim for damages to the above sum from a sum of 10,000,000 yen in prior instance).

(4) To demand payment of a sum of 500,000 yen by Appellee to Appellant ASUMI GIKEN (Appellant ASUMI GIKEN restricted the claim for damages to the above sum from a sum of 2,000,000 yen in prior instance).

2 Appellee's incidental object of the appeal

(1) To modify the original judgment as follows.

(2) With regard to the claims pertaining to the case A in prior instance,

to demand that Appellant NiCK and Appellant X pay jointly and severally to Appellee a sum of 3,974,986 yen together with an amount thereon at the rate of 5% per annum from December 15, 2011 until full payment of such sum shall have been made (Appellee restricted the claim for damages to the above sum from a sum of 10,842,000 yen together with a late charge thereon at the rate of 5% per annum from December 15, 2011 until full payment of such sum shall have been made in the case A in prior instance).

(3) With regard to the claims pertaining to the case B in prior instance:

A. to demand that Appellant NiCK does not reproduce the programs listed in 2 and 3 of the list of Appellant's (defendant's) programs attached to the original judgment;

B to demand that Appellant NiCK does not sell and display for sale or does not make Appellant ASUMI GIKEN sell and display for sale the products listed in 1 to 5

of the list of Appellant's (defendant's) products attached to the original judgment;

C to demand that Appellant ASUMI GIKEN does not sell or display for sale the products listed in 1 to 5 of the list of Appellant's (defendant's) products attached to the original judgment;

D to demand that Appellant NiCK and Appellant ASUMI GIKEN dispose of the products listed in 1 to 5 of the attached list of Appellant's (defendant's) products and semi-finished products thereof (those comprising the features listed in 1 to 5 of said list but not yet completed as a product) in the original judgment as well as any CD-ROM, flash memory, hard disk, or other storage media storing the programs listed in 2 and 3 of the list of Appellant's (defendant's) programs attached to the original judgment;

E to demand that Appellant NiCK and Appellant X pay jointly and severally to Appellee a sum of 10,000,000 yen together with an amount thereon at the rate of 5% per annum from October 19, 2012 for Appellant NiCK and from October 20, 2012 for Appellant X until full payment of such sum shall have been made.(Appellee restricted the claim for damages to the above sum from a sum of 40,500,000 yen together with a late charge thereon at the rate of 5% per annum from October 19, 2012 for Appellant NiCK and from October 20, 2012 for Appellant X until full payment of such sum shall have been made in the case B in prior instance); and

F to demand that Appellant X pays to Appellee a sum of 2,564,090 yen together with an amount thereon at the rate of 5% per annum from October 20, 2012 until full payment of such sum shall have been made.

II Outline of the case (terms are abbreviated according to the original judgment unless otherwise stated)

1 Summary of the case

(1) Outline of the case in prior instance

A Case A in prior instance

Appellee demanded that Appellant NiCK and Appellant X pay jointly and severally to Appellee a sum of 10,842,000 yen (based on the following [i], [ii] or [iii] for Appellant NiCK and the following [i], [ii], [iii] or [iv] for Appellant X) together with a late charge thereon at the rate of 5% per annum as designated according to the Civil Code from December 15, 2011 following the occurrence of the tort until full payment of such sum shall have been made, alleging: [i] Appellant NiCK made Appellant X in charge of developing the "contact angle calculation (sessile drop method) program" (or Appellant's (Defendant's) old contact angle calculation (sessile drop method) program) by reproducing or adapting the "contact angle calculation

(sessile drop method) program" (Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program) out of the programs (Appellee's (Plaintiff's) programs) listed in the list of Appellee's (Plaintiff's) programs attached to the original judgment, Appellant NiCK's act of manufacturing and selling the product mounted with Appellant's (defendant's) old version (automatic contact angle meter) constitutes infringement of the copyright of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program of Appellee; [ii] the wrongful disclosure of source codes of Appellee's (Plaintiff's) program (hereinafter referred to as "Appellee's (Plaintiff's) source codes") and the algorithms (Appellee's (Plaintiff's) algorithms) listed in the list of algorithms attached to the original judgment, which are Appellee's trade secrets, by Appellant X to Appellant NiCK and the wrongful acquisition thereof by Appellant NiCK constitute acts that fall under Article 2, paragraph (1), items (vii) and (viii) of the Unfair Competition Prevention Act; [iii] the illegal use of Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms by Appellant X and Appellant NiCK to create Appellant's (Defendant's) old version and sell products mounted therewith constitutes acts that fall under a joint tort infringing Appellee's legal interest; and [iv] the disclosure and leakage of Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms, which are Appellee's trade secrets, by Appellant X who used to be Appellee's employee to Appellant NiCK in breach of the obligations of keeping trade secrets constitute acts that fall under a default on the labor contract between Appellant X and Appellee.

B Case B in prior instance

Appellee made allegations as follows: [i] Appellant NiCK developed the "contact angle calculation (sessile drop method) program" (Appellant's (Defendant's) new contact angle calculation (sessile drop method) program) out of programs listed in 2 and 3 of the list of Appellant's (Defendant's) programs (Appellant's (Defendant's) new version) attached to the original judgment by adapting Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program out of Appellee's (Plaintiff's) programs, and Appellant NiCK's manufacture and sales and Appellant ASUMI GIKEN's sales of each of the products mounted with Appellant's (Defendant's) new version (Appellant's (Defendant's) products 1 to 5) as listed in 1 to 5 of the list of Appellant's (Defendant's) products attached to the original judgment constitute acts infringing the copyright of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program; [ii] the wrongful disclosure of Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms, which are Appellee's trade secrets, by Appellant X, the wrongful acquisition thereof by Appellant NiCK, and the wrongful

acquisition and use thereof by Appellant ASUMI GIKEN constitute acts that fall under Article 2, paragraph (1), items (vii) to (ix) of the Unfair Competition Prevention Act; [iii] the illegal use of Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms by Appellant X and Appellant NiCK to create Appellant's (Defendant's) new version and sell Appellant's (Defendant's) products 1 to 5 mounted therewith constitute acts that fall under a joint tort infringing Appellee's legal interest; [iv] the disclosure and leakage of Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms, which are Appellee's trade secrets, by Appellant X who used to be Appellee's employee to Appellant NiCK in breach of the obligations of keeping trade secrets constitute acts that fall under a default on the labor contract between Appellant X and Appellee; and [v] Appellant X who is involved in illegal activities that may inevitably cause no payment of retirement allowance is obliged to return to Appellee a sum equivalent to the retirement allowance received from Appellee as unjust enrichment. Based on the above allegations, Appellee demands: (1) an injunction against reproduction of Appellant's (Defendant's) new version and sales of Appellant's (Defendant's) products 1 to 5 mounted with Appellant's (Defendant's) new version by Appellant NiCK based on Article 112, paragraph (1) of the Copyright Act or Article 3, paragraph (1) of the Unfair Competition Prevention Act; (2) an injunction against sales of Appellant's (Defendant's) products by Appellant ASUMI GIKEN based on Article 113, paragraph (1), item (ii) and Article 112, paragraph (1) of the Copyright Act or Article 3, paragraph (1) of the Unfair Competition Prevention Act; (3) disposal of Appellant's (Defendant's) products 1 to 5 and their semi-finished products as well as any storage media storing Appellant's (Defendant's) new version by Appellant NiCK and Appellant ASUMI GIKEN based on Article 112, paragraph (2) of the Copyright Act or Article 3 or paragraph (2) of the Unfair Competition Prevention Act; (4) Appellant NiCK and Appellant X pay jointly and severally to Appellee a sum of 40,500,000 yen (based on the above [i], [ii] or [iii] for Appellant NiCK and the above [i], [ii], [iii], or [iv] for Appellant X) together with a late charge thereon at the rate of 5% per annum as designated according to the Civil Code from the date after occurrence of the tort; that is, October 19, 2012 for Appellant NiCK (the day following the date of delivery of complaint) and October 20, 2012 for Appellant X (the day following the date of delivery of complaint), until full payment of such sum shall have been made; and (5) Appellant X pays to Appellee a sum equivalent to the paid retirement allowance of 2,564,090 yen together with a late charge thereon at the rate of 5% per annum as designated according to the Civil Code from October 20, 2012 (the day following the date of delivery of complaint) until full payment of such

sum shall have been made, based on Article 703 of the Civil Code.

C Case C in prior instance

Appellant NiCK and Appellant ASUMI GIKEN demanded that Appellee pay to Appellant NiCK a sum of 10,000,000 yen on account of damages and to Appellant ASUMI GIKEN a sum of 2,000,000 yen on account of damages based on Article 709 of the Civil Code and Article 4 of the Unfair Competition Prevention Act, alleging: [i] the suit pertaining to case B filed by Appellee against Appellant NiCK and Appellant ASUMI GIKEN lacks appropriateness significantly in light of the purpose and objective of the judicial system and falls under a tort; and [ii] Appellee's act of notification on the home page (notifications 1 and 2) and delivery of notification documents (notification documents A and B) to Appellant NiCK's clients falls under Article 2, paragraph (1), item (xv) of the Unfair Competition Prevention Act (or Article 2, paragraph (1), item (xiv) thereof prior to revision by Act No. 54 of 2015, the same shall apply hereinafter).

(2) Details of the original judgment

A Case A in prior instance

The original judgment held that Appellant's (defendant's) old contact angle calculation (sessile drop method) program is found to be a reproduction or adaptation of Appellee's (plaintiff's) contact angle calculation (sessile drop method) program as a computer program work, and partially granted Appellee's claims pertaining to case A to the extent of making Appellant NiCK and Appellant X pay jointly and severally to Appellee damages amounting to 1,901,258 yen together with a late charge thereon at the rate of 5% per annum as designated according to the Civil Code from December 15, 2011 until full payment of such sum shall have been made, while dismissing the remaining claims entirely.

B Case B in prior instance

The original judgment held as follows and dismissed Appellee's Claims pertaining to case B entirely: [i] Appellant's (defendant's) new contact angle calculation (sessile drop method) program is not found to an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program; [ii] Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms do not fall under the "trade secrets" in Article 2, paragraph (vi) of the Unfair Competition Prevention Act, and Appellant X is not found to have taken Appellee's (Plaintiff's) source codes out of Appellee and disclosed to Appellant NiCK; [iii] Appellee's (Plaintiff's) source codes and Appellee's (Plaintiff's) algorithms are not found to fall under the confidential information stated in the "written oath of maintenance of confidentiality" and Appellant X is not found to

have taken Appellee's (Plaintiff's) source codes out of Appellee; and [iv] Appellant X is not found to have acted illegally.

C Case C in prior instance

The original judgment dismissed the claims by Appellant NiCK and Appellant ASUMI GIKEN in case C entirely, holding: [i] the suit pertaining to case B filed by Appellee does not constitute a tort; and [ii] Appellee's posting of the notifications 1 and 2 and delivery of the notification documents A and B do not fall under Article 2, paragraph (1), item (xv) of the Unfair Competition Prevention Act.

(3) Details of the appeal case and the incidental appeal case

Appellants protested against the lost part in the original judgment and instituted this appeal case seeking reversal of the original judgment while partially restricting the claims. Appellee also filed an incidental appeal case seeking reversal of the original judgment in the lost part while partially restricting the claims.

2. The facts used as premise are relevant to correction of the original judgment and as described in the original judgment, "Facts and reasons," II, 1. Hence, these facts are quoted as follows.

(omitted)

3. Issues

(1) Claims pertaining to case A in prior instance

A Whether or not the Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program;

B Whether or not Appellant X wrongfully disclosed Appellee's trade secrets and Appellant NiCK wrongfully acquired them;

C Whether or not creation of Appellant's (Defendant's) old version and sales of products mounted therewith fall under a tort infringing the legal interest;

D Whether or not Appellant X is liable for a default on the labor contract with respect to Appellee; and

E The amount of damages.

Appellee asserts the statement of claims for damages principally with the above A and alternatively with the above B, C, and D according to the order of listing.

(2) Claims pertaining to case B in prior instance

A Whether or not Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is an adaptation of Appellee's (Plaintiff's) contact angle

calculation (sessile drop method) program;

B Whether or not Appellant X wrongfully disclosed Appellee's trade secrets and Appellant NiCK and Appellant ASUMI GIKEN wrongfully acquired them;

C Whether or not creation of Appellant's (Defendant's) new version and sales of products loaded therewith fall under a tort infringing the legal interest;

D Whether or not Appellant X is liable for a default on the labor contract with respect to Appellee;

E The amount of damages; and

F Whether or not Appellant X is obliged to return the retirement allowance to Appellee.

Appellee asserts the statement of the claims for damages principally with the above A and alternatively with the above B, C, and D according to the order of listing, and asserts the statement of the claims for injunction and disposal principally with the above A and alternatively with the above B.

(3) Claims pertaining to case C in prior instance

A Whether or not institution of the suit by Appellee against Appellant NiCK and Appellant ASUMI GIKEN in case B in prior instance constitutes a tort; and

B Whether or not Appellee's notification through notifications 1 and 2 and notification documents A and B falls under acts of unfair competition involving making a false allegation

(omitted)

IV Judgment of this court

1. Claims based on the copyright

(1) Issue (1) A (Whether or not Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program)

A Findings

Putting the above facts used as premise, the evidence (Exhibits Ko 7, 27, and 38, Exhibit Otsu 13, and Exhibit Otsu 18-1) and the entire import of the oral argument together, the following findings shall be acknowledged.

(A) Structure of Appellee's (Plaintiff's) program

a. Appellee's (Plaintiff's) program is mounted on an automatic contact angle meter to automatically measure a contact angle (an angle made by a liquid surface and a solid surface at a position where static liquid on a free surface is in contact with a solid

wall, an angle inside the liquid).

Appellee manufactures and sells those automatic contact angle meter products (Appellee's (Plaintiff's) products) listed in the list of Appellee's (Plaintiff's) products attached to the original judgment. Appellee's (Plaintiff's) products comprise a sample (solid) stage, lens, camera and syringe for producing droplets and contain Appellee's (Plaintiff's) program serving as dedicated software mounted thereon. Appellee's (Plaintiff's) products use the sessile drop method as a contact angle measuring method. The contact angle measuring method specifically comprises producing a droplet at a needle tip of a syringe provided in an apparatus, bringing a solid surface closer to the droplet to make the droplet adhere thereon, capturing an image of the adhering droplet by CCD camera, and analyzing the image to measure a contact angle.

b. Appellee's (Plaintiff's) program that is written using a programming language called Visual Basic Version 6 (VB) corresponds to multiple models and has functions including a contact angle measuring function (sessile drop method/side surface observation, extension/contraction method, sliding method, θ/2 method, tangent method and curve fitting method), a liquid surface tension measuring function, and a solid surface free energy analyzing function.

Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is one of the programs to constitute Appellee's (Plaintiff's) program and has a function of analyzing an image of a droplet, which was produced on a solid sample, captured from a horizontal direction and obtaining coordinates of an endpoint, a vertex, and three points on left and right sides of an arc to automatically measure a contact angle for droplet contact angle measurement by the θ/2 method or the tangent method.

c. Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is structured substantially as shown in "FAMAS ver3.1.0 contact angle (sessile drop method) calculation part (including a function not provided in i2win)" (Plaintiff's tree diagram) attached to the original judgment.

In Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, the contents of source codes of 16 programs numbered (1) to (16) (the subject part), which are core programs for contact angle calculation by the θ/2 method and the tangent method, are as described in the "FAM AS source (showing the original source codes)" column of: [Attachment 8-2] attached to the original judgment for "(1) Contact angle calculation main"; [Attachment 9-2] attached to the original judgment for "(2) Droplet detection"; [Attachment 10-2] attached to the original judgment for "(3) Needle tip detection"; [Attachment 11-2] attached to the original judgment for "(4) Needle side surface detection"; [Attachment 12-2] attached to the original

judgment for "(5) Side surface detection"; [Attachment 13-2] attached to the original judgment for "(6) Y-coordinate validity check"; [Attachment 14-2] attached to the original judgment" for "(7) X-coordinate validity check"; [Attachment 15-2] attached to the original judgment for "(8) Rotational direction determination"; [Attachment 16-2] attached to the original judgment for "(9) Effective range check"; [Attachment 17-2-2] attached to the original judgment for "(10) Automatic threshold calculation"; [Attachment 18-2] attached to the original judgment for "(11) Endpoint detection"; [Attachment 19-2] attached to the original judgment for "(12) Invalid area detection"; [Attachment 20-2] attached to the original judgment for "(13) Vertex detection"; [Attachment 21-2] attached to the original judgment for "(14) Surface detection for contact method"; [Attachment 22-2] attached to the original judgment for "(15) Contact angle calculation"; and [Attachment 23-2] (along with the source codes comparative table 1) in the original judgment for "(16) Contact method calculation."

d. Appellee's (Plaintiff's) source codes consist of an execution file size of 10.4 MB, a source codes size of 12.5MB, 132 source codes files and 170,672 lines, in which source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program occupy 2,525 lines including 2,055 lines for source codes of the subject part.

(B) Structure of Appellant's (Defendant's) old version

a. Appellant's (Defendant's) old version is a program having a contact angle measuring function.

The products (Appellant's (Defendant's) products) manufactured and sold by Appellant NiCK and listed in the list of Appellant's (Defendant's) products attached to the original judgment are automatic contact angle meters configured to automatically measure a contact angle by the sessile drop method, and comprise hardware including a sample stage, lens, camera, and syringe for producing droplets. Appellant's (Defendant's) old version was mounted on Appellant's (Defendant's) products 1 through 3 and 6.

b. Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is one of the programs to constitute Appellant's (Defendant's) old version, and has the same sort of functions as those of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and a calculation function on the liquid contour detection level based on the X-coordinate in the upper surface image, which is not found in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

c. Appellant's (Defendant's) old contact angle calculation (sessile drop method) program has a program structure substantially as shown in "the contact angle

calculation main program configuration in Appellant's (Defendant's) old version" (Appellant's (Defendant's) old tree diagram) attached to the original judgment (programs having the same numbers as those of Plaintiff's tree diagram have the same functions as those of Appellee's (Plaintiff's) program). There is also "s_calc_outline_detect_level_x" (program numbered by (10-1)) that is a program relating to a function of performing calculation on the liquid contour detection level based on X-coordinate in the upper surface image. The contents of source codes of the respective programs including the program numbered (10-1) added to 16 programs from "(1) Contact angle calculation main" to "(16) Tangent method calculation" are as described in the "i2win source (before modification)" column in the source code comparative table 1 (although there is a slight discrepancy in the line feed position).

d. Appellant's (Defendant's) old version has source codes consisting of 20 source codes files and 18,738 lines, in which source codes of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program occupy 1,923 lines including 1,320 lines for source codes of the subject part.

(C) Common features in the subject part

a. Comparison of program structures

(a) In Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, source codes of the subject part are described as follows: [redacted].

Meanwhile, in Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, source codes of the subject part are, similar to those of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, described such that as the program "(1) Contact angle calculation main" uses "Call" sentence to call each of the programs "(10) Automatic threshold calculation," "(2) Droplet detection," "(11) Endpoint detection," "(12) Invalid area detection," and "(13) Vertex detection" and then uses "Call" sentence to call the program "(15) Contact angle calculation" to perform contact angle calculation by the θ/2 method, or uses "Call" sentence to call the program "(14) Surface detection for tangent method," followed by using "Call" sentence to call the program "(15) Contact angle calculation" to perform contact angle calculation by the tangent method. Thus, Appellee's (Plaintiff's) program and Appellant's (Defendant's) program share common features as stated above.

(b) Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program involves:
[redacted]

b. Comparison in the entire source codes

(a) When source codes of the subject part are compared between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, it is found that the programs numbered (1) through (16) therein have substantially the same functions and one-to-one correspondence and blocks (such as "F1" and "I1" in the source codes comparative table 1) in each of the programs also have substantially one-to-one correspondence in the function and order.

(b) When source codes of the subject part are compared between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, it is found that about 44% of source codes of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program (shown by yellow in the source codes comparative table 1) is consistent with source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program in terms of variables and syntax. It is also found that about 42% thereof (shown by orange in the source codes comparative table 1) is different in the variable, function, or constant names, different in the number of arguments added, different as to whether variables are arrayed or not, different as to whether reference of array is expressed by a function or not, and different as to whether "If" sentence or "Select Case" sentence is used to determine conditions. However, Appellee's (Plaintiff's) contact angle calculation (sessile drop

method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program are substantially consistent with each other except for these differences (Exhibit Ko 27).

Besides, the order of describing source codes is the same or similar in many parts of both programs.

c. Comparison in [Attachment 10-2] of the source codes comparative table 1

When source codes of the subject part shown in [Attachment 10-2] ("(3) Needle tip detection" program) of the source codes comparative table 1 are compared between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, the following common features are found (Exhibit Ko 38).

(a) Parameter (argument) and variable names

Appellant's (Defendant's) old contact angle calculation (sessile drop method) program uses 18 pieces of parameters (arguments) and variables, in which 13 of them have the same names as those of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

Also, even though two of them are named differently ("meas_para" and "ca_para" as opposed to "proc_count" and "draw_count"), they are similar to each other except for partially different variables.

(b) Order of definition of parameters (arguments) and variables

In Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, one parameter (argument) ("device_num") is added and two parameters (arguments) ("draw_mark" and "picture") found in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program are deleted. However, the order of definition of the remaining six parameters (arguments) is consistent with that of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

Besides, except for "i" positioned differently in the order of definition of variables and the absence of "draw_req," Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is consistent with Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

(c) Type of parameters (arguments) and variables

Both Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program designate "Long" type, not "Integer" type, as the data type of the loop counter "i" in the variable defining blocks ("F2" in the former and "I2" in the latter).

Additionally, both Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program designate "Double" type, not "Integer" type, as the data type of "edge_x" and "edge_y" in the argument defining blocks ("F1" in the former and "I1" in the latter) and as the data type of "x" and "y" in the variables defining blocks ("F2" in the former and "I2" in the latter).

(d) Syntax

In both Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, the needle tip coordinate detection blocks ("F4" in the former and "I4" in the latter) contain an "If" sentence, "Select Case" sentence, "For ... Next" sentence, "Do ... Loop" sentence, and the like in substantially the same manner in terms of content and order. Besides, a "Do ... Loop" sentence also contains a "For ... Next" sentence and an "If" sentence in substantially the same manner in terms of content and order.

Further, "Exit" sentences ("Exit Sub", "Exit For", "Exit Do", etc.) are used in common positions in the needle side surface detection blocks ("F3" in the former and "I3" in the latter) and the needle tip coordinate detection blocks ("F4" in the former and "I4" in the latter).

(e) Twisted definition in the needle tip coordinate detection block

Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program further involves the following description in the needle tip coordinate detection block ("F4"):

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Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method)

program commonly involve "Case separation" using a variable which is "process."

Besides, in both Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, "select" sentence deals with case separation in the surface detection direction as follows: [redacted], in which a so-called "twisted definition" situation appears commonly.

(f) Position of the string connection character ("_")

Both Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program contain the string connection character "_" inserted at four positions to start a new line in the needle tip coordinate detection blocks ("F4" in the former and "I4" in the latter).

(D) Selectability of other expressions (room for selection)

a. Program structure (Exhibit Ko 7)

For processing that can be seen in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and the Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, there are several other source code description methods that can be employed, including, for example, [i] a description method of making "(1) Contact angle calculation main" program to call a program to perform contact angle calculation by the θ/2 method or a program to perform contact angle calculation by the tangent method and then making these programs to call programs such as "(10) Automatic threshold calculation," "(2) Droplet detection," "(3) Needle tip detection," and "(11) Endpoint detection" respectively; [ii] a method of describing a program to perform contact angle calculation by the tangent method as a sub-program of a program to perform contact angle calculation by the θ/2 method; and [iii] a description method of directly calling a program to perform contact angle calculation by the θ/2 method and a program to perform contact angle calculation by the tangent method from the outside without passing through "(1) Contact angle calculation main."

Additionally, to determine which function should be treated as a sub-routine to constitute an individual program among functions required in contact angle calculation by the sessile drop method or how to configure blocks in each program, in addition to

the method of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, several other description programs can be employed.

b. Algorithm in each program (Exhibit Ko 27)

(a) Algorithm used in "(10) Threshold calculation" of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is configured to measure the luminance of two representative points on left and right sides of the background and determine a threshold for monochromatic determination based on the average value of the luminance.

Threshold calculation methods include, in addition to the above method, as a general method, a mode method (in which a luminance histogram of an image is created to determine luminance in the deepest valley between two peak positions as a threshold) and a percentile method (in which a ratio of an area to binarize in an image to the entire image area is specified by percentage to binarize the area). Besides, even if a method similar to the algorithm of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is adopted, several combinations such as selecting more than two points and selecting vertical or diagonal points rather than left and right points in the background can be considered as a method of selecting representative points for threshold calculation.

(b) Algorithm of "(3) Needle tip detection" of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program utilizes a binarized image to trace a needle side surface and detect a needle tip position, or specifically involves: [i] scanning an image from a left side in the "+X" direction and changing the scanning direction to "+Y" direction at a position of the pixel changing from "white" to "black" (position coming in contact with a needle contour) for scanning (first step); and [ii] using the black point detected at the first step as a start point and scanning the image while tracing the black points (on the needle contour) to the downward direction until being aligned to Y-coordinate of the black point (needle tip) detected at the first step, thus searching for a black point of the maximum value in Y-coordinate.

Several methods can be considered as the needle tip detection method, including: in addition to the above method, [i] a method of detecting a position of the pixel changing from "black" to "white" (needle tip) while scanning an area inside the needle downward from the center of an image; and [ii] a method of detecting a position of the pixel changing from "white" to "black" (needle tip) while scanning the entire image from left to right or right to left. Even in the case of using a method similar to the algorithm of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, several methods can be considered including: [i] a method of starting

scanning operation at the first step in "-X" direction from the right side of the image; and [ii] a method of appropriately selecting the uppermost end or the center position in the image as a scanning operation start position on Y axis at the first step.

(c) Algorithm of "(11) Endpoint detection" of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program looks into an image from the needle tip to the directly downward direction to detect the presence of a droplet, and further looks into the image in the manner of moving around along the surface of the droplet to detect endpoints on both sides of the droplet, or specifically involves: [i] scanning the image from the needle tip to "+Y" direction and starting contour scanning while moving toward lower right along black points (droplet contour) from a position of the pixel changing from "white" to "black" (position reaching the droplet contour) (first step); [ii] scanning the image along black points (droplet contour) to detect a position having inversion of X-coordinate (convex part) (second step); [iii] reversely tracing the image so as to return to the opposite direction and similarly detecting a position having inversion of X-coordinate, whereby storing coordinates of endpoint (convex part) in a memory (third step); [iv] further scanning black points (droplet contour) continuously toward the lower side and searching of a portion having inversion of X-coordinate (concave part) (a contact angle is determined as an acute angle if no concave part is found) (fourth step); [v] upon detection of a concave part, reversely tracing the image so as to return to the opposite direction and similarly detecting a position having inversion of X-coordinate, whereby storing coordinates of endpoint (concave part) in a memory (a contact angle is determined as an obtuse angle if a concave part is found) (fifth step); [vi] identifying whether the concave part corresponds to an endpoint on the measured surface or was generated due to a "crack" resulting from an image error, based on whether the concave part falls within ±2% of the radius of a virtual circle passing through the convex part (sixth step).

Several methods can be considered as an endpoint detection method, including: in addition to the above method, [i] a method of scanning an image in the vertical direction and utilizing the state of the pixel changing from "white" to "black" to "white" to detect a an endpoint of a convex part of a droplet at the second step; [ii] a method without passing through the third step; [iii] a method of scanning an image in the vertical direction and utilizing the state of the pixel changing from "white" to "black" to "white" to "black" to "white" to detect an endpoint of a concave part of a droplet at the fourth step; and [iv] a method without passing through the sixth step.

(d) Algorithm of "(13) Vertex detection" of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program sets a perpendicular bisector by utilizing

left and right endpoints (convex part or concave part) and detects the vertex of a droplet by monochromatic determination on the perpendicular bisector. Specifically, monochromatic determination on the perpendicular bisector is performed by looking into an image on the perpendicular bisector downward from the already detected needle tip position, and adopting the first white/black changing point.

Several methods can be considered as a vertex detection method, including: in addition to the above method, [i] a method of scanning an image in the crosswise direction and utilizing the state of variation from "white" to "black" to "white" to detect the vertex of a droplet; [ii] a method of scanning an image in the vertical direction and utilizing the state of variation from "white" to "black" to detect the vertex of a droplet; and [iii] a method of looking into an image along the boundary of a droplet and utilizing the timing of inversion of Y-axis moving direction from "-" to "+" to detect the vertex of the droplet.

(e) Algorithm of "(14) Surface detection for tangent method" of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program uses left and right endpoints (convex part or concave part) as starting points and traces a droplet contour to detect coordinates required for measurement in order to obtain independent left and right contact angles by the tangent method.

Several methods can be considered as a method of surface detection for tangent method, including, in addition to the above method, a method of scanning an image in the vertical direction and detecting a droplet surface in the vicinity of endpoints to detect coordinates required for measurement.

c. Description of source codes (Exhibit Ko 38)

To perform programming by VB used in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, the name of variable, argument, function and constant can be determined freely by creators and the name thereof does not bring a difference in the compiled object code. Thus, even if a different name is given, the same command can be given to the electronic computer. The order of definition of parameters (arguments) and variables can also be determined freely by creators. It is further possible to select whether similar processing is turned into a sub-routine, or make variables arrayed and use parameters (arguments) and functions as a reference for variable. There are several kinds of loop sentences such as "For ... Next" and "Do ... Loop" for repetitive processing and condition determination can also be realized by "If" sentence and "Select Case" sentence. Thus, there is a certain degree of diversity under certain restrictions as to how to describe and arrange source codes for the command of the same content, such as allowing selection as to what kind of

function should be used.

B. Feasibility of reproduction or adaptation

(a) Reproduction means reproducing a work in a physical form through printing, photography, or replication, by recording its sound or visuals, or in any other way (Article 2, paragraph 1, item (xv) of the Copyright Act). The Copyright Act protects creative expression of thoughts or sentiments (Article 2, paragraph 1, item (i) of the Copyright Act). Thus, reproduction of a work is understood to be the act of relying on an existing work and maintaining identity of creative expression thereof to create an article from which those who encountered the article can directly perceive essential features expressed by the work. Adaptation of a work (Article 27 of the Copyright Act) is the act of, while relying on an existing work and maintaining identity of creative expression thereof, modifying, increasing/decreasing, and changing the specific expression and thus expressing new creative thoughts or sentiments to create another work from which those who encounter the thoughts or sentiments can directly perceive essential features expressed by the existing work (Supreme Court 1999 (received) No. 922, judgment of the first petty bench on June 28, 2001, Minshu Vol. 55, No. 4, at 837).

Accordingly, in case where a work created by relying on an existing work is identical thereto in the creative expression and those who encountered the work can directly perceive essential features expressed by the existing work, the work falls under a reproduction or adaptation. Meanwhile, a work created by relying on an existing work is identical to the existing work merely in the aspect other than expression of thoughts, sentiments, ideas, facts, or cases or in the aspect without involving expressed creativity, the work shall not fall under a reproduction or adaptation.

(B) Dependency

As described in the above facts used as premise, Appellant X who used to be Appellee's employee was mainly in charge of creating Appellee's (Plaintiff's) program including the features of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program. Thus, it is obvious that Appellant X who created Appellant's (Defendant's) old contact angle calculation (sessile drop method) program recognized the presence and expressed contents of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

Then, in addition to the fact that Appellant X admitted having referred to Appellee's (Plaintiff's) program to create Appellant's (Defendant's) old version including the features of Appellant's (Defendant's) old contact angle calculation

(sessile drop method) program, in light of the identity between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program as acknowledged in the above A, Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is found to have been created by relying on Plaintiff's contact angle (calculation) sessile drop method.

(C) Identity of creative expression

a. A program is, by its nature, restricted in expressed symbols, subject to a strict language system and also restricted in selection of combination of commands to make the electronic computer function as economically and efficiently as possible. Thus, not a few programs are provided with specific descriptions that are similar. The Copyright Act protects specific program expression, not functions or ideas. Hence, programs in which specific descriptions created by any persons remain substantially the same due to the restriction of expression, very short programs, or common programs shall be regarded as demonstrating no originality of creator and lacking creativity. Meanwhile, in the entire program consisting of command expression, command combination, and command order, if there is room for selection of some other expression and some kinds of originality of creator are expressed therein, creativity shall be acknowledged therein.

b. In Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, the subject part can be characterized in that: [i] most of the program structures are identical to each other as stated in the above A (C) a; [ii] the block structures in the respective programs numbered from (1) through (16) having substantially the same functions in one-to-one correspondence are also found to have a substantially one-to-one correspondence in the function and order, as stated in the above A (C) b (a); and [iii] in about 86% of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, source codes based on these structures are identical or closely resemble to Appellee's (Plaintiff's) program as stated in the above A (C) b (b) and c, and these source cords are also found to be identical or similar thereto in the description order and combination or the like. Although Appellant's (Defendant's) old contact angle calculation (sessile drop method) program does not contain some of the programs provided in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program as stated in the above A (C) a (b), these programs are not essential in droplet contact angle measurement. Besides, as stated in the above A (C) a (b), although Appellant's (Defendant's) old contact angle

calculation (sessile drop method) program contains additional programs that are not found in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, it is simply because programs integrated in advance into already existing programs were separated therefrom and described as other programs.

Then, with regard to the description of source codes relevant to the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program sharing identity with Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, when said description is viewed as a whole, there is sufficient room for selection of some other expressions in the command expression, command combination, and command order as stated in the above A (D), and the description is not found to be common expression. The description is therefore found to be creative expression expressing originality of a creator.

c. Hence, Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is identical to Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program to the extent of the subject part and creative expression, and it is found that those who encountered Appellant's (Defendant's) program can directly perceive the essential features expressed by Appellee's (Plaintiff's) program in the subject part.

C. Claims by Appellant NiCK and Appellant X

(A) Appellant NiCK and Appellant X allege that there is only the word-level similarity in the yellow part of the source codes comparative table 1, while the orange part thereof shows only the same function with no similarity in expression, and the needle tip coordinate detection block (F4) in [Attachment 10-2] has no creativity because the rotational direction for needle tip detection is limited to only four kinds and "Select Case" sentence is used for three or more case separations.

However, when the description of source codes of the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program sharing identity with Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is viewed as a whole, it is found that Appellee's (Plaintiff's) program shares identity with Appellant's (Defendant's) program not only on the word-level or the function level but also in the program structure, the block structure in each program, the content of description of source codes based on these structures, the order and combination of the description, and creativity is found in the features sharing identity, as stated in the above B (C).

It is inevitable to conclude that the above allegation by Appellant NiCK and Appellant X, in which creativity of descriptive expression of individual source codes

constituting the subject part is viewed as a problem, is improperly made due to the identity found between the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and the subject part of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program even when the subject part is viewed as a whole in this case, as stated in the above B (C) b.

(B) Appellant NiCK and Appellant X allege that Appellant's (Defendant's) old contact angle calculation (sessile drop method) program was created based on "habits" and "thought patterns" of Appellant X serving as a programmer and therefore do not have dependency on Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

However, when the description of source codes of the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program sharing identity with Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is viewed as a whole, it is found that Appellee's (Plaintiff's) program shares identity with Appellant's (Defendant's) program not only on the word-level or the function level but also in the program structure, the block structure in each programs, the content of description of source codes based on these structures, and the order and combination of the description, and creativity is found in the features sharing identity, as stated in the above B (C).

As stated above, Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is identical to Appellant's (Defendant's) old contact angle calculation (sessile drop method) program not only on the word-level and the function level and but also in the majority of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program sharing identity with Appellee's (plaintiff's) contact angle calculation (sessile drop method) program (1,320 lines of source codes out of 1,923). In view of the above, it is not possible to immediately conclude that programs of both parties were created mainly by Appellant X and are therefore influenced by "habits" and "thought patterns" of Appellant X as a programmer. On the contrary, [i] programs of both parties are found to be identical to the level of detailed source codes expression as stated in the above A (C) c, and [ii] even though many source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program created mainly by Appellant X in charge are provided with supplementary "comments," source codes of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program presented as evidence in this case have no description of "comments," which is unnatural and rather gives an idea that Appellant's (Defendant's) old contact angle calculation (sessile drop method) program

were created using source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program. In light of the above, it is not possible to conclude that "habits" and "thought patterns" of Appellant X as a programmer were merely reflected onto Appellant's (Defendant's) old contact angle calculation (sessile drop method) program.

D Summary

From the above, Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is found to be a reproduction or adaptation of the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

(2) Issue (2) A (whether or not Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program)

A. Findings

Putting the above facts used as premise, the evidence (Exhibit Otsu 14 and Exhibit Otsu 20), and the entire import of the oral argument together, the following facts are found.

(A) Structure of Appellant's (Defendant's) new version

a. Appellant NiCK appointed Appellant X as a main person in charge to complete Appellant's (Defendant's) new version, and manufactures and sells automatic contact angle meters mounted with Appellant's (Defendant's) new version (the products 1 through 5 listed in the list of Appellant's (Defendant's) products attached to the original judgment) from October 1, 2010 in place of Appellant's (Defendant's) old version.

b. Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is one of the programs to constitute Appellant's (Defendant's) new version, and has the same function as Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

c. Appellant's (Defendant's) new contact angle calculation (sessile drop method) program has a program structure that is substantially as described in the attached tree diagram of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program (Exhibit Otsu 20). Appellant's (Defendant's) new contact angle calculation (sessile drop method) program includes source codes that are described in "i2win source (revised)" column of "source codes comparative table 2" (source codes comparative table 2) attached to the original judgment.

d. Source codes of Appellant's (Defendant's) new version consist of 23 source codes files and 21,771 lines, including 994 lines of source codes for Appellant's

(Defendant's) new contact angle calculation (sessile drop method) program.

(B) Comparison between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) new contact angle calculation (sessile drop method) program

a. Program structure

Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is described as stated in the above (1) A (C) a.

Meanwhile, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is as follows: [redacted]

b. Description of source codes

(a) When source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program are compared to source codes of Appellant's (defendant's) new contact angle calculation (sessile drop method) program, it is found that these functions has a substantially one-to-one correspondence in each block.

(b) With regard to description of source codes in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) new contact angle calculation (sessile drop method) program, variable and argument names are slightly different in the three blocks as follows: [redacted]. Expression of function is identical or similar.

However, in addition to the above three blocks, the two programs do not have common description of source codes in the expression, sub-routine method, order of description, and the like.

(c) Difference in the sub-routine method

Means for providing a sub-routine involves, for example, the following

difference between Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) new contact angle calculation (sessile drop method) program.

i. Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program: ●● ●● ●●

ii. Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program: ●● ●● ●●

iii. Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program: ●● ●● ●●●

B. Feasibility of adaptation

Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) new contact angle calculation (sessile drop method) program are found as follows: [i] the two programs do not have a common program structure as stated in the above A (B) a, and [ii] as stated in the above A (B) b, even though the programs have a substantially one-to-one functional correspondence in each block, identical or similar source code description is found only in three blocks dedicated to simple calculation and each block has 11 to 12 short lines in the case of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program so that, except for these three blocks, the two programs are found to have no commonality in the expression of source codes, sub-routine method, order of description, and the like.

Accordingly, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is not found to maintain identity in the essential features expressed in the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

C. Appellee's allegation

(A) Appellee alleges that Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program shares identity with Appellant's (Defendant's) new contact angle calculation (sessile drop method) program in the expression, because comparison of program structures of both programs reveals no change in the basic logic of

expression as a whole.

However, the two programs have common source codes only in three blocks and are not found to have commonality in the expression except for the three blocks, as stated in the above B. When there is no commonality in the program (source code) expression but similar program structures or processing flows are simply shown in the tree diagrams, it simply falls under commonality in the idea but arguably denies identity in the expression.

(B) Appellee alleges that Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and Appellant's (Defendant's) new contact angle calculation (sessile drop method) program share identity in the expression because comparison of both programs reveals a one-to-one correspondence in 20 programs in the source code comparative table 2 and also reveals a correspondence in blocks having the same functions.

However, similar to the above (A), it is not possible to see the identity in the expression simply on the ground that there is no commonality in the program (source code) expression but there is a one-to-one correspondence in programs and a correspondence in blocks having the same functions.

(C) Appellee alleges that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program and Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program share identity in the expression, because comparison of both programs reveals that expression is changed simply by rewriting each set of expression through any of corrections including slight change of expression, simple deletion of a part of processing (description), addition of processing (description) without changing the basic logic, sorting of existing processing (description), outing of existing processing (description), or retrogression of processing (description), without adding any change to the logic and mechanism of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

However, the above Appellee's allegation is unreasonable because it fails to specify which part of source codes of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program corresponds to the above allegation through specific comparison of source codes of both programs.

D. Summary

From the above, it is not possible to conclude that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

(3) Summary

A. Case A in prior instance

Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is a reproduction or adaptation of the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, and Appellant X's act of creating Appellant's (Defendant's) old contact angle calculation (sessile drop method) program and Appellant NiCK's act of manufacturing and selling Appellant's (Defendant's) old contact angle calculation (sessile drop method) program or the contact angle meters mounted therewith are found to fall under the act of infringing the appellee's copyright (right of reproduction and right of ownership transfer, or right of adaptation and the right under Article 28 of the Copyright Act) in connection with Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

Then, Appellant NiCK and Appellant X are found to have acted intentionally or negligently with regard to the above copyright infringement and therefore shall be liable for damages caused by the copyright infringement against Appellee.

B. Case B in prior instance

Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is not found to be an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program. Hence, no ground is found for the claim for injunction, the claim for disposal, and the claim for damages based on the copyright infringement in relation to the case B in prior instance.

2. Claim based on the Unfair Competition Prevention Act in relation to trade secrets

(1) Applicability of Appellee's (Plaintiff's) source codes to trade secrets

A. Findings

Putting together the facts used as premise, the evidence, and the entire import of the oral argument mentioned below, the following facts are found and there is no evidence that is sufficient to overturn the findings.

(A) Appellee's rules of employment set forth the rules on service by employee (Section 7(6)) including the responsibility after resignation (Section 38) stipulating "do not leak job-related confidential matters and matters putting the company at a disadvantage to any third parties" and the ground for disciplinary dismissal (section 47(6)) stipulating that "employees must not leak the company's confidential information known while in office to third parties," in which it is specified that "in case of leaking job-related important confidential information accessible in the course of duties or making an attempt to leak thereof." Appellee also demands submission of "written oath of maintenance of confidentiality" by resigning employees to promise compliance with the following matters in general and actually received the written

oath from Appellant X (Exhibit Ko 8 and Exhibit Ko 9).

Section 1 (Confirmation of maintenance of secrecy)

In resignation from the company, I confirm that I return the entirety of originals, copies, and relevant materials of each and every material relating to the company's technical or trade information listed below (hereinafter referred to as "the confidential information") and do not possess any of them:

(1) Information concerning product development, manufacturing and sales plan, technical materials, manufacturing costs and pricing, etc.

(2) Information concerning financial and personnel affairs, etc.

(3) Information concerning business partnership with other companies

(4) Information designated as confidential information by the supervisor and information designated specifically as the subject of maintenance of secrecy by the company

Section 3 (Promise of maintenance of secrecy after retirement)

I promise that I do not disclose, leak, or use the confidential information for myself or for any other business operators or any other third parties after resignation from the company.

(B) Appellee commenced development of a program mounted on automatic contact angle meters from December 1998, completed "FAMAS ver 1.0.0.0" having a contact angle measuring function by the sessile drop method, and started selling the automatic contact angle meter ("CA-V") mounted with the program from October 6, 2000.

Appellee then repeated program version upgrading by adding functions and completed Appellee's (Plaintiff's) program ("FAMAS ver 3.1.0.0") on July 9, 2009 (Exhibit Ko 11 and Exhibit Otsu 9).

(C) Appellee used to store program source codes in the folder shared in the Research and Development Division until around August 2008 without taking any measures such as access authority restriction to the shared folder. However, in or after around September 2008, Appellee started storing completed program source codes in the "SOFT_Source" folder in the "RandD_HDD" server, a network shared folder in the Research and Development Division and managing the folder with password, whereby restricting the authority of access to the folder to the employees (programmers, the Chief of Development and the Head of Research and Development) involved in software development in the Research and Development Division.

Appellee notified the employees in the Research and Development Division of the above change by electronic mail and called for attention to the effect that folder access history (log) indicating which personal computer was used to access the folder

is kept even in case of unauthorized use.

Actually, it was possible to confirm about the latest twenty accesses in the shared folder access history (log) (Exhibits Ko 20 to 25, and 40).

Additionally, in the appellee, programmers use personal computers loaned by Appellee to develop software. Program source codes are also stored in the above personal computers used by programmers with password setting (Exhibit Ko 40).

B Applicability to trade secrets

(A) Secret manageability

As acknowledged in the above A, at the time of July 2009 in which Appellee's (Plaintiff's) program was completed, password was set for personal computers used by programmers who are in charge of development, Appellee stored completed program source codes in the "SOFT_Source" folder in the "RandD_HDD" server, a network shared folder in the Research and Development Division, managed said folder with password, restricted access right holders, notified employees of the above management system, and called for the attention to the effect that any unauthorized use is kept in the folder access history(log) and therefore it is possible to identify which personal computer was used to access the folder. In light of the above circumstance, Appellee's (Plaintiff's) source codes should be acknowledged as having been managed as secret in Appellee.

(B) Usefulness and no common awareness

Appellee's (Plaintiff's) program is software exclusively used for contact angle meters that account for a large part of sales of Appellee engaged in developing, manufacturing, and selling physical and chemical apparatuses. Thus, source codes are useful technical information for Appellee's business activities and not known publicly (Exhibit Ko 12 and Exhibit Otsu 9).

(C) From the above, Appellee's (Plaintiff's) source codes are found to fall under "trade secrets" in Article 2, paragraph (6) of the Unfair Competition Prevention Act.

(2) Applicability of Appellee's (Plaintiff's) algorithms to trade secrets

A. Findings

Putting together the facts used as premise, the evidence, and the entire import of the oral argument mentioned below, the following facts are found and there is no evidence that is sufficient to overturn the findings.

(A) The handbook was prepared for sales representatives around October 2006 by Appellee's Development Department of the Research and Development Division and contains the beginning ("Introduction") stating as follows: "This material summarizes the concept and function outline of the measurement/analysis integrated system

software FAMAS mainly for sales representatives who often interact with customers. Although some of the descriptions are also found in the instruction manual, the handbook contains know-how elements of the company and is therefore regulated as "internal use only." We hope the handbook can be of any help in any occasions such as business trips. -- Research and Development Division, Development Department, X --." There is a large print of "CONFIDENTIAL" at the center of cover page with a small print of "[internal use only]" on the upper margin of each page (Exhibit Ko 12).

(B) The handbook involves the following description in general (Exhibit Ko 12).

a. Disclosure of image processing parameter

Since the former software was designed by an outside software company, the internal structure of so-called "general" image processing was completely a black box to the customers and us.

Since the internal algorithm is not disclosed, the cause of any image processing error was unknown and the only solution was to grope for any means to obtain an image to process.

FAMAS is based on the idea as follows: [redacted], in which the following image processing parameters are disclosed to provide an alternative method of allowing customers to find optimum image processing suitable for a sample, thus enabling image processing for a wide range of samples (page 62).

b. Image processing area

FAMAS provides setting of "image processing area" to allow measurement by focusing on a required range. [redacted]

Contact angle measurement is set to a default of 30 dots from the end of each image.

The image processing area is used commonly not only for contact angle/interfacial tension measurement but also for needle tip recognition, liquid volume measurement and adhering droplet recognition (page 64).

c. Binarization and threshold level

Droplet images entered from the solid-liquid interface analysis system, contact angle meter, and interfacial tension meter appear dark resulting from refraction. To capture droplet endpoints, first of all, it is necessary to securely capture a droplet contour.

An image board used in FAMAS can be obtained with 8-bit brightness in each

pixel and ... expressed with 256 gradations (0 through 255 levels). In image processing, this multi-gradation image is so-called "binarized" and divided into "black" which is equal to or less than certain brightness and "white" which is brighter than the brightness (two gradations) and a contour of the black is processed as a contour of an object (or a droplet herein). This brightness is called a "threshold level." It is not an exaggeration to say that the quality of binarization determines the quality of end point recognition (page 64).

d. Automatic threshold level

[redacted]

e. Needle tip recognition

To recognize a needle, first of all, it is necessary to detect needle side surfaces.

In the side surface detection, "black" coordinates detected first by moving from left and right positions of the upper end of an image processing area towards the center are treated as respective needle side surfaces.

Needle tip end detection is carried out by repeatedly tracing a black contour in the downward direction from the detected needle side surfaces as the starting points until the height of side contour sections is aligned with the starting points, in which coordinates detected first among lowest height points are treated as a needle tip end.

Accordingly, needle tip end coordinates have independent left and right X axes. If it is not possible to detect "black" in the side surface detection, it is determined that there is "no needle," and center upper ends on the left and right of the image

processing area are determined to be needle tip positions (page 71).

f. Droplet surface detection (only contact angle measurement)

The method of detecting an adhering droplet surface includes ... a sessile drop method in which ... after needle tip recognition, "black" coordinates detected first by moving from left and right needle tip positions to the downward direction are treated as a droplet surface (page 75).

g. Image processing algorithm (only contact angle measurement)

To obtain a droplet contact angle, it is necessary to securely obtain right and left endpoints of an adhering droplet. Judging that it is essentially impossible to apply general image processing to all the sample combinations, FAMAS increased the variety of image processing algorithms from only one kind in the former software to the following six kinds so as to be used differently for respective sample combinations (page 76).

[90° or less (protruding endpoint detection)]

This algorithm treats right and left endpoints of a droplet as protruding (can be seen to have a contact angle of 90° or less) and detects protruding portions of a droplet contour as endpoints. Using droplet surface coordinates as the starting points, the surface is traced outward on the left and right sides and slight fluctuation of contour detection is also taken into consideration to detect coordinates recognized as "clearly turning into an internal tracing direction." Then, the same algorithm is used to trace the surface in the opposite direction while storing contour coordinates and counting the number of stored coordinates, and detect coordinates recognized as turning into an internal direction.

Herein, Y-coordinate is obtained when the number of stored coordinates is half counted, and the same Y-coordinate is retrieved from the stored coordinates. The outermost coordinate among them is regarded as an endpoint (page 76).

(Showing the same diagram as the first diagram of "4. Endpoint detection" in the list of algorithms attached to the original judgment)

[90° or more (concave curved endpoint detection)]

This algorithm treats right and left endpoints of a droplet as concave curves (can be seen to have a contact angle of 90° or more) and detect concave curved portions of a droplet contour as endpoints. First of all, the above "90° or less" algorithm is used to obtain protruding endpoints that are used as the starting points to trace the surface toward the inside of the left and right sides and detect coordinates recognized as "clearly turning into an external tracing detection." Then, the same algorithm is used to trace the surface in the opposite direction and detect coordinates recognized as

turning into an external direction while storing contour coordinates and counting the number of stored coordinates.

Herein, Y-coordinate is obtained when the number of stored coordinates is half counted, and the Y-coordinate is treated as an endpoint (page 76).

(Showing the same diagram as the second diagram of "4. Endpoint detection" in the list of algorithms attached to the original judgment)

[Automation]

This algorithm automatically determines whether a protruding point is treated as an endpoint or a concave curved point is treated as an endpoint based on the contour shape by combining the above 90° or less and 90° or more algorithms.

First of all, the above "90° or less" algorithm is used to obtain protruding endpoints. Further, an area beneath the coordinates found by scanning "black" downward from positions disposed outside of said protruding endpoints by 10 dots is stored as an "invalid area."

Next, the above "90° or more" algorithm is used to find out concave curved endpoints, in which protruding points are detected as endpoints if there is no concave curved endpoint found by tracing an "invalid area." ...

Further, when a concave curved point is found, to avoid false recognition due to image noise, only in the case where the concave curved point is included in the range of "±2% of the radius of the circle" based on the diameter of the coordinates of the left and right protruding points, the concave curved point is treated as an endpoint. If the concave curved point is not included in the range, the concave curved point is determined to be produced by noise and a protruding point is treated as an endpoint (page 77).

(showing the same diagram as the third diagram of "4. Endpoint detection" in the list of algorithms attached to the original judgment)

[No reflection]

This algorithm is used when there is no reflection on a solid sample, in which a contour of a droplet and a solid sample is traced to detect inflection points. To ensure that the shade of a solid sample is processed as "black," simple binarization is selected automatically without use of automatic threshold level only when this algorithm is used.

Droplet surface coordinates are treated as the starting points and the surface is traced outward on the left and right sides until coming off an image processing area, in which all the coordinates obtained herein are stored.

For all the coordinates, an angle made by a direction from tenth coordinates prior

to the subject coordinates (see green arrow in the diagram shown below (judgment note: *the same diagram as the fourth diagram of "4. Endpoint detection" in the list of algorithms attached to the original judgment)) and a direction to tenth coordinates ahead (see red arrow in the diagram shown below) is obtained and coordinates in which the angle reaches the maximum are treated as inflection points and detected as endpoints (page 78).

h. Analysis method

[θ/2 method]

A droplet adhering on a solid becomes circular owing to its own surface tension and forms a part of a sphere. The shape at that time is captured as an image by a CCD camera, in which right and left endpoints and the vertex of the droplet are found by image processing to obtain a radius (r) and a height (h) of the droplet image.

Obtained values are assigned to the following equation to obtain a contact angle θ (page 28):

$$\tan\theta_1=h/r \rightarrow \theta=2\arctan h/r$$

(the same diagram as that of "6. θ/2 method calculation" in the list of algorithms attached to the original judgment)

[Tangent method]

As shown in the following drawing (judgment note: *the same diagram as that of "7. Three-point detection for tangent method"), the vicinity of droplet endpoints is treated as a part of a sphere and a center M of a circle O is obtained from points L_1, L_2, and L_3 on a circular arc so as to obtain a tangent to the circle at the point L1.

An angle made by the obtained tangent to the circle and a straight line serves as a contact angle on the left side of the droplet.

In the same manner, a contact angle on the right side of the droplet can be obtained from R_1, R_2, and R_3 on the circular arc (page 29).

B. Applicability to trade secrets

(A) Secret manageability

a. According to the facts acknowledged in the above A, the contents of the appellee's (plaintiff's) algorithms are found to be described in the handbook or fall under matters that can be easily derived from the described matters as explained below.

Specifically, among the contents described in the list of algorithms attached to the original judgment, it is found that: [i] "1. Automatic threshold calculation" is described in or can be easily derived from the matters described in the above A (B) b, c, and d; [ii] "2. Needle tip detection" is described in or can be easily derived from the matters described in the above A (B) d and e; [iii] "3. Droplet detection" is described

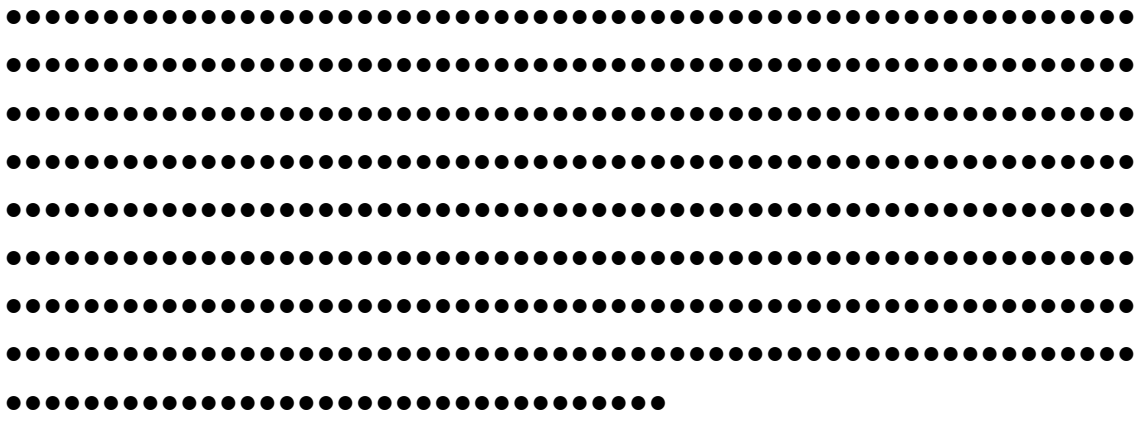
in or can be easily derived from the matters described in the above A (B) f; [iv] "4 endpoint detection" is described in or can be easily derived from the matters described in the above A (B) g; [v] "5. Vertex detection" is described in or can be easily derived from the matters described in the above A (B) h; [vi] "6. θ/2 method calculation" is described in or can be easily derived from the matters described in the above A (B) h; [vii]"7 three-point detection for tangent method" is described in or can be easily derived from the matters described in the above A (B) h (even though the "specified value of 30 dots" is not described in the handbook, in reading coordinates of three points at certain intervals, it is common to set a specified value at the intervals and no special significance is found to set the specified value to 30 dots corresponding to the performance of the apparatus to constitute the product); and [viii] "8. Tangent method calculation" is described in or can be easily derived from the matters described in the above A (B) h.

b. Then, as acknowledged in the above A, the handbook was prepared for sales representatives in a portable manner by Appellee's Development Department of the Research and Development Division to assist explanation of software to customers. The θ/2 method and the tangent method are publicly known principles as a contact angle analysis method, and it is found that Appellee followed the policy of allowing customers to find out optimum image processing suitable for a sample by disclosing image processing parameters. In light of these facts, it is not possible to conclude that Appellee's (Plaintiff's) algorithms detached from the program source code description were managed as a secret by Appellee.

(B) No common awareness

a. To automatically measure a contact angle on a free surface of static liquid by image analysis, measurement is carried out by causing the needle tip to drop a liquid (specific liquid) onto a plate (specific solid), tracing an adhering droplet contour, and calculating an angle made by the surface of the droplet and the plate at the contact point of the droplet and the plate. Specific procedures in Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program are as follows: [redacted] (Exhibit Otsu 39, the entire import of the oral argument).

(a) Automatic threshold calculation



(b) Needle tip detection

From the fact that a droplet as a measuring object in measurement is prepared by causing a needle tip to drop a liquid (specific liquid) onto a plate (specific solid) in Appellee's (Plaintiff's) products, the droplet is usually considered to be beneath (or above) the needle tip and it is also generally known that a luminance difference between the needle and the background is greater than a luminance difference between the droplet and the background and the needle tip can be detected more easily and accurately than the droplet. Thus, the droplet detection method carried out by needle tip detection and based on the detected needle tip position cannot be something special.

Then, methods generally considered for needle tip detection include: [i] a method of detecting a black point position (needle tip) at the maximum Y-coordinate by scanning an image from the left side in the "+X" direction, detecting a position of the pixel changing from "white" to "black" (the position coming in contact with the needle contour), and scanning the image to the downward direction by using the detected black point position as a starting point while tracing the black points (needle contour) until being aligned to the Y-coordinate at the detected black point position; [ii] a method of scanning an area inside the needle downward from the center of an image and detecting a position of the pixel changing from "black" to "white" (needle tip); and [iii] a method of scanning the entire image from left to right (or from right to left) and detecting a position of the pixel changing from "white" to "black" (needle tip). Thus, the way itself to obtain a needle tip as adopted in Appellee's (Plaintiff's) algorithms is not something special.

(c) Droplet detection

Droplet detection is an essential procedure in contact angle measurement by image analysis. It is a general method to detect a needle tip for detection of droplet

based on the detected needle tip.

Then, the droplet is positioned in a lower (or upper) side of the image of the detected needle tip. Thus, it is not something special to scan the image downward by using the needle tip position as a starting point and determine a position of inversion from "white" to "black" as the position of the droplet.

(d) Endpoint detection

Endpoint detection is found to be substantially an essential procedure required in many contact angle calculations. Endpoint can be a convex or concave part depending on the viscosity of adhering droplet liquid, and it is a generally known matter that measurement assuming both cases is required.

Methods generally considered as a convex detection method include: [i] a method of determining endpoint coordinates by looking into an image in the directly downward direction from a needle tip to detect the presence of a droplet and detecting a position of X-axis coordinate changing from a decrease to an increase (or from an increase to a decrease) (convex part) while further looking into the image by moving around along the droplet surface; and [ii] a method of determining the first (or last) detected coordinates as endpoint coordinates by repeatedly scanning an image in the vertical direction and detecting a position of the first (or last) inversion from "white" to "black" to "white" while changing X-axis coordinate sequentially. In addition, methods generally considered for concave detection include: [i] a method of determining endpoint coordinates by looking into an image in the directly downward direction from a needle tip to detect the presence of a droplet, and detecting a position of X-axis coordinate changing from, after a decrease, an increase to a decrease in (on the left side) (convex part) while further looking into the image by moving around along the droplet surface; and [ii] a method of determining the first (or last) detected coordinates as endpoint coordinates by repeatedly scanning an image in the vertical direction and detecting a position of the first (or last) inversion from "white" to "black" to "white" to "black" to "white" while changing X-axis coordinate sequentially. Accordingly, the way itself to obtain a droplet vertex as adopted by Appellee's (plaintiff's) algorithms is not something special.

It is also found that detecting an endpoint followed by verification of the detected endpoint by repeatedly tracing the surface in the opposite direction for enhancement of measurement accuracy is a general method.

Meanwhile, it cannot be regarded as general method to detect whether a concave is within a certain percentage of the radius of a virtual circle passing through left and right convexes to confirm that a detected concave part is not a crack droplet image

generated by noise or light reflection, as adopted in Appellee's (Plaintiff's) algorithms,

It is possible without special difficulty to set a certain percent for the above certain percentage through trial and error, and using 2% for the value has no special technical significance.

(e) Vertex detection

Vertex detection is a procedure required in the θ/2 method or the like that is generally well known as a contact angle calculation method. Methods generally considered as a droplet vertex detection method include: [i] a method of detecting a droplet vertex by setting a perpendicular bisector using right and left endpoints and making monochromatic determination on the perpendicular bisector; [ii] a method of detecting a droplet vertex by scanning an image in the crosswise direction and using a variation from "white" to "black" to "white"; [iii] a method of detecting a droplet vertex by scanning an image in the vertical direction and using a variation from "white" to "black"; and [iv] a method of detecting a droplet vertex by looking into an image along a droplet boundary and using inversion from "-" to "+" in the Y-axis moving direction. Hence, the way itself to obtain a droplet vertex as adopted by Appellee's (Plaintiff's) algorithms is not something special.

(f) θ/2 method calculation

A procedure to perform the θ/2 method calculation is a generally well known method.

(g) Three-point detection for tangent method

Surface detection is a procedure required in the tangent method calculation that is generally well known as a contact angle calculation method. Surface detection required in the tangent method calculation is based on a droplet surface in the vicinity of both endpoints detected in "endpoint detection" and it is therefore not something special to detect the surface by tracing a droplet contour using both endpoints as starting points.

Then, extraction of three points of traced coordinates and determination of the degree of certain intervals at which the three points are disposed can be carried out as appropriate according to the capability of imaging and image processing as well as required accuracy. The value per se does not have any special technical significance.

(h) Tangent method calculation

A procedure to perform tangent method calculation is a generally well-known method.

b As stated in the above a, it is inevitable to conclude that many of the contents of Appellee's (Plaintiff's) algorithms can be easily conceived from or based on generally

well-known methods or composed of information having no special technical significance. In addition, even if Appellee's (Plaintiff's) algorithms partially include information that can be regarded as know-how, as stated in the above (A) b, Appellee fundamentally followed the policy of allowing customers to find out optimum image processing suitable for a sample by disclosing image processing parameters, and Appellee's (Plaintiff's) algorithms are described in the handbook prepared in a portable manner for sales representatives to assist in explanation of software to customers. Hence, it is presumable that Appellee's (Plaintiff's) algorithms were publicly known through explanation thereof by Appellee's sales representatives to their customers.

c. From the above, it is not possible to conclude that Appellee's (Plaintiff's) algorithms were not publicly known.

(C) Based on the above, Appellee's (Plaintiff's) algorithms do not fall under "trade secrets" in Article 2, paragraph (6) of the Unfair Competition Prevention Act.

(3) Unfair competition acts

A. Findings

(A) Putting together the facts used as premise, the evidence, and the entire import of the oral argument mentioned below, the following facts are found and there is no evidence that is sufficient to overturn the findings.

a. Appellant NiCK is a company established by Y (representative of the Appellant NiCK) and P, former employees of Appellee, on April 17, 2009. Y was working with Appellee from August 1, 2006 to August 15, 2008, belonged to the Sales Department, and was engaged in selling contact angle meters mounted with the software "FAMAS", P was working with Appellee from August 19, 1996 to April 15, 2009, belonged to the Research and Development Division, and assumed the role of Chief of the Development Department (Exhibit Ko 3).

b. Appellant X joined Appellee on April 3, 1995 and then belonged to the Development Department of the Research and Development Division. From December 1998, Appellant X served as a person (programmer) in charge of development and version upgrade of the software "FAM AS" having a contact angle measuring function by the sessile drop method thoroughly to the completion of Appellee's (Plaintiff's) program on July 9, 2009 (Exhibit Ko 11, Exhibit Ko 12, and Exhibit Otsu 42).

Appellee authorized Appellant X as a person in charge of development to access Appellee's (Plaintiff's) source codes, without taking any specific measures to restrict reproduction thereof (Exhibit Ko 21, Exhibit Ko 22-1, Exhibit Otsu 9, and Exhibit Otsu 42).

c. Appellant X completed Appellee's (Plaintiff's) program on July 9, 2009 and then resigned from Appellee on August 31, 2009. When resigning from Appellee, Appellant X bought the personal computer loaned by Appellee and used for creation of Appellee's (Plaintiff's) program (Exhibit Ko 42, Exhibit Otsu 8 and the entire import of the oral argument).

d. Appellant X joined Appellant NiCK on September 1, 2009, the day following resignation from Appellee, commenced development of the software "i2win" having a contact angle measuring function by the sessile drop method, and completed Appellant's (Defendant's) old version including Appellant's (Defendant's) old contact angle calculation (sessile drop method) program in general before around October 20, 2009 (Exhibit Ko 5).

e. In the proceedings of the case of provisional disposition filed by Appellee against Appellant NiCK as the other party (Tokyo District Court, 2010 (Yo) 22046, hereinafter referred to as "the provisional disposition case"), Appellant NiCK admitted that Appellant's (Defendant's) old version was created by referring to the functions (26 functions) described in Appellee's program in the course of development of Appellant's (Defendant's) old version. Besides, in the course of proceedings of the provisional disposition case, Appellant NiCK as a debtor with Appellant X designated as an interested person presented proposed terms of settlement to Appellee, including a clause to the effect that "the debtor admits partial use of Appellee's (Plaintiff's) program in manufacturing and selling Appellant's (defendant's) old version" (page 1), a clause to the effect that "Appellant X admits partial use of Appellee's (Plaintiff's) program source codes for the sake of Appellant NiCK in breach of the ‘written oath of maintenance of confidentiality’ dated June 17, 2009 and submitted to the appellee" (page 2), a clause to the effect that "both Appellant NiCK and Appellant X apologize to Appellee for each of the above acts " (page 3), and a clause to the effect that "Appellant NiCK and Appellant X delete Appellee's (Plaintiff's) program possessed by Appellant NiCK and Appellant X" (page 8) (Exhibit Ko 83, Exhibit Otsu 18).

(B) Against the above admission, Appellants allege that development of Appellant's (Defendant's) old version was completed before December 24, 2009 and it was on sale starting the same date.

However, the above allegation is contradictory to the statement posted on Appellant NiCK's home page to the effect that Appellant's (Defendant's) products 1 and 2 mounted with Appellant's (Defendant's) old version were released for sale on October 20, 2009 (Exhibit Ko 5). Aside from this, there is no other evidence that is sufficient to acknowledge the above fact as alleged by Appellants.

On the contrary, in light of what is stated on the above home page, it is presumable that Appellant X completed Appellant's (Defendant's) old version in general before October 20, 2009.

B. Claim relevant to Appellant's (Defendant's) old version (case A in prior instance)

With regard to the case A in prior instance, Appellee principally alleges copyright infringement and alternatively alleges violation of the Unfair Competition Prevention Act in the statement of the claims for damages. Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is a reproduction of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, and Appellant NiCK and Appellant X are liable for damages based on copyright infringement against Appellee, as stated in the above 1 (1). Considering circumstances of the case, judgment is also made below for the claim relevant to the case A in prior instance based on the Unfair Competition Prevention Act (issue (1) B).

(A) Unfair competition by Appellant X

In addition to the finding that Appellant's (defendant's) old contact angle calculation (sessile drop method) program is a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program as stated in the above 1 (1), as acknowledged in the above A, development of Appellant's (Defendant's) old version was completed in an extremely short period of about two months, Appellee imposed no restriction on reproduction of source codes by those in charge of software development, Appellant X bought the personal computer loaned and used for development of Appellee's (Plaintiff's) program when resigning from Appellee, Appellant NiCK admitted use of the functions described in Appellee's program as a reference to create Appellant's (Defendant's) old version in the proceedings of the provisional disposition case, and Appellant NiCK and Appellant X possess Appellee's (plaintiff's) source codes and presented to Appellee the proposed terms of settlement based on the premise that Appellant's (Defendant's) old version was created by using a part of Appellee's (Plaintiff's) source codes. In light of the above facts, it is presumable that Appellant X did not dispose of Appellee's (Plaintiff's) source codes when resigning from Appellee but has been possessing them and used them to create Appellant's (Defendant's) old contact angle calculation (sessile drop method) program.

Then, it is found that Appellant X conducted the above acts for the purpose of making Appellant NiCK acquire a wrongful gain by enabling Appellant NiCK to manufacture and sell products mounted with Appellant's (Defendant's) old version including Appellant's (Defendant's) old contact angle calculation (sessile drop method)

program, or to manufacture and sell Appellant's (Defendant's) old contact angle calculation (sessile drop method) program that is a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program. Hence, Appellant X's above acts shall fall under unfair competition in Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention Act.

(B) Unfair competition by Appellant NiCK

According to the facts acknowledged in the above A, Appellant NiCK is a company established by Y and P, former employees of Appellee, on April 17, 2009 and Appellant NiCK presumably obtained source codes of Appellant's (Defendant's) old contact angle calculation (sessile drop method) program that is a reproduction of adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, knowing that Appellant X did not dispose of Appellee's (Plaintiff's) source codes when resigning from Appellee and has been possessing them and used them to create Appellant's (Defendant's) old contact angle calculation (sessile drop method) program.

Accordingly, Appellant NiCK is found to have obtained or used Appellee's (Plaintiff's) source codes knowing that they were acquired through an improper disclosure act. Hence, Appellant NiCK's above acts shall fall under unfair competition in Article 2, paragraph (1), item (viii) of the Unfair Competition Prevention Act.

(C) As stated above, with regard to Appellee's (Plaintiff's) source codes recognized as Appellee's trade secrets, Appellant X's acts shall fall under Article 2, paragraph (1), item (vii) of the Unfair Competition Prevention and Appellant NiCK's acts shall fall under Article 2, paragraph (1), item (viii) of the Unfair Competition Prevention Act.

C. Claim relevant to Appellant's (Defendant's) new version (case B in prior instance)

Meanwhile, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not fall under an adaptation of source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program as stated in the above 1 (2). In addition, as acknowledged in the above 1 (2) A, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not share a common program structure with Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, shares the same or similar source code description therewith only in three blocks dedicated to simple calculation, and except for these three blocks, has nothing in common therewith in the aspects of source code expression, sub-routine method, and description order or the like. Hence, it is no

longer possible to evaluate that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program uses Appellee's (Plaintiff's) source codes.

Then, commonality may be found between algorithms of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program and Appellee's (Plaintiff's) algorithms but Appellee's (Plaintiff's) algorithms are not found to fall under "trade secrets" in Article 2, paragraph (6) of the Unfair Competition Prevention, as stated in the above (2) B.

Accordingly, Appellant X's act, Appellant NiCK's act, and Appellant ASUMI GIKEN's act with regard to Appellant's (Defendant's) new version are not found to fall under the act infringing Appellee's business interests by unfair competition.

From the above, no ground is found for Appellee's claims for injunction and disposal as well as claim for damages in relation to Appellant's (Defendant's) new version.

3. Claims based on tort

(1) Claim relevant to Appellant's (Defendant's) old version (case A in prior instance)

Appellant's (Defendant's) old contact angle calculation (sessile drop method) program is a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, and Appellant NiCK and Appellant X are liable for damages based on copyright infringement and the Unfair Competition Prevention Act against Appellee, as stated in the above 1 (1) and 2 (3). Then, this act also falls under Article 709 of the Civil Code.

(2) Claim relevant to Appellant's (Defendant's) new version (case B in prior instance)

A. The Copyright Act grants the exclusive right for persons within certain limits to use works under certain conditions, and clarifies the extent and limit of the exclusive right by defining the cause, content, range and cause of omission, etc. of the copyright for the purpose of harmonizing the exclusive right and the people's freedom in the cultural life. Hence, it is appropriate to understand that the act using a work that does not fall under an adaptation of another's work does not constitute a tort, unless there are special circumstances such as infringement of legally protected interests different from the interest brought by use of work subjected to the discipline of the Copyright Act (Supreme Court, 2009 (received) No. 602 and No. 603, judgment of the first petty bench on December 8, 2011, see Minshu Vol. 65, No. 9, at 3275).

Applying the above precedent to this case, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not fall under an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, as

stated in the above 1 (2).

Then, Appellee alleges only that damages suffered by Appellee due to the sales of Appellant's (Defendant's) new version should be compensated for, and fails to argue or prove that Appellant NiCK's act using Appellant's (Defendant's) new version infringes Appellee's legally protected interests different from the interests brought by use of Appellee's (Plaintiff's) program. Hence, Appellant NiCK's act using Appellant's (Defendant's) new version is not found to constitute a tort.

B. Additionally, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not fall under an adaptation of source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program. Besides, as acknowledged in the above 1 (2) A, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not share a common program structure with Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, shares the same or similar source code description therewith only in three blocks dedicated to simple calculation, and except for these three blocks, has nothing in common therewith in the aspects of source codes expression, sub-routine method, description order, etc. Hence, it is no longer possible to evaluate that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program uses Appellee's (Plaintiff's) source codes.

Then, commonality may be found between algorithms of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program and Appellee's (Plaintiff's) algorithms, but Appellee's (Plaintiff's) algorithms are not found to have secret manageability or no common awareness, as stated in the above (2) B.

As a result, from the above viewpoint Appellant NiCK's act using Appellant's (Defendant's) new version is not found to constitute a tort.

C. For this reason, no ground is found for Appellee's claims for damages based on the tort in relation to Appellant's (Defendant's) new version.

4. Claim based on the default on the labor contract

(1) Feasibility of default

As acknowledged in the above 2 (1) A, Appellant X was, based on the labor contract with Appellee, under the obligation of maintenance of secrecy so as not to leak Appellee's secrets accessible during the tenure of office to other third parties, and under the obligation of returning to Appellee all the materials concerning confidential information such as information on "product development" and "technical materials" when resigning from Appellee.

Then, when resigning from Appellee, Appellant X did not dispose of Appellee's

(Plaintiff's) source codes falling under Appellee's secrets and confidential information but has been possessing them after the resignation without returning them to Appellee, as stated in the above 2 (3).

As a result, Appellant X's above acts shall fall under a default in breach of confidentiality obligation under the labor contract.

(2) Feasibility of claims for damages

A. Claim relevant to Appellant's (Defendant's) old version (case A in prior instance)

As stated above, with regard to Appellee's (Plaintiff's) source codes regarded as Appellee's secrets and confidential information, a default in breach of confidentiality obligation under the labor contract is found in Appellant X.

As a result, Appellant X is liable for damages based on a default in relation to Appellant's (Defendant's) old version.

B Claim relevant to Appellant's (Defendant's) new version (case B in prior instance)

Meanwhile, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not fall under an adaptation of source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, as stated in the above 1 (2). In addition, as acknowledged in the above 1 (2) A, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program does not share a common program structure with Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, shares the same or similar source code description therewith only in three blocks dedicated to simple calculation, and except for these three blocks, has nothing in common therewith in the aspects of source codes expression, sub-routine method, description order, etc. Hence, it is no longer possible to evaluate that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program uses Appellee's (Plaintiff's) source codes.

Then, commonality may be found between algorithms of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program and Appellee's (Plaintiff's) algorithms but Appellee's (Plaintiff's) algorithms are not found to have secret manageability or no common awareness, as stated in the above (2) B and therefore not found to fall under Appellee's secrets or confidential information.

Accordingly, Appellant X's above default and Appellant NiCK's manufacturing and selling of Appellant's (Defendant's) new version and Appellant's (Defendant's) products mounted therewith are not found to have a considerable causal relationship with damages caused thereby.

From the above, no ground is found for Appellee's claim for damages due to the

default in relation to Appellant's (Defendant's) new version.

5. Amount of damages

(1) According to the above 1 through 4, with regard to the case A in prior instance, Appellant X and Appellant NiCK shall be jointly and severally liable for damages suffered by Appellee due to Appellant NiCK's manufacturing and selling of Appellant's (Defendant's) products mounted with Appellant's (Defendant's) old version, based on copyright infringement, the Unfair Competition Prevention Act, tort and default for Appellant X and based on copyright infringement, the Unfair Competition Prevention Act, and tort for Appellant NiCK.

On the other hand, with regard to the case B in prior instance, no ground is found for the claims for damages in relation to Appellant's (Defendant's) new version based on the copyright infringement, violation of the Unfair Competition Prevention Act, tort, and default.

For this reason, the amount of damages in relation to the case A in prior instance is investigated below.

(2) Issues (1) E (amount of damages)

A. Damages based on Article 114, paragraph (1) of the Copyright Act

(A) Transferred quantity

Appellant NiCK sold, during the period from around the end of October 2009 to around the end of September 2010, ● units of Appellant's (Defendant's) product 1 mounted with Appellant's (Defendant's) old version software ●●●●●●●●●●●●●●●●●●●●●●●●●●●●, ● units of Appellant's (Defendant's) product 3 mounted therewith ●●●●●●●●●●●●●, and ● units of Appellant's (Defendant's) product 6 mounted therewith ●●●●●●. What could have been sold in the absence of the infringement relevant to Appellant's (Defendant's) product 1 corresponds to Appellee's (Plaintiff's) product 1, and similarly Appellant's (Defendant's) products 3 and 6 correspond to Appellee's (Plaintiff's) product 2.

(B) Amount of profit per unit of Appellee's (Plaintiff's) product 2

a. According to the evidence (Exhibits Ko 66 to 68, including branch numbers) and the entire import of the oral argument, it is found that Appellee sold, during the period from around November 2009 to around July 2010, ●● units of Appellee's (Plaintiff's) product 2 without options at the average sales price of ●●●●●●● yen (tax included) and the cost of Appellee's (Plaintiff's) product 2 per unit is ●●●●●●● yen. Then, in calculation of the amount of marginal profit of Appellee's (Plaintiff's) product 2, there is no evidence that is sufficient to acknowledge the amount of expenses to be deducted from the average sales price in addition to the above cost, and therefore the marginal

profit of Appellee's (Plaintiff's) product 2 per unit shall be ●●●●●●●●●●●●●●●●●●●●●●●●●●●●.

b. Amount of profit corresponding to the subject part

(a) Since copyright infringement is found in the subject part of Appellee's (Plaintiff's) program mounted on Appellee's (Plaintiff's) product 2, the amount of profit per unit as stipulated in Article 114, paragraph (1) of the Copyright Act is also limited to the amount of marginal profit corresponding to the subject part of Appellee's (Plaintiff's) product 2.

(b) According to the evidence (Exhibit Ko 66-15) and the entire import of the oral argument, the price at which Appellee's (Plaintiff's) product 2 was sold by Appellee to a customer around March 2010 as one of transaction examples was ●●●●●●●● yen, of which ●●●●●●● yen is found to be the unit price of Appellee's (Plaintiff's) program software. Herein, considering the fact that the cost (component cost) of Appellee's (Plaintiff's) product 2 is mostly incurred by hardware (component cost of the software itself is nothing more than only several hundred yen for the disk, the entire import of the oral argument), the ratio of the marginal profit of Appellee's (Plaintiff's) program to Appellee's (Plaintiff's) product 2 in the above transaction example is as follows: ●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●●. Then, considering some fluctuations in this ratio depending on the clients or other factors, it is reasonable to acknowledge that the ratio of the marginal profit of Appellee's (Plaintiff's) program to Appellee's (Plaintiff's) product 2 is about ●●% in calculation of the amount of damages.

(c) Also, putting together the above facts used as premise, the evidence (Exhibit Ko 9, Exhibit Ko 27, and Exhibit Ko 43) and the entire import of the oral argument, Appellee's (Plaintiff's) program consists of 170,672 lines, in which the ratio of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program occupying 2,525 lines or especially the subject part (2,055 lines) to Appellee's (Plaintiff's) entire program is low. However, Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program allows automatic execution of contact angle measurement and calculation and is found to be an important program in the center of Appellee's (Plaintiff's) program. Thus, the degree of contribution of the subject part to Appellee's (Plaintiff's) program is reasonably found to be 70%.

(d) From the above, the amount of profit per unit of the subject part in Appellee's (Plaintiff's) product 2 is ●●●●●●● yen (●●●●●●●● yen, fractions smaller than ●●●●●●●●●● yen omitted).

(e) Appellant NiCK and Appellant X allege that Appellee's product corresponding to

Appellant's (Defendant's) product 3 is "DM-CE1" which has been actually sold to the National Institute of Advanced Industrial Science and Technology.

However, according to the evidence (Exhibit Otsu 29-1&2) and the entire import of the oral argument, Appellee is found to have sold the above product only in overseas countries with no sales in Japan and supplied the above product in exceptional circumstances to the above National Institute for the purpose of assisting research and development for the public. Hence, the above claims by Appellant NiCK and others shall be inadmissible.

(C) Amount of profit per unit of Appellee's (Plaintiff's) product 1

In addition, while the average sales price of Appellee's (Plaintiff's) product 1 is ●●●●●●●● yen (Exhibit Ko 66 (including branch numbers) and the entire import of the oral argument)), there is no evidence that directly indicates the unit price or ratio of Appellee's (Plaintiff's) program to the sales price of Appellee's (Plaintiff's) product 1. According to the evidence (Exhibit Ko 50 and Exhibit Ko 61) and the entire import of the oral argument, it is found that Appellee's (Plaintiff's) program mounted on Appellee's (Plaintiff's) product 1 is software that enables dynamic contact angle measurement and has various functions added to the basic version mounted on Appellee's (Plaintiff's) product 2, and Appellee's (Plaintiff's) product 1 equipped with a single dispenser system is superior to Appellee's (Plaintiff's) product 2 in the hardware aspect. In light of these circumstances and the fact that the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is included in the above basic version, it is reasonable to presume that the amount of profit per unit of Appellee's (Plaintiff's) product 1 corresponding to the subject part of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program is ●●●●●●●●●●●●●●●.

(D) Circumstances in the proviso to Article 114, paragraph (1) of the Copyright Act

Appellant NiCK and Appellant X allege that Appellee is unable to sell the quantity corresponding to the transferred quantity due to the presence of rival companies.

However, circumstances in the proviso to Article 114, paragraph (1) of the Copyright Act should be argued or proved by a person who infringed the copyright, but Appellant NiCK and Appellant X fail to specifically argue or prove the circumstances where the presence of rival companies prevents Appellee from selling the quantity equivalent to all or part of quantity transferred from Appellant NiCK. On the contrary, according to the evidence (Exhibit Ko 42 and Exhibit Ko 43), other contact angle meters sold in Japan appear to have different functions such as not

adopting the tangent method. Thus, the presence of circumstances in the proviso to Article 114, paragraph (1) of the Copyright Act is not found.

(E) Amount of damages

From the above, the amount obtained by multiplying the number of items transferred from Appellant NiCK (● units) by the amount of profits per unit of the item that could have been sold by Appellee in the absence of the infringement (● units of Appellee's (Plaintiff's) product 1 and ● units of Appellee's (Plaintiff's) product 2) (●●●●●●● yen per unit) is ●●●●●●●● yen that is not found to be beyond the amount corresponding to Appellee's ability to sell.

B. Investigation costs

(A) According to the evidence (Exhibits Ko 7, 62, 63, 65, and 73) and the entire import of the oral argument, it is found that: [i] Appellee purchased Appellant's (Defendant's) product 1 along with "i2w in surface free energy calculation license" and "calibration target" at a discounted price of 1.68 million yen (tax included) through Q medical university around March 2010 to investigate whether Appellant's (Defendant's) old version infringes the copyright of the Appellee's (Plaintiff's) program; [ii] Appellee actually investigated, using the product in the above [i], the identity or similarity between Appellee's (Plaintiff's) program and Appellant's (Defendant's) old version by a method such as obtaining assemble codes by disassembling the object program of Appellant's (Defendant's) old version and examining the ratio of the number of consistent characters to the total number of characters in instruction strings of each function; [iii] Appellee actually investigated the identity or similarity between Appellee's (Plaintiff's) program and Appellant's (Defendant's) old version by a method such as comparing the basic operation of Appellant's (Defendant's) old version and that of Appellee's (Plaintiff's) program; [iv] at the time of the above [i], Appellant NiCK issued an estimate for Appellant's (Defendant's) product 3 at a fixed price of 1.45 million yen with a discount rate of about 25% to Q medical university; and [v] the same sort of investigation is possible for Appellant's (Defendant's) product 3.

Then, putting the above findings together, it is found that the investigation costs having a considerable causal relationship with the copyright infringement by Appellant NiCK and Appellant X are reasonably found to be or 840,000 yen, which is equivalent to 50% of 1.68 million yen spent by Appellee to purchase Appellant's (Defendant's) product 1.

(B) Appellants allege that Appellant NiCK has sold only the software of Appellant's (Defendant's) old version at 182,700 yen (tax included) in the past and therefore the

investigation costs having a considerable causal relationship with the copyright infringement by Appellant NiCK and Appellant X should not exceed the level of the above amount.

However, the alleged sales record of only the software of Appellant's (defendant's) old version by Appellant NiCK is limited to only one transaction example. In addition, to investigate whether or not Appellant's (Defendant's) old version infringes the copyright of Appellee's (Plaintiff's) program, rather than simply analyzing the software of Appellant's (Defendant's) old version, it is effective to analyze the basic operation of Appellant's (Defendant's) old version for reference in the analysis. If it is only the software that is analyzed without involving analysis of the basic operation, the above investigation will inevitably go through considerable difficulty, and therefore the Appellants' above claim shall be inadmissible.

C. Expenses for attorneys

It is found that Appellee entrusted Appellee's attorney acting as counsel to file and proceed with this lawsuit and paid the expenses for attorney.

Then, considering all other circumstances appearing in this case in a comprehensive manner, including the details of this case, difficulty, the amount determined as damages, and the course to the lawsuit, it is reasonable to acknowledge that expenses for attorney having a considerable causal relationship with the tort resulting from the copyright infringement by Appellant NiCK and Appellant X amount to 300,000 yen.

D. Total of 3,049,890 yen

(3) Summary

Appellee alleges only that the amount of damages based on the Unfair Competition Prevention Act, tort, and default is equivalent to the amount of damages resulting from copyright infringement with no particular argument or evidence. Hence, in this case, the amount of damages resulting from the above causes is not found to exceed the amount in the above (2).

Accordingly, without further judgment of the remaining matters, there is a ground for granting Appellee's claims pertaining to case A in prior instance to the extent of demanding that Appellant NiCK and Appellant X jointly and severally pay to Appellee a sum of 3,049,890 yen together with an amount thereon at the rate of 5% per annum as designated according to the Civil Code from December 15, 2011 until full payment of such sum shall have been made, while no ground is found for the remaining claims.

6. Claim for reinstitution of unjust enrichment (retirement allowance)

(1) Issue (2) F (whether or not Appellant X is obliged to return the retirement allowance to Appellee)

A. There is a provision specifying "(6) when the employee leaked or made an attempt to leak job-related important confidential information accessible in the course of duties" in Article 47 of Appellee's rules of employment as the ground for disciplinary dismissal, in which no payment of all of part of the retirement allowance in case of disciplinary dismissal is specified (Exhibit Ko 8).

Meanwhile, retirement allowance has the nature of deferred payment of wage. It should therefore be interpreted that no payment of all of part of the retirement allowance based on the above clause of no payment of retirement allowance is limited to the case where there is a ground for disciplinary dismissal and the ground falls under an extreme breach of faith to the extent of crossing out or diminishing the worker's merit of continuous service in the past.

B. Appellee's (Plaintiff's) source codes are found to fall under Appellee's "important confidential information" and Appellant X did not dispose of Appellee's (Plaintiff's) source codes when resigning from Appellee but has been possessing them after resignation and used them to create Appellant's (Defendant's) old contact angle calculation (sessile drop method) program for Appellant NiCK, a competitor company, as stated in the above 2 (3).

It can be said that Appellant X leaked Appellee's (Plaintiff's) source codes, which are Appellee's important confidential information, to the outside by providing the created Appellant's (Defendant's) old contact angle calculation (sessile drop method) program to Appellant NiCK. Hence, Appellant X's act shall fall under the ground for disciplinary dismissal in Article 47(6) of the rules of employment.

Then, in light of the fact that Appellee's (Plaintiff's) program has been improved by Appellee over many years and is Appellee's important business asset, it has to be said that the act of taking out and using Appellee's (Plaintiff's) program to create Appellant's (Defendant's) old contact angle calculation (sessile drop method) program for Appellant NiCK as a competitor company without disposing Appellee's (Plaintiff's) program shall fall under not only the ground for disciplinary dismissal pursuant to the rules of employment but also an extreme breach of faith to the extent of canceling out or diminishing Appellant X's merit of continuous service in the past.

(2) Amount to return

According to the evidence (Exhibit Ko 35-1&2 and Exhibit Ko 36) and the entire import of the oral argument, it is found that Appellant X received, when resigning from Appellee, payment of 443,131 yen as a retirement allowance from Appellee and

payment of 2,120,959 yen from the head office of the smaller enterprise retirement allowance mutual aid system in September 2009.

Among the above payments, with regard to the payment of 443,131 yen received from Appellee as a retirement allowance, it is found that Appellant X gained a profit with no legal ground and the same amount of loss occurred in Appellee.

On the other hand, with regard to the payment of a sum of 2,120,959 yen paid from the head office of the smaller enterprise retirement allowance mutual aid system, it is not found that Appellant X gained a profit based on Appellee's loss.

Therefore, based on the right for claiming reinstitution of unjust enrichment, Appellee is granted to demand that Appellant X pays to Appellee a sum of 443,131 yen equivalent to the amount of the retirement allowance paid by Appellee together with a late charge thereon at the rate of 5% per annum as designated according to the Civil Code from October 20, 2012, the day following the date of delivery of complaint pertaining to the case B in prior instance, until full payment of such sum shall have been made.

(3) Summary

From the above, there is a ground for granting Appellee's claims pertaining to the case B in prior instance to the extent of demanding, based on the right for claiming reinstitution of unjust enrichment claim, that Appellant X pays to Appellee a sum of 443,131 yen together with an amount thereon at the rate of 5% per annum from October 20, 2012 until full payment of such sum shall have been made, while no ground is found for the remaining claims.

7. Claim for damages due to unjustified action

(1) Findings

According to the evidence (Exhibits Ko 83-1 to 83-3, Exhibits Otsu 4 to 8, and Exhibit Otsu 18-1&2) and the entire import of the oral argument, the following facts are found and there is no evidence that is sufficient to overturn the findings.

A. Before around late November of 2010 in which the provisional disposition case was pending, Appellant NiCK disclosed to Appellee source codes excluding those of programs numbered (26) through (28) listed in "source codes lines" attached to the original judgment among Appellant's (Defendant's) old contact angle calculation (sessile drop method) program, and source codes corresponding to the above programs among Appellant's (Defendant's) new contact angle calculation (sessile drop method) program.

B Appellee presented proposed terms of settlement on January 13, 2011 based on a framework that Appellant NiCK and others apologize to Appellee by admitting

Appellant NiCK's manufacturing and selling of Appellant's (Defendant's) old version through a reproduction or adaptation of Appellee's (Plaintiff's) program and Appellant X's use of Appellee's (Plaintiff's) source codes, etc. for Appellant NiCK without returning them to Appellee, Appellant NiCK discontinues manufacture and sales of Appellant's (Defendant's) old version and disposes of any recording media storing thereof, Appellant NiCK pays a certain amount for damages, Appellee allows manufacture and sales of products mounted with Appellant's (Defendant's) new version as long as products mounted with Appellant's (Defendant's) old version are not manufactured and sold, and settlement details are kept secret but it is allowed to issue any documents stating that a settlement has been reached or describing the outline of the settlement or to disclose them on the home page. However, the settlement was not reached and Appellee has withdrawn a petition for the provisional disposition case afterward.

C Appellee filed an action pertaining to case A in prior instance in relation to Appellant's (Defendant's) old version on November 15, 2011, and filed an action pertaining to case B in prior instance in relation to Appellant's (Defendant's) new version on September 3, 2012.

(2) Feasibility of tort

A. The filing of an action is deemed to be an illegal act against the other party only when the filing of an action remarkably lacks appropriateness in light of the purpose and objective of the judicial system, as in the case where the right or legal relationship alleged in the action by the person who instituted the action lacks a factual and legal basis and the action was filed purposefully even though said person or a reasonable person would have easily known the lack of factual and legal basis (Supreme Court, 1985 (O), No. 122, judgment of the third petty bench on January 26, 1988, see Minshu Vol. 42, No. 1, at 1).

B. Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is not found to be an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, as stated in the above 1 (2). As acknowledged in the above (1), in light of the fact that source codes of a part of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program were disclosed by Appellant NiCK to Appellee before filing of an action pertaining to the case B in prior instance, it is found that certain analysis was possible for Appellee to determine whether Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program before filing of an action pertaining to case

B in prior instance.

However, Appellant's (Defendant's) old contact angle calculation (sessile drop method) program relevant to Appellant's (Defendant's) old version mounted on the products by Appellant NiCK before revision to Appellant's (Defendant's) new version is found to be a reproduction or adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program as stated in the above 1 (1), Appellant's (Defendant's) new contact angle calculation (sessile drop method) program partially contains somewhat different variable and argument names but has the function expression and content identical to Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program and whether or not it falls under an adaptation thereof or not is a legal evaluation based on the Copyright Act. Considering the above findings, it is difficult to conclude that when an action pertaining to case B in prior instance was filed, Appellee would have known or a reasonable person would have easily known inapplicability of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program to fall under an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

C. Additionally, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program is not found to have been generated using source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program, and Appellee's (Plaintiff's) algorithms does not fall under "trade secrets" in Article 2, paragraph (6) of the Unfair Competition Prevention. Hence, there is no ground for Appellee's claims against Appellant NiCK and Appellant ASUMI GIKEN based on the Unfair Competition Prevention Act, as stated in the above 2 (3).

However, as stated in the above B, it is difficult to conclude that when an action pertaining to case B in prior instance was filed, Appellee would have known or a reasonable person would have easily known that Appellant's (Defendant's) new contact angle calculation (sessile drop method) program was not produced from use of source codes of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

Further, Appellant's (Defendant's) new contact angle calculation (sessile drop method) program adopts algorithms that are substantially the same as Appellee's (Plaintiff's) algorithms. Considering that Appellee managed Appellee's (Plaintiff's) source codes adopting Appellee's (Plaintiff's) algorithms as secrets, and whether or not the source codes fall under "trade secrets" specified in the Unfair Competition Prevention Act is a legal evaluation based on the same Act, it is difficult to conclude that when an action pertaining to case B in prior instance was filed, Appellee would

have known or a reasonable person would have easily known inapplicability of Appellee's (Plaintiff's) algorithms falling under "trade secrets" specified in the same Act.

D. From the above, it is not found that Appellee's filing of an action pertaining to case B in prior instance remarkably lacks appropriateness in light of the purpose and objective of the judicial system.

(3) Claims by Appellant NiCK and Appellant ASUMI GIKEN

Appellant NiCK and Appellant ASUMI GIKEN allege that Appellee presented, upon disclosure of source codes of Appellant's (Defendant's) new version during proceedings of the provisional disposition case, the proposed settlement premised on no infringement of Appellee's copyright of Appellee's (Plaintiff's) program by Appellant's (Defendant's) new version and therefore Appellee recognized no infringement of the copyright of Appellee's (Plaintiff's) program by Appellant's (Defendant's) new version when an action pertaining to case B in prior instance was filed.

However, even though Appellee presented the proposed settlement upon partial disclosure of source codes of Appellant's (defendant's) new version during proceedings of the provisional disposition case as acknowledged in the above (1), the proposed settlement concerning Appellant's (Defendant's) new version states that manufacture and sales of products mounted with Appellant's (Defendant's) new version are approved conditionally. Thus, it is difficult to conclude that the proposed settlement was naturally premised on no infringement of the copyright of Appellee's (Plaintiff's) program by Appellant's (Defendant's) new version.

Accordingly, it is not found with the fact of presentation of the above proposed settlement that when an action pertaining to case B in prior instance was filed, Appellee would have known inapplicability of Appellant's (Defendant's) new contact angle calculation (sessile drop method) program to fall under an adaptation of Appellee's (Plaintiff's) contact angle calculation (sessile drop method) program.

(4) Summary

Based on the above, no ground is found for the claims for damages by Appellant NiCK and Appellant ASUMI GIKEN based on unjustified action.

8. Claim in relation to making a false allegation based on the Unfair Competition Prevention Act

(1) Notification 1

A. Appellee posted on its home page during the period from December 1, 2011 to June 13, 2012 a notification (Notification 1) titled "Notification of action against

NiCK Corporation" stating that "On November 15, 2011, we filed a suit before the Tokyo District Court in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by NiCK Corporation (a company established by our former employee on April 17, 2009) due to violation of the Copyright Act and violation of the Unfair Competition Prevention Act," as described in the above facts used as premise.

B. The above Notification involves the statement to the effect that Appellee filed a suit before the Tokyo District Court in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by Appellant NiCK on the ground of violation of the Copyright Act and violation of the Unfair Competition Prevention Act. Appellee actually filed a suit pertaining to case A in prior instance on November 15, 2011. Thus, the content of the notification is true and not found to contain a false fact.

C. Appellant NiCK alleges that Notification 1 does not distinguish the subject for which the suit was filed, thus notifying that the suit also covers Appellant's (Defendant's) new version. In this regard, Notification 1 states only "in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by Appellant NiCK" without referring to the distinction of versions. However, when it is viewed based on the ordinary attention and reading of general consumers, Notification 1 is not understood to be the statement notifying that the suit covers Appellant's (Defendant's) new version as a fact beyond the fact that the suit was filed against the contact angle meter manufactured and sold by Appellant NiCK.

(2) Notification 2

A. In addition to the appellee's statement on it home page with regard to a suit filed on November 15, 2011 against Appellant NiCK due to violation of the Copyright Act and violation of the Unfair Competition Prevention Act, Appellee posted on its home page on September 20, 2012 a notification (Notification 2) titled "Additional actions - Action for injunction of sales, action for damages, and action for reinstitution of unjust enrichment" stating that "On September 4, 2012, in relation to the contact angle meter (wettability evaluation apparatus: mounted with the software since i2win Ver.1.3.0) currently manufactured and sold by NiCK Corporation, a suit was filed additionally in the same manner as the above case (said suit covers, in addition to NiCK Corporation, an action for demanding injunction of sales by ASUMI GIKEN, Limited involved in selling (advertising) said product on its HP). At the same time, a suit was filed additionally demanding reinstitution of unjust enrichment in relation to the already paid retirement allowance." as described in the facts used as premise.

B. The above notice involves the statement to the effect that Appellee filed a suit before the Tokyo District Court in relation to the contact angle meter (wettability evaluation apparatus: mounted with the software since i2win Ver.1.3.0) currently manufactured and sold by Appellant NiCK on the ground of violation of the Copyright Act and violation of the Unfair Competition Prevention Act, and a suit demanding injunction of sales of the above product was also filed against ASUMI GIKEN, Limited. Appellee actually filed a suit pertaining to case B in prior instance on September 3, 2012. Thus, the content of the notification is true and not found to contain a false fact. Notification 2 includes an error of the date of filing of a suit. However, it is obvious that this error can hardly be harmful to the business reputation of Appellant NiCK and Appellant ASUMI GIKEN.

C. Appellant NiCK and Appellant ASUMI GIKEN allege that Notification 2 notifies suspected infringement by Appellant NiCK and Appellant ASUMI GIKEN to a considerable extent. However, when it is viewed based on the ordinary attention and reading of general consumers, Notification 2 is not understood to be a statement notifying suspected infringement of copyright and violation of the Unfair Competition Prevention Act by Appellant NiCK and Appellant ASUMI GIKEN to a considerable extent beyond the fact that the suit was filed in relation to the matter in dispute.

(3) Notification according to Notification Document A

A. Appellee distributed a document (Notification Document A) to Appellant NiCK's clients in or after around December 2011, stating that "We filed a suit before the Tokyo District Court against NiCK Corporation as follows (see also our HP). We filed a suit before the Tokyo District Court on November 15, 2011 in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by NiCK Corporation (a company established by our former employee on April 17, 2009) due to violation of the Copyright Act and violation of the Unfair Competition Prevention Act." as described in the above facts used as premise.

B The above notification document involves a statement to the effect that Appellee filed an action before the Tokyo District Court in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by Appellant NiCK on the ground of violation of the Copyright Act and violation of the Unfair Competition Prevention Act. Appellee actually filed a suit pertaining to case A in prior instance on November 15, 2011. Hence, the content of the notification is true and not found to contain a false fact.

C. Appellant NiCK alleges that Notification Document A does not distinguish the subject for which the suit was filed, thus notifying that the suit also covers Appellant's

(Defendant's) new version. In this regard, Notification Document A states only "in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by Appellant NiCK" without referring to the distinction of versions. However, when it is viewed based on the ordinary attention and reading of clients, Notification Document A is not understood to be a statement notifying that the suit covers Appellant's (Defendant's) new version as a fact beyond the fact that the suit was filed against the contact angle meter manufactured and sold by Appellant NiCK.

(4) Notification according to Notification Document B

A. Appellee distributed a document (Notification Document B) to distributors in around November 2011, stating, in addition to the matter of the suit filed before the Tokyo District Court by Appellee on November 15, 2011 in relation to the contact angle meter manufactured and sold by Appellant NiCK due to violation of the Copyright Act and violation of the Unfair Competition Prevention Act, "We are terribly sorry to intrude on your precious time but please ascertain such facts and we would like to hear from you about your future policy. We hope to maintain a sound relationship with you in the same manner as before.", as described in the facts used as premise.

B. The above notification document involves the statement informing the suit filed before the Tokyo District Court by Appellee in relation to the contact angle meter (wettability evaluation apparatus) manufactured and sold by Appellant NiCK on the ground of violation of the Copyright Act and violation of the Unfair Competition Prevention Act, and asking the clients to ascertain the facts and provide their future policy from the standpoint of distributors. Appellee actually filed the suit pertaining to case A in prior instance on November 15, 2011. The premise asking about the policy is true and not found to be a falsehood. Then, the statement asking distributors about their future policy is limited to the question of the future policy based on the above fact of filing of a suit and is not understood to be a notification of violation of the Copyright Act and violation of the Unfair Competition Prevention Act by Appellant NiCK and Appellant ASUMI GIKEN or suspicion of such violation to a considerable extent.

C. Appellant NiCK alleges that Notification Document B notifies that Appellant's (Defendant's) new version violates the Copyright Act or the Unfair Competition Prevention Act or is suspected as such and asks distributors to discontinue dealing therewith. However, when it is viewed based on the ordinary attention and reading of clients, Notification Document B is not understood to be the statement as alleged by Appellant NiCK.

(5) Summary

According to the above, no ground is found for the claims for damages by Appellant NiCK and Appellant ASUMI GIKEN based on the Unfair Competition Prevention Act.

9. Conclusion

Based on the above, without further judgment of the remaining matters, (1) there is a ground for the claim pertaining to case A in prior instance to the extent of granting Appellee to demand that Appellant NiCK and Appellant X jointly and severally pay a sum of 3,049,890 yen together with an amount thereon at the rate of 5% per annum from December 15, 2011 until full payment of such sum shall have been made, while no ground is found for the remaining claims, (2) there is a ground for the claim pertaining to case B in prior instance to the extent of granting Appellee to demand that Appellant X pay a sum of 443,131 yen together with an amount thereon at the rate of 5% per annum from October 20, 2012 until full payment of such sum shall have been made, while no ground is found for the remaining claims, and (3) no ground is found for the claims pertaining to case C in prior instance.

Consequently, no ground is found for the appeal case filed by Appellants and Appellants' claims shall be dismissed entirely. Since there is a ground for a part of the incidental appeal case filed by Appellee (the claim of reinstitution of unjust enrichment against Appellant X among the claims pertaining to case A in prior instance and the claims pertaining to case B in prior instance), modification of the original judgment shall be made to grant Appellee's claim to the extent of the above (1) and (2), while the remaining claims against Appellant NiCK and Appellant X as well as the claims against Appellant ASUMI GIKEN shall be dismissed entirely. The claims made by Appellant NiCK and Appellant ASUMI GIKEN against Appellee shall be dismissed entirely. Article 67, Article 61, Article 64, and Article 65 of the Code of Civil Procedure shall be applied to judge the burden of the court costs as stated in the main text.

Intellectual Property High Court, Fourth Division

Presiding Judge: TAKABE Makiko

Judge: MASEKI Sumiko

Judge: SUZUKI Wakana