

Date	May 26, 2011	Court	Tokyo District Court, 47th Civil Division
Case number	2007 (Wa) 24698		
– A case in which the court recognized the infringement of the plaintiff's copyright (the right of reproduction, etc.) for the program of the software for land survey.			

The plaintiff is a company engaged in the sale and lease of land survey software, land survey subcontracting work, the sale and lease of land survey equipment, etc. The plaintiff provides land survey services, etc., by using the plaintiff's software for land survey work. Defendant 1 is a company subcontracting civil engineering work and construction work, etc. Defendant 2 is a company established for the purpose of providing land survey services, etc. Defendant 3 is the representative director of Defendant 1 and a director of Defendant 2 and had served as the representative director of Defendant 2 until 2008. Defendant 4 is a former employee of the plaintiff and joined Defendant 1 after leaving the plaintiff. Regarding the defendants' software, which is a software product designed for land survey used by Defendants 1 and 2, the plaintiff alleged that the program for the defendants software (the "defendants program") is a reproduction or an adaptation of the program for the plaintiff's software (the "plaintiff's program") and that the defendants' act of jointly manufacturing, reproducing, using, and assigning the defendants program constitutes infringement of the plaintiff's copyright for the plaintiff's program. The plaintiff sought against Defendants 1 and 2 an injunction against the manufacturing, etc. of the defendants' program and demanded against the defendants a payment of damages for their act of tort. In response, the defendants disputed the plaintiff's allegation by alleging, among other things, that [i] the plaintiff's program is not creative and that [ii] the plaintiff's program was not created by Defendant 4 in the course of carrying out his/her job duties and therefore may not be regarded as an employee work and, thus, the plaintiff does not hold a copyright for the plaintiff's program.

In this judgment, the court found that the plaintiff's program, which consists of certain combinations of orders that have been selected from a wide range of possible options, may be considered to be expressing the distinctiveness of the program creator on the grounds that the program creator selected and categorized the functions that are considered to be necessary and useful for land survey work, divided them into almost 40 file formats, and correlated them with each other in order to create the plaintiff's program. Furthermore, the court found that the program creator's distinctiveness may also be found in what decisions the program creator made in consideration of a wide range of options, i.e., the decision of which processing step should be extracted from

each file in order to make a subroutine when the program creator was selecting and extracting the parts that may be considered to be common and compiling those parts into one file, the decision of what type of and how many variables should be used as parameters, and the decision of which system variables should be used to transfer values. On these grounds, among other things, the court found the plaintiff's program to be creative. Regarding the issue of whether or not the plaintiff's program may be regarded as an employee work, the court recognized the development process, etc. of the plaintiff's software and found that the plaintiff's program was created on the initiative of the plaintiff by Defendant 4, who was engaged in the development of a software program as an employee of the plaintiff at that time, in the course of carrying out his/her job duties, and, therefore, that the plaintiff's program may be regarded as an employee work. Thus, the court concluded that the author of the plaintiff's program is the plaintiff. Furthermore, the court found that the plaintiff's program is almost identical to the defendants' program in terms of the content of source code and that the two programs may be considered to be identical or similar to each other in substance in terms of expressions as programs, and that, since Defendant 4, who was aware of the content of the plaintiff's program, created the defendants' program based on the plaintiff's program, the defendants' program may be considered to be a reproduction or an adaptation of the plaintiff's program. The court concluded that the defendants infringed the plaintiff's copyright for the plaintiff's program and accepted the plaintiff's claim against Defendants 1 and 2 for an injunction against their use, etc. of the defendants' program and the plaintiff's claim against the defendants for the payment of damages.