Date	January 25, 2012	Court	Intellectual Property High Court, Fourth Division
Case number	2009 (Ne) 10024		

–A case in which the court revoked the judgment in prior instance which found copyrightability in the program in question by holding as follows: Even if the source code for a program to control a device has been submitted, as long as a specific allegation or proof has not been made with regard to the part in which the programmer's individual character is shown, the function of the instruction inserted in a program as well as the existence of other selectable parts for insertion or other selectable instructions remain unclear. Moreover, there is no sufficient evidence to find that the relevant instruction was selected by the programmer from a wide range of alternatives and is not a commonplace expression and that the programmer's individual character, i.e., intellectual creations in expression, is shown.

References:

Article 2, paragraph (1), item (x)-2 of the Copyright Act

In this case, with regard to the reproduction of the computer program in question which was installed in the "Train Remote Electric Wave Control System Parking Brake"(hereinafter referred to as the "Device") used by Y1 (the defendant in the first instance), X (the plaintiff in the first instance) filed an action seeking (i) confirmation that the copyright of the computer program in question (hereinafter referred to as the "Computer Program") belongs to X; and (ii) the joint and several payment of 1.5 billion yen in total as royalties or an amount equivalent to unjust enrichment (as a partial claim of 2 billion yen) based on the agreement of payment of royalties for the computer program in question (principal claim against Y, etc. and alternative claim 1 against Y1) or unjust enrichment (alternative claim 2 against Y1) and the delay damages accrued thereon, against Y and other defendants, on the grounds that X had acquired by means of transfer the copyright of the computer program in question and thus an agreement was reached between X and Y1 and Y2 (the defendant in the first instance and an associated company of Y1)for the payment of royalties for the Computer Program, in relation to Y1's use of the Device, or even if no agreement was reached, Y1 was obtaining unjust enrichment through the use of the Device. The judgment in prior instance upheld the claim for confirmation concerning the copyrights in the Computer Program as mentioned in (i) above, by finding as follows: The method and device for the combination, release and brake operation of train cars in the Device has sufficient novelty to be patentable and thus novelty can also be found in the contents of the Computer Program corresponding to the Device. Furthermore, the

Computer Program is large in size and can be considered to have been selected and arranged from a wide range of alternatives and arrangements, and thus, it may be presumed that the programmer's individual character is shown in the expression of the Computer Program in whole. Moreover, the copyright of the Computer Program can be found to have been transferred to X by around 1999 at the latest.

However, the judgment in prior instance dismissed the claim for payment of money in relation to the copyright in the Computer Program as mentioned in (ii) above, on the following grounds: It cannot be found that an agreement had been reached for the payment of royalties for the Computer Program and, as long as Y1 was merely using the lawful reproduction of the Computer Program in the Device, X cannot be found to have suffered any loss in relation to such use and thus no unjust enrichment may be found.

Both X and Y, dissatisfied with the judgment in prior instance filed appeals.

This judgment held as follows and rescinded the part of the judgment in prior instance that upheld the claim for confirmation concerning the copyright of the Computer Program.

"A computer program means 'an expression of a combination of instructions to cause a computer to function in order to be able to obtain a certain result' (Article 2, paragraph (1), item (x)-2 of the Copyright Act). Thus, the programmer's individual character which should be protected under the Copyright Act will appear in the expression of the instructions to the computer, the combination of the expressions of the instructions, and the order of the expression, while constrained by prescribed computer programming language, rules, and algorithms. Accordingly, in order to find coprightability in a computer program, it shall be required that there is a wide range of choices for the computer program in whole, which consist of the expression of an instruction itself, the combination of the expressions of instructions, and the order of the expressions, and that the expression is not commonplace but shows the programmer's individual character, i.e., intellectual creations in expression."

Regarding the program for DHL cars (hereinafter referred to as the "program for DHL cars") included in the Computer Program, when modifications were made to respond to malfunctioning at the time of control of the Device, the jump address, which will be indicated as "JP, ##" in the source code, was not designated, and as a result, the JP instruction (CA0000), which performs the same operation as in the case when the jump address 0000 is designated, was inserted. Although it remains unclear as to whether the instruction was indispensable to achieve the minimum function to operate the Device, taking into account that the computer program was modified to respond to the

abnormalities in the Device, the programmer may be presumed to have left the abovementioned instruction inserted with some intention, such as to maintain the modified timing of control after the modification of the computer program, despite the fact that there were other options.

"Then, there may be some room to find that the program for DHL cars constitutes intellectual creations because of the abovementioned instruction inserted therein. However, X alleged that copyrightabilty can essentially be found in the Computer Program without any detailed examination of the source code, and initially, did not submit the source code of the Computer Program in writing. Moreover, X considered whether or not to submit the source code of the whole Computer Program in writing only after the authorized judge exercised the authority to ask for explanation in the fourth preparatory proceedings in this court on May 210, 2010, and then, submitted the source code of the program for DHL cars, but did not specifically make allegations or show proof regarding which part of the Computer Program shows the programmer's individual character.

Accordingly, not only do the function of the abovementioned instruction inserted in the program for DHL cars and the existence of any other selectable parts for insertion or any other selectable instructions remain unclear, but also there is no sufficient evidence to find that the relevant instruction was selected by the programmer from a wide range of alternatives and is not a commonplace expression and that the programmer's individual character, i.e. intellectual creations in expression, is shown. Based on the abovementioned holding, the program for DHL cars may not be found to have constituted intellectual creations in expression."

Regarding the program for TC cars (hereinafter referred to as the "program for TC cars") included in the Computer Program, the source code has not been disclosed for a considerable portion of such program. "As the program for DHL cars and the program for TC cars will control the Device only when each program functions," in order to respond to malfunctioning, "it may be presumed that the same attention should be given to both programs." "Then, it may not be denied that an instruction for which it remains unclear whether it is indispensable to achieve the minimum function to operate the Device is also inserted in the program for TC cars as in the case of the program for DHL cars.

Nevertheless, even if such instruction is inserted, there is not sufficient evidence to find that the existence of the relevant instruction shows the programmer's individual character, i.e. intellectual creations in expression, as in the case of the program for DHL cars.

Accordingly, the program for TC cars may also not be found to have constituted intellectual creations in expression."