2. Law of Property and Obligations

1. Protection of computerized programs for TV-type game machines on the basis of the Copyright Act.

Decision by the Third Civil Affairs Dept. of the Tokyo District Court on Dec. 6, 1982. Case No. (*wa*) 10867 of 1979. A case demanding damages. 1060 *Hanrei Jihō* 18. 482 *Hanrei Taimuzu* 65.

[Facts]

Company X (plaintiffs) have been engaged in the sales and lease of the TV game machine "Space Invader Part II." The source program displayed by the assembly language was turned into machine language and encased in an object program in the form of electric signals which exhibits TV pictures on the screen.

Defendant Y, at the request of customer M, loaded the object program of the TV game in question by using a ROM writer (a copy instrument) in another ROM (= Read On Memory: a memory system) in the form of electric signals and installed it into M's TV game so that the same contents of X's TV game could be put on the screen on M's TV game.

Thereupon X filed a suit for damages on the basis of the Copyright Act against Y. (Article 21 and 141(1) of the Copyright Act, Ch. 48 of 1970.) Y in his claim contended that the source program in possession of X corresponded to a "literary production" as described in Article 2(1) of the Act, and that the act of Y having the object program encased in another ROM also corresponded to the term "reproduction" described in Article 215 of the Act.

Whether or not the claim of X should be accepted depended on the two points mentioned above.

[Opinions of the Court]

(1) Is Computer Program a "Literary Production"?

After examining the course of production of X's source program in question, the court held that the source program in this case was the creative expression of the independent academic thought of the producer and that it could be admitted as the literary production protected by the Copyright Act (Article 2(1) of the Act).

(2) Reproduction of Computer Program.

The court held that the object program in question was the reproduction of the source program in this case. The act of loading the object program of Y, into another ROM was the further reproduction, and that it corresponded to a reproduction (Article 2(1) (xv) of the Act) by reproducing the source program in tangible form.

Then, the court awarded damages to X in accordance with Article 141(1) of the Copyright Act.

[Comment]

(1) TV-type games and computer software.

In TV-type game machines (commonly called TV games), pictures are shown on the TV screen in the first place. For instance, pictures showing the scene of an attack by a spaceship. The pictures are operated by a button or a joy stick attached to the machine. Points are won by shooting at the attacking spaceship by a cannon.

TV games can be played by connecting the line to a home TV set or by a set manufactured exclusively for that purpose. The latter are usually installed in coffee shops and can be played by dropping a coin into a slot.

In most cases computer programs (computer software) are put into the TV game. The need to protect legally the computer software of not only the TV program but others has been keenly felt in Japan, and measures have been under study to protect them under the Copyright Act and the Patent Act (Ch. 121 of 1959).

The current decision was the first of its kind to extend protection to computer software by the Copyright Act, and this is the reason why we picked up the current case, although the de-

cision was made by a lower court.

(2) Copyright Act and computer software.

The purpose of the Copyright Act is "to define the right of producers concerning their literary productions and extend protection to the rights of the producers, etc. with attention paid to the fair use of such cultural productions, thus contributing to cultural progress." (Article 1 of the Act).

Article 2(1)(i) of the Act also defines literary production as follows: "The literary production as a creative expression of thought or feeling belongs to the scope of literary art, science, fine arts or music." Article 10(1) of the Act also illustrates the list of literary production such as novels, scenarios, academic essays, music, paintings, block prints, sculpture, movies, and photographs, but there is no mention about computer programs in the list. Hence the question lies in whether or not computer programs meet the requirements of Article 2(1).

On this score, the court decision as shown in (2) ruled that the computer program in the current case corresponded to a "literary production" under the Copyright Act.

Article 2(1)(xv) of the Act also defines reproduction as an act of reproducing in tangible form by such means as printing, photographing, copying, recording, videotaping, etc. Article 21 of the Act furthermore stipulates that "the producer enjoys the right to reproduce his literary productions exclusively." Ruling that the act of Y was tantamount to reproduction of the source program of X (as shown in its decision (2)) approved the claim of X for damages for reason of violation of the right of the producer to reproduce.

Article 114(1) of the Copyright Act also stipulates that "should the person who is entitled to the copyright demand compensation for the damages he has suffered from the person who committed the violation of the copyright, intentionally or by negligence; and if the person received profit by virtue of his act of violation, the amount of the profit shall be estimated to be the amount of the damages the person entitled to the copyright has suffered."

In ordinary cases of unlawful acts, the aggrieved person is obliged to prove the amount of loss he has suffered, but in the case of copyright violation the amount of damages is estimated by law and the aggrieved person whose copyright was violated is exempt from proving the amount of damages suffered. In this regard, X are entitled to claim against Y the same amount as the profit Y has earned.

2. A case in which a residents' claim by subrogation based on the Local Government Act was denied.

Decision by the Third Petty Bench of the Supreme Court on July 13, 1982.

Though the facts and the opinions of the court concerning this case are introduced in the chapter on Administrative Law (Decisions), the issue is taken up here from the standpoint of civil law.

[Comment]

A citizens' suit (tax payer's suit) is a special form of suit designed to prevent and correct corruptive acts in the finance of local public entities and to ensure the fair management of local entities. In this citizens' suit, the residents (hereinafter called "X") questioned whether or not the act of discharging waste by four mills (hereafter called "Y") corresponded to the discharge of waste water beyond the "generally accepted limit" (or permissible limit in terms of law), and whether it was subject to criticism as an unlawful act. This is the reason why we have taken this up as a civil case.

There were opinions that such a case could not be considered the subject of a citizens' suit, but the Supreme Court did not dismiss it in spite of such opinions, and recognized that the dischargers of the waste water could be ordered to pay compensation for the damage caused by their unlawful act through the procedure of a citizens' suit within a certain limited scope.

In this respect, it can be evaluated that the intention of X was served to a certain extent. There is a certain problem about

the judgment made by the Supreme Court, however. It is questionable that the court stated that even if the discharge of waste water by Y went beyond the generally accepted "certain limit" and constituted an unlawful act, the responsible enterprises (Y) shall not be forced to bear the total expenses needed for getting rid of the resultant pollution.

The Supreme Court ruled that even if environmental pollution was caused by an unlawful act of a private enterprise, and even if the inadequate administrative policies of the local entity were responsible partly for the cause of the pollution, the local entity could cover the cost of rectifying the pollution, within its own discretion.

Concerning the loss the public entity suffered due to the unlawful act of an enterprise, there is some portion which can be borne by the discretion of the public entity and it is not proper to claim in a citizens' suit for compensation of that portion against the enterprise. On this score, it must be criticized that although the current decision has opened the way to recover damages from a private enterprise in the proceedings of a citizens' suit, the responsibility of enterprises for causing pollution has somewhat diminished.

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3. Family Law

1. The commencement of the limitation period for an action for acknowledgment after the death of a father.

Decision by the Second Petty Bench of the Supreme Court on Mar. 19. *Jokoku* appeal reversed and remanded. The case of a claim for acknowledgment. Case No. (*o*) 1072 of 1980. 36 *Minshū* 432. 1038 *Hanrei Jihō* 282. 468 *Hanrei Taimuzu* 91.