BADAJOZ
SIXTH COURT OF
FIRST INSTANCE

ORDINARY PROCEDURE 761/2005

RULING, 15/2.006.-

IN BADAJOZ, on FEBRUARY SEVENTEEN TWO THOUSAND AND SIX, seen by the distinguished don LUIS CÁCERES RUIZ, MAGISTRATE-JUDGE of the SIXTH COURT OF FIRST INSTANCE of this city and partido, who acts on the present ORDINARY PROCEDURE 761/2005 between the plaintiff SOCIEDAD GENERAL DE AUTORES Y EDITORES (SGAE), represented by the Attorney at law Mr. Rivera Pinna and aided by Mrs. Lena Marín; and the defendant don RICARDO ANDRES UTRERA FERNÁNDEZ, represented by the Attorney at law Mrs. Rodolfo Saavedra and aided by De la Fuente Serrano: has decided the present ruling under the following:

FACTS

FIRST. - The Attorney at law Mr. Rivera Pinna in the name and representation of the SOCIEDAD GENERAL DE AUTORES Y EDITORES filed a law suit in which after alleging the facts and principles of law that he considered to be relevant, he asked for a ruling from this court to declare that: a) during the period between November 2002 and August 2005, both months included, the defendant used works administered by the plaintiff in his establishment, called "Disco Bar Metropol" without having obtained the necessary license; and consequently, to find against the defendant as follows: a) the preceding declaration; b) that he must cease using the repertoire of works administered by the plaintiff immediately until the necessary license to use said repertoire is obtained by the defendant, ordering in the mean time the removal of the equipment used that can be removed from the establishment, and the seizing of all equipment which cannot be removed; c) that he must indemnify the plaintiff, to its full satisfaction, as stated by article 140 of the Ley de Propiedad (Intellectual Property Law Act), for the public performance of works without authorization at the establishment called "Disco Bar Metropol" during the period between November 2002 and August 2005, both months included, the sum of 4,816.74 €, which this claim seeks; d) that he must pay the legal interest rate on said sum from the moment of the suit's filing and cost of this trial.

SECOND. - On October 6, 2005 the suit was admitted to trial, calling the defendant to appear on and answer the plaintiff.

THIRD. - The Attorney at law Mrs. Rodolfo Saavedra in the name and representation of don RICARDO UTRERA FERNÁNDEZ appeared before this Court, presenting a written response in which after alleging the facts and principles of law that she considered to be relevant, consisting basically of the acknowledgement that the defendant was, indeed, the owner of the establishment called "Disco Bar Metropol" during the period claimed by the plaintiff and that there he used music to make the clients enjoy their time but denied the use of works from the repertoire administered by the SOCIEDAD GENERAL DE AUTORES Y EDITORES, ending by asking this Court for a ruling absolving the defendant of all claims filed by the plaintiff and ordering the plaintiff to pay the cost of the trial.

FOURTH. - Both parties to this trial were required to appear at a previous hearing on December 22, 2005. This earlier hearing was suspended because the plaintiff presented an updated copy of its statutes, appointing as a new date to continue the hearing on January 17, 2006.

The previous hearing was continued on the appointed date and both parties presented evidence, admitting document exhibits (in paper, video and DVD), questioning the parties, giving witness testimonies and experts opinions.

FIFTH.- On the appointed date this Court proceeded to admit the evidence. Once admitted, the parties made the arguments they considered opportune, reiterating their initial stance, subject to this Courts ruling.

PRINCIPLES OF LAW

FIRST.- This Court states that it has been proven by the admission of both parties that don RICARDO ANDRÉS UTRERA FERNÁNDEZ is the proprietor of the establishment called "Disco Bar Metropol" at least during the period between November 2002 and August 2005, both months included, using music to entertain his clients. Equally, both parts acknowledge that the defendant has neither solicited authorization to the SOCIEDAD GENERAL DE AUTORES Y EDITORES, nor has he paid any sum to it.

The difference between both parties' arguments and what constitutes in the controversy in this trial, is that the plaintiff states that the defendant has been using works of the plaintiff's repertoire in the establishment called "Disco Bar Metropol", a fact that the defendant denies.

SECOND.- The SOCIEDAD GENERAL DE AUTORES Y EDITORES brings this action pursuant to article 138 of the Real Decreto Legislativo (Royal Legislative Decree) 1/1996, of April 12, which approved the text of the Ley de Propiedad Intellectual (Intellectual Property Act), that regulated, clarified and harmonized the different legal bills in use on the subject: "the holder of the rights recognized by this law, without prejudice of other actions to which he may be entitled, will be able to ask for the cessation of the illegal activity by the infringer and demand the indemnification for the harm or loss caused, under the terms of articles 139 and 140". As for the indemnification, the plaintiff may choose the

remuneration he would have obtained by authorizing the use of the works administered by him.

The SOCIEDAD DE AUTORES Y EDITORES is an entity created according to article 147 of the Ley de Priopiedad (Intellectual Property Law) to, on its own or in others name, manage rights of exploitation or other of an economic nature, on behalf and in the interests of various authors or rightsholders of intellectual property rights, having obtained the necessary authorization from the Ministry of Culture as published on the States Official Journal.

As a collecting society, it is authorized to exercise the rights given to it to be managed and to enforce them in all types of administrative and judicial procedures. To prove its authority, the collecting society will need no more than to present a copy of its statutes and the certification of its administrative authorization. Having met these requirements, the collecting society has the authority to bring this action pursuant to that procedure (article 150 of cited legal text).

THIRD.- The claim has been filed for the unauthorized use of works administered by the SOCIEDAD GENERAL DE AUTORES Y EDITORES at the so called "Disco Bar Metropol" in Badajoz during the period between November 2002 and August 2005, both months included.

The defendant denies that he has publicly performed works belonging to authors managed by the SOCIEDAD GENERAL DE AUTORES.

FOURTH.- According to article 217.2 of the Ley de Enjuiciamiento Civil (Civil Procedure Law) "the plaintiff and the counter claiming defendant bear the burden of proving the facts from which, according to applicable laws, the legal effect and claims can be inferred", and in compliance to chapter six of said legal proposition "the Court will have to keep in mind the availability and easiness of proof concerning each part of the claim".

The plaintiff is obliged to prove that it manages the rights for music that was performed in the establishment of the defendant.

FIFTH.- According to article 281.4 of the Ley de Enjuiciamiento Civil (Civil Procedure Law), "there is no need to prove facts that are self-evident or generally well-known". It can be considered as a self-evident fact and generally well-known, as it has been in this trial, that the SOCIEDAD GENERAL DE AUTORES Y EDITORES, directly and through agreements made with similar entities in other countries, has under its management the vast majority of the music that is publicly performed. This has given rise to the fact that, given the majority of the music publicly performed is under the management of the SOCIEDAD GENERAL DE AUTORES Y EDITORES, if such performances are taking place, it is presumed that works that are administered by this collecting society are being performed (Rulings of the Provincial Audience of Zaragoza of September 8, 1997 and of the Provincial Audience of Cuenca of July 22, 1997) "it is the owner of the establishment who has to prove that he only uses music that is not under the management of the entity".

Therefore, it can be assumed that, if music from many diverse authors is played in a general and repetitive basis, it is sufficient proof that, at least, part of such music is managed by the SOCIEDAD GENERAL DE AUTORES Y EDITORES. However, assumption can be refuted by the defendant's evidence.

SIXTH.- It is not enough for the defendant to allege he does not play or perform music managed by the plaintiff, he has to prove it. However he can't be asked to prove the impossible ("probatio diabolica") and to prove that all and each of the works he has performed does not belong to those managed by the plaintiff. An adequate distribution of the burden, in this case, is to have the defendant rebut the plaintiff's favorable presumption. For such purpose, the defendant will have to prove that he has the personal and technical ability to obtain music that is not managed by the SOCIEDAD GENERAL DE AUTORES, that he has the personal and technical ability to use it and play it in his establishment and that he has done so.

The defendant provided a large amount of evidence. From the titles presented as well as the testimony of Mr. Mata Lozano the defendant proved that he has the technical ability to create music and access it through technological means. Several witnesses (Mr. Lemus Rubiales, Mr. Salguero Barrena, Mr. Barrero Peláez and Mr. Ares García) testified that they regularly frequented the defendant's establishment and such establishment neither produces nor performs any music under the management of the SOCIEDAD GENERAL DE AUTORES Y EDITORES, but on the contrary the majority of the music played in said establishment is downloaded from the Internet under a "CREATIVE COMMONS" license.

"The intellectual property of a literary, artistic or scientific work belongs to the author by the simple fact of its creation" (article 1 of the Intellectual Property Law). The author has both moral and economic rights on his creation. Thus, as proprietor, he can manage such rights as he wishes, being able to grant its free or partial use of the work. "CREATIVE COMMONS" licenses are a series of different licenses that the rightsholder of a work allows in relation to his work authorizing a more or less free and royalty-free use of his work. There are, as proven by the parties, different types of these licenses, that permit third parties to use a work freely and royalty-free to a greater or lesser extent; and in some of such licenses, the payment of copyright royalties is stated. The defendant proves that he uses music whose authors have granted the right to use under "CREATIVE COMMONS" licenses.

The relevant point for this trial isn't that the defendant has used music which has been granted a royalty-free use by its authors through a CREATIVE COMMONS license, but if he has used music under the management of the SOCIEDAD GENERAL DE AUTORES Y EDITORES, the plaintiff. The use of music licensed under CREATIVE COMMONS licenses only proves that the defendant has obtained and performed a vast variety of works that aren't under the management of the SGAE. In this way the defendant proves that he has indeed obtained access to musical works that aren't being managed by the SGAE.

By proving that he has access to such works and that he has the technical means to obtain it and perform it in his establishment, the initial presumption that, at least, part of the

music played in his establishment must belong to the repertoire managed by the SGAE is rebutted. The defendant proves that he can obtain a number of musical works that are not being managed by the SGAE, that he has the technical means to do so and that such music is the type that is played in his establishment.

Once the presumption that the musical works played in the establishment are featured within the collecting society's repertoire has been rebutted , the burden to prove the contrary falls to the plaintiff, therefore the evidence of the plaintiff must be analyzed in order to find out if it indeed has proven that the establishment plays musical works under its management.

SEVENTH.- The plaintiff conducted various tests and collected evidence, primarily the recording from the inside of the discotheque, as well as the testimony from private investigators and the testimonies of SGAE's agent Mrs. Carvajal González and their expert Mr. Albero Tamarit.

From the recordings and the testimonies of the private investigators it is only shown that music is played in the establishment but not that certain musical works being placed there are managed by the SOCIEDAD GENERAL DE AUTORES Y EDITORES. As for the agent of the SGAE and the expert, even though they said that musical works being managed by the SGAE were being played, they did not indicate any specific work or author, despite the fact that they both said regulars at the establishment.

In conclusion, the plaintiff only proves that music is being played in the establishment, a fact already acknowledged by the defendant, but it doesn't prove the public performance of musical works featured in the repertoire under its management.

EIGHTH.- For the claim to be successful, the SOCIEDAD GENERAL DE AUTORES Y EDITORES needed to have shown that music under its management was played in the establishment. The facts on which the plaintiff bases its claim have not been proven, making it possible under the burden of the proof principle stated in article 217 of the Civil Procedure Law to overrule the plaintiff's claim in its whole.

NINTH.- Pursuant to article 394 of the Civil Procedure Law, the plaintiff is ordered to pay the costs that the defendant has incurred for this trial.

Seen the cited legal principles and others of general application

DECISION

1.- Dismissing the suit filed by the Attorney at law Mr. Rivera Pinna representing the SOCIEDAD GENERAL DE AUTORES Y EDITORES (SGAE) I must acquit the defendant don RICARDO ANDRÉS UTRERA FERNÁNDEZ from the claims filed against him.

2.- The plaintiff is ordered to pay for the cost of the trial.

The plaintiff may file in this same Court an appeal within a period of five days after the notification of this decision.

Be this ruling certified and incorporated in the process and the original be included in the book of rulings.

This be my ruling, I pronounce, order and sign it.

PUBLICATION: The foregoing ruling was read and published by the Illustrious Mr. MAGISTRATE-JUDGE that issues it, taking place and being in a public audience in the day of its date, I give in faith.