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## **Provincial Court of Pontevedra (1<sup>st</sup> Section)**

**November 29<sup>th</sup>, 2005,**

Appeal no. 612/2005

Doc. no. 3008/2005

Record: Appeal (LECN) 0003008/2005

Subject: Oral Proceedings 9/05

Trial Court: Court of First Instance no. 1 (Commercial) of Pontevedra

The 1<sup>st</sup> Section of the Provincial Court of Pontevedra, formed by the magistrates Mr. Francisco Javier Valdes Garrido, Mrs. Maria Begona Rodriguez Gonzalez and Mr. Francisco Javier Menendez Estebanez, has decided in the name of the King the following decision no. 612:

Having seen, under appeal, the oral proceeding n.09/2005 from the Court of 1<sup>st</sup> Instance no. 1 of Pontevedra (case 3008/2005), where the appellant-defendant is Mr. Jose Luis and the appellee-plaintiff is SGAE, legally represented by Mrs. Carmen Torres Alvarez and assessed by Mr. Juan Jose Yarza Urquiza, concerning damages for copyright infringement; the Magistrate Mr. Francisco Javier Valdes Garrido writes the decision of this Section.

### ***Findings of fact***

**First.** The Court of First Instance no. 1 of Pontevedra, on February 15<sup>th</sup> 2005 decided as follows:

“That I fully accept the claim presented by Mrs. Torres, on behalf and as legal representative of SGAE, against Mr. Jose Luis, and order the defendant to pay to the plaintiff the amount of 539.14 €, plus the legal interests accrued since the filing of this claim until the date of the current decision, after which art. 576 of LEC will be applied, and impose on the defendant the procedural costs thereof.”

**Second.** Against this decision, Mr. Jose filed an appeal which was accepted, and the proceedings were forwarded to this Section, to be heard on the 23<sup>rd</sup> of November.

**Third.** On this appeal, all legal terms and conditions have been fulfilled.

### ***Findings of law***

**First.** The defendant, owner of the business “DIRECCION000” located in Marin and used as a coffee bar, appeals the decision of first instance which ordered him to pay to the plaintiff SAGE the amount of 539,14 €, for the use of intellectual property rights, by the acts of communication to the public in the premises, without the required authorization, of the repertoire of works managed by the plaintiff, by means of a mechanic or electronic musical device (not fit to play images) during the

period comprised between June 2003 and November 2004. The defendant alleges, as the only ground of appeal, the lack of proof that any acts of communication to the public of the works in the SGAE repertoire were carried on in his business, since only royalty-free music was used in the premises, that is, music from authors who have decided to license the exploitation of their works for free and outside the management of SGAE; and presents as documentary proof the Creative Commons license of free musical use, a list of authors of free music that is played in his business under such royalty-free license, some pictures of the premises showing several signs indicating these two circumstances, as well as two witnesses, customers of the business, to explain the kind of music that was played in the premises.

The document presented by the defendant-appellant as license of free musical use is nothing but a mere informatory leaflet about the contents of the license and is lacking any signature; therefore it cannot be asserted any value.

In addition, after examining all of the evidence submitted in the proceedings, it must be concluded that the use of musical works in the premises, obviously as one of the several services offered to the customers of the business, is not limited to the authors listed in the document presented by the defendant, but it includes authors of commercial music.

This results from the deposition presented by the witness Estela, who had personal knowledge of the facts and whose truthfulness cannot be doubted, being an independent worker who — at the instance of the plaintiff — visited the business of the defendant on 5 occasions in order to inspect the possible use in the premises of the repertoire of musical works managed by SGAE, and having been completely reliable in her deposition, since in the premises she could hear - coming from a musical equipment with speakers — the sound of pop national music (1<sup>st</sup> visit), international music (2<sup>nd</sup> visit), pop music (3<sup>rd</sup> visit), the song “Princesa” by Joaquin Sabina (4<sup>th</sup> visit), and a broadcast by M-80 Radio, where she could identify a song by Gloria Estefan, among others (5<sup>th</sup> visit). The same conclusion derives from the depositions presented by the defendant and the witnesses-customers he presented, which confirmed that different styles of music are used in the premises (pop, rock, jazz, chill out, ethnic, electronic, background), to the extent that one of the witnesses, Jaime, explained that “a little of everything” is being played.

All this taken into account, having been proved that the defendant did entertain acts of communication to the public in the business according to art. 20 LPI, which comprises — since they occurred in a place accessible to the public and not in a strictly domestic environment— both the original performance and the reception (Supreme Court decision of July 19<sup>th</sup> of 1993) of music, and the defendant having failed to justify his opposition to the plaintiff’s claim on any of the three grounds envisioned in art.150 par.2 LPI, the appeal must be denied and the decision of first instance hereby appealed must consequently be confirmed.

Finally, the defendant must bear the legal costs generated during the first instance proceedings, since — as alleged by the plaintiff-appellee in its answer to the appeal — it is compulsory by law, although, the specific amount may be determined at a later time, under assessment of costs.

**Second.** Since the appeal has been denied, the defendant-appellant must bear the legal costs of the current appeal (art. 381-1 LEC).

By virtue of the jurisdictional power conferred by the popular sovereignty and on the name of the king, *we decide* to deny the appeal and confirm the appealed decision of first instance; and expressly impose the legal costs of the current appeal on the defendant-appellant.

Decided, pronounced, mandated and signed.