
JUDGMENT

Civil Cassation section I - 19/02/2015, n. 3340

Heading

THE SUPREME COURT OF CASSATION
FIRST CIVIL SECTION

Composed by the Messrs. Magistrates:

Dr. CECCHERINI Aldo

- President -

Dr. RAGONESI Vittorio

- Director - - rel. Director - -

Dr. GENOVESE Francesco Antonio

Director -

Dr. MERCOLINO Guido

Dr. NAZZICONE Loredana

- Director -

pronounced the following:

judgment

on the appeal 18738/2008 proposed by:

UNIVERSAL MUSIC PUBLISHING RICORDI SRL (CF (OMISSIS)), formerly BMG RICORDI MUSIC PUBLISHING SPA, in the person of the pro tempore legal representative, MI.MO EDIZIONI MUSICALI SRL, in the person of the pro tempore legal representative,

KING,

AL, electively domiciled in ROME, VIA DELLE

QUATTRO FONTANE 161, with the attorney ATTOLICO LORENZO, who represents and defends them, just power of attorney on the sidelines of the appeal;

- applicants -

versus

DGF, SONY BMG MUSIC ENTERTAINMENT (ITALY) SPA;

- intimated -

As well as from:

DGF (CF (OMISSIS)), electively domiciled in ROME, VIA G. NICOTERA 2 9,

with the lawyer ANDREA MICCICHE ', who represents and defends him, just power of attorney on the sidelines of the defense and conditional cross-appeal;

- countercurrent and incidental recurring -

versus

SONY BMG MUSIC ENTERTAINMENT (ITALY) SPA, UNIVERSAL MUSIC PUBLISHING RICORDI SRL, MI.MO EDIZIONI MUSICALI SRL,

TO THE,

KING;

- intimated -

As well as from:

SONY BMG MUSIC ENTERTAINMENT (ITALY) SPA (pi (OMISSIS)), formerly SONY MUSIC ENTERTAINMENT (ITALY) SPA, in the person of its pro tempore legal representative, electively domiciled in ROME, CORSO

TRIESTE 37, with the lawyer FEDERICO MARIA FERRARA, who the represents and defends, just power of attorney on the sidelines of the defense and cross appeal;

- countercurrent and incidental recurring -

versus

DGF, UNIVERSAL MUSIC PUBLISHING RICORDI SRL,
MI.MO EDIZIONI MUSICALI SRL, TO THE, R.
AND.;

- intimated -

against sentence no. 3160/2007 of the COURT OF APPEAL of ROME, filed on 07/16/2007; having heard the report of the case carried out in the public hearing of 08/01/2015 by the Director Dr. FRANCESCO ANTONIO GENOVESE;

having heard, for the applicants, Attorney ATTOLICO LORENZO who asked for acceptance; hearing, for the countercurrent and incidental applicant

DG,

the lawyer MICCICHE 'ANDREA who asked for the appeal to be rejected

principal; having

heard, for the countercurrent and incidental applicant SONY, the lawyer FERRARA FEDERICO MARIA who requested the rejection of

the

main appeal;

having heard the PM, in the person of the Deputy Attorney General Dr.

SALVATO Luigi, who concluded for the rejection of the main appeal and the SONY cross-appeal; absorbed the cross appeal D.

G ..

CONDUCT OF THE PROCESS

1. The judge of the Court of Rome, in acceptance of the appeal proposed (pursuant to articles 669 ter and 700 cpc) by Edizioni Musicali Ritmi e Canzoni srl (subsequently merged into BMG Ricordi spa) and by MI.MO. Musical Editions srl, as holders of the rights to use the song "Zingara", as well as by Messrs. AL and RE, as authors of the work, prevented Sony Music Entertainment spa and Mr. DGF, the former as producer and the latter as author, to further spread and market the song "Take this gypsy dwarf".

2. The protesters' complaint was accepted and the order revoked.

3. At the outcome of the judgment on the merits, the same Court declared that the title of the song "Take this Gypsy Hand" by DGF, and the first two lines of the same, constituted plagiarism of the first two lines of the song "Zingara" by A . and R. and prevented the defendants from further disseminating and marketing the song, condemning them to pay compensation

non-pecuniary damage paid in Euro 8,000.00 for each, with compensation for judicial expenses.

4. The appeal of the GM, which was followed by the intervention and the cross appeal of Sony spa, was accepted, with the request being rejected by the plaintiffs, sentenced to pay the legal costs of the two levels of trial.

5. According to the Territorial Court, although the first two lines of the literary text of DG's song were identical to those of the song created in the 1960s by A. and R. (except in one word: "future" instead of "destiny"), the rest of the text and the musical part would have been completely different, hence the exclusion of plagiarism, being - if anything - a "quotation", for which the L. n. 399 of 1978, art. 10, third paragraph. Hence the rejection of the main appeal, which was also followed by the rejection of the incidental one proposed by Sony spa, for the alleged damage from non-commercialization of the song considered the result of plagiarism, and for the hypothetical aggravated procedural responsibility of the actors.

5.1. From this last point of view, in particular, the district judge ruled out that the plaintiffs had acted, also pursuant to art. 96 cpc, paragraph 2, "with bad faith or gross negligence", having attached facts that are objectively true and unchallenged, but only differently evaluated, by way of legal interpretation, by the judges of the various procedural stages.

6. By this decision Universal Publishing Ricordi srl (formerly BMG Ricordi Music Publishing Spa), MI.MO. Musical Editions srl as well as Messrs. AL and RE, have filed an appeal in cassation, entrusted to three grounds of censure, also illustrated with a memorandum pursuant to art. 378 cpc, against which Sony Music Entertainment Italy spa and Mr. DGF, each with defense, also illustrated by the memorandum.

Finally, the latter proposed, respectively, an incidental appeal, entrusted to a single plea, and a conditional cross appeal, divided into two submissions, the latter also illustrated by the memorandum.

GROUNDS FOR THE DECISION

1.1 With the first main complaint (violation and false application of Law no. 633 of 1941, articles 1, 2, 4, 18 and 20, and of article 2577 of the civil code, pursuant to article 360 cpc, nos. 3 and 5) the applicants have formulated the following legal question: Tell the Court whether the reproduction of a famous, original and complete fragment of the literary text of a musical work in another musical work, should be considered plagiarism, even if only partial, also in

consideration of the particular prominence that this reproduction has had in the plagiaristic musical work.

According to the applicants, given that the DG had not only used the first line of the work composed by Messrs. A. and R., making it the title of his work, but also using it three more times, as well as in the attack on the work, the district judge would have erred in excluding the plagiarism, even partial, committed by the GM. In fact, for there to be plagiarism, the absolute identity between the plagiarized and the plagiarized work would not be required, since the recovery of creative elements of the former is sufficient.

Furthermore, the appropriation would have affected the first two lines (which normally have a power to feed the memory in the public), making a relevant reproduction (not minimal and imperceptible) without noticing the fact that it would have concerned only a part of the work, that of the literary text. In fact, in composed works there would be an ontological and juridical autonomy of the constitutive elements, susceptible of separate economic use, as recognized by the jurisprudence that would have admitted the partial plagiarism of the literary part of a composed work.

In the present case, the two lines of the song "Gypsy" used by the DG would be worthy of protection, because they have an adequate semantic structure, capable of forming an object of conceptual apprehension and interpretation, and of a treatment of the original argument also in the syntactic construction that they reveal a personal and identifying imprint of a creative activity and an aesthetic commitment capable of giving rise to ideas and feelings, as would be shown by the memory that one has of them, despite the time that has elapsed since its first execution. In short, for the same possibility of saying the same concept in another way, they would constitute the heart of the plagiarized song, which would make them deserving of the protection of the law.

1.2 With the second reason of the same appeal (violation and / or false application of Law n. 399 of 1978, art. 10, pursuant to art. 360 of the Italian Civil Code, n. 3) the applicants formulated the following question of law: Tell the Court if, in order to recognize the reproduction of a fragment of a literary work (in this case, the literary text of a musical work) in another literary work (in this case, the literary text of another musical work) a suitable citation to exclude the occurrence of plagiarism between said works, it is necessary that this reproduction is faithful and that, with reference to the same, the source and the name of the author of the cited work are mentioned.

The applicant argued that the decision would have blatantly infringed the provision referred to as the DG not only did not exactly reproduce the two lines of the musical piece composed by Messrs. A. and R. (having replaced the word "destiny" with "future" and having added the word "pure") but would not even have recalled the source and the name of the author of the cited work. In such cases, it could not

find application of the exemption pursuant to art. 10 cit., And should be concluded for the existence of plagiarism.

1.3 With the third reason for the said appeal (omitted and / or insufficient and / or contradictory reasoning on controversial and decisive facts for the violation judgment pursuant to Article 360 of the Italian Civil Code, no. 5) the applicants formulated the following question of right: Tell the Court whether, in order to exclude the recurrence of a (even partial) plagiarism of a literary text of a musical work, it is sufficient and not contradictory to affirm that there is textual identity with a fragment of the literary part of another musical work and diversity between the respective musical parts and between the remaining literary part of the musical works themselves.

The applicants assume that the territorial court would have omitted or, at least, insufficiently motivated as to why it is not plagiarism, not even partial, the use, albeit with a different musical part and a residual text, of the verses composed by Messrs.

A. and R. and reproduced five times in the piece written by the DG, as well as placed under the title of the same. And he would not even have explained why those verses that have not even faithfully reproduced those composed by Messrs. A. and R ..

2. With the only reason for conditional cross-appeal (violation and false application of Law no. 633 of 1941, articles 1, 2, 4, 18 and 20, and omitted and / or insufficient and / or contradictory reasons on facts controversial and decisive for the dispute) the appellant DG formulated the following legal question: Tell the Court whether, for the purposes of the correct application of Law no. 633 of 1941, arts. 1, 2, 6 and 20, and a sufficient and coherent motivation, before ascertaining whether the total or partial reproduction of a small segment present in another work constitutes plagiarism, prior verification of the qualification of work is necessary and, therefore, the existence the creative nature and novelty of this segment.

3.1. With the first ground of cross appeal (violation of Article 112 of the Italian Civil Code; error in proceeding pursuant to Article 360 of the Italian Code of Civil Procedure, No. 4), the appellant Sony formulated the following legal question: Tell the Court whether the contested sentence should be quashed for violation of art. 112 cpc, for the lack of ruling - in the operative part of the sentence - in order to the head of the request proposed by Sony to sentence the applicants to compensation for damages and reckless per lite pursuant to art. 92 cpc, paragraph 2, and if, therefore, this omission constitutes the defect of omitted ruling regarding that head of the application.

The Territorial Court, despite having motivated the reasons for the rejection of the compensation claims proposed by Sony spa, would not have achieved the ruling of rejection in the operative part of the sentence.

3.2. With the second ground of cross appeal (violation and false application of article 96 of the Italian Civil Code, paragraph 2, pursuant to article 360 of the Code of Civil Procedure, no. 3), the applicant Sony formulated the following question

of law: Tell the Court if the contested sentence should be quashed for violation and / or false application of rules of law pursuant to art. 360 cpc, n. 3, to have the Court of Appeal excluded the applicants' liability, holding that the aggravated liability invoked by Sony and provided for by art. 96 cpc, paragraph 2, exists only if the party has acted with bad faith or gross negligence.

4. The complaints proposed by the main plaintiffs are all centered on the linguistic substratum - material according to which the fragment of text under discussion ("take this gypsy hand, tell me what fate will I have", which in the new song has become the title "take this gypsy hand "and then also, in the text," take this gypsy hand, tell me what future I will have ") would express in a completely original way, for the first time, by the authors of the song" Gypsy "(the applicants A. and R.), a concept (the request for prediction of the fate of a love affair between two people, made by one of the two to the gypsy seer) that can be expressed in numerous other ways. Hence the affirmation of the full completeness and protectability of that linguistic (and poetic) fragment capable of expressing that concept, independently of the remaining part of the literary text and, even more so, of the musical theme underlying that enunciation.

4.1. According to the applicants, the appellate judge did not understand these essential data and therefore denied the request for protection, violating the aforementioned provisions of the 1941 authorial protection law and committing a motivational error, with the negative solution given to the question submitted to him.

4.2. Furthermore, the territorial court would have erred in qualifying the "linguistic revival" as a sort of "quotation" of a poetic-linguistic verse extracted from another musical work.

5. The Court observes that the complaints made by the applicants are not well founded, but also that they must be rejected only through a correction-integration of the reasons given by the Territorial Court in the judgment challenged here.

The complaints, however, although clearly kept separate in the appeal, require, due to the very close connection that binds them, that they be dealt with jointly.

6. To the question of law aimed at establishing whether a significant fragment of the literary part of a musical work is or is not susceptible to autonomous authorial protection, the district judge did not give a negative answer (to the point that he indicated the possibility of qualifying that transplant like a quotation from another work), even if it later excluded plagiarism on the basis of four parameters:

a) the (modest) variation given to a part of the reproduced text;

b) the complete diversity of the literary text in its remainder, after deducting the reproduced part;

c) the treatment of completely different themes by the new work;

d) the total diversity of the musical part.

6.1. The Court observes that none of these statements, in their factual value, have been specifically contested by the applicants.

7. In abstract terms, the applicants are right to demand that the principle according to which copyright is infringed be affirmed even in the event that a composed work (in this case a linguistic and musical text) becomes the object of undue copying (total or partial) only in one of its parts or components (think of the case in which a musical work is transferred, almost entirely, in its poetic-literary text only, grafted onto another musical score; or rather, perhaps more frequently, that a completely different text is grafted onto an identical or similar musical theme).

7.1. From this point of view, it could be argued that the appeal sentence affirmed a *regula iuris* of opposite value where it recalled, in the motivation, the total diversity of the musical parts of the two songs, as if that were enough to exclude plagiarism. What it is not, as can be deduced from the examination of the structure of the grounds of the contested judgment, which excluded plagiarism on the basis of four parameters and not only on the basis of what the censured *regula iuris* expresses (i.e. the one according to which, in a song, plagiarism must necessarily invest both components of it: words and music).

7.2. In fact, even if the reasoning were amended by such an implicit affirmation (if it were considered that the decision affirmed this principle) it would allow its dictum to remain standing since plagiarism would be excluded on the basis of the other three reasons stated and, in particular, on the basis of those under b) and c) of p.5, the judge of merit having noted a total diversity of the remaining text and the treatment of completely different themes in the new work.

8. Except that the applicants ask this Court to answer a specific question of law by clarifying that the reproduction of a famous, original and complete fragment of the literary text of a musical work in another musical work, is plagiarism, even if only partial, also in consideration of the particular prominence that this reproduction has had in the plagiaristic musical work.

9. This question too deserves, in the abstract, a positive answer, since it is not necessary that the plagiarism of the poetic-literary part contained in the musical work invests a substantial part of it, being able to limit itself to the so-called heart of the work, provided that it assumes in the new artistic work a role not different or similar to that of the work that is assumed to be plagiarized.

9.1. Except that even this assertion was considered unfounded by the court of merit, as the latter implicitly excluded that the fragment to be grafted into the subsequent work, which is assumed to be plagiarized, constitutes the heart of both the first and the second artistic composition. In fact, the district judge not only remarked that there is a complete diversity of the literary text in its remainder (with respect to the said fragment), but also emphasized that the poetic-literary part, beyond the identity of the sentence placed at the center of the controversy, has carried out (and still carries out) a "treatment of completely different themes" with respect to the artistic work owned by the applicants.

9.2. And, in fact, this assessment, although not analytically carried out by the Territorial Court, has not even been the subject of dispute and censorship in part here by the applicants, who have limited themselves to a generic motivational complaint, carried out under other and different profiles (cf. p.1.3), challenging the reasoning of the territorial court in the part in which it seems to have excluded the autonomous and complete character of that literary poetic fragment, which imposes its consequent rejection.

9.3. Indeed, the aforementioned statement (set out above, in point c) of page 6) is precisely decisive for the purpose of rejecting the appeal, as we must affirm, here, the principle of law according to which, in the matter of plagiarism of a 'musical work, a poetic-literary fragment of a song that is reprized in another does not in itself constitute plagiarism, as the judge of merit must ascertain whether or not the fragment inserted in the new literary poetic text has preserved a identity of poetic-literary meaning, that is, it has clearly and clearly highlighted a semantic gap compared to what it had in the previous work.

9.3.1. In fact, in general, according to aesthetic theories, poetic discourse, starting from the linguistic material of common discourse, already makes a semantic difference with respect to this and, to the denoting elements of that starting point, confers additional polysense connotations gradually new, different from text to text, always referring to a specific contextuality. In this way reality and society enter the work of art not because they proceed with mechanical immediacy from the basic denotative contents, but because they are mediated by the multisense structure of formal (connotative) transformations, which vary from "art" to "art", according to the peculiar sign system of each one.

Even the artistic discourses, following the path of the so-called "aesthetic truth" and, therefore, "unscientific", provide, each through specific complex languages, a knowledge of the world that is not at all "inferior" to the "scientific" one.

9.4. Having the district judge pointed out that the new work contains a "treatment of completely different themes" with respect to the artistic work owned by the applicants, he implicitly stated that the grafting of the fragment object of the case into the second work also received an artistic significance. totally different. And, in this sense, the

motivation of the district judge must be expressed according to the principle of law referred to above.

10. It also does justice to the alleged classification as a "citation" (which is assumed to be carried out in violation of the Law of 1999, art. 10) of that fragment object of grafting, operated by the district judge, considering that, apart from the hypothetical nature of that statement ("if anything ..."), even if it had a different enunciative value, it is in any case superfluous in the motivational context reported above, as well as illuminated on the basis of the principles of law enunciated regarding the different meaning that the same linguistic fragment can have both with respect to the common discourse and to two different poetic-literary contexts, when connected to completely different subjects.

10.1. And this without having to evoke a more correct interpretation of the citation discipline, referred to in Law no. 399 of 1978, art. 10, (on which see Cass. Section 1, Sentence no. 2089 of 1997) and the artistic or critical or scientific context of the lawful use of literary or artistic works, in accordance with those good uses (or, even more, the mention of the source or its author) which, as we have seen, are of no relevance in the case examined.

11. It is now possible to move on to the conditional cross appeal of the DG, which must declare itself absorbed due to the rejection of the main appeal.

12. On the other hand, Sony's cross-appeal must be dealt with, even if rejected.

12.1. The first plea is unfounded, on the basis of the principle (repeatedly affirmed by this regulatory Court) of integrating the operative part of the sentence with its motivation, given that where the appellate judge, after having rejected the request in the motivating part, has nothing established in the device, there are no problems of interpretation, imposing, in a clear and simple way, the non-acceptance of it (unlike the case in which there is a reason for acceptance, not followed by the corresponding ruling in the device, which demanding to be differently articulated and specified, according to the discretionary powers of the judge, entails the cassation of the ruling precisely for the necessary deployment of those powers that cannot be substituted in the legitimacy check). This is all the more so when (as in the present case) there is a provision, however incomplete, which has already established the acceptance of part of the appeal and which, only by material omission, has not also formally stated the rejection of the remaining applications, although clearly disregarded in the motivating part of the decision (see Cass.

Section 1, Judgment n. 5337 of 2007).

12.2. The second ground for cross-appeal must also be rejected.

In fact, the censured statement and actually incorrect (the district judge ruled out that the plaintiffs had acted "with bad faith or gross negligence", while the applicant had

also envisaged the subjective state of slight negligence, pursuant to art. 96 of the Italian Code of Civil Procedure, paragraph 2, and not the first one that does not require) does not exhaust the ratio decidendi contained in the contested sentence, which is also based, even without the evocation of art. 96 cpc, paragraph 1, on the succession of conflicting rulings, which followed one another during the trial, and "the result of a different legal interpretation of true and undisputed facts"; an observation which essentially amounts to the implicit denial of the lack of normal prudence (which is a judgment reserved to the trial judge: see Cass. Section 3, Sentence no. 15551 of 2003).

12.2.1. In this way, the district judge has adequately justified the existence or not of the subjective element required by art. 96 cpc, paragraph 2.

In conclusion, the main appeal and the incidental one, on the whole unfounded, must be rejected (and the costs between the two applicants, for the reciprocal loss, must be compensated), the conditional incident absorbed, and the main plaintiffs condemned - jointly and severally - to pay , with regard to the GM, the only non-losing party, of the related expenses, paid as per the disposition.

PQM

Rejects the main and incidental appeals, absorbed the conditional incident and, compensated for those between the main plaintiffs and Sony Spa, condemns the main plaintiffs to pay jointly and severally the legal costs incurred by the defendant DG, which are liquidated to the extent of Euro 8,200.00, of which € 200.00 for disbursements, plus lump-sum expenses and legal accessories.

So decided in Rome, in the Council Chamber of the First Civil Section of the Court of Cassation, on January 8, 2015.

Filed in the Chancellery on February 19, 2015