[IT] SIAE Sticker on CDs and DVDs: Italian Courts Divided over ECJ Schwibbert Ruling

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Some recent judgments by the Italian *Corte di Cassazione* (Court of Cassation) have brought to the fore the division among Italian criminal courts over the interpretation of the judgment delivered by the European Court of Justice in case C-20/05 Schwibbert, dealing with the obligation to affix the SIAE marking to compact discs for the purposes of marketing them within the Italian territory.

The Italian Copyright Statute, Law No 633 of 22 April 1941, laid down the mandatory requirement of affixing a distinctive sign bearing the initials of the Italian *Società Italiana degli Autori ed Editori* (Society of Authors and Publishers - SIAE) to any medium containing protected works, as an authentification tool and a safeguard enabling legitimate products to be distinguished from pirated goods. In its Schwibbert judgment, however, the ECJ established that such a requirement constitutes a “technical regulation” which, if not notified to the Commission pursuant to Directive 98/34/EC as amended by Directive 98/48/EC, cannot be invoked against an individual.

Since the Italian Government actually failed to notify of that 'technical regulation', the ECJ findings in Schwibbert have had a significant impact on a number of criminal proceedings pending before the Italian courts. Both lower and higher courts seem to concur that, although the ECJ judgment dealt with the failure to affix the SIAE sign to compact discs of works of figurative art, the principles of law set out in that ruling also apply to other types of media (e.g. DVDs) and content, such as music, films and software programmes (see judgment no. 35562/08 of the Court of Cassation).

Courts further agree that the unenforceability against individuals of the “technical regulation” at hand implies the inapplicability to defendants in criminal proceedings of those provisions of the Italian Copyright Statute, such as Article 171ter lit c) thereof, which punish the import, distribution, sale or possession of compact discs and DVDs not bearing the 'SIAE' sticker.

Conversely, there is no consensus as to other provisions of the Copyright Statute (e.g. Article 171ter lit d) thereof) that criminalize the distribution, sale or possession of unlawfully reproduced compact discs and DVDs. In most of the judgments delivered prior to the Schwibbert ruling, the absence of the 'SIAE' sign

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on a given medium was regarded by criminal courts as strong evidence of its unauthorised duplication.

Part of the case law, including judgment no. 13816/08 of the Court of Cassation, supports the proposition that, albeit the failure to affix the SIAE sign on a given medium cannot be regarded any longer as a criminal offence per se, it can still prove, along with other reliable, precise and consistent evidence, that such a medium was illegally reproduced.

Another school of thought (see, to that effect, judgment no. 21579/08 of the Court of Cassation) however, argues that recognising even a limited probative value to the absence of the SIAE sticker would be tantamount to giving effect to the aforementioned 'technical regulation', as if it had become inapplicable only as from the Schwibbert judgment onwards. In contrast, those rules should be regarded as being inapplicable from the beginning, hence they cannot yield any negative consequence for private parties who acted in breach of them even prior to the date on which the Schwibbert judgment was delivered.

According to Italian criminal procedural law, inconsistencies in the case law should be reconciled by a judgment delivered by the Chambers for criminal matters of the Court of Cassation sitting in plenary session. Nonetheless, judgments by the Joined Chambers of the Court of Cassation, albeit highly persuasive, are not binding on lower courts. Another solution would be to refer the unsolved questions to the ECJ for a preliminary ruling, which would be binding on every court in the European Union adjudicating on a similar matter.

Corte di Cassazione, Sezione III Penale, Sentenza 12 febbraio 2008, n. 13810

http://www.penale.it/page.asp?mode=1&IDPag=602

Court of Cassation, Third Criminal Chamber, Judgment 12 February 2008, no. 13810

Corte di Cassazione, Sezione VII Penale, Sentenza 6 marzo 2008, n. 21579

http://www.penale.it/page.asp?mode=1&IDPag=631

Court of Cassation, Seventh Criminal Chamber, Judgment 6 March 2008, no. 21579

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Corte di Cassazione, Sezione III Penale, Sentenza 24 giugno 2008, n. 35562

http://www.penale.it/page.asp?mode=1&IDPag=693

Court of Cassation, Third Criminal Chamber, Judgment 24 June 2008, no. 35562

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