
CRIMINAL LIABILITY FOR FORGERY OF PRINT IN POLISH LEGISLATION

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art forgery, forgery of art print, criminal liability of art forgery, counterfeit product marking

ABSTRACT

This paper aims to outline relevant legal problems of domestic legislation in aspects such as evidence difficulties, the so-called legalisation of forgery, and choosing the legal qualification of forgery of print. The doctrine for many years has postulated (and still does) the increase of protection of works of art from crimes such as forgery would increase the safety and fair trade on the art market. However, legislators tend to omit this problem. So, the other possible acts are: the Polish Criminal Code, Act of 23 of July 2003 on the Protection and Guardianship of Monuments, and Act of 16 of April 1993 on Fair Trade. Each of these acts are analysed in the context of its evidential requirements to find the most useful one. The choice of a legal action depends on whether the work of art (print) is considered a monument as in the definition included in the Act on the Protection and Guardianship of Monuments. We then compared our results with cases prosecuted in Poland.

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I. INTRODUCTION

The Polish art market has gradually expanded with record-breaking auctions¹ and new types of buyers² (with some of them being art laymen). This growing demand for art attracts deceitful sellers who supply the market with fakes. There are many examples of forged pieces in almost every branch of visual art,³ and even the most experienced collectors must be very cautious when purchasing a piece. According to T.P.F. Hoving, ‘there has not been a single collector in the entire history of collecting who has not made a mistake.’⁴ Such mistakes might be made by private collectors as well as public museums. However, art forgery as a problem has existed in the Polish art market since its beginnings. It contributes to a decrease in the credibility of the market and the security and certainty of transactions – the very foundation of this trade. One of the reasons for this is the lack of regulation that would directly penalise the forgery of works of art. As a result, forgery is often classified as fraud, the use of someone else’s work, etc. In this paper, we would like to discuss legal acts in Polish law that are often used to criminalise the forgery of artworks (including prints), point out why they are insufficient, and how new legislation might help reduce this crime and improve the criminal procedure against forgers.

II. LEGAL ASPECTS OF ART FORGERY

It is indeed an error to collect a forgery but it is a sin to stamp a genuine piece with the seal of falsehood.

Max Fiedländer

¹ ‘Raport polskiego rynku aukcyjnego 2022’ (OneBid) < <https://onebid.pl/pl/aktualnosci/Raport-polskiego-ryнку-aukcyjnego-2022> > accessed 08 February 2023 and ‘Raport kolekcjonerski 2021/2022’ (OneBid) <<https://onebid.pl/pl/aktualnosci/Raport-kolekcjonerski-2021-2022>> accessed 08 February 2023

² According to art market analysts, there are different types of participants depending on their motivations for buying art, experience, and knowledge of art. These are highly specialised clients: investors, emotional buyers, ones wishing to express their cultural capital, corporate clients, and experimentators. Some of them, being laymen, use the services of art experts. – Anna Theiss, ‘Kto, jak i po co kupuje w Polsce sztukę?’ (Rynek i sztuka, 19 February 2020) <<https://rynekisztuka.pl/2020/02/19/kto-kupuje-w-polsce-sztuke/>> accessed 12 August 2020

³ There are many publications depicting fakes in visual arts, see e.g.: Mark Jones (ed.), *Fake?: the art of deception* (University of California Press 1990); Paul Craddock, *Scientific investigation of copies, fakes and forgeries* (Elsevier 2009); Frank Arnau, *Sztuka fałszerzy – fałszerze sztuki* (Wydawnictwa Artystyczne i Filmowe 1988); Monika Bryl, *Rynek dzieł sztuki. Poradnik dla kolekcjonerów i inwestorów* (Wydawnictwo Naukowe PWN 2017).

⁴ Thomas Pearsall Field Hoving, ‘*The Game of Duplicity*’ (1968) 6 *The Metropolitan Museum of Art Bulletin* 241.

Creating an exact copy on the same scale as an existing monument is legally allowed if there are reasonable causes. One of the most common examples is when a monument is endangered, and it is impossible to protect it by conservation methods. Another is the possibility of theft due to its place of exposition.⁵ Creating a copy or a brand new piece imitating another artist's style wouldn't be considered a criminal act (a forgery) as long as it bears the information either about its actual creator or that it is indeed a copy. It also wouldn't be considered a forgery if the owner of such a product (who doesn't necessarily need to be the product's creator) sold it by misleading the buyer to purchase it (i.e., the person has to be convinced of the authenticity of the product). According to art. 286 par. 1 of the Polish Criminal Code, such an act would be considered fraud (provided that seller acted with the purpose of gaining a material benefit). However, the deceptive intent of the seller is significantly difficult to prove. And as a result, such cases are rarely reported or disclosed, and those that are prosecuted are often discontinued. Quoting Dariusz Wilk's research, between 2006 and 2015, out of 53 cases, 42 of them were discontinued, mainly because of a lack of possibility of proving that the perpetrator met all the criteria of a prohibited act.⁶ A case from Gdańsk is yet another example of this issue. The District Attorney's Office in Gdańsk conducted a prosecution based on art. 286§1 with regard to art. 296§1 of the Polish Criminal Code.⁷ S. Goldenberg was suspected of inducing another person to disadvantageously dispose of personal property to gain a material benefit of 538,000.00 PLN. He was suspected of offering 80 prints, selling 58 of them, and misleading buyers by claiming that Salvador Dali was their author. Due to lack of a possibility of proving the intent of a crime, the prosecution was discontinued.⁸

Other problems in the art market are deceitful practices such as: deliberate lowering of the number of proofs in edition in order to boost market's demand, and the 'legalisation' of forgery. The latter is committed when artists and their heirs (family members or closest associates) enforce their right to authenticate a piece of work. As a result, a forgery is often claimed to be an original art piece,

⁵ Mieczysław Kurzątkowski, *Mały słownik ochrony zabytków* (Min. Kultury i Sztuki. Ośrodek Dokumentacji Zabytków 1989) 38.

⁶ Dariusz Wilk, *Falszerstwa dzieł sztuki. Aspekty prawne i kryminalistyczne* (C.H. Beck 2015) 205. Similar are results of Agnieszka Szczekała's research, see: Agnieszka Szczekała, *Falszerstwa dzieł sztuki. Zagadnienia prawnokarne* (Wolters Kluwer Polska 2012) 235.

⁷ Art. 296 par.1. Whoever being obliged by a statutory provision, decision of a competent authority or a contract to manage the financial matters or business activity of a natural person, a juridical person or an organisational entity without a legal personality, inflicts substantial material damage upon such person or entity by abusing the granted authority or failing to fulfill the incumbent duties, is subject to the penalty of deprivation of liberty for between 3 months and 5 year. - Journal of Laws of the Republic of Poland 2022, item 1138, translation: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek.

⁸ Information received on 5th of October 2018 from District Attorney's Office in Gdańsk.

and the verification and clarification of those claims are difficult to rebut. This right may add to the artist's oeuvre works of other family members or excellent but anonymous pieces from a similar period.⁹ This problem, in particular, affects artists in France, where this right is superior when examining the art piece. In other words – the opinion of those closest to artists has supremacy on authentication. That right is sometimes abused. Case in point – Jean-François Millet's grandson and his friend, painter Paul Cazot developed a flourishing trade in forgeries.¹⁰ What's important to note is that family members often lack the knowledge of the artist's oeuvre, style, and manner and might fall victim to skillful forgers. At the same time, they might contribute to disregarding an artist's less successful yet authentic piece to protect his good name and brand. The second case of the legalisation of forgery appears when an expert gives expertise based on assumptions and/or methodological mistakes. The first is more dangerous and difficult to dismiss, as experts often write expertise using safe and ambiguous wording.¹¹

III. ACT ON THE PROTECTION AND GUARDIANSHIP OF MONUMENTS

The main purpose of this regulation is to increase the protection of heritage. Monuments are its most important material elements¹² and therefore needed special protection and care. However, there was some criticism over limiting the protection only to monuments and not all works of art. But the fact is that 'cultural goods resource isn't reduced due to art forgery, on the contrary, sometimes it is increased.'¹³ This means that a forgery created in the same period or shortly after the original artwork has its own artistic, historical, or cultural value.

Chapter 11 of the Act on the Protection and Guardianship of Monuments enlists the criminal offenses and petty offenses against monuments. For the topic of this paper, two articles – 109a and 109b – are vital. The general subject of protection in these articles is a national heritage and the objective subject – certainty of the monument's trade and its authenticity.¹⁴ Before the implementation

⁹ Wojciech Szafrński, 'Certyfikaty dzieł sztuki w Polsce' (2011) 22 *Człowiek i dokumenty* 29-40.

¹⁰ Alice Beckett, *Fakes: Forgery and the Art World* (Richard Cohen Books 1995) 44.

¹¹ Jerzy Stelmach, 'Granice falsyfikatu' in: Ryszard Krawczyk (ed) *Zagrożenia dzieł sztuki i meandry ich ochrony* (Wydawnictwo JAK 2011) 95.

¹² Kamil Zeidler, *Prawo ochrony dziedzictwa kultury* (Oficyna a Wolters Kluwer business 2007) 44.

¹³ *ibid* 207.

¹⁴ Bartłomiej Gadecki, *Ustawa o ochronie zabytków i opiece nad zabytkami. Art. 108-120. Przepisy karne. Komentarz* (C.H. Beck 2014) 71.

of this regulation in 2006, art forgery and trade were penalised as fraud as described in art. 286§1 of the Criminal Code. The latter is still used when a forgery is committed of an artwork that is not a monument. This applies to works of living artists, etc.

Art. 3 of the Act on the Protection and Guardianship of Monuments defines a monument, an immovable monument, a movable monument, and an archaeological monument. Prints might be defined either as a monument or a movable monument. According to point 1 of this article, a monument is an immovable or movable object or part or group thereof, made by man or connected with man's activity and constituting a testimony to a past era or event, the preservation of which is in the interest of society due to its historical, artistic, scientific, or academic value. Point 3 of this article adds that a movable monument is a movable object, or part or group of objects referred to in point 1 of this article. As a supplement to this regulation, art. 6 enlists objects under protection and guardianship regardless of their state of preservation. Art. 109a penalises the forgery of a monument. It defines two activities, i.e., two methods of forgery – production of a fake object and alteration of the existing one. The first aims to imitate an authentic monument and pass the appearance of the artist's manner. This is a new object bearing the traits of the monument. The second activity penalised in this article is alteration. It occurs when the forger makes changes in the original artwork. The object is still authentic, but the changes are not. This most often happens when forger inserts different artistic or aesthetic essence.¹⁵

As mentioned before, work created with similarity to a monument is not considered a forgery unless it is labeled as a copy or imitation or otherwise marked.¹⁶ Polish law accepts copies that are an exact repetition of original artwork in the same scale (1:1).¹⁷ These can be made when a monument is in danger of destruction, and there are no other possibilities of protecting it with conservation methods. Another possibility of creating said copy occurs when an original artwork display makes it prone to, for example, theft.¹⁸

There is a significant difference between a copy and a fake. The first emphasises its relationship with the original; the latter hides it and tries to pass as the original. In order to acknowledge a piece as a copy, not fake, it has to:

- a) be created with the approval of an artist or the copyright owner and the owner of the original piece;
- b) have different size;
- c) be marked as a copy.

¹⁵ Wilk (n 6) 36.

¹⁶ *ibid* 35.

¹⁷ Kurzątkowski (n 5) 38.

¹⁸ *ibid*.

Art. 109a doesn't demand criminalization based on gaining a material benefit from a perpetrator. The liability is based on the use of a fake in the monument's trade (doctrine postulates to interpret the phrase "use in monument's trade" as the first-time use¹⁹). It means that the legislator's intention was to penalise every, i.e., financial and non-financial ways of placing the objects on the market (which corresponds with other acts using this phrase²⁰). In addition, beyond criminalisation are other purposes like presenting one's craft, producing for self-use or as a supplement of collection, and selling an object while informing it is a copy or for use as a study aid. Usually, a perpetrator commits a forgery to increase the value of an object (however, the article doesn't make a criminalisation conditional on that fact). Therefore, there is a possibility, however rare, that perpetrator alters an object to decrease its value²¹ (for example to facilitate illicit trafficking). Another article that corresponds with the topic of this paper is art. 109b of the Act on the Protection and Guardianship of Monuments. It addresses a common issue in the Polish art market when a seller who offers fakes isn't necessarily its producer, i.e., a forger.²² Again, two actions are penalised, according to this article. The first one is disposing a movable object as a movable monument while being aware it is a fake. And the second one is disposing a monument as another monument while being aware it was altered and therefore is fake as well. A buyer who discovered that his acquisition is a fake and sells it as an original piece in order to recover money also commits a crime as described in this article.²³

Crimes described in both articles can only be committed intentionally (if the perpetrator intends its commission, i.e., wants to commit it or, foreseeing the possibility of its commission, accepts it²⁴). As many cases have shown, it is difficult to prove the perpetrator's intention, i.e., the knowledge that an object is a fake. Another problem for the prosecution is proving the existence of intent of using a product in a trade before or during the creating process, i.e., whilst committing a forgery. Both crimes are general crimes that can be committed by anyone who could face criminal liability, and both are subject to the penalty of fine, limitation of liberty, or deprivation of liberty up to 2 years.

¹⁹ More on that: Wilk (n 6) 38.

²⁰ Szczekala (n 6) 125.

²¹ Marek Kulik, *Komentarz do przepisów karnych ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami* (Dz.U.03.162.1568), LEX/el., 2010.

²² Kamil Zeidler (ed), *Leksykon prawa ochrony zabytków* (Wydawnictwo C.H.Beck 2010) 63.

²³ Kulik (n 21)

²⁴ Art. 9 par. 1. A prohibited act is committed intentionally if the perpetrator intends its commission, i.e., wants to commit it or, foreseeing the possibility of its commission, accepts it. - Journal of Laws of the Republic of Poland 2022, item 1138, translation: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek.

3.1. Cumulative concurrence of regulations

The interpretation of criminal regulation included in the Act on the Protection and Guardianship of Monuments has to be conducted together with the regulations of the Criminal Code and The Petty Offences Code. When establishing criminal liability, the prosecution ought to use all three acts. The most often concurrence of regulations appears when a perpetrator first forges or alters a monument, then sells it and induces another person to disadvantageously dispose of personal property. The perpetrator commits two crimes – forgery of a monument and fraud. So, art. 109a of Act on the Protection and Guardianship of Monuments and art. 286 § 1 of the Criminal Code should be used accordingly.²⁵ However, there is a great disproportion between those articles on the subject of the penalty (as mentioned before – forgery of a monument is subject to deprivation of liberty for up to two years while fraud is subject to up to eight years). Another cumulative concurrence occurs when a perpetrator forges or alters a monument and then sells it. In this case, there is a concurrence of art. 109a and 109b of the Act on the Protection and Guardianship of Monuments. And if, while altering, a monument was damaged art. 108 p. 1 of the same Act will be used.²⁶ If the monument was considered merchandise, there would be a cumulative concurrence of the art. 109a and art. 306 of the Criminal Code²⁷ (provided the perpetrator's action met all the criteria described in these articles).

IV. CRIMINAL CODE

According to art. 286 par. 1. whoever, with the purpose of gaining a material benefit, induces another person to disadvantageously dispose of personal or someone else's property by misleading this person or by exploiting this person's error or incapability to duly understand the undertaken action, is subject to the penalty of deprivation of liberty for between six months and eight years.²⁸ The subject of protection is personal property.

²⁵ Artur Ginter, Anna Michalak, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz* (Wolters Kluwer 2016) 414.

²⁶ Art. 108 p.1. Whoever destroys or damages a monument, shall be subject to the penalty of deprivation of liberty for between 6 months and 8 years. - Journal of Law No. 03.162.1568, UNESCO Cultural Heritage Laws Database.

²⁷ Art. 306. Whoever removes, forges, counterfeits or alters manufacturer's identification labels, a production date or a date to which a merchandise or device is fit to use, is subject to the penalty of deprivation of liberty for up to 3 years. - Journal of Laws of the Republic of Poland 2022, item 1138, translation: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek.

²⁸ *ibid.*

The Supreme Court said that ‘the most crucial for the criminal liability is a connection between misleading a person or exploiting this person’s error and disadvantageous disposal of property.’²⁹ The perpetrator’s actions must result in the disadvantageous disposal of someone’s property by taking one of three actions described in this article, leaving other ways of achieving this result beyond the criminalisation of this article.³⁰ The perpetrator’s act does not necessarily need to be devious or malicious; every action that results in said disadvantageous disposal of property is considered a fraud. In this article, ‘an error’ is defined as the difference between the actual state of affairs and its image created in one’s consciousness. In the art market, this happens when a buyer has a false belief that a print he is purchasing is an original artwork. Misleading a person could be a result of both action and omission. In the first, a seller could, for example, provide false transaction data for which the buyer pays him a commission. In the latter, a seller withholds relevant information regarding his encumbered assets or a legal defect of the subject of a transaction.³¹ In print trade, misleading a person about the quantity of numbered pieces and distributing other copies, even in a different size, is considered a breach of fair trade. As a result, a seller might also be liable for warranty for legal and physical defects, which are regulated by the Civil Code (art. 556, 568, 568¹, 573-576).³² In addition, four types of error result in misleading a person:

- verbal error
- document’s error
- error of behavior
- concluded error,³³ e.g., placing a forgery between original artworks.

What is more, misleading a person must regard essential circumstances of the case, i.e., those appearing in the decision-making process and resulting in disadvantageous disposal of property.³⁴ All that leads to the buyer’s false conclusion and the decision of disposal of property.

²⁹ *E.K. v “S” S.C.* [19 July 2007] V KK 384/06 (Poland’s High Court) LEX nr 299205.

³⁰ Małgorzata Dąbrowska-Kardas, Piotr Kardas ‘Art. 286’ in Andrzej Zoll (ed), *Kodeks Karny. Część szczegółowa. Tom III. Komentarz do art. 278-363* (5th edn, Wolters Kluwer 2022) 278-279.

³¹ *E.K. v “S” S.C.* [19 July 2007] V KK 384/06 (Poland’s High Court) LEX nr 299205.

³² Ewa Ferenc-Szydelko (ed), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (4th edn, C.H. Beck 2021) 52. Civil liability is not the subject of this paper and therefore will not be further discussed.

³³ Michał Królikowski, Robert Zawłocki (ed), *Kodeks karny. Część szczegółowa. Tom II. Komentarz. Art. 222-316* (4th edn, C.H. Beck 2017) 728.

³⁴ *T.P. v Bank Pekao SA* [28 June 2000] III KKN 86/98 (Poland’s High Court) OSNKW 2000/7-8/65.

Another action of perpetrator is exploiting a person's error, which is also criminalised by art. 286 par. 1. It is defined as a result of the perpetrator's actions when a buyer incorrectly judged the piece of reality, which influenced the disposal of property and was taken advantage of by a perpetrator.³⁵ Exploiting a person's error is also called passive fraud because of the victim's (rather than a perpetrator's) more extensive activity. Nevertheless, at the same time, the perpetrator has to confirm or sustain a victim's error. Moreover, the third act, 'incapability to duly understand the undertaken action', occurs when a person lacks the ability to correctly evaluate the situation. It is often due to either limited capacity, complete incapacitation for juridical acts, partial incapacitation, or total incapacitation. This includes young age (under thirteen years of age), mental illness, mental retardation, or another kind of mental disorder, particularly alcoholism or drug addiction. Such incapacity might be periodical, caused by illness or alcohol or drug intoxication. Art. 286 par. 1 penalises an action taken by a perpetrator that exploits this state of a victim.

All of the actions described above can result in the victim's disadvantageous disposal of personal property. Such disposal could mean liquidating assets, encumbering assets, debt release, or contracting liabilities. This could be a one-time action or a repeated one. The term 'disadvantageous' used in this article means both *damnum emergens*, i.e., the actual loss in assets, and *lucrum cessans*, i.e., the loss of expected gain. However, this is not equal to damage. The 'disadvantageous' term would refer to the victim's interests, even if there were no actual damage. The latter is not obligatory when deciding on criminal liability based on art. 286 par. 1.³⁶ As a result of this action, a perpetrator gains a material benefit, which could be either increasing their assets or decreasing their liabilities.³⁷ The perpetrator acts to gain a material benefit, and it is not relevant whether he succeeds.

It is challenging, especially in the art market trade, to prove that by accepting an obligation, a seller had already intended not to keep it. Other evidence difficulties regard proving that perpetrator acted with the direct purpose of gaining a material benefit.³⁸ Forging a piece of art is not enough to criminalise a person based on art. 286 par. 1.³⁹ That merely could be qualified as preparation to fraud,

³⁵ Violetta Konarska-Wrzosek (ed), *Kodeks karny. Komentarz* (3rd edn, Wolter Kluwer 2020) 1207.

³⁶ *M.I. v A.T.* [27 June 2001] V KKN 96/99 (Poland's High Court) LEX nr 51672.

³⁷ Konarska-Wrzosek (n 35) 1210.

³⁸ Maciej Trzciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna* (Wolters Kluwer 2010) 53.

³⁹ Wilk (n 6) 50.

which, according to art. 16 par. 2 of the Criminal Code would not be punishable.⁴⁰ In the case of valuable artworks, it is possible to concur art. 286 par. 1 with art. 294 par. 1 or par. 2 (with regard to a property of special cultural significance). That means the possibility of a higher penalty (10 years of imprisonment). However, there is a problem in enforcing this penalisation because the term ‘property of special cultural significance’ is quite unclear and establishing the cultural significance of objects is always challenging for prosecutors.⁴¹

V. ACT ON FAIR TRADING

This act regulates the usage of someone else’s work to an extent beyond the Industrial Property Law and Act on Copyright and Related Rights. Art. 24 of Act on Fair Trading states that anyone who, using technical means of reproduction, copies the appearance of a product or markets such a copy of a product, which may mislead customers as to the identity of the manufacturer or the product, thus causing serious damage to an entrepreneur, is liable to a fine, restriction of personal liberty, or imprisonment of up to two years.⁴² There are two subjects of protection. Firstly, the manufacturer’s interest for the client’s correct belief in his identity. Secondly, the client’s interest in safe trade free from misleading information.

To determine liability based on art. 24, one needs to refer to art. 13 p. 1 of the same Act. Accordingly, it is an unfair trading practice to imitate the appearance of an existing product using technical means of reproduction, if such imitating may mislead customers as to the identity of the product or the manufacturer.⁴³ All these premises must occur cumulatively because the emulation of someone else’s product is not reprehensible – progress is accomplished by emulating achievements of the past.⁴⁴ The exact imitation of the original product has to be made using technical means of reproduction such as a Xerox machine, photograph, or

⁴⁰ Art. 16 par. 2. Preparation is punishable only when a statute provides so. - Journal of Laws of the Republic of Poland 2022, item 1138, translation: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek.

⁴¹ Jan Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, t.2 (Zakamycze 2001) 604-605.

⁴² Journal of Laws of the Republic of Poland 2022, item 1233, translation: Centrum Tłumaczeń PWN.PL.

⁴³ *ibid.*

⁴⁴ *L.S. A/S, L.T. A/S, K. A/S w D. and L.P., spółka z o.o. in W. v K.i P., R.i P. and “C.”, spółka z o.o.* [11 July 2002] I CKN 1319/00(Poland’s High Court) OSP 2003/4/54

computer.⁴⁵ Such machines allow reproducing products (and matrices, ornamental casting, etc.) multiple times, which in printmaking is crucial.⁴⁶ In fine arts, this article will be applied primarily to prints. The most popular and easiest way to forge a print is to make a xerox copy, insert it in a dusty frame and sell either at a flea market or online where it is impossible for the buyer to inspect the piece.⁴⁷

Another premise of liability from art. 24 is the possibility of misleading customers as to the identity of the product. The possibility of such misleading is sufficient for the liability. By taking such action, the perpetrator causes severe damage to the manufacturer. It is evaluated by estimating the material and nonmaterial depreciation (decrease or loss of a manufacturer's goodwill).⁴⁸

5.1. Cumulative concurrence of regulations

If the perpetrator, while copying the product's appearance, copies the manufacturer's trademark as well, a cumulative concurrence is possible of art. 24 of the Act of Fair Trading and art. 305 p.1 of the Industrial Property Law.⁴⁹ Another possible concurrence of art. 24 is with art. 115 p.1 of the Act on Copyright and Related Rights,⁵⁰ especially when a product is a work of art. Moreover, if the perpetrator acted to gain a material benefit, point 2 of art. 115 will be applicable.⁵¹ In practice, the perpetrator often markets to trade a work product (defined in art.

⁴⁵ Janusz Szwaja (ed), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* (5th edn, Wydawnictwo C.H. Beck 2019) 920.

⁴⁶ Marian Zdyb, Małgorzata Sieradzka (ed), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, (2nd edn, Wolters Kluwer 2016) 1162.

⁴⁷ More on that: Olivia Rybak-Karkosz, *Badanie autentyczności grafiki artystycznej – aspekty kryminalistyczne* (Dom Organizatora, 2020).

⁴⁸ Krzysztof Stefanowicz, Anna Mechowska, 'Oryginał czy kopia - naśladownictwo produktów jako czyn podlegający odpowiedzialności karnej' (2002) 15 *Monitor Prawniczy* 688.

⁴⁹ Art. 305 p.1 Whoever, for the purpose of marketing, indicates any products with a fake trademark, including fake European Union trademark, registered trademark or European Union trademark which they are not entitled to use or is involved in the marketing of any products marked with such trademarks shall be subject to a fine, the penalty of limitation of liberty or imprisonment of up to 2 years. - *Journal of Laws of the Republic of Poland* 2021, item 324, translation: Centrum Tłumaczeń PWN.PL and Centrum Tłumaczeń i Obsługi Konferencji LIDEX

⁵⁰ Art 115 p .1. Anyone who appropriates the authorship or misleads as to the authorship of the whole or a part of a third person's work or performance, is liable to a fine, restriction of personal liberty or imprisonment for up to 3 years. - *Journal of Laws of the Republic of Poland* 2021, item 1062, translation: Centrum Tłumaczeń PWN.PL and Centrum Tłumaczeń i Obsługi Konferencji LIDEX.

⁵¹ Art. 115 p. 2. The same penalty may be imposed on a person who distributes, without giving the name or pseudonym of the author, a third person's work in its original version or as a derivative work, or a performance, or deforms such work or a performance, phonogram, videogram or broadcast in public. – *ibid*.

1 p. 1 of the Act on Copyright and Related Rights).⁵² In this case, a cumulative concurrence of art. 24 of the Act of Fair Trading and art. 116 of the Act on Copyright and Related Rights⁵³ will determine the criminal liability.⁵⁴ By marketing to trade a product with a copied appearance with the intent to gain a material benefit, a perpetrator induces another person to disadvantageously dispose of the property. In this case, a cumulative concurrence of art. 24 will be with art. 286 par. 1 of the Criminal Code.

VI. CONCLUSION

The analysis of legal aspects concerning the forgery of prints draws the following conclusion. In the event of print's forgery, few legal acts could be used: the Act on the Protection and Guardianship of Monuments, the Criminal Code, and the Act of Fair Trading. The doctrine for many years has postulated that the increase of protection of works of art from crimes such as forgery would increase safety and fair trade in the art market. The solutions were supposed to be art. 109a and 109b of the Act on the Protection and Guardianship of Monuments. However, these are far from perfect solutions, because they only protect the works of art that are monuments. As a result, other works like modern prints still need such protection. It also hardly changed the actions of forgers and the dealers of fakes.⁵⁵ In addition, often, the lack of possibility of proving the intent to deceive the buyer results in the discontinuation of many proceedings.

Implementing a direct regulation criminalising artwork forgery seems necessary now that the trade of fakes has evolved. Extensive workshops were replaced by individual forgers who now rework old fakes and other artists' pieces. It creates a 'forger's chain' similar to the fence's chain in art theft. As a result, finding perpetrators and assigning them the blame is challenging. That is why the only culprits that might be prosecuted under current regulations are those who

⁵² Art. 1 p.1. The subject matter of copyright is each individual creative work, embodied in any form, regardless of its value, designation, or medium of expression (work). – *ibid.*

⁵³ Art. 116 p. 1. Anyone who, without an authorisation or in defiance of the conditions of an authorisation, distributes a third person's work in its original version or as a derivative work, a performance, a phonogram or a broadcast, is liable to a fine, restriction of personal liberty or imprisonment for up to 2 years. – *ibid.*

⁵⁴ Szwaja (n 45) 924.

⁵⁵ Wojciech Szafrński, 'Ustawa o ochronie zabytków i opiece nad zabytkami z perspektywy fałszerza - wokół art. 109a i 109b' in Zeidler (ed.) (n 22) 570-586.

fake the art and then sell it. And those types of forgers on a large scale are almost gone.⁵⁶

Ignoring the problem contributes to its acceptance by the art market which might lead to pathological situations. This, in connection with limited possibilities of taking action to prevent it or combat the issue by law enforcement is the situation that criminal groups might exploit on a large scale.

Criminalising art forgery could improve the criminal procedure against forgers and help reduce this crime. Firstly, the qualification of the act might be more accessible so that the number of discontinued cases would drop. Secondly, it could prevent fakes from returning to the market. It could help to avoid the situation when, after the discontinuity of the case, a forger or a seller recovers the questioned pieces and offers them on the market again. Another situation which could be avoided is when a buyer of a fake tries to recover some of the lost money by selling the work. Art crime could be described as a separate act dedicated to all works of art. Another possibility is that all crimes against works of art could be described in a separate chapter of the Criminal Code. This would guarantee universal protection for all works of art and not only for monuments.

References

- Arnau F, *Sztuka fałszerzy – fałszerze sztuki* (Wydawnictwa Artystyczne i Filmowe 1988)
- Beckett A, *Fakes: Forgery and the Art World* (Richard Cohen Books 1995)
- Bryl M, *Rynek dzieł sztuki. Poradnik dla kolekcjonerów i inwestorów* (Wydawnictwo Naukowe PWN 2017).
- Craddock P, *Scientific investigation of copies, fakes and forgeries* (Elsevier 2009)
- Ferenc-Szydelko E (ed), *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz* (4th edn, C.H. Beck 2021)
- Gadecki B, *Ustawa o ochronie zabytków i opiece nad zabytkami. Art. 108-120. Przepisy karne. Komentarz* (C.H. Beck 2014)
- Hoving T P F, 'The Game of Duplicity' (1968) 6 The Metropolitan Museum of Art Bulletin
- Konarska-Wrzošek V (ed), *Kodeks karny. Komentarz* (3rd edn, Wolter Kluwer 2020)
- Jones M (ed.), *Fake?: the art of deception* (University of California Press 1990)
- Królikowski M, Zawłocki R (ed), *Kodeks karny. Część szczegółowa. Tom II. Komentarz. Art. 222-316* (4th edn, C.H. Beck 2017)
- Kulik M, *Komentarz do przepisów karnych ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami* (Dz.U.03.162.1568), LEX/el., 2010.

⁵⁶ Wojciech Szafrński, 'Nowe zjawiska w obrębie przestępczości na rynku sztuki w Polsce' in Maciej Trzeciński, Olgierd Jakubowski (ed.), *Przestępczość przeciwko dziedzictwu kulturowemu* (Uniwersytet Wrocławski 2016) 59.

Kurzątkowski M, *Mały słownik ochrony zabytków* (Ministerstwo Kultury i Sztuki. Ośrodek Dokumentacji Zabytków 1989)

Michalak A, Ginter A, *Ustawa o ochronie zabytków i opiece nad zabytkami. Komentarz* (Wolters Kluwer 2016)

Pruszyński J, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, t.2 (Zakamycze 2001)

‘Raport kolekcjonerski 2021/2022’ (OneBid) <<https://onebid.pl/pl/aktualnosci/Raport-kolekcjonerski-2021-2022>> accessed 08 February 2023

‘Raport polskiego rynku aukcyjnego 2022’ (OneBid), <https://onebid.pl/pl/aktualnosci/Raport-polskiego-rynku-aukcyjnego-2022> accessed 08 February 2023

Stefanowicz K, Mechowska A, ‘Oryginał czy kopia - naśladownictwo produktów jako czyn podlegający odpowiedzialności karnej’ (2002) 15 Monitor Prawniczy

Stelmach J, ‘Granice fałsyfikatu’ in: Krawczyk R.(ed) *Zagrożenia dzieł sztuki i meandry ich ochrony* (Wydawnictwo JAK 2011)

Szafrański W, ‘Certyfikaty dzieł sztuki w Polsce’ (2011) 22 Człowiek i dokumenty

Szafrański W, ‘Nowe zjawiska w obrębie przestępczości na rynku sztuki w Polsce’ in: Trzciniński M, Jakubowski O (ed.), *Przestępczość przeciwko dziedzictwu kulturowemu* (Uniwersytet Wrocławski 2016) 59.

Szafrański W, ‘Ustawa o ochronie zabytków i opiece nad zabytkami z perspektywy fałszerza - wokół art. 109a i 109b’ in: Zeidler K (ed.), *Prawo ochrony zabytków* (Wydawnictwo Uniwersytetu Gdańskiego 2014) 570-586.

Szczekala A, *Falszerstwa dzieł sztuki. Zagadnienia prawnokarne* (Wolters Kluwer Polska 2012)

Szwaja J (ed.), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* (5th edn, Wydawnictwo C.H. Beck 2019)

Theiss A, ‘Kto, jak i po co kupuje w Polsce sztukę?’ (Rynek i sztuka, 19 February 2020) <<https://rynekisztuka.pl/2020/02/19/kto-kupuje-w-polsce-sztuke/>> accessed 12 August 2020

Trzciniński M, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawnokryminalistyczna* (Oficyna a Wolters Kluwer business 2010)

Van Bemmelen J M, ‘Introduction’ in: H van de Waal, Th Würtenberger and W Froentjes (eds), *Aspects of Art Forgery* (Springer 1962)

Wilk D, *Falszerstwa dzieł sztuki. Aspekty prawne i kryminalistyczne* (Wydawnictwo C. H. Beck 2015)

Zdyb M, Sieradzka M (ed), *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz* (2nd edn, Wolters Kluwer 2016)

Zeidler K (ed), *Leksykon prawa ochrony zabytków* (Wydawnictwo C.H.Beck 2010)

Zeidler K, *Prawo ochrony dziedzictwa kultury* (Oficyna a Wolters Kluwer business 2007)

Zoll A (ed), *Kodeks Karny. Część szczególna. Tom III. Komentarz do art. 278-363* (5th edn, Wolters Kluwer 2022)