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**PENALIZING THE FORGERY OF A WORK OF ART<sup>1</sup>  
IN THE POLISH LEGAL SYSTEM:  
NOTES *DE LEGE LATA* AND POSTULATES  
*DE LEGE FERENDA***

KARANIE FAŁSZERSTWA DZIEŁA SZTUKI  
W POLSKIM SYSTEMIE PRAWNYM.  
UWAGI *DE LEGE LATA* I POSTULATY  
*DE LEGE FERENDA*

The aim of the conducted considerations is to justify the formulated postulate to separate in the Polish legal system an autonomous type of offence consisting in the counterfeiting, alteration or illegal reproduction of a work of art, which would comprehensively – similarly to the protection of monuments, or maybe even more broadly – cover the most important phases of this behaviour, taking into consideration also those of a secondary nature related to marketing the forgery or its distribution. The concept of ‘work of art’ has been narrowed down to works of plastic art for the purpose of the conducted considerations and in this text is understood as an independent object separated from other objects of individual and independent specificity, being man-made, possessing aesthetic value, and expressing emotional qualities (M. Gołaszewska, *Zarys estetyki. Problematyka, metody, teorie*. Warsaw 1986: 277). In the individual sections of the article there are presented the most important problems connected with activation of criminal law protection in the event that a perpetrator engages in conduct commonly referred to as ‘forgery of a work of art’. The research was conducted primarily using the dogmatic method, and to a lesser extent the historical and comparative method. Finally, it is established that the system of legal interests surrounding the current art market rules makes it necessary for the scope of legal protection of a work of art, including a historical monument in case of forgery, to focus equally on the rights of purchasers – as it has been the case so far – but consideration should also be given to the rights of original creators, so that they can react effectively if they are violated. As a result, having identified the need for legislative intervention with regard to the crime of altering or forging an item and the crime of sale of a forgery, a proposal is formulated to modify the existing legal solutions.

Keywords: protection of national heritage; falsification of a work of art; counterfeiting or alteration of a monument; forgery; author’s rights

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<sup>1</sup> The concept of ‘works of art’ in this text is understood as an independent object separated from other objects of individual and independent specificity, man-made, possessing aesthetic value and expressing emotional qualities (Gołaszewska 1986: 277).

Celem prowadzonych rozważań jest uzasadnienie sformułowanego postulatu wyodrębnienia w polskim systemie prawnym autonomicznego typu przestępstwa obejmującego podrobienie albo przerobienie bądź nielegalną reprodukcję dzieła sztuki, które kompleksowo – podobnie jak w wypadku ochrony zabytków, a może nawet szerzej – obejmowałyby najważniejsze fazy tego zachowania, uwzględniając również i te o ubocznym charakterze, związane z wprowadzeniem falsyfikatu do obrotu lub jego rozpowszechnieniem. Dla prowadzonych rozważań pojęcie dzieła sztuki zawężone zostało do dzieł sztuki plastycznej, a przez „dzieło sztuki” rozumie się samodzielny przedmiot oddzielony od innych przedmiotów o indywidualnej i niezależnej specyfice, stworzony przez człowieka, posiadający wartość estetyczną i wyrażający walory emocjonalne (M. Gołaszewska, *Zarys estetyki. Problematyka, metody, teorie*. Warszawa 1986: 277). W poszczególnych częściach artykułu przedstawiono najważniejsze problemy związane z uruchomieniem karnoprawnej ochrony w razie realizacji przez sprawcę zachowania określanego powszechnie jako „fałszerstwo dzieła sztuki”. W prowadzonych badaniach wykorzystano przede wszystkim metodę dogmatyczną oraz w węższym zakresie historyczną i komparatystyczną. Finalnie ustalono, że układ interesów prawnych wokół aktualnych reguł funkcjonowania rynku sztuki sprawia, że zakres ochrony prawnej dzieła sztuki, w tym również zabytku w razie fałszerstwa, w równej mierze powinien koncentrować się na prawach nabywców – jak dotychczas – ale także powinien uwzględniać prawa twórców oryginałów, tak aby mogli w razie ich naruszenia skutecznie reagować. W rezultacie, dostrzegając potrzebę interwencji legislacyjnej także wobec przestępstwa przerobienia albo podrobienia zabytku oraz przestępstwa zbycia falsyfikatu zabytku, wskazano na konieczność wprowadzenia do polskiego systemu prawnego autonomicznego typu przestępstwa fałszerstwa dzieła sztuki.

Słowa kluczowe: ochrona dziedzictwa narodowego; fałszerstwo dzieła sztuki; podrobienie albo przerobienie zabytku; falsyfikat; prawa twórcy utworu

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## I. INTRODUCTORY REMARKS

The falsification of works of art is, firstly, a phenomenon that was already known in antiquity, secondly, one that has been variously assessed over the centuries, and thirdly – and unfortunately – still relatively common.<sup>2</sup>

In historical terms, it is worth drawing attention to the fact that the crime of counterfeiting works of art has not been introduced into the Polish legal system.<sup>3</sup>

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<sup>2</sup> The publications on this issue agree that the widespread dissemination of the practices of counterfeiting works of art began in ancient Rome, and the premise for this was the huge demand for works of Greek art on the part of patrician families. As a result, in order to meet the needs of the market, the shortage of originals began to be supplemented with copies or counterfeits. Trade in counterfeit works of art in Europe began to develop intensively again during the Renaissance, but then in the activities of counterfeiters, in addition to the desire to obtain financial benefits, a new motivation appeared in many cases, resulting from a renewed interest in ancient art and the desire to learn the classical ideal of beauty through analysis and reproduction of ancient cultural works. Nowadays, among the motives behind the activities of art counterfeiters, apart from the expected financial benefits, the need to pursue the artistic ambitions of the creator is also often mentioned, which in this way compensates for the lack of recognition of his own works in the eyes of contemporaries. Moramarco (2015): 1128.

<sup>3</sup> In Poland, the problem of large-scale counterfeiting of works of art was noticed for the first time at the beginning of the twentieth century, when the works of Jacek Malczewski and Julian Fałat were very popular, and with time there was a shortage of them on the market. As

During the period of the Penal Code of 1932,<sup>4</sup> the forgery of a work of art in order to gain financial gain was prosecuted as an offense of fraud, as defined in Article 264 par. 1, as well as under the 1969 Penal Code,<sup>5</sup> in which the crime of fraud was penalized by the provision of Article 205 par. 1.<sup>6</sup> Neither does the Penal Code of 1997<sup>7</sup> contain a provision that would directly regulate the issue of forgery of a work of art, thus continuing the approach of qualifying this type of behaviour as a form of fraud, since it repeats in Article 286 par. 1, the content of the above-mentioned Article 205 par. 1 of the Penal Code from 1969. It should be noted, however, that when analysing a specific case in order to ensure adequate and effective legal protection, it may also be necessary to take into account other crimes, such as for example fencing (Articles 291 and 292 of the Penal Code), violation of the integrity of things (Article 288 par. 1 of the Penal Code), counterfeiting or the modification of a document (Article 270 par. 1 of the Penal Code), or extortion of the attestation of an untruth (Article 272 of the Penal Code).

Due to the level of legal protection resulting from the act, it should be noted in this context that in Article 294 par. 2 the Penal Code in force stipulates that if the perpetrator commits crimes against property listed therein – including, inter alia, the crimes of fraud – in relation to goods of particular importance to culture, the sanction for committing this crime is aggravated.

An important group of provisions relevant for determining the criminal liability of the perpetrator of counterfeited works of art are also those relating to the protection of copyright. Pursuant to Article 115 sec. 1 of the Copyright and Neighbouring Rights Act (hereinafter referred to as: ACNR),<sup>8</sup> misappropriation of authorship or misrepresentation as to the authorship of all or part of someone else's work is subject to penalization. Another criminal sanction applies to conduct consisting in disseminating someone else's work without giving the name or pseudonym in its original version or in the form of a study (Article sec. 115 point 2 of the ACNR). Determining the criminal liability of a counterfeiter of a work of art is therefore not only the problem of classifying a case under the provisions of the Penal Code, but may also

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a result, in order to increase the supply, students or young painters willingly prepared copies of the desired works at the request of local antiquarians [in:] *Falsyfikaty malarskie*, *Świat* 1911, no. 17: 5.

<sup>4</sup> The Regulation of the President of the Republic of Poland of 11 March 1932, Penal Code, *Dziennik Ustaw Rzeczypospolitej Polskiej* [Journal of Laws = JL] 1932, No. 60, item 571.

<sup>5</sup> The Act of 19 April 1969 – Penal Code, JL 1969, No. 13, item 94.

<sup>6</sup> From the content of art. 205 par. 1 of the Penal Code of 1969, it follows that the crime of fraud was committed by a person who, in order to gain financial gain, leads another person to disadvantageously dispose of his own or someone else's property by means of deception or exploitation of a mistake or inability to properly understand the undertaken action. The 1932 Penal Code distinguishes the circumstances of the perpetrator's actions in two separate articles: Article 264 par. 1 applied to situations where the perpetrator, in order to gain financial benefits, was misleading or used an error to disadvantageously dispose of his own or someone else's property; while Article 266 specified cases where the perpetrator used, in order to obtain financial benefits, the inability to properly understand the action taken by the person performing the action unfavourable to him.

<sup>7</sup> The Act of 6 June 1997 – Penal Code, consolidated text JL 2020, item 1444.

<sup>8</sup> The Act of 4 February 1994 on Copyright and Neighboring Rights (consolidated text, JL 2021, item 1062).

require taking into account the provisions on copyright in order to define the limits of the indictment in question in accordance with the actual scope of criminal protection.

Against this background, *de lege lata* presents itself exceptionally in Article 109a of the Act on the Protection and Care of Historical Monuments (APCHM),<sup>9</sup> the crime of counterfeiting a monument consisting in forging or altering a monument for the purpose of using it in the course of trading in monuments. This is the first regulation in the Polish national heritage protection system which provides for a criminal sanction in connection with the forging or alteration of a work of art classified as a monument. The Act also penalizes behaviour consisting in the sale of a movable property as a monument or a monument as another monument, if the perpetrator knew that they were forged or altered (Article 109b of the APCHM). The *de lege lata* solution adopted in the APCHM is therefore comprehensive in nature, as it also covers the associated behaviours related to the introduction of a counterfeit to the market, which in turn facilitates the legal qualification of behaviour consisting in forging a monument, but most of all protects the national heritage from including worthless copies in its stock.

The several-year period during which the regulations adopted in Articles 109a and 109b of the APCHM were valid allows for an assessment of the level of protection thus determined, and to answer the question of whether this level is sufficient or perhaps requires modification.

The legal status outlined above reveals that in the Polish order the issue of introducing an autonomous type of crime of counterfeiting or altering a work of art has still not been resolved in a way that would, like in the case of the forgery of a monument, comprehensively cover the most important phases of this behaviour, also taking into account those of an incidental nature related to placing a counterfeit on the market or its dissemination. The arrangement of legal interests around the current rules for the functioning of the art market means that the scope of legal protection of a work of art, including a monument in the event of forgery, should equally focus on the rights of buyers – as is the case so far – but also take into account the rights of the authors of the originals, so that they can react effectively in the event of their violation.

Thus, it is clear that even a brief review of the current regulations determining the level of real legal protection in cases related to the forgery of works of art reveals areas that require legislative intervention. In this context, the main issue that comes to the fore is the consideration of the proposal to concentrate the various legal provisions on counterfeiting works of art in a single normative instrument. The legitimacy of the proposed solution will be the main subject of the following considerations.

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<sup>9</sup> The Act of 23 July 2003 on the Protection and Care of Historical Monuments (consolidated text JL 2021, item 710).

## II. THE FORGERY OF A MONUMENT IN THE LIGHT OF THE PROVISIONS OF THE ACT ON THE PROTECTION AND CARE OF HISTORICAL MONUMENTS

The content of Article 109a of the APCHM shows that the criminal liability is borne by the person who forges or modifies a monument for the purpose of using it in the course of trade in monuments. The full definition of the features of this crime requires taking into account the definition of a movable monument contained in Article 3 points 1 and 3 of the APCHM.<sup>10</sup> Taking into account, in turn, the structure of the Polish system of monument protection, in order to clarify the boundaries of the crime in question, it is also necessary to distinguish the aforementioned definition of a monument from the status of a monument, which is obtained by entering into the register of monuments on the basis of a decision of the voivodeship conservator of monuments (Article 7 sec. 1 of the APCHM).

This decision is connected with recognizing an item as a historical monument with special legal protection, which is implemented primarily within the scope of administrative law. With the due diligence of monument protection authorities, a counterfeit or altered monument should not be entered in the register of monuments. In this context, additional commentary is required on the situation of works that belong to the national heritage of other countries. Taking into account that the definition of a monument adopted in the APCHM does not take into account the 'national' criterion, the criminal prosecution of perpetrators for counterfeiting or altering a monument cannot be strictly limited only to objects that have connections with the Polish national heritage.

Anyone may be the perpetrator of the offense of counterfeiting or altering a monument, because the act does not indicate any specific features that the perpetrator should have, so it is a common crime. Taking into account the literal interpretation of Article 109a of the APCHM, when determining criminal liability it is necessary to demonstrate the subjective feature of this crime in the form of an intention to use the monument being created in the trade of monuments, it can therefore only be committed with a direct intention. An analysis of the perpetrator's subjective profile should show that the intention was to make a counterfeit or altered item with an authentic character, in order to reap future benefits.

For the existence of the crime, it does not matter whether the use of a counterfeit in the trade in monuments actually took place or not. As a result, the lack of effect in the form of the use of a false monument in the trade in monuments does not limit criminal prosecution; however, the execution of a counterfeit solely for one's own satisfaction without commercial intentions remains outside the scope of application of the provision in question. With the

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<sup>10</sup> Article 3 point 3 in conjunction with point 1 provides that a movable monument is an item that is the work of man or related to his activity, being a testimony to a bygone era or event, the preservation of which is in the public interest due to its historical, artistic or scientific value. More about the concept of a monument, see Gerecka-Żołyńska (2019): 61–77.

construction of the crime of forgery of a monument adopted in the ACHM, the issue of determining the psychological element of this crime, which is the perpetrator's intention, is of primary importance, both in the context of the possibility of a beneficial defence of the accused and supporting the accusations. In Article 109a of the APCHM, a distinction was made between the method of the perpetrator's action, briefly listing two alternative forms: 'counterfeiting' and 'remaking', therefore each of these expressions requires in practice clarification and specification of the areas of application designated for them.

In criminal law, the form of the perpetrator's action through 'counterfeiting' or 'alteration' is first and foremost connected with the description of the crime of forging a document, in which the object of protection is of particular importance, as it concerns, first of all, public faith. The doctrine also indicates that in the case of the offense of counterfeiting or remaking a monument, *ratio legis* does not only take into account the protection of the private interest, but also covers the need to preserve the authenticity of the national heritage, and in a broader perspective, to maintain the rules of trust and loyalty in the turnover of monuments. However, this view is not uniformly accepted, and there are also voices warning against too broad a semantic interpretation of the concept of "public faith", recommending that it be limited only to cases of counterfeiting and marketing works of special importance and reputation.<sup>11</sup>

The common understanding of 'counterfeiting' is to make a thing look like some other original thing that is already known. The Italian Corte Suprema di Cassazione (Supreme Court of Cassation) aptly defined the counterfeiter's intentions to 'counterfeit' a work of art in a judgment of 2 December 2004, stating that it seeks 'to make things look authentic, simulating its origin contrary to its true origin'.<sup>12</sup> This effect is most often achieved by using a style clearly assigned to a given artist when creating a counterfeit, and marking the work with a forged signature. The perpetrator may also limit himself only to using the style of another artist, at the same time not signing the made thing with his own or someone else's name. In the latter case, the lack of a forged signature additionally makes it difficult to demonstrate the criminal nature of the perpetrator's behaviour, as in common terms it is usually treated as an imitation, which is ambivalent from the point of view of criminal law. At the same time, it is worth emphasizing once again that the non-commercial possession of a counterfeit or altered monument for one's own satisfaction is not subject to criminal sanction pursuant to Article 109a of the APCHM.

The second form of action of the perpetrator indicated in Article 109a of the APCHM is a 'modification', in this case the perpetrator uses an existing original monument in order to obtain a counterfeit more attractive to potential buyers. The monument can be used in any form, most often it is dismantled and then the parts obtained in this way are used. The perpetrator's action may consist in removing or adding characteristic iconographic elements, as well as eliminating undesirable details that reduce the prestige of the object. Parts

<sup>11</sup> Maccari (2006): 459.

<sup>12</sup> Moramarco (2015): 1133.

of the monument can be used both as the basis for a new copy, or attached as other elements. For this purpose, an authentic monument may be subjected to dismantling, thus involving destruction, which in turn means that this act must be recognized in conjunction with the crime of destroying the monument specified in Article 108 sec. 1 of the APCHM.<sup>13</sup>

The literature emphasizes that the counterfeiting or alteration of a monument is a type of activity currently very widespread among counterfeiters because it not only facilitates the commercialization of a counterfeit, but also in the case of stolen monuments or those illegally removed from the territory of another country, hinders their recognition by the police and their recovery by the rightful owners.<sup>14</sup> Against this background, it is pointed out that Article 109a of the APCHM does not clearly determine what fate should befall the apparent monument, the lack of authenticity of which was confirmed by a legally valid court decision.

The criminal sanction determined in this case in relation to the perpetrator provides for the possibility of imposing a fine, restriction of liberty or imprisonment, but does not contain an instruction concerning a counterfeit in the form of an obligatory forfeiture of object. It is true that the court may optionally order the forfeiture of the object on the basis of the general directive formulated in Article 44 par. 1 of the Penal Code, according to which the forfeiture of items directly derived from the crime is adjudicated, but due to the maintenance of the real value of the Polish national heritage, in the event of committing the offense of counterfeiting or altering a monument, counterfeits should be obligatorily eliminated from its resources. In criminal proceedings, the decision on the form of enforcement of the forfeiture is made by the court in the conviction (Article 413 par. 2 point 2 of the Code of Penal Procedure<sup>15</sup>).

It is worth noting that in the event of a counterfeit or alteration of a monument, the forfeiture judgment should not be unconditionally equated with the necessity to destroy a non-authentic copy, which in the final assessment may sometimes be considered exceptional due to its artistic qualities, for example. A special situation could arise if the counterfeit was a perfect reconstruction of a missing or lost monument, or was a successful copy of another monument. In such a situation, using the solution provided for in the penal code, it would be reasonable to hand over the counterfeit monument to the museum for exhibition purposes, with the simultaneous provision of the obligation to clearly indicate the lack of authenticity. A decision on this matter may be made by the court upon request or with the consent of the museum (Article 195aa par. 1 of the Executive Penal Code).<sup>16</sup> It should be emphasized, however, that *de lege lata* it is a general solution that covers all items covered by the forfeiture, as long as they have scientific, artistic or historical value. It is also appropriate to make the acceptance of the forfeited item conditional on the approval of

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<sup>13</sup> Who destroys or damages the historical monument is punishable by imprisonment from 6 months to 8 years.

<sup>14</sup> Maccari(2006): 471.

<sup>15</sup> The Act of 6 June 1997 – Code of Penal Procedure (consolidated text JL 2021, item 534).

<sup>16</sup> The Act of 6 June 1997 – Executive Penal Code (consolidated text JL 2021, item 53).



the museum, which thus protects its collections against controversial exhibits that could lower their status.

It has already been mentioned above that, apart from forgery of a monument, the APCHM also penalizes associated behaviour related to the introduction of a counterfeit to the market. Pursuant to Article 109b of the aforementioned sale of a counterfeit or altered monument it is a crime if the vendor knows about its inauthentic nature. It is a crime of general nature and can be committed by anyone. It is noteworthy that the relationship between the crime of counterfeiting the monument and the sale of the counterfeit is open, in the sense that the seller of the counterfeit may also be a person other than the one who forged or modified the monument. The acts specified in Article 109a and 109b of the APCHM constitute separate behaviours and are not absorbed, thus, as a result, the introduction into circulation of an inauthentic monument by the perpetrator of its earlier forging or remaking fulfils the features of two types of crimes and must be qualified as a proper convergence of provisions (Article 11 par. 2 of the Penal Code). Participation in the forging or alteration of a monument is therefore not a condition of criminal liability in the event of behaviour consisting in the sale of an inauthentic monument. The perpetrator may obtain a counterfeit or altered monument in various ways, for example, by purchase or donation, but it may also be brought into the territory of Poland from another country.

The offense of selling a counterfeit or altered monument may only be committed intentionally, and it is necessary to show that the copy is covered by a commercial offer. The perpetrator carries out his intention by providing false data about the antique value of the item or by not correcting the buyer's misconception about the historic status of the item and its authenticity. Otherwise, if the seller honestly informs about the inauthentic origin of the item and its non-monumental nature, a crime will not be committed. Controversy may arise when the method of counterfeiting or remaking a monument is so primitive and rough that not only an expert, but every average person is able to judge that the offered item is not authentic. The solution to this problem should be sought in the procedural opportunism and the directive of the futility of prosecution resulting from it, due to the insignificant social harmfulness of the act, which is expressed in Article 17 par. 1 point 3 of the Code of Penal Procedure).

Taking into account the above remarks, it should also be emphasized here that the APCHM in relation to the crime of selling a counterfeit or altered monument does not penalize the behaviour consisting in its possession, hence only taking an instruction to sell a counterfeit will result in criminal prosecution. From the point of view of the subjective aspect of the crime in question, the above-mentioned common character of the offense is worth noting. Criminal liability for the sale of a forged or counterfeited antique was not dependent on the status of the perpetrator based on his education, profession or business activity.

It must be said that this solution is not entirely satisfactory. Due to the public protection of the fairness of trade in monuments, it is desirable to dis-



tinguish a qualified type of this crime, including cases in which the perpetrator would be professionally involved in the trade of monuments. The current legal status, however, allows the perpetrator's knowledge and competence to be interpreted as aggravating circumstances in such a case, which entails not only imposing a penalty in the upper limits of the threat for the offense specified in Article 109b of the APCHM, but also the possibility of a court ordering a penal measure in the form of a ban on practicing a profession or conducting business pursuant to Article 41 par. 1 and 2 of the Penal Code. Moreover, there is no doubt that the *de lege ferenda* postulate of permanent elimination of counterfeit monuments from commercial circulation, in line with the above remarks, but with certain reservations, is also valid with regard to the crime of selling a counterfeit or forged counterfeit. Forfeiture should not apply to things belonging to third parties that were offered for sale without their consent, especially if they were stolen. This limitation is in line with the concept of forfeiture in the Polish penal system.<sup>17</sup> The protection should also cover the buyers of the fake monument, if the circumstances of the purchase and the price paid prove that they acted in good faith; in such a case the perpetrator should be obliged to repair the damage caused to the buyers (this possibility results from Article 49a of the Code of Criminal Procedure<sup>18</sup>).

It is worth paying attention once again to the issue of preserving the integrity of cultural heritage in the context of counterfeit or altered monuments circulating in the course of trade. At the level of international cooperation, the newest guideline for drawing up relations on this subject is contained in the Convention on Offences relating to Cultural Property, adopted by the Council of Europe in 2017.<sup>19</sup> In the Convention, crimes directly related to the trade in monuments that threaten the integration of cultural heritage are indicated as follows: theft of a cultural property (Article 3), unlawful archaeological excavations (Article 4), illegal export or import (Article 5–6), illegal acquisition of a cultural property derived from crime (Article 7), placing on the market of a cultural property derived from crime (Article 8), forgery of documents relating to illegally obtained cultural goods in order to document their legal origin (Article 9), destruction or damage to a cultural object (Article 10). The reason

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<sup>17</sup> The rule of protection of the property rights of third parties when adjudicating the forfeiture of things that were obtained as a result of committing a crime or were used to commit a crime is rarely violated. Most often it takes place when the possession of certain items is prohibited and is subject to criminal or administrative sanctions. In connection with the protection of monuments, the provision of Article 9 point 5 of the Act of 17/05/2017 on the restitution of national cultural goods (consolidated text, JL 2019, item 1591), which allows for the forfeiture of a national cultural good for the benefit of the State Treasury, in the event of its return after illegal removal from the territory of Poland, if it became the property of the insurer after the compensation was paid to the aggrieved by the theft of this good.

<sup>18</sup> To the extent that they have not been included in criminal proceedings, claims may be pursued on the basis of civil procedure, taking into account, for example, the provisions of the warranty for a physical defect (Article 556 of the Civil Code), compensation for non-performance or improper performance of an obligation (art. 471 of the Civil Code; Act of 1 January 2020 – Civil Code, consolidated text JL 2020, item 1740).

<sup>19</sup> Council of Europe Convention on Offences relating to Cultural Property Nicosia, 19 May 2017 (Council of Europe Treaty Series – No. 221) <<https://www.rm.coe.int/conventions>>.

why the crime of creating or selling counterfeit art objects was not included in this statement was explained in the report published with the adoption of the Nicosia Convention, which stated that this type of crime did not have a direct impact on the integrity of cultural heritage. Forged objects of art, unlike the goods constituting the cultural heritage, usually do not have historical, artistic or scientific value, moreover, their marketing does not affect the actual protection of an authentic work.

However, it was emphasized that forgeries could disrupt the stability and security of the art market and commercial transactions.<sup>20</sup> As a result, from the point of view of the need to preserve the safety of the art market and eliminate the threat of introducing unreliable products, it should be stated once again that in the event of the detection of the offenses of counterfeiting or altering a monument and introducing counterfeit or altered monuments into commercial circulation, the obligatory declaration of their forfeiture is the most effective means of protecting the market.

### III. CRIMINAL LAW REGULATIONS COVERING THE FORGERY OF A WORK OF ART THAT DOES NOT HAVE THE STATUS OF A HISTORICAL MONUMENT

In the Polish legal system, forgery of a work of art is classified as the crime of fraud as defined in Article 286 par. 1 of the Penal Code. The concept of 'work of art', as already noted with reference to the title of this article, is very broad, however, taking into account the fact that the crime of fraud belongs to crimes against property, thus, in criminal law terms, its scope is limited to the category of things, which excludes, for example, forms related to conceptual art, where the act of creation itself is elevated to the rank of a work of art, regardless of its final effect.<sup>21</sup> The crime of fraud can therefore concern many movable goods, but most often they are paintings, sculptures, graphics, photographs, 'Ready Made' items, as well as contemporary pop-art works and visual art effects.

The signs of the *de lege lata* fraudulent offence include the perpetrator's action in order to gain financial benefits consisting, firstly in deception, that is causing non-compliance with objective reality and its reflection in human consciousness, or exploiting a mistake, and secondly in taking advantage of the inability to properly understand the undertaken action, which is characteristic of children or people with intellectual deficits. The effect of the above-mentioned behaviour of the perpetrator leads the aggrieved party to disadvantageous disposal of his own or someone else's property, while the financial benefit obtained may arise not only for the perpetrator, but also for another

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<sup>20</sup> CETS 221 – Explanatory Report to the Council of Europe Convention on Offences relating to Cultural Property (coe.int); <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?document=0900001680710437>> [accessed 19 September 2021].

<sup>21</sup> Alibrandi, Ferri(2001): 784.

person (*animus lucri faciendi*).<sup>22</sup> By specifying the signs of a fraud associated with the introduction of the apocrypha to the market, it can be concluded that the perpetrator directly aims at creating a false belief in another person that the work offered by him was made by a creator other than the actual one and therefore has certain artistic or historical values that increase the commercial value of the counterfeit. This crime can only be committed with intent, and anyone can commit it, so it is of a common nature. The act does not distinguish the case when the perpetrator of the crime is a person professionally dealing with works of art, which, however, should be taken into account. In order to justify this postulate, the argumentation used above in the analysis of Article 109b APCHM remains valid.

By confronting the conditions of criminal prosecution in the event of a crime of counterfeiting a work of art with the regulation contained in the APCHM, in connection with the penalization of behaviour consisting in the forgery of a monument, several significant similarities and differences can also be indicated. First of all, it should be noted that in the case of behaviour commonly referred to as forgery of a work of art within the adopted legal qualification based on Article 286 par. 1 of the Penal Code, behaviour that corresponds to that specified in Article 109b of the APCHM is penalized: the disposal of an inauthentic work of art as an original in order to obtain a material benefit. The perpetrator of the crime may be the creator of the counterfeit, as well as any other person who has knowledge of the inauthenticity of the work. In contrast to the APCHM, the Penal Code does not contain a standard that would penalize the act of counterfeiting a work of art by forging or altering it. As a result, without taking into account the provisions on criminal law protection of the right of the creator of an original work as defined in Article 115 sec. 1 of the ACNR, it would be impossible to indicate an appropriate legal basis for penalizing this type of behaviour. The current legal status also means that Article 286 par. 1 of the Penal Code does not include the responsibility of the creator of the copy if, without his knowledge, the buyer of the counterfeit offers it for sale as the original. However, rationally speaking, the ability of the creator of the copy to demonstrate lack of knowledge of the buyer's criminal intention may be difficult to demonstrate if the work is not marked as a copy.

On the other hand, referring to the previous comments on the need for the court to adjudicate the forfeiture of goods in the event of a person committing the offense of offering a counterfeit work of art for sale as an original, it is reasonable to indicate the similarity with the forfeiture judgment in the event of a person committing the crime of theft. The literature indicates that the difference results primarily from the legal interest taken into account, which in the case of the crime of theft consists in excluding the possibility of trading in items derived from crime, while in the crime of selling a counterfeit work of art, it is important to protect the legality and fairness in trade on the art market.<sup>23</sup>

<sup>22</sup> For more detailed discussion, see Bednarzak (1972): 700; (1971): 35–37.

<sup>23</sup> Moramarco (2015): 1131.

#### IV. THE LIABILITY OF THE COUNTERFEITER OF A WORK OF ART, AND PROTECTION OF THE AUTHOR'S COPYRIGHT

Defining the offense of altering or counterfeiting a monument in the Act on the Protection and Care of Historical Monuments also necessitates assessment of the relationship between the aforementioned crime and the protection of the rights of the author of the work guaranteed by the ACNR. The main issue is not only the possibility of recognizing the works of living artists as a monument, but also the need to confront the above-mentioned definition of a 'movable monument' contained in Article 3 points 1 and 3 of the APCHM with the definition of 'work'.

Pursuant to Article 1 sec. 1 of the ACNR, a work is any manifestation of creative activity of an individual nature, established in any form, regardless of its value, purpose and manner of expression. A work shall be the subject of copyright as soon as it has been established, even in its unfinished form, and its author shall be protected *ex lege* irrespective of the fulfilment of any formalities (Article 1 sec. 3 and 4).<sup>24</sup> Therefore, it is pointed out that the definition of a monument also emphasizes that only works that are the result of human work or related to human activity can obtain the status of a monument. In both cases, the creation of the work as a result of human labour is of key importance. In order to obtain the status of a monument, however, the necessity to demonstrate the specific features of an object, such as having an artistic, scientific or historical value, which justify the public interest in starting legal protection, has been stipulated. The *ratio legis* of the author's legal protection is completely different, in this case the quality and value of the work do not matter, it is first of all important to secure the economic interests of the author and to recognize his effort in creating the work.

The ACNR does not contain a standard that would explicitly exclude from the category of monuments the works of living creators, or those for which copyrights have not yet expired, but this effect was partially achieved by defining a monument. The definition of a monument explicitly stipulates that such status may be obtained only by works 'which are a testimony to a bygone era or event' (Article 3 point 1 of the APCHM). Dismissing from to set the time limits for recognition as a monument in the act, especially with regard to works 'being a testimony to a past event', created conditions for recognizing a work of a living artist as a monument, because the 'past event' may result from the not-so-distant past. The same applies to the expression 'a bygone epoch', although in this case the interpretation is more difficult, because only an epoch that is already closed can be considered as such, and the lack of statutory support in the periodization of epochs and the fast pace of contemporary socio-historical and scientific changes complicate the deter-

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<sup>24</sup> The Supreme Court in its judgment of 29 October 1979, case IV CR 353/79 (OSNCP 1980, issue 2, item 40) emphasized that a work may be established not only by recording it in writing or drawing, but also in another way, individualizing and concretizing enough to allow it to have an artistic impact.

mination of a ‘close’ date. As a result, it is more and more difficult to apply the concept of a ‘bygone epoch’ in practice as a criterion co-deciding on granting the status of a monument.<sup>25</sup>

The ACNR does not distinguish the offense of counterfeiting or altering a work, but it includes a criminal sanction against behaviour consisting in the appropriation of the authorship of someone else’s work or a misrepresentation of the whole or part of someone else’s work (Article 115 sec. 1). The behaviour penalized in Article 115 sec. 1 of the ACNR, has a broader scope and favours the multi-faceted protection of the author’s private interest, and also includes situations in which the perpetrator’s actions are not aimed at gaining material benefits, but violate personal rights.

In the event of counterfeiting or altering a monument, the creator of which is a living person, or for which copyrights have not yet expired,<sup>26</sup> it is therefore necessary to take into account the cumulative confluence of provisions specifying the types of offenses in Article 109a of the APCHM and Article 115 sec. 1 of the ACNR. From the procedural point of view, this is connected with the obligation to hear the creator of the original as a witness who will have the status of a victim of crime in the proceedings.

The current legal status, however, is not conducive to launching criminal law protection for a given artist when the perpetrator does not mark the counterfeit copy with the signature of the imitated artist, although the created work unambiguously brings to mind the authorship of the counterfeited artist due to the technique of its production, type and subject matter. In this case, the conflict arising as a result of the infringement of the author’s personal rights is resolved on the basis of the rules of civil law.

In the light of the above comments, it is also worth commenting on ‘the author’s series’ (artistic graphics<sup>27</sup>), which are currently popular on the art market, where reproductions are considered originals of the work, if certain conditions of reproduction are met: firstly, the matrix constituting the basis for the reproduction should be made or authorized by the artist, secondly, the artist should define the amount of circulation and the numbering of the series in advance. Failure to comply with the conditions for making the reproduction undermines its authenticity, which may occur when the reproduction of the work is made by an unauthorized person, or the number of copies produced is greater than the number agreed with the author. From the point of view of criminal liability *de lege lata*, both the situations in which the reproduction is

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<sup>25</sup> For more detailed discussion, see Kowalski (2015): 122–123, 125.

<sup>26</sup> According to the general rule (excluding the exceptions stipulated in the Act), copyrights expire 70 years after the author’s death, and in the case of co-authored works, from the death of the author who survived the other contributor(s) (Article 36 sec. 1 of the Act on Copyright and Neighbouring Rights). For the protection of personal rights, see Ożóg (2020): 214–218.

<sup>27</sup> Graphics is a branch of visual arts, in which the actual work is a print from a graphic plate that allows for duplication. Due to the methods of the artist’s work, a distinction is made between artistic graphics, in which the plate is prepared by the artist himself, using various graphic techniques and utility graphics in which the plate is a printed form (e.g. print) prepared with the use of photochemical methods according to the artist’s design, allowing for the duplication of prints in large amounts. See Zwolińska, Malicki (1990): 101.ic.

made by an unauthorized person, as well as an authorized person if he makes a larger number of copies than that specified by the creator (Article 117 of the ACNR), are important, this offense is prosecuted at the request of the aggrieved party (Article 122 of the ACNR). In the event that the authorized person exceeds the limit for the reproduction of copies set by the creator, the issue of mutual settlements between the creator and the perpetrator, which may be settled under civil law (e.g. based on the already mentioned Article 471 of the Civil Code, regulating the issue of improper performance of an obligation), remains open. At the same time, copies exceeding the proprietary circulation due to the wear of the dyes are of lower quality and, as a result, obtain a lower price on the market.<sup>28</sup>

The assessment of the situation is different when the reproduction is made by an unauthorized person and the used matrix was not made or authorized by the author. In this case, the effect of the work of an unauthorized person is treated as a counterfeit work and such behaviour is classified as a crime of misappropriation of someone else's work (Article 115 sec. 1 of the ACNR). Accepting the classification as the offense of counterfeiting a monument will come into play when the perpetrator's actions concern works classified as a monument.

The aforementioned problem of assessing authenticity also applies to sculptures that are made on the basis of a form prepared by the artist, if the number of casts reserved by him is exceeded, or the cast is made by an unauthorized person. In practice, the violation of the creator's rights most often concerns bas-reliefs, regardless of the material from which they were made. The possibilities of duplicating sculptures have been facilitated today due to the availability of casting techniques that exclude direct contact with the original.<sup>29</sup> This phenomenon also applies to objects classified as monuments, and in this respect, the criteria of an offense specified in Article 109a and 109b of the APCHM are met, depending on the stage of the perpetrator's activity.

## V. FINAL CONCLUSIONS

It follows from the above considerations that the Polish criminal law concept of protection of artistic heritage lacks a comprehensive regulation that creates an autonomous type of crime involving behaviour commonly referred to as 'falsification of works of art'. As a result, the designated *de lege lata* level of legal protection does not always effectively protect the basic legal interests of authors, and does not fully protect the national heritage from the inclusion of objects of questionable value. The source of the threat is primarily the increase in the number of counterfeits on the art market, which is fostered by technological progress that facilitates the work of counterfeiters, which

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<sup>28</sup> See also Golka (1991): 73–76.

<sup>29</sup> Casini (2017): 215.



can sometimes even take on a mass character. A large number of inauthentic works of art, in turn, makes it difficult to detect them on the art market, which is directly related to a small number of units specialized in prosecuting this type of crime. The necessity to counteract the aforementioned tendencies, however, does not only serve to protect loyalty rules that stabilize the functioning of the art market, but it should be remembered that it is also important for the level of credibility of the artistic heritage, or more broadly speaking, the national cultural heritage.

Against this background, it is worth emphasizing that the introduction of an autonomous type of crime consisting in counterfeiting, altering or illegally reproducing a work of art could also contribute to strengthening the social belief that the behaviours penalized in it are dangerous and should not be underestimated. In order to achieve this social goal, as part of general prevention, in the event of a conviction, the perpetrator should be subject to a punitive measure in the form of the sentence being published, and the publication would have to be made in a daily national newspaper.

However, while in the real assessment of the legislative process the introduction of a new type of crime is rather a long-term postulate, the correction of the current state of criminal law protection of monuments, in the scope in which it concerns forging or remaking a monument and introducing an inauthentic monument to the market, is a feasible and, above all, a desirable task.

Bearing in mind the current content of Article 109a of the APCHM, it should be expected that, apart from the behaviour consisting in forging or altering a monument, the provision should distinguish additional alternative behaviour consisting in illegal reproduction of a monument, if the object obtained in this way can be considered the original. The activity of exploiting the 'author's series' within the contemporary art market, as shown above, fully justifies this proposition.

From the point of view of the protection of the author's rights, it would also be reasonable to supplement Article 109a of the APCHM with an additional editorial unit, which would include a stipulation that prosecuting the offense of altering or forging a monument does not limit the rights of the author.

It should also be considered necessary to adopt a qualified version with regard to the offense of introducing a counterfeit or altered monument to the market in the event that the perpetrator is a person professionally involved in the brokerage of monuments, including the introduction of an obligatory sanction in the form of prohibiting the perpetrator from practicing a profession or conducting business activity in the field of trade in monuments, or even more broadly – works of art.

Finally, in an attempt to limit the risk of disseminating inauthentic works, it should be postulated that the final court decision imposes the obligation to mark the work as inauthentic, also when it is forfeited to the State Treasury.

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