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A COMPARATIVE STUDY OF CRIMINAL LIABILITY FOR ART FORGERY IN SELECTED EUROPEAN COUNTRIES

Abstract

In this paper, the author would like to outline relevant legal problems of the domestic legislation in Poland criminalizing art forgery. Academic authors, for many years, have been postulating an increase in the protection of works of art against offences such as forgery. This would increase the safety and fair trade in the art market. However, the legislator seems to ignore the problem. The author compared Polish law with similar legislative solutions in four European countries. There are two types of criminalizing art forgery. It can be approached as fraud and its penalization can be provided for either in the Criminal Code or copyright law. Another approach is direct penalization of art forgery, envisaged either in an Act dedicated to the protection of art or in one of the chapters of the Criminal Code. The author analyses the laws applicable in the Italian Republic, the Kingdom of the Netherlands, the French Republic, and the Federal Republic of Germany and assigns them to either group. The aim is to verify if any of the solutions could inspire the Polish legislator to introduce similar provisions in domestic law to help reduce this type of crime and improve criminal procedure in cases of art forgery.

KEYWORDS

comparative law, art forgery, cultural heritage protection

SŁOWA KLUCZOWE

prawo porównawcze, fałszerstwo dzieł sztuki, ochrona dziedzictwa kulturowego

I. INTRODUCTION

Art forgery is a serious problem present in the art market in every country regardless of its scale and experience, and the Polish art market is no exception.¹ Expansion of this market in the recent years has attracted new buyers, thanks to which the prices of Polish art are growing. It has also attracted dishonest sellers supplying the market with forgeries. What is more, there are many new types of buyers, many of them are art non-specialists. However, even the most experienced collectors must be very cautious when purchasing a piece of art. According to TPF Hoving, ‘there has not been a single collector in the entire history of collecting who has not made a mistake’.² In this paper, the author would like to discuss the Polish legislative acts that criminalise forgery of a piece of art and compare them to similar solutions in four European countries – the Italian Republic, the Kingdom of the Netherlands, the French Republic, and the Federal Republic of Germany. The aim is to verify if there are any solutions that could inspire the Polish legislator to adapt necessary provisions in the domestic law to help reduce this type of crime and improve criminal procedure in cases of art forgery. Lack of universal protection of works of art and lack of criminalization of art forgery is a problem that Polish doctrine often indicates.³ Lack of protection contributes to a decrease in the credibility of the market and the security and certainty of transactions – the very foundation of this trade.

In general, there are two methods of criminalizing art forgery:

1. it is treated as fraud and its penalization is provided for either in the Criminal Code or in copyright law;
2. an article defining art forgery contained either in an Act dedicated to the protection of art or in one of the chapters of the Criminal Code.⁴

¹ <<https://pieniadze.rp.pl/inwestycje-alternatywne/art17454221-falsyfikat-w-kazdym-domu-polacy-traca-miliony-to-patologia>> accessed 19 December 2021.

² Thomas Pearsall Field Hoving, ‘The Game of Duplicity’ [1968] *The Metropolitan Museum of Art Bulletin* 241.

³ For example: Dariusz Wilk, *Falszerstwa dzieł sztuki. Aspekty prawne i kryminalistyczne* (Wydawnictwo C.H. Beck 2015), 77.

⁴ Agnieszka Szczekała, *Falszerstwa dzieł sztuki. Zagadnienia prawnokarne* (Wolters Kluwer Polska 2012) 98.

II. RESEARCH AND RESULTS

1. THE REPUBLIC OF POLAND – COMBINING THE TWO SOLUTIONS

The Polish legislation combines both the above approaches. The Polish model is a semi-codex, which means there exists a special act, however, it is dedicated only to certain objects. In case of other works of art Criminal Code is used. Here are highlights of this issue. For wider analysis the author would like to refer the reader to author's other article.⁵ The penalization of art forgery is included in the articles 109a and 109b of the Act of 23 July 2003 on the protection and care of monuments.⁶ However, this act only protects objects that are monuments, i.e., fulfill the requirements enlisted in Article 3 of the Act. It states that a monument is an immovable or a 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, Article 6 enlists objects under protection and guardianship regardless of their state of preservation. These criteria are highly subjective. Especially the evaluation of whether there is an interest in society due to its historical, artistic, scientific, or academic value to protect. In effect, administrative bodies often have difficulties identifying if the object is, in fact, a monument.

Article 109a penalizes forgery of a monument. It defines two acts, i.e., two methods of forgery – creation of a fake object and alteration of an existing one. The former aims to imitate an authentic monument and create an appearance that the work was originated by another person. The work is a new object bearing the traits of the monument. The second act penalized under the same Article is alteration. This occurs when the forger introduces changes to an original artwork. The object is still authentic, but the changes are not. This most often happens when the forger imparts different artistic or aesthetic elements.⁷ Article 109a does not demand criminalization based on gaining a material benefit from a perpetrator. The liability is based on the use of a fake in the monuments trade. Usually, a perpetrator commits a forgery to increase the value of an object (however, the

⁵Olivia Rybak-Karkosz, 'Criminal Liability for Forgery of Print in Polish Legislation' [2022], 12 *Wroclaw Review of Law, Administration & Economics*, 77-90.

⁶Act of 23 July 2003 on the protection and guardianship of monuments [2022] *JoL [Journal of Laws]* 840 as amended (PL).

⁷Dariusz Wilk (n 3) 36.

Article does not make a criminalisation conditional on that fact). Therefore, there is a possibility, however rare, that perpetrator alters an object to decrease its value (for example to facilitate illicit trafficking).

Another Article relevant from the point of view of the topic is Article 109b of the Act on the protection and care of monuments. It addresses a common problem in the Polish art market – when a seller offering a fake is not necessarily its originator, i.e. the forger.⁸ Again, two acts are penalized under this Article. The first one consists in disposing of a movable object as movable monument while being aware that the object is a counterfeit. And the second one consists in disposing of a monument as another monument while being aware that it has been altered or is a fake. A buyer who has discovered that his acquisition is a counterfeit and sells it as an original piece in order to retrieve money also commits the offence defined in this Article.⁹

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 it¹⁰). However, as practice has 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 creation 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.

As it was mentioned, Act on Monuments, protects only those objects that are monuments. As for the rest of the objects, for example pieces of contemporary art, forgery of works of art and their trade is penalized as fraud, defined in Article 286 paragraph 1 of the Polish Criminal Code. This applies to, for example, works of living artists etc. (i.e. creations of the fine arts that are not monuments). Under Article 286 paragraph 1, whoever, with the intention of gaining a material benefit, induces another person to disadvantageously dispose of their own or someone else's property by misleading this person or by exploiting the person's error or incapability to duly understand the undertaken action is subject to the penalty of imprisonment for between 6 months and 8 years.¹¹ This is a common crime,

⁸ Kamil Zeidler (ed), *Leksykon prawa ochrony zabytków* (Wydawnictwo C. H. Beck 2010) 63.

⁹ Marek Kulik, Komentarz do przepisów karnych ustawy z dnia 23 lipca 2003 r. o ochronie zabytków i opiece nad zabytkami (Journal of Laws 03.162.1568) (LEX/el. 2010) accessed 19 August 2021.

¹⁰ Art. 9 para 1. A prohibited act is committed intentionally if the perpetrator intends its commission, ie, 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.

¹¹ Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended.

which means it can be committed by anyone who can be held criminally liable. The protected legal interest under this provision is property.

In case of valuable artworks, it is possible to apply Article 286 paragraph 1 in conjunction with Article 294 paragraph 1 or paragraph 2 (with regard to property of special cultural significance). This means a possibility of higher penalty (up to 10 years of imprisonment). However, there is a problem with enforcing these rules because the term ‘property of special cultural significance’ is quite unclear and it is always challenging for prosecutors to establish cultural significance.¹² However, the lack of definition of this term and the determination of its relationship to statutory concepts like ‘monument’ or constitutional ones like ‘national heritage’ preclude the determination of the object of legal protection. According to the judiciary, by using this term, the legislator emphasizes that ‘there is a cultural good hierarchy and that only some of them have a special cultural significance, while others, despite their unquestionable significance, do not’.¹³ The interpretative issue thus comes down to identifying the prerequisites that help decide if an object is, in fact, the ‘property of special cultural significance’. According to some researchers, it has to be a cultural good that is more important for heritage than others. Some direction as to how to interpret this term could be the World Heritage List listed according to the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage from 16th of November 1972. It is possible, although unlikely, that an object listed by UNESCO could be forged and offered for sale. In such a situation, Article 286 in conjunction with Article 294 could apply. On the other hand, in rare occasions, a fake might be treated as a ‘property of special cultural significance’ if it has, for instance, historic value for the culture rather than artistic value.¹⁴

Apart from the qualified types of offense described above, Article 294 enlists two more in paragraph 3 and 4 for the crimes committed against property of a value higher than an amount equal to either five or ten times the threshold defining property of significant value. In these cases, the punishment is equal to either 3 to 20 years or 5 to 25 years of imprisonment. Apart from the qualified types of offense described above, Article 294 enlists two more in paragraph 3 and 4 for the crimes committed against property of a value higher than an amount equal to either five or ten times the threshold defining property of significant value. In these cases, the punishment is equal to either 3 to 20 years of imprisonment or 5 to 25 years.

¹² Jan Pruszyński, *Dziedzictwo kultury Polski. Jego straty i ochrona prawna*, Vol 2 (Kantor Wydawniczy ‘Zakamycze’ 2001) 604–605.

¹³ Case II AKa 90/18, LEX nr 2524972, 27 June 2018, Court of Appeal in Kraków.

¹⁴ Dariusz Wilk (n 3) 49.

The problem with this legal regime is that it is challenging, especially in the context of transactions in the art market, to prove that, by accepting an obligation, the seller already intended not to keep it. 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’.¹⁵ The perpetrator’s actions must result in the disadvantageous disposal of someone’s property by taking one of three actions described in article 286 paragraph 1, leaving other ways of achieving this result beyond the criminalisation of this article.¹⁶ As a result of this action, a perpetrator gains a material benefit, which could be either increasing their assets or decreasing their liabilities.¹⁷ 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.¹⁸

And as a result, such cases are rarely reported or disclosed, and those that are prosecuted are often discontinued. What is more, a mere forgery of a piece of art is not enough to convict a person under Article 286 paragraph 1.¹⁹ Such act could be qualified as preparation to fraud, which in the discussed situation, according to Article 16 paragraph 2 of the Criminal Code, is not punishable.²⁰

2. THE FRENCH REPUBLIC – COMBINING THE TWO SOLUTIONS

In France, like in Poland, works of art are protected by a combination of the two solutions. There is an Act on forgery of works of art (*Loi du 9 février 1895 sur les fraudes en matière artistique*), called ‘Bardoux law’, however, its application is limited to specific objects. It applies to objects covered by author’s economic rights. In other words, all works of art are protected except for those in the public domain, so those whose author’s died no later than 70 years ago. As far as the rest of artworks is concerned, their protection is granted under the Penal Code (*Code pénal*). A separate solution to regulate art market includes practices regarding the presentation of the nature, composition, origin and age of the goods sold and to avoid confusion between original, copy or imitation, the regulatory authority has established a pre-

¹⁵ *E.K. v “S” S.C.* [19 July 2007] V KK 384/06 (Poland’s High Court) LEX No 299205.

¹⁶ Małgorzata Dąbrowska-Kardas, Piotr Kardas ‘Article 286’ in Andrzej Zoll (ed), *Kodeks Karny. Część szczególna. Tom III. Komentarz do art. 278-363* (5th edn, Wolters Kluwer 2022) 278-279.

¹⁷ Konarska-Wrzosek (n 35) 1210.

¹⁸ Maciej Trzeciński, *Przestępczość przeciwko zabytkom archeologicznym. Problematyka prawno-kryminalistyczna* (Wolters Kluwer 2010) 53.

¹⁹ Dariusz Wilk (n 3) 50.

²⁰ Art. 16 para 2. Preparation is punishable only when a statute provides so.

cise terminology, which must be used in transactions involving works of art and collectibles, and is intended to inform buyers about the specifications of the goods offered.²¹ Thus, any facsimile, over-moulding, copy or other reproduction of a work of art or a collectible must be designated as such.²² Defining the terms ‘attributed to’, ‘school of’, ‘in the taste of’, ‘style, manner of, genre of, after’ etc. and requiring copies, reproductions, etc. to be visibly mentioned is obligatory.²³

‘Bardoux law’ penalizes forgery of a signature by placing or indicating another author’s mark on works of art such as painting, sculpture, print, or musical work. It also penalizes fraudulent forging to mislead the buyer as to the authorship of the work. The punishment for these acts is imprisonment up to 2 years and a fine of €75,000. Participants in the art market who, despite knowing about the object’s falseness, either place it on the market or trade it can face the same penalty. This is referred to as forgery by proxy.²⁴ Article 3 of the Act provides for another punitive measure – irrespective of the outcome of the court proceedings, the court might order confiscation of the counterfeit or its delivery to the prosecutor. This prevents further resale of the fake in the art market and, as a consequence, another fraud. The lack of similar obligation in Polish jurisdiction is a severe problem. As a result, the same counterfeits are repeatedly offered to different buyers. The art market is helpless and the legislator seems reluctant to solve the problem.

As it is challenging to find sufficient evidence and prove the intention (when prosecuting a monument’s forgery) or the purpose of gaining a material benefit while inducing another person to disadvantageously dispose of their own or someone else’s property by misleading this person or by exploiting the person’s error (when prosecuting fraud), most cases are discontinued. In such situation, the fake returns to the previous owner, and it might as well return to the art market. This problem, constantly signalled in Polish academic literature,²⁵ by art experts²⁶ and journalists,²⁷ still remains unsolved.

²¹ Elisabeth Fortis, ‘La Marchandisation de L’art et le Droit Penal’ [2017] 39 Archives de politique criminelle, 35.

²² Decree No 81-255, 3 March 1981 on the repression of fraud in art transactions and collections, known as the ‘Marcus decree’.

²³ Elisabeth Fortis (n 21).

²⁴ Dariusz Wilk (n 3) 244.

²⁵ For example: Wojciech Szafranski, ‘Wpływ falsyfikatów na rynek sztuki. Siła prawa czy jego bezradność?’ in Robert Pasieczny (ed), *Problematyka autentyczności dzieł sztuki na polskim rynku* (Narodowy Instytut Muzealnictwa i Ochrony Zbiorów 2012) 44-61.

²⁶ For example: Janusz Miliszkiewicz, Rafał Belke, ‘Falsyfikaty krążą po rynku sztuki’ (2010) Rzeczpospolita <<https://www.rp.pl/ekonomia/art16055111-falsyfikaty-obrazow-kraza-po-rynku-sztuki>> accessed 27 July 2022.

²⁷ For example: Andrzej Skórka, ‘Tarnowianin handlował podrobionymi obrazami’ (2011) *Gazeta Krakowska* <<https://gazetakrakowska.pl/tarnowianin-handlowal-podrobionymi-obrazami/ar/450131>> accessed 27 July 2022.

The Act has been in force since 1895 and the doctrine has pointed out that its protection is insufficient nowadays, allowing for a modern scope of art forgery. France is the fourth country in the world art market in terms of the number of transactions.²⁸ The ‘Bardoux law’ only penalizes the forgery of a signature, an author’s mark and leaves out the forgery of the object (which does not necessarily need to be signed). Moreover, a signature is an addition to the piece, not its integral part. So, its authenticity (or forgery) does not determine an artwork’s authenticity (or forgery). Additionally, the Act only mentions a few fine arts, such as painting, sculpture, print, or musical work, and only these are protected by the Act’s rules. Given the rising popularity of digital art, this enumeration needs to be widened. The protection should also cover all the artworks, also these in the public domain.

As mentioned before, in respect to forged works of art in the public domain, the provisions of the Penal Code defining fraud and fraudulent obtaining apply. Article 313-1 defines the latter as an act of deceiving a natural or legal person by the use of a false name or a fictitious capacity, by the abuse of a genuine capacity, or by means of unlawful manoeuvres, thereby to lead such a person, to his prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation. Fraudulent obtaining is punished by five years of imprisonment and a fine of €375,000.²⁹ The following Article 313-2³⁰ provides for an aggravated type of the offence with a higher penalty of imprisonment up to 7 years and double fine of €750,000 if the fraudulent obtaining is committed: 1. by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission; 2. by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission; 3. by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance; 4. to the prejudice of a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator. In addition, the penalties are increased to ten years’ imprisonment and to a fine of €100,000 if the fraud is committed by an organized gang. This statutory regime is concluded by Article 313-3, providing that an attempt to commit offences set out under the same Section of the Code is subject to the same penalties. Finally, in cases of fraudulent obtaining, no prosecution may be initiated where the offence is committed by a person: 1. to the prejudice of his

²⁸ Information report Ass. Nat. No 4234, filed by S. Travert on 16 November 2016, 23.

²⁹ Criminal Code of the French Republic (*Code pénal*).

³⁰ *ibid.*

or her ascendant or his or her descendant; 2. to the prejudice of a spouse, except where the spouses are separated or authorised to reside separately.³¹

Similarly to Polish solution, the French one is also criticised. The protection of works of art is scattered across several acts, which does not promote understanding of the criminal policy followed in this area.³² A separate issue, highlighted by the doctrine is a judiciary practice. The dedicated criminal qualifications of artistic fake and counterfeiting are abandoned in favour of those of fraud or deception on the substantial qualities of the object. The criminal policy followed then has the effect of making the work of art appear more like a commodity than as a work of a creator to be protected.³³

As a result, on the initiative of the Senate, a revision of the provisions concerning the penalisation of art forgery was proposed. The proposed amendment³⁴ seeks to repeal the so-called ‘Bardoux Law’ and to introduce a new Chapter II bis, entitled ‘Combating Art Forgery’, into the Heritage Protection Code (*Code du patrimoine*). These provisions would offer protection to all works of art, regardless of their date of creation or the technique used to create them. A criminal act will be any creation or modification, by any means, of work of art with the intent to deceive others about the identity of its creator, its origin, its dating, its nature, its composition, or its provenance. Similarly to ‘Bardoux law’ not only the forger will be punished but a person that presents, distributes or transmits, free of charge or for a fee, a work of art knowing its misleading nature. The penalties for these acts have been toughened, compared to ‘Bardoux law’ and aligned with those for fraud. It would be five years imprisonment and a fine of €375,000.

Heavier penalties are set for fraud committed habitually or with the help of accomplices (7 years in prison and a fine of €750,000) and for fraud committed by an organized gang (10 years in prison and a fine of €1 million).

The additional penalty for these acts is a confiscation of works and return to the complainant or if such person does not exist – their destruction. The latter is a restrictive solution, however it helps to protect the art market and its users. The work would not be brought back to the market. Such is a big problem in Polish art market. When an investigation is discontinued, the questioned works come back to the owner who often sells it through a legitimate source.

The bill was accepted by the Senate and now it is waiting for The National Assembly approval. At the moment of writing this article, the first reading of the legislation has been completed.³⁵

³¹ Article 311–12. *ibid.*

³² Elizabeth Fortis (n21).

³³ *ibid.*

³⁴ Proposition de loi, n° 109 par le Sénat, deposited on 23 July 2024.

³⁵ <<https://www.senat.fr/dossier-legislatif/ppl22-177.html>> accessed 20 March 2024.

3. THE FEDERAL REPUBLIC OF GERMANY – ART FORGERY AS FRAUD

The German legislative framework is an example of the former solution – art forgery is penalized as a fraud. The relevant legal basis has been provided for in paragraph 263 of the German Criminal Code³⁶ (*Strafgesetzbuch, BGBl. I S. 3322*). Under this Article, a penalty of imprisonment for a term not exceeding five years or a fine is decided on a person that with the intention of obtaining an unlawful pecuniary benefit for themselves or a third party, damages the assets of another by causing or maintaining an error under false pretences or distorting or suppressing true facts. Additionally, different than in Poland, an attempt is also punishable and the court may order supervision of conduct. In especially serious cases, the penalty is imprisonment for a term from six months to 10 years. An especially serious case typically occurs where the offender: 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery of documents or fraud; 2. causes a major financial loss to or acts with the intention of placing a large number of persons in danger of financial loss by the continued commission of fraud; 3. places another person in financial hardship; 4. abuses his or her powers or position as a public official or European official; or 5. pretends that an insured event has happened after they or another person have set fire to an object of significant value or destroyed it, in whole or in part, by setting fire to it or caused the sinking or grounding of a ship.³⁷ And, lastly: whoever commits fraud on a commercial basis as a member of a gang whose purpose is the continued commission of such offences as: fraud, subsidy fraud, forgery of documents, forgery of technical records or forgery of data of probative value, incurs a penalty of imprisonment for a term between one year and 10 years, and, in less serious cases, imprisonment for a term between six months and five years.³⁸

This legal regime is very similar to the Polish legal definition of fraud. Both legislative frameworks emphasize the perpetrator's purpose, i.e., obtaining an unlawful pecuniary benefit. However, the German Act additionally requires that the benefit be received by the perpetrator or a third party (Polish Act emphasises the need for a perpetrator to gain a benefit). Furthermore, both acts do not penalise mere creation of a fake, i.e., alteration or forgery. This would be treated as a preparation for committing a fraud, and would not be punished according to the Article 16 paragraph 2 of the Polish Criminal Code. Not until the fake has been used to gain a material benefit by misleading the buyer into believing in the false attribution and authenticity of the object this would be a crime. Another similarity

³⁶ Criminal Code (*Strafgesetzbuch, BGBl. I S. 3322*).

³⁷ *ibid.*

³⁸ *ibid.*

between the Polish and German legislation is the relation between the damage and misleading of a person or exploiting the person's error by the perpetrator through either providing false or altered data or withholding information.

According to the German Criminal Code, art forgery can also be prosecuted as document forgery under paragraph 267 *StGB*. This provision states that anyone who produces a forged document, falsifies a genuine one, or uses such a document to commit fraud in legal transactions is liable to a penalty of up to five years' imprisonment or a fine. Attempting to commit this offense is also punishable. The document in question must be misleading with regard to the identity of its author; however, the truth or falsity of the content itself is irrelevant.

Paragraph 3 of this section outlines the first aggravated form of the offense, punishable by imprisonment ranging from six months to five years. This applies when the offender acts in a professional capacity or as a member of a gang formed for the purpose of committing repeated acts of fraud or forgery, causes significant financial loss, seriously endangers the integrity of legal transactions through the use of numerous forged or falsified documents, or abuses their authority or position as a public or European official. The second aggravated form, described in paragraph 4, carries a penalty of one to ten years' imprisonment. It applies to individuals who commit document forgery on a commercial basis as members of a gang organized for the continuous commission of such offenses.

It is debatable whether a work of art can be considered a document because the commonly accepted definition in legal doctrine describes a document as a statement which, by virtue of its content, is intended and suitable to serve as proof of a legal relationship, and which allows the identification of its author. It is widely accepted that works of art – such as paintings, sculptures, prints, and similar – do not meet this definition. Therefore, paragraph 267 of the German Criminal Code (*StGB*) should not be applied in such cases.³⁹ A similar view was expressed some time ago by Polish legal scholars who argued that a painting does not constitute evidence of a legal relationship or any fact that could have legal consequences. Neither its form nor its substance allows it to be treated as a document. Its primary function is to provide an aesthetic or emotional experience.⁴⁰

However, as demonstrated by German court rulings, it is accepted in judicial practice to classify art forgery as both fraud and document forgery, treating them as cumulative offenses. This approach is justified by the argument that a signature on a painting serves as proof of authorship. This reasoning, however, is open to criticism. A signature is a separate element added to the artwork, and

³⁹ Joachim Löffler, 'Künstlersignatur und Kunstfälschung - Zugleich ein Beitrag zur Funktion des par. 107 UrhG' [1993] 22 NJW, 1424.

⁴⁰ Teresa Dukiet-Nagórska, Tadeusz Widła 'Odpowiedzialność karna za sfalszowanie obrazu' [1980] 4 Nowe Prawo, 6.

it can be used independently of the painting itself – for example, as part of an exhibition logo or in the context of an art school. One of the most well-known cases in German legal history is the prosecution of Wolfgang Beltracchi, a forger, along with his accomplices: his wife Helene, her sister Jeanette Spurzem, and his brother-in-law Otto Schulte-Kellinghaus. The court classified Beltracchi's actions as document forgery, as he falsely attributed authorship by forging signatures, and cumulatively as fraud. The case was also deemed an aggravated offense, as it was proven that all four defendants operated as members of a gang organized for the ongoing commission of document forgery on a commercial scale.⁴¹

Changes in German criminal law could, in general, not be detected as a result of any of the cases. And the need of change has been postulated for years. Similarly to Polish doctrine, the German one also proposes the creation of a crime of 'forgery of art' and penalisation of it as a different act from fraud and forgery of documents. With regard to the policing and prosecution of art fraud, they are rare and difficult, leading to lenient sentences and frustration of investigators and prosecutors alike. *Beltracchi* case and others prove that there is no correlation between the complexity of the investigations and the sentence received by offenders. There is equally no consistency of the correlation between the damage caused by offenders and the impact on the detection, investigation and prosecution of art fraud as well as preventive strategies implemented by the art market.⁴²

4. THE KINGDOM OF THE NETHERLANDS – THE FIRST SOLUTION WITH ADDITIONAL CRIMINALIZATION OF SIGNATURE FORGERY

Dutch legislation is also an example of the first type of protection – art forgery is treated as fraud and, consequently, the Dutch Criminal Code applies (*Wetboek van Strafrecht*, BWBR0001854). The Code contains a unique solution for the forgery of a signature placed on works of art, Section 326⁴³ applies. Under this provision, any person who, with the intention of benefitting himself or another person, unlawfully, either by assuming a false name or a false capacity, or by cunning manoeuvres, or by a tissue of lies, induces a person to hand over any property, to render a service, to make available data, to incur a debt or relinquish a claim, shall be guilty of fraud and shall be liable to a term of imprisonment

⁴¹ Case 110 KLs 17/11, LG Cologne, Judgment of 27 October 2011.

⁴² Saskia Hufnagel, 'Case Study 1: Beltracchi and the History of Art Fraud in Germany' in Saskia Hufnagel, Duncan Chappell (eds), *The Palgrave Handbook on Art Crime* (Palgrave Macmillan 2019), 321–342.

⁴³ Criminal Code (*Wetboek van Strafrecht*, BWBR0001854).

not exceeding four years or a fine of the fifth category.⁴⁴ Item 2 of this Section defines an aggravated type of the offence by providing that the punishment shall be increased by one third if the offence was committed with the intention of preparing or facilitating a terrorist offence. It is important to prove the perpetrator's knowledge that the object is a fake.⁴⁵

This Section penalises the use of another person's signature (or other author's designation), forgery, and a trade in objects that bear such signatures or other designations. A perpetrator is either the forger himself or another party who knows that the signature is spurious even though he or she has not forged it. This legal regime shows certain similarities to Articles 109a and 109b of the Polish Act on the protection and care of monuments. However, the main difference is that the Dutch law exclusively applies to forgery of the author's designation while the Polish Monuments Act penalizes forgery of an entire object. In addition, Section 326b protects each and every work of literature, science, art or craft, whereas Articles 109a and 109b, as mentioned before, protect only monuments. Moreover, the Dutch law penalises an act regardless of whether the perpetrator acted with the intention to gain a material benefit or induced another person to disadvantageously dispose of their own or someone else's property. Such intention becomes relevant when it comes to proving a forgery of a work of art (the whole object, rather than the author's designation).

In Polish literature, for years, the need has been raised to introduce a similar solution in the domestic legislation,⁴⁶ that is to penalise forgery of a signature. Sadly, though, this has not been done so far. The legislature is reluctant and continually ignores the problem. As a result, it is necessary to search for different provisions to legally classify the offence. There are several legislative acts that come into question. These are the following acts: the Criminal Code of 6 June 1997,⁴⁷ the Code of Contraventions of 20 May 1971,⁴⁸ the Act of 16 April 1993 on combatting unfair competition,⁴⁹ the Act of 30 June 2000 – Industrial Property Law.⁵⁰ The choice of the legal basis depends on how the artist's signature is qualified – as trademark, identification mark, signature, or logo. In the author's

⁴⁴ According to Section 23, 4 of Criminal Code it is 83.000€.

⁴⁵ Sentence by the Appeal Court, ECLI:NL:GHSHE:2011:BP9521, 30-03-2011, 20-001515-08.

⁴⁶ For example: Maciej Trzeciński (n 18) 72.

⁴⁷ Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended (PL), English version: Włodzimierz Wróbel (ed), Adam Wojtaszczyk, Witold Zontek, <<https://www.lex.pl/>> accessed 15 August 2021.

⁴⁸ Act of 20 May 1971 – Petty Offence Code [2023] JoL [Journal of Laws] 2119 as amended (PL).

⁴⁹ Act of 16 April 1993 on Fair Trading [2022] JoL [Journal of Laws] 1233 as amended (PL).

⁵⁰ Act of 30 June 2000 Industrial Property Law [2023] JoL [Journal of Laws] 1170 as amended (PL).

opinion, Article 306 of the Criminal Code seems to be the best solution. It offers universal protection but only as long as we recognise a signature as a standalone element, being an identification mark.

Under this Article, whoever removes, forges, counterfeits, or alters the manufacturer's identification marks, date of manufacture, or date to which merchandise or device is fit to use is subject to the penalty of deprivation of liberty for up to 3 years.⁵¹ Article 306 relates to marks placed on merchandise, that is in consumer business trading. Such merchandise is genuine, however, it bears an altered manufacturer's identification label. If, at the same time, the genuine label is removed and replaced with a different one, both conditions (of removing and forging) are met. Under this legal regime, the subject of protection is truthful merchandise data i.e. information permitting the product's identification.⁵² Signature on a work of art is such information (if we classify it as a trademark). The manufacturer's identification marks are, among other things, traits that help to individualize a particular piece. In case of prints, for instance, a protected element is also the number of a given copy within the edition. Signature on a work of art constitutes such information (if we classify it as a trademark). The manufacturer's identification marks are, among other things, traits that help to individualize a particular piece. In case of prints, for instance, a protected element is also the number of a given copy within the edition.

An act will be recognized as offence if the purpose of the actions referred to in the Article is to make a pretence that the merchandise comes from a different (false) source of origin.⁵³ This rule was introduced mainly to protect devices like cars, but obviously, it can apply to other offenses, like forgery of a signature on a work of art. Again, this is possible if a signature is treated as a means to designate its author. In that case, it is an identification mark of an artist. Offences defined in this Article are subject to the penalty of deprivation of liberty for up to 3 years. This provision does not penalize the manufacture and trade of such merchandise.⁵⁴ Such solution is far from perfect.

⁵¹ Act of 6 June 1997 – Criminal Code [2024] JoL [Journal of Laws] 17 as amended (PL), English version: Włodzimierz Wróbel (ed.), Adam Wojtaszczyk, Witold Zontek, <<https://www.lex.pl/>> accessed 15 August 2021.

⁵² Robert Zawłocki (ed), *Przestępstwa przeciwko przedsiębiorcom. Komentarz* (Wydawnictwo C. H. Beck 2003) 752.

⁵³ Dariusz Wilk (n 3) 55.

⁵⁴ Michał Królikowski, Robert Zawłocki (eds), *Kodeks karny. Część szczegółowa. Tom II. Komentarz. Art. 222-316* (Wydawnictwo C.H. Beck 2017) 1003.

5. THE ITALIAN REPUBLIC – A LEGISLATIVE ACT DEDICATED TO THE PROTECTION OF ART

The Italian legislation is an example of the second solution, and the main legislative act regulating the discussed offence is the Code of the Cultural and Landscape Heritage (*Codice dei beni culturali e del paesaggio* – D.lgs. 22 gennaio 2004, n.42). Article 178 (Forgery of Works of Art) lists acts that give rise to criminal liability. These are as follows:

- a) counterfeiting, altering or reproducing a work of painting, sculpture or graphic art, or an antique object, or an object of historical or archaeological interest (if the action is undertaken for gainful purposes);
- b) putting on sale, holding for the purpose of sale, introducing into the territory of the State with the purpose for sale or, in any case, putting into circulation samples of works of painting, sculpture, graphic art or antique objects, or objects of historical or archaeological interest designating them as authentic while they are counterfeited, altered or reproduced. This refers to perpetrators who do not participate in forging a piece of work, yet, know about its fake status;
- c) authenticating objects mentioned above knowing they are fakes;
- d) certificating fakes as authentic through other declarations, evaluations, publications, affixation of stamps or labels or by any other means.

These acts are punishable by imprisonment for a period from three months to four years and with a fine ranging from €103.00 to €3,099.00. However, if the offence is committed in the exercise of the perpetrator's commercial activity, the punishment will be increased (Article 178 (2)). Beside a conviction, fine and a ban under Article 30 of the Criminal Code, there is another applicable punitive measure, that is a publication of the conviction in three daily newspapers with national circulation. Article 36, paragraph 3 of the Penal Code shall apply.

This Article penalizes each type of act relating to fake objects. From creating a fake, copying a work of art, putting it on sale, or using it in trade (as mentioned before, the seller does not have to be the forger but it is sufficient that he knows that the object is not an authentic piece of art) to authenticating such objects. The definition of 'counterfeiting' is to make a thing look like some other original thing that is already known.⁵⁵ The Italian Corte Suprema di Cassazione (Supreme Court of Cassation) established the counterfeiter's intentions to 'counterfeit' a work of art in a judgment of 2 December 2004, as an attempt 'to make things look authen-

⁵⁵ Anna Gerecka-Żołyńska, 'Penalizing The Forgery of a Work of Art in the Polish Legal System: Notes *de lege lata* and Postulates *de lege ferenda*' [2022], 2 *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 83.

tic, simulating its origin contrary to its true origin'.⁵⁶ The Article penalizes a wide range of acts certifying a fake, whether it is a fake Certificate of Authenticity or false expertise, or another form of expert opinion and it applies to each person regardless of them being experts or not.⁵⁷ Subsection (a) of the Article highlights the perpetrator's purpose, which is to make gain. And this might be any type of gain. That is the main difference between the Italian and Polish law. The latter, as mentioned before, knows two principal statutory regimes that may relate to this delinquency type. Article 286 paragraph 1 of the Criminal Code requires that the gain be material if the act is to be criminalised. And Article 109a of Act of 23 July 2003 on the protection and care of monuments only indicates that the forged or altered monument must be used in trading. This means that a perpetrator commits an offence when selling an object or exchanging it for another one. An offence is not committed when the object is donated.

However, there are certain similarities between the Italian and Polish regimes. Subsection (b) of Article 178 is similar to Article 109b of the Monuments Act. Both penalize selling fakes when the seller knows of their falseness. Moreover, both Articles indicate that the seller need not be the producer nor the author of the fakes at the same time. The main difference between the statutory frameworks is the scope of protection. As mentioned above, the Italian Act offers broader protection as it applies to any type of work of art, whereas the Polish one protects only monuments.

Trading participants in the art market should be reliable, their actions should be based on trust and guarantee certainty of transactions. Therefore, the second paragraph of Article 178 provides for an aggravated type of the offence – punishment is considerably higher if an offence was committed in the exercise of the perpetrator's commercial activity. An additional punitive measure may be imposed, under Article 30 of the Italian Penal Code, namely a ban on such commercial activity from one month to five years unless in situations clearly defined by law. This punitive measure is similar to the one laid down in Article 41 paragraph 2 of the Polish Criminal Code. The court may prohibit the exercise of a specific business activity while convicting for an offence committed in relation to the pursuance of such business activity if its further exercise poses a threat to substantive, legally protected interests.⁵⁸ The subjects of protection of this Article are works of art such as paintings, sculptures, or graphic arts, or an antique object or an object of historical or archaeological interest. However, the Italian judiciary

⁵⁶R. Moramarco, 'Commento all'art. 178 Contraffazione di opere d'arte' in G. Famiglietti, N. Pignatelli (eds), *Codice dei beni culturali e del paesaggio* (Neldiritto Publisher 2015), 1133.

⁵⁷Dariusz Wilk (n 3) 267.

⁵⁸Code of the Cultural and Landscape Heritage – Legislative Decree No 42 of 22 January 2004.

stresses that, in fact, only copies with unique traits attributable to the work considered to be reproduced should be protected by this provision.⁵⁹

Item 3 of the Article is similar to Article 43b of the Polish Criminal Code. Accordingly, the court may order publication of the sentence in a particular manner if this is found expedient, especially bearing in mind the social impact of the sentence, unless such publication infringes on the injured party's interests.⁶⁰ Additionally, the court will always order forfeiture of items directly derived from an offence, unless they belong to persons other than the parties to the offence. This is similar to Article 44 paragraph 1 of the Polish Criminal Code.

Article 179 of the Code of the Cultural and Landscape Heritage stresses the most significant difference between the Italian and Polish legislation. It lays down situations when Article 178 does not apply. Under that Article, the discussed provisions do not apply to: whosoever reproduces, holds, puts on sale, or otherwise distributes copies of works of painting, sculpture or graphic art, or copies or imitations of antique objects or objects of historical or archaeological interest which are expressly declared to be inauthentic when exhibited or sold, by means of written annotation on the work or on the object or, when this is not possible because of the nature or size of the copy or imitation, by means of a declaration issued upon exhibition or sale. Nor do the provisions apply to artistic restorations which do not reconstruct the original work in a determinant manner. Also under Polish law, such cases are not considered offences, however, this conclusion comes from academic literature and is based on the interpretation of the Monuments Act. Nonetheless, in order to succeed on a criminal charge under this law, irrefutable proof of intent to deceive and financial gain is necessary.⁶¹ Even though, the Italian code is a fine solution, it still can be improved. It lacks a clear implementation pattern when it comes to arguing that someone (apart from the forgers themselves) is aware of the non-authenticity of the artifact.⁶²

III. CONCLUSION

The analysis of legal aspects of art forgery allows to draw the following conclusions. There are two types of legislative frameworks penalising forgery

⁵⁹ Agata Klimczyk, 'Analiza prawno porównawcza przepisów dotyczących zjawiska fałszowania dzieł sztuki w prawie polskim i włoskim' [2016] *Journal of Education, Health and Sport* 241.

⁶⁰ Code of the Cultural and Landscape Heritage - Legislative Decree No 42 of 22 January 2004.

⁶¹ Tatyana Kalaydjian Serraino, 'Remembering Modigliani: Italy's Ongoing Battle against Forgery', <<https://itsartlaw.org/2020/07/17/remembering-modigliani-italys-ongoing-battle-against-forgery/>> accessed 12 December 2021.

⁶² *ibid.*

of an artwork. The first one approaches it as fraud, an offence defined in the Criminal Code. This solution was chosen by the Federal Republic of Germany and the Kingdom of the Netherlands. The Netherlands are also the only of the analysed jurisdictions to penalize forgery of an artist's signature as a separate type of offence. The author believes that the adoption of a similar solution in Polish law would be very helpful from the point of view of law enforcement, as prosecutors often lose an uneven battle with deceitful sellers offering forgeries in our domestic art market.

The second mechanism of protection is direct penalisation of art forgery. Such offence is defined either in a dedicated Act or in a chapter of the Criminal Code devoted to works of art.⁶³ The Italian Code of the Cultural and Landscape Heritage is a fine example of such an approach. Certain States have decided to combine both models. In the French Republic, the Act on forgery of works of art applies to objects outside the public domain. As far as the rest is concerned, protection is afforded under the Penal Code (*Code pénal*). A similar solution can be found in Polish domestic law, in Articles 109a and 109b of the Act on the protection and care of monuments. However, it is far from perfect because the Act protects only works of art declared as monuments. As a consequence, other works lack such protection. In addition, Article 109a requires that prosecutors prove the perpetrator's intent to deceive and market a counterfeit, which is a necessary condition of liability. This means that the act is only penalized when committed intentionally. Most cases are discontinued because it is challenging to find sufficient evidence and prove the intention.

Academic authors for many years have postulated (and still do) an increase in the protection of works of art against offences such as forgery. This would improve the security and fair trade in the art market. The author proposes to define all offences against any works of art in a separate chapter of the Polish Criminal Code or in a separate Act dedicated to works of art as a total. This would guarantee universal protection for all works of art, and not only for monuments (The Monuments Act would be *lex specialis* to such Act, due to the special significance and care of objects qualified as monuments). In addition, the author proposes to adopt the same solution as applicable in the French Republic when dealing with fake – the court should be in a position to order confiscation of a counterfeit or its delivery to the prosecutor regardless of the outcome of the court proceedings.

A good legislation providing protection and assurance for the participants of the art market is crucial not only for the stabilisation and trustworthiness of the market itself. It is also important for the level of credibility of the artistic heritage, or more broadly speaking, the national cultural heritage. It would also contribute

⁶³ Agnieszka Szczekala (n 4) 98.

to strengthening the social belief that the behaviours penalised in it are dangerous and should not be underestimated.⁶⁴

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⁶⁴ Anna Gerecka-Żołyńska (n 55) 83.

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