

## Forgery of artists' signatures on paintings or print from the perspective of Polish law

Fałszerstwo sygnatury artystycznej na gruncie prawa polskiego

Подделка подписи художника в соответствии с польским законодательством

Підробки художнього підпису за польським законодавством

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**Summary:** The protection granted by law to art buyers ensures safe trade and confidence in the art market. It is also a crucial factor whenever a purchased piece turns out to be a forgery. Having a single legal act instead of various provisions spread across many of them is essential for the judiciary because it enables the correct legal qualification of the perpetrator's action. Unfortunately, Polish legislation lacks a regulation that would directly penalize the forgery of an artist's signature. This is a crucial issue because a signature is one of the elements verified during complex analyses that aim to establish the authenticity of an art piece. However, a signature is deemed to be separate from the art piece itself. Its authenticity does not mean that the whole artwork is authentic. There have been cases where authentic paintings or prints have been marked with fake signatures (placed, for instance, by the artist's family member to confirm the authorship), and the affixing of an authentic signature on a forged painting or print is also within the realm of possibility. This proves the importance of considering a signature and an art piece to be two separate items. This paper aims to establish the most suitable regulation for signature forgery to provide a universal penalization. The methodology analysed legal acts that penalize forged trademarks, identification labels and logos. However, as established in the paper, the Industrial Property Law and Act on Fair Trading do not apply to contemporary artistic creativity. The reason is that a signature would have to be registered in the Patent Office of the Republic of Poland as a trademark. As such, in the author's opinion, Article 306 of the Polish Criminal Code would be the most suitable option. It offers universal protection – if we deem a signature to be a standalone identification label. Nonetheless, this is merely a placeholder solution and the author proposes the implementation of a regulation that would directly penalize the forgery of an artist's signature. The Dutch or French rules could be used as a model in this regard.

**Key words:** artist's signature, art forgery, counterfeit product marking

**Streszczenie:** Możliwość poszukiwania ochrony prawnej w przypadku ustalenia nieautentyczności nabytego obiektu zapewnia uczestnikom rynku sztuki pewność i bezpieczeństwo obrotu oraz zaufanie do prawa. Dla organów ścigania jest to istotny aspekt na potrzeby ustalenia odpowiedniej kwalifikacji prawnej danego czynu. Niestety brakuje w polskim ustawodawstwie regulacji odnoszącej się bezpośrednio do fałszerstwa sygnatury artystycznej. To o tyle istotne, że sygnatura stanowi jeden z elementów branych pod uwagę i analizowanych podczas kompleksowej ekspertyzy mającej na celu ustalenie autentyczności dzieła sztuki. Jest to jednak byt odrębny od dzieła, na którym się znajduje i jej autentyczność nie przesądza o autentyczności całego obiektu. Możliwe są bowiem przypadki, kiedy na autentycznym obrazie znajduje się nieautentyczna sygnatura (umieszczona np. przez członka rodziny autora w celu „wzmocnienia” autorstwa dzieła). Jednocześnie znane są historie umieszczenia autentycznej sygnatury na nieautentycznym dziele. Dlatego tak istotne jest wyodrębnienie obu bytów. Celem opracowania jest więc wskazanie regulacji prawnej, która byłaby odpowiednia dla fałszerstwa sygnatury i zapewniała uniwersalną penalizację. Metodyka pracy zakładała przegląd aktów prawnych zawierających regulację dotyczącą fałszerstwa oznaczeń pochodzenia dzieła lub produktu. Wybór uzależniony jest od uznania sygnatury albo za znak towarowy, albo za byt samodzielny stanowiący oznaczenie pochodzenia dzieła.

Jako że współczesna twórczość artystyczna pozostaje poza zakresem czynności opisanych w Prawie własności przemysłowej oraz w ustawie o zwalczaniu nieuczciwej konkurencji (wskazana sygnatura musiałaby zostać zarejestrowana jako znak towarowy), najodpowiedniejszą, w ocenie autorki, regulacją jest art. 306 Kodeksu karnego. Dzięki temu zachowana byłaby konsekwencja uznania sygnatury za byt samodzielny stanowiący oznaczenie pochodzenia dzieła. Jest to jednak rozwiązanie zastępcze, dlatego postuluje się wprowadzenie, na wzór innych państw europejskich, regulacji bezpośrednio penalizującej fałszerstwo sygnatury artystycznej.

**Słowa kluczowe:** sygnatura artystyczna, fałszerstwa dzieł sztuki, fałszerstwo oznaczeń produktu

**Резюме:** Возможность обращения за правовой защитой в случае установления неподлинности приобретенного предмета искусства обеспечивает участникам рынка предметов искусства и антиквариата уверенность и безопасность торговли, а также доверие к закону. Для правоохранительных органов это является важным аспектом для определения соответствующей юридической квалификации того или иного деяния. К сожалению, в польском законодательстве нет нормы, напрямую касающейся подделки подписи художника. Это тем более важно, что подпись является одним из элементов, принимаемых во внимание и анализируемых в ходе комплексной экспертизы, направленной на установление подлинности произведения искусства. Однако подпись является отдельной сущностью от произведения, на котором находится, и ее подлинность не определяет подлинность всего объекта. Действительно, возможны случаи, когда на подлинной картине ставится неаутентичная подпись (поставленная, например, членом семьи автора, чтобы «усилить» авторство произведения). В то же время известны случаи, когда подлинная подпись ставилась на неаутентичном произведении. По этим причинам важно различать эти две сущности. Целью исследования является определение правового регулирования, которое касалось бы подделки подписи и обеспечивало бы универсальную криминализацию. Методология исследования предполагала обзор нормативно-правовых актов, содержащих норму о подделке подписи на произведении или продукте. Выбор зависит от рассмотрения подписи либо как товарного знака, либо как самостоятельного объекта, являющегося указанием на происхождение произведения. Поскольку современное художественное творчество остается вне сферы деятельности, описанной в Законе о промышленной собственности и Законе о борьбе с недобросовестной конкуренцией (указанная подпись должна быть зарегистрирована как товарный знак), наиболее подходящим регулированием, по мнению автора, является статья 306 Уголовного кодекса. Благодаря такому решению, возможно сохранить последствия признания подписи в качестве независимого объекта, являющегося указанием на происхождение произведения. Однако это лишь замещающее решение, поэтому предлагается ввести, по примеру других европейских стран, норму, прямо предусматривающую наказание за подделку подписи художника.

**Ключевые слова:** подпись художника, подделка произведений искусства, подделка товарных знаков

**Резюме:** Можливість звернення за судовим захистом у разі встановлення неавтентичності придбаного об'єкта забезпечує учасникам ринку мистецтва впевненість і безпеку торгівлі, а також довіру до закону. Для правоохоронних органів це важливий аспект у визначенні відповідної правової кваліфікації того чи іншого діяння. На жаль, у польському законодавстві немає норми, яка б прямо стосувалася підробки художнього підпису. Це важливо, оскільки підпис є одним із елементів, який враховується та аналізується під час комплексної експертизи, спрямованої на встановлення автентичності твору мистецтва. Однак це буття, відокремлено від твору, на якому воно знаходиться, і його автентичність не визначає автентичність усього об'єкта. Можливі випадки, коли автентична картина має неавтентичний підпис (поставлений, наприклад членом родини автора для «підсилення» авторства твору). Водночас відомі історії про нанесення автентичного підпису на неавтентичний витвір мистецтва. Ось чому так важливо розрізнити обидва буття. Таким чином, мета дослідження полягає в тому, щоб визначити правове регулювання, яке було б прийнятним для підробки підпису та забезпечувало б загальне покарання. Методологія роботи передбачала перегляд нормативно-правових актів, що містять норми щодо фальсифікації позначок походження твору чи товару. Вибір залежить від визнання підпису як торгової марки або незалежного існування, що вказує на походження твору. Оскільки сучасна художня творчість виходить за межі діяльності, описаної в Законі про промислову власність та в Законі про боротьбу з недобросовісною конкуренцією (зазначений підпис мав би бути зареєстрований як торгова марка), на думку автора, найбільш прийнятним є регулювання ст. 306 Кримінального кодексу. Завдяки цьому буде збережено наслідок визнання підпису як самостійного буття, який становить ознаку походження твору. Однак це альтернативне рішення, і тому передбачається

запровадити, наслідуючи приклад інших європейських країн, правила, які прямо каратимуть підробку художнього підпису.

**Ключові слова:** художній підпис, фальсифікація творів мистецтва, фальсифікація товарного маркування

## Introduction

A signature on a painting or print is one of the elements that are verified during the complex analysis of the artwork's authenticity. Other such elements include the artwork itself and its provenance. Nonetheless, it must be noted that an art piece and a signature are two separate items, and the authenticity of one does not determine the authenticity of the other. There are forged artworks that bear authentic signatures and forged signatures may be placed on authentic art pieces, too.<sup>1</sup> The value of a good-quality handmade drawing by an unknown artist increases when a forger marks it with a fake signature of a famous artist (it makes it more valuable on the art market).<sup>2</sup> That is why most fake paintings or prints bear signatures. This also prevents forgers from having to answer additional questions regarding authorship that a buyer could otherwise ask. The Polish art market suffers from many fake artworks and fake signatures on artworks. One of the reasons is the lack of regulations that would penalize the forgery of an artist's signature on works of art. Polish legal doctrine experts have long advocated for such a law to be introduced. However, the legislature remains reluctant and tends to ignore the problem. While there exists a specific regulation concerning this issue, that is, the Act on the protection and guardianship of monuments, it is irrelevant to our topic. It only penalizes the forgery of monuments. Its Article 109a defines two prohibited activities: the production of a fake art piece and the alteration of an existing one, i.e. two methods of forgery, and as emphasized before, a signature is deemed separate from the art piece itself. As such, it is necessary to seek different provisions that would enable the legal classification of this offence. Several legal acts might offer a solution: Criminal Code of 6 June 1997,<sup>3</sup> Petty Offence Code of 20 May 1971,<sup>4</sup> Act of 16 April 1993 on

<sup>1</sup> For more information, see O. Rybak-Karkosz, *Badanie autentyczności grafiki artystycznej. Aspekty kryminalistyczne*, Toruń 2020, pp. 66 ff.

<sup>2</sup> F. Arnau, *Sztuka fałszerzy – fałszerze sztuki. Trzydzieści wieków antykwarskich mistyfikacji*, transl. F. Buhl, Warszawa 1988, p. 17.

<sup>3</sup> Criminal Code of 6 June 1997, consolidated version: Journal of Laws [Dziennik Ustaw] 2022 item 1138.

<sup>4</sup> Petty Offence Code of 20 May 1971, consolidated version: Journal of Laws 2021 item 2008.

Fair Trading<sup>5</sup> and Act of 30 June 2000 – Industrial Property Law.<sup>6</sup> The choice of the act depends on how an artist's signature is qualified, i.e. whether it is considered a trademark, an identification label, a signature, or a logo. The author believes that in order to propose the best qualification, it is first necessary to determine the relationship between the work of art that bears the signature and the signature itself.

## 1. Artist's signature and its elements

A signature is very closely related to its author. It is his property and his characteristic. To put it briefly, a signature is an artist's personal mark.<sup>7</sup> According to Skubiszewski's classification of artwork marks, signatures rank among expressions that inform us about the artwork as an object that exists both in time and space.<sup>8</sup> Artists choose different forms of signature. It might be just their first name (van Gogh often signed his works 'Vincent') and/or the last name (as seen on impressionist works of such artists as Claude Monet) or their nickname – Stanisław Ignacy Witkiewicz, a Polish formist artist, often signed his works 'Witkacy.' Another form of signature is a monogram – a sign composed of one or more letters (most often the artist's initials). Yet a monogram might also be formed as an abbreviation of several words or even sentences.<sup>9</sup> A painting might bear both a signature and a monogram, too.<sup>10</sup> Moreover, a signature may also include a complete sentence – van Eyck signed 'The Arnolfini Portrait' with the following statement: 'Jan van Eyck was here, 1434'. Sometimes artists or publishers dedicated their works to rulers, clerics, scientists, other artists or friends. This practice was widespread in Italy between the 16th and the 18th century. Occasionally, the dedication was humorous and ambiguous. For example, van Eyck signed the frame of his 'Portrait of a Man (Self Portrait?)' as follows: 'Johes de Eyck me fecit ano MCCCC33 21 Octobris'. The keyword here is *fecit* which means both 'made' and 'executed'. If we use the latter meaning, the inscription would mean 'Jan van Eyck executed me on 21 October

<sup>5</sup> Act of 16 April 1993 on Fair Trading, consolidated version: Journal of Laws 2022 item 1233.

<sup>6</sup> Act of 30 June 2000 Industrial Property Law, consolidated version: Journal of Laws 2021 item 324.

<sup>7</sup> *Słownik terminologiczny sztuk pięknych*, eds. K. Kubalska-Sulkiewicz, M. Bielska-Łach, A. Manteuffel-Szarota, Warszawa 2007, p. 395.

<sup>8</sup> P. Skubiszewski, *Znaki w dziełach sztuki*, in: *Wstęp do historii sztuki*, vol. 1. *Przedmiot – metodologia – zawód*, ed. P. Skubiszewski, Warszawa 1973, p. 359.

<sup>9</sup> *Słownik terminologiczny sztuk...*, p. 265.

<sup>10</sup> T. Widła, *Ekspertyza sygnatury malarskiej*, Katowice 2016, p. 166.

1433'. A longer signature could inform us about such things as the artist's health condition. The abovementioned Witkacy is an excellent example of an artist's variety in signing. His signatures are usually reminiscent of a cypher. For instance, his 'Portrait of a woman' is signed in the following manner: '1930 3/IV / Witkacy (T.C + NP1); NŻNWS'. 'T.C' stands for 'type C' – a portrait prepared by Witkacy for his friends free of charge while he was under the influence of alcohol or narcotics.<sup>11</sup> 'NP1' means that he has not smoked for one day. The abbreviation 'NŻNWS' is unclear; experts assume that it refers to the artist's psychophysical state during painting.<sup>12</sup>

Artists' signatures may present information on their place of origin or prestigious connotations with other artists (e.g. Jacob Matham *Goltzij privignus* – Hendrik Goltzius' stepson) or their court position (*S.C.M. Pictor*). They may refer to an academy affiliation, like in the case of the official engraver Jean Moreau, who had the right to have the phrase *Graveur du Roy* added to his signature. Yet another possible addition to the signature is information about the artist's rank – Erik Dahlberg used *supr. castor. met.* which meant that he was chief quartermaster.<sup>13</sup> Signatures on prints also inform us about the involvement of various people in every stage of creating a proof. It was akin to a credits list that was prevalent in art print, where it was common for one person to be responsible for the drawing of the project, another for working the matrix, and another for printing the proof. A predicate was thus added next to the artists' names to promote the artists themselves, as well as other people involved in the project.<sup>14</sup> The most common terms were *fecit* (made), *pinxit* (painted), *delineavit* (drew), *impressit* (printed), *sculpsit* (sculpted, engraved).<sup>15</sup> Yet another group interested in leaving a mark of their work were restorers who renovated artworks.<sup>16</sup> A full sentence was used for this purpose until the 18th century, at which point artists started to sign artworks with their first and last names and dates.<sup>17</sup> Another element of a signature is a date indicating the end of the work in the form of a year or a day. The year may be stated either in full or abbreviated form,

<sup>11</sup> A. Żakiewicz, *Portret kobiety*, <http://www.witkacy.hg.pl/galeria/turban.html> [access: 3.02.2016].

<sup>12</sup> Ibidem.

<sup>13</sup> K. Krużel, *Wśród starych rycin. Wybrane zagadnienia opracowania formalnego dawnej grafiki*, Kraków 1999, p. 27.

<sup>14</sup> H. Widła, T. Widła, *Predykaty w sygnaturach*, in: *Współczesna problematyka badań dokumentów*, ed. R. Cieśla, Wrocław 2015, p. 286.

<sup>15</sup> For more information, see O. Rybak-Karkosz, *Predykaty w sygnaturach w grafice artystycznej*, in: *Współczesna problematyka badań dokumentów*, ed. R. Cieśla, Wrocław 2019, pp. 377–388.

<sup>16</sup> T. Widła, *Zaufanie do sygnatur*, in: *Zagrożenia dzieł sztuki i meandry ich ochrony*, ed. R. Krawczyk, Kraków 2011, p. 115.

<sup>17</sup> T. Widła, *Ekspertyza sygnatury malarskiej...*, p. 166.

with the latter version including two or sometimes three last digits (for example, Olga Boznańska's 'Breton Woman', finished in 1890, bears the date of '890'). The date is sometimes accompanied by information about the place where the painting was finished.

Besides all that, a signature might also take the form of an acronym, abbreviation, or icon.<sup>18</sup> It may be the logo of the artist or his or her workshop or the donor's emblem.<sup>19</sup> For instance, Paul Gauguin signed his works with the abbreviation 'PGO' (Pego), which was his dog's name. Nonetheless, there may be another explanation – the artist was a sailor, and 'pego' means 'a man' in sailing jargon. Gauguin may have deliberately used this wordplay. A signature may take the form of a geometric figure, like the master's signature on dice with a 'B.' monogram, which was famous in the 1st half of the 16th century; it may also take the form of an animal, e.g. a dragon with a ring, as seen on Cranach's emblem, or Jacopo de' Barbari's caduceus; or an entirely different symbol like Nicoletto da Modena Rosex's jug between two stems.

Yet a genuine artwork does not need to be signed and there are several reasons for this. For example, in 15th century Florence, engravers employed in workshops considered their work a service to the art of painting – they subordinated their technique to pictorial effects, thus contributing to the popularization of important paintings.<sup>20</sup> A similar practice was applied in 19th century grand French workshops – artists were treated like medieval craftsmen and were not allowed to sign the works they reproduced. Another example in this respect is Marcantonio Raimondi's change of signature to an empty tablet in 1515, which is deemed by experts to reflect a change in Raimondi's working style from individual to workshop-based.<sup>21</sup> Caspar David Friedrich did not sign his paintings either, claiming it would ruin the composition. *Die Brücke*, pioneers of German expressionism, never signed their works because of a solid partnership. They did not want to emphasize their stylistic differences.<sup>22</sup> On the other hand, Henri Cartier-Bresson claimed that graphic artists and photographers are just craftsmen and that their calling themselves artists is an illusion because both arts are reproductive. As such, he was against limited editions as well as signing and numbering proofs.<sup>23</sup> In art print, the lack of signature

<sup>18</sup> T. Widła, *Metody ustalania autentyczności obrazów*, Studia Kryminologiczne, Kryminalistyczne i Penitencjarne 1979, vol. 10, p. 274.

<sup>19</sup> P. Skubiszewski, *Znaki w dziełach sztuki...*, p. 368.

<sup>20</sup> A. Hyatt Mayor, *Prints and People. A Social History of Printed Pictures*, New York 1972, p. 104. The First Florentine engraver who dropped the anonymity was Cristofano Robetta.

<sup>21</sup> L. Pon, *Raphael, Dürer and Marcantonio Raimondi. Copying and the Italian Renaissance Print*, New Haven–London 2004, p. 72.

<sup>22</sup> W. Baraniewski, *Ekspresjonści*, in: *Sztuka świata*, vol. 9, ed. W. Włodarczyk, Warszawa 1996, p. 62.

<sup>23</sup> J. Hyman, *The Prints of Henri Cartier-Bresson*, *Print Quarterly* 1998, vol. 15, no. 1, p. 35.

might result from the artist's rejection due to poor proof quality (if he worked with a professional printer). It might also indicate that the proof was once part of a book, manuscript, magazine or album and was then carved and deceitfully offered on the market as a standalone piece. Another possible reason for the lack of signature on a proof might be that it was a pattern for ceramics or was created post-mortem.

The decision to sign a piece of work belongs to the artist. There are no requirements on whether it should be signed, and if so, how the signature should look. Thus, the signature itself may well be a statement of the artist's expression. This leads us to the contemporary understanding of a signature as something akin to the markings used by car or clothes manufacturers.<sup>24</sup> A painting without a signature does not lose its value. On the other hand, a signature is not a painting. They are two separate items, able to function independently from one another.<sup>25</sup> Based on current research, the findings of verification of signature authenticity do not determine the authenticity of the whole art piece that bears the signature. There have been cases of genuine paintings bearing forged signatures, for instance, due to post-signing. On the other hand, sometimes forged or misattributed works bear authentic signatures (due to beguilement, or the so-called goodwill signature).

## 2. Forgery of manufacturer's identification labels – Article 306 of the Criminal Code

The regulation that best suits the previous deliberation is Article 306 of the Criminal Code. According to it, whoever removes, forges, counterfeits or alters manufacturer's identification labels, production dates or use-by dates of merchandise or devices shall be subject to up to 3 years' imprisonment. According to the High Court judgement, the phrase 'to remove' means 'to file off genuine product identification markings'.<sup>26</sup> The term 'to forge' means both 'to alter' and 'to counterfeit' (Article 270 of the Criminal Code)<sup>27</sup> and definitions included in it are to be used

<sup>24</sup> T. Widła, *Autentyczność sygnatur a autentyczność dzieła sztuki*, in: *Meandry ochrony dziedzictwa kultury. Aspekty prawnokarne i kryminalistyczne*, eds. M. Sabaciński, M. Trzciński, Warszawa 2019, p. 175.

<sup>25</sup> T. Widła, *Fałszerstwa sygnatur*, in: *Dokument i jego badania*, ed. R. Cieśla, Wrocław 2014, p. 416.

<sup>26</sup> Judgement of Poland's High Court of 3 January 2002, III KKN 519/99, LEX nr 55367.

<sup>27</sup> Article 270 Section 1 of Criminal Code of 6 June 1997: "Whoever forges, counterfeits or alters a document with the purpose of using it as an authentic one, or uses such document as an authentic one, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Section 2. Whoever fills in a form bearing someone else's signature in a manner inconsistent with the signatory's will and to his detriment or uses such document, is subject to the same penalty."



accordingly. Article 306 regulates labels placed on merchandise that is in consumer business trading. Such merchandise is genuine but has an altered manufacturer's identification label. If a genuine label is removed and replaced with a different one, both conditions (of removing and forging) are met.

The regulation protects truthful data about merchandise, i.e. valuable information for its identification.<sup>28</sup> A signature on a work of art is exactly such information (if we classify it as a trademark). Merchandise protected under this article is either present in consumer business trading or is acquired or designed for such purpose.<sup>29</sup> Manufacturers' identification labels help to individualize single pieces, among other things. In the case of prints, apart from the signature, the protected feature is also the number of proof in the edition.

If the purpose of actions described in this article is to falsify the merchandise's point of origin, then this is recognized as a crime.<sup>30</sup> While this regulation was implemented mainly to protect cars, it can be applied to other offences like the forgery of a signature on an art piece. Again, this is only possible if a signature is treated as a means to reveal its author. In such a case, it is an artist's identification label. Perpetrators of crimes penalized under this article face up to 3 years' imprisonment. This regulation does not penalize the production of and trade in such merchandise.<sup>31</sup>

### **3. Removing manufacturer's identification labels from products – Article 136 of the Petty Offence Code**

This article states that the removal of a label from merchandise (Section 1) and/or making such merchandise available on the market (Section 2) constitutes an offence. This applies to products that are already intended for sale when the perpetrator removes a label. Otherwise, the regulation does not apply.<sup>32</sup> In the case of artworks, the term 'intended for sale' means that the artwork in question is put up for auction or offered for sale in an antique market or antique shop. In that case, it is merchandise offered in consumer trade. This regulation could be used for paintings or prints that are not monuments or cultural goods but which, for instance, constitute an invest-

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<sup>28</sup> R. Zawłocki, *Przestępstwa przeciwko przedsiębiorcom. Komentarz*, Warszawa 2003, p. 752.

<sup>29</sup> *Kodeks karny. Komentarz*, eds. A. Grześkowiak, K. Wiak, Warszawa 2018, p. 1421.

<sup>30</sup> D. Wilk, *Falszerstwa dzieł sztuki. Aspekty prawne i kryminalistyczne*, Warszawa 2015, p. 55.

<sup>31</sup> *Kodeks karny. Część szczególna*, vol. 2. *Komentarz. Art. 222–316*, eds. M. Królikowski, R. Zawłocki, Warszawa 2017, p. 1003.

<sup>32</sup> T. Bojarski, *Kodeks wykroczeń. Komentarz*, Warszawa 2015, p. 527.



ment.<sup>33</sup> Monuments and cultural goods are items of a specific nature and given their artistic, cultural, and historical value – which is more important than their commercial worth – it is questionable whether they could be considered merchandise.<sup>34</sup> Article 136 lists specific labels the removal of which may be grounds for penalization under this act. This includes price tags, best-before dates, production dates, as well as grade, quality and quantity and origin markings. In this case, one should qualify a signature on a work of art as the latter. If authentic, it is proof of one's authorship and the artwork's provenance, i.e. origin. Another factor required for criminal liability under this article is that the label removed by the perpetrator must have been previously preserved on or permanently attached to the merchandise.<sup>35</sup> In the case of print, this would mean a lettered, printed, stamped, or sealed signature, the removal of which would result in the permanent loss of information attached to the proof or its destruction that would prevent a customer from reading it.<sup>36</sup>

Such an offence can only be committed intentionally, and the very intent to commit it is penalized as well. Aiding and abetting anyone in committing such an offence is also subject to criminal liability. The action referred to in Section 1 is subject to imprisonment, restriction of liberty or fine, whereas that described in Section 2 is subject to restriction of liberty or fine up to PLN 1,500.

#### **4. Misleading customers as to the origin of the product – Article 25 of the Act on Fair Trading**

Article 25 states that “anyone who, by designating products or services or failing to comply with the obligation to designate products or services, misleads customers as to the origin, quantity, quality, ingredients, manufacturing method, fitness for purpose, uses, repair, maintenance or other main characteristics of products or services, or does not inform about the risk associated with using those products or services, thus exposing the customers to damage, is liable to detention or fine.”<sup>37</sup>

<sup>33</sup> For more information, see letter of 28 June 2021, Director of the National Tax Information – Expenses for the Purchase of a Work of art and Amortization of Proprietary Copyrights as Tax Costs, 0114-KDIP3-1.4011.288.2021.2.EC.

<sup>34</sup> For more information, see judgment of the Court of 10 December 1968, C 7-68, ECR 1968/423, ECLI:EU:C:1968:51 and M. Niedźwiedz, *Obrót dobrami kultury w Unii Europejskiej*, Kraków 2000, pp. 19–23.

<sup>35</sup> *Kodeks wykroczeń. Komentarz*, ed. P. Daniluk, Warszawa 2016, s. 868.

<sup>36</sup> D. Wilk, *Falszerstwa dzieł sztuki...*, p. 75.

<sup>37</sup> Act of 16 April 1993 on Fair Trading.

The damage does not have to be significant; its occurrence is sufficient to establish criminal liability.

However, the customer must have been misled as regards any of the above – the mere occurrence of damage is insufficient.<sup>38</sup> This regulation serves to protect customer interests. One may commit such an offence both by acts of commission (e.g. falsifying product designation) and omission (e.g. failing to designate products).<sup>39</sup> Like in the case of the previously discussed Article 136 of the Petty Offence Code, this article also lists the specific labels that sellers must place on products (however, this list is not exhaustive unlike that in Article 136). In the case of this regulation, similarly to Article 136, a signature on a work of art should be qualified as provenance.

Article 25 of the Act on Fair Trading is a special provision regarding Article 136 Section 2 of the Petty Offence Code. The latter penalizes the removal of existing labels. In contrast, the Act on Fair Trading article takes one step back and criminalizes the act of falsifying a product designation before the label's removal. This constitutes a real aggregation of offences.<sup>40</sup>

## 5. Forging a trademark – Article 305 of Industrial Property Law

The first paragraph of this article defines the basic type of the act. Accordingly, “whoever, for the purpose of marketing, indicates any products with a fake trademark, including fake European Union trademark, registered trademark or European Union trademark which they are not entitled to use or is involved in the marketing of any products marked with such trademarks shall be subject to a fine, the penalty of limitation of liberty or imprisonment of up to 2 years.”<sup>41</sup> The second paragraph defines this act of minor importance and the perpetrator in this case is liable to a fine. The third paragraph is in use when a perpetrator made the commission of this offence his permanent source of income or commits said offence in respect of high-value goods. In this case a perpetrator is liable to imprisonment from 6 months to 5 years. This qualification determines whether the crime is prosecuted upon the harmed party's motion (Sections 1 and 2) or the public prosecutor's motion (Section 3). Anyone who uses a trademark described in this article without

<sup>38</sup> M. Mozgawa, *Zwalczanie nieuczciwej konkurencji środkami prawa karnego*, Gdańsk 1997, p. 60.

<sup>39</sup> *Ustawa o zwalczaniu nieuczciwej konkurencji. Komentarz*, eds. M. Zdyb, M. Sieradzka, Warszawa 2016, p. 1186.

<sup>40</sup> *Ibidem*.

<sup>41</sup> Act of 30 June 2000 Industrial Property Law.

being entitled to do so could be held liable under the article's provisions. The offence in question can only be committed intentionally. In addition, a fake trademark can only be placed with direct intent, whereas the marketing of any products marked with such a trademark can also be committed with potential intent.

The article protects the interest of the parties entitled to use the trademark and their property that may be harmed due to such an offence. Moreover, it safeguards the reliability and propriety of trade.<sup>42</sup> The trademark itself is protected by other regulations.

Article 120 Section 3 point 3 of Industrial Property Law defines counterfeit trademarks as unlawfully used marks which are identical to those registered for goods covered by a protection right or are indistinguishable from them in normal trading conditions.<sup>43</sup> At the same time, a registered trademark is a trademark that was granted protection and then registered in the Patent Office of the Republic of Poland. In addition, according to Article 120 Section 3 point 1, the trademark is also understood to mean service marks. A commonly known yet unregistered mark would not be protected by this regulation.<sup>44</sup> This concludes that protection under this Act is only granted to signatures registered as trademarks. As such, it applies to signatures on old porcelain, ceramics, jewellery, or handicraft rather than to signatures on paintings and prints.<sup>45</sup>

Article 305 of Property Industrial Law is used concurrently with Article 286 Section 1<sup>46</sup> of the Criminal Code, but only if the buyer disposes of his or someone else's property in a disadvantageous manner. The relation between Article 306 of the Criminal Code and Article 305 of Property Industrial Law is that the latter is *lex specialis*. However, it is possible to commit both offences jointly by first offending against Article 306 of the Criminal Code (removing a trademark) and then against Article 305 of Property Industrial Law (using a fake or registered trademark).<sup>47</sup> Further, in cases where the trademark features traits protected by copyright, it meets

<sup>42</sup> S. Tosza, W. Wróbel, *Komentarz do art. 303–310*, in: *Prawo własności przemysłowej. Komentarz*, red. P. Kostański, Warszawa 2014, p. 1454.

<sup>43</sup> Act of 30 June 2000 Industrial Property Law.

<sup>44</sup> S. Tosza, W. Wróbel, *Komentarz do art. 303–310...*, p. 1457.

<sup>45</sup> D. Wilk, *Falszerstwa dzieł sztuki...*, p. 68.

<sup>46</sup> Article 286 Section 1 of Criminal Code of 6 June 1997: "Whoever, with the purpose of gaining a material benefit, induces another person to disadvantageously dispose of personal or someone else's property by misleading this person or by exploiting this person's error or incapability to duly understand the undertaken action, is subject to the penalty of deprivation of liberty for between 6 months and 8 years."

<sup>47</sup> S. Tosza, W. Wróbel, *Komentarz do art. 303–310...*, p. 1464.

the conditions provided for this regulation, as well as Article 115 Section 3 of the Act of 4 February 1994 on Copyright and Related Rights.<sup>48</sup>

## 6. Concurrent use of legal provisions

Article 306 of the Criminal Code might be used concurrently with other regulations mentioned above. A similar solution is found in Article 136 of the Petty Offence Code. However, this regulation applies only to consumer trade while Article 306 of the Criminal Code applies to all merchandise in business trading.<sup>49</sup> Both qualifications are used concurrently when articles cumulate and the prosecution is able to prove the perpetrator's intent. Doctrine, however, does not agree with this practice and proposes that Article 306 of the Criminal Code should be used as a superior option and that Article 136 of the Petty Offence Code<sup>50</sup> should be excluded. Apart from that, a perpetrator might simultaneously commit a crime under Article 306 of Criminal Code and Article 305 of Industrial Property Law if he or she forges a trademark and then markets products labelled with it. Another cumulation occurs when a perpetrator forges an identification label and markets such a product to gain profit. These acts are qualified as a forgery of trademark (Article 305 of Industrial Property Law) and a fraud. The latter crime is described in Article 286 Section 1 of Criminal Code.

## Conclusion

Polish legislation lacks regulations penalizing the forgery of artists' signatures. It is necessary to find a legal act that would protect them in order to criminalize such offences. The Industrial Property Law and Act on Fair Trading do not apply to con-

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<sup>48</sup> Article 115 Section 3 of Act of 4 February 1994 on copyright and related rights, consolidated version: Journal of Laws 2021 item 1062: "Anyone who, in order to achieve financial benefits in a manner other than that defined in paragraph 1 or 2, infringes a third person's copyright or related rights established in Articles 16, 17, 18, 19.1, 191, 86, 94.4, or 97, or does not perform the obligations defined in Article 193.2 or Articles 20.1 to 20.4, shall be liable to a fine, restriction of personal liberty, or imprisonment for up to a year."

<sup>49</sup> R. Zawłocki, *Przestępstwa przeciwko przedsiębiorcom...*, p. 749.

<sup>50</sup> A. Zoll, in: *Kodeks karny. Część szczególna. Komentarz*, vol. 3. *Komentarz do art. 278–363*, ed. A. Zoll, Warszawa 2016, p. 763.

temporary artistic creativity.<sup>51</sup> The reason is that a signature would have to be registered in the Patent Office of the Republic of Poland as a trademark, which happens very rarely. Hence, Article 306 of the Criminal Code seems to be the best solution. It offers universal protection but only if we acknowledge a signature as a standalone identification label.

To conclude this paper, it seems appropriate to propose a regulation that would exclusively penalize the forgery of artists' signatures on works of art. Section 326b of the Dutch Criminal Code could serve as a model in this regard. It states that any person who falsely places any name or mark or falsifies the authentic name or mark on or in any work of literature, science, art or craft to make it appear as if that work had been created by the person whose name has been placed on or in it, and/or intentionally sells, offers for sale, delivers, has in store for sale or imports into the Netherlands a work of literature, science, art or craft, falsely labelled with any name or mark or on or in which the authentic name or mark has been falsified as if that work had been created by the person whose name or mark it has been falsely labelled with, shall be liable to no more than two years' imprisonment or a fine of the fifth category.<sup>52</sup> Implementing a similar regulation in Polish law would be very helpful to law enforcement who sadly often lose the uneven battles against deceitful sellers who offer forgeries in the Polish art market.

French legislation contains a similar solution. However, the Act on forgery of works of art (*Loi du 9 février 1895 sur les fraudes en matière artistique*) applies to items protected by the Author's Economic Rights (i.e. works that are not in the public domain). The rest of them are protected under the Penal Code (*Code pénal*). The Act on forgery of works of art penalizes using someone else's signature. Its Article 1 states that whoever places an author's mark on works of art such as paintings, sculptures, prints, and musicals and forges that mark to mislead the buyer as to the authorship of the work shall be sentenced to imprisonment of up to 2 years and a fine of € 75,000.

Any art market sellers who trade an item or place it on the market despite knowing about its spuriousness face the same penalty. In this case, trading such an item constitutes forgery by proxy. Article 3 of this Act provides for yet another penalty: irrespective of the outcome of the court proceedings, the court may decide that the fake item shall be confiscated or transferred to the defendant. This prevents forged artworks from returning to the market and being used to commit another fraud.

<sup>51</sup> T. Widła, *Falszerstwo doskonałe*, in: *Problematyka autentyczności dzieł sztuki na polskim rynku*, ed. R. Pasieczny, Warszawa 2012, p. 169.

<sup>52</sup> [https://www.legislationline.org/download/id/6415/file/Netherlands\\_CC\\_am2012\\_en.pdf](https://www.legislationline.org/download/id/6415/file/Netherlands_CC_am2012_en.pdf) [access: 15.07.2020].

The lack of similar obligation in Polish jurisdiction is a severe problem that results in the same fakes being repeatedly offered to different buyers. The art market is helpless, and the legislator seems reluctant to solve the issue.

The author believes that of the two solutions, Article 326b of the Dutch Criminal Code is a better choice and should serve as a model for the Polish legislator since it provides universal protection for all works of art.

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