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On Some Aggravating Elements of Appropriation of Authorship (Plagiarism)

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The author proves that it is not reasonable to introduce plagiarism concerning two or more people or plagiarism causing an extra large damage as an aggravating element of the crime in the contents of art. 146 of the RF Criminal Code.
An introduction of the aggravating element – the appropriation of the authorship in relation to two or more people in art. 146 of the RF Criminal Code– doesn't always show the number of broken rights and degree of their diminishing, and consequently it can't serve as a true criterion of the higher social danger degree. The social danger degree of the appropriation of the authorship is connected with the number of broken rights, the ways and/or degree of their violation, and not with the number of victims. The introduction of the aggravating element – plagiarism causing extra large damage in art. 146 of the RF Criminal Code – means: the extra large damage after the appropriation of the authorship consists in the property damage not in the moral harm. But it is impossible to assess the exact amount of the property damage as it usually consists of loss of profit.

Keywords: appropriation of the authorship, plagiarism, aggravating element of the appropriation of the authorship (plagiarism), plagiarism, concerned two or more people, appropriation of the authorship in relation to two or more people, appropriation of the authorship (plagiarism), causing extra large damage.

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Introduction

The contemporary legal science suggests complementing part 1 of article 146 of the Russian Federation Criminal Code with different aggravating elements (hereinafter referred to as "RF Criminal Code"). Among them there are some aggravating elements which are of the great interest to us. There is appropriation of the authorship concerning two or more people (authors) (Philippov, 2003: 27) and appropriation causing extra large damage (Batutin, 2007: 9). These scholars consider that infringement of the rights of several people is more social dangerous than violation of the right of one man as the several people rights infringement means that the degree of the crime, its consequences are substantial.

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The appropriation of the authorship (plagiarism) in relation to two or more people

These thoughts are fair in general but there exist some exceptions. First it concerns co-authorship. The direct object of criminal appropriation of the authorship is the personal non-property right of the authorship and the exclusive right (p. 1 art 146 of the RF Criminal Code).

In regard to a protected work of science, literature and art, made in a co-authorship, there is only one exclusive right but a few personal non-property rights according to the number of co-authors (p. 2 art. 1229, p. 2 art. 1255, art. 1265 of the Russian Federation Civil Code) (hereinafter referred to as "RF Civil Code"). In this case plagiarism is likely to touch interests of a few authors. However when determining the degree of social danger at appropriation of the authorship it is necessary to take into account the fact if the authorship is separate or non-separate (art. 1258 of the RF Civil Code). If the co-authorship is separate it's necessary to establish who created the part of the work that has become an object of appropriation. If the appropriation touches the part that belongs to one author we may say that only his right for the authorship is violated. If the appropriation concerns the part created by a few authors (people), then several rights of the authorship are broken. When the co-authorship is non-separate it is impossible to determine who exactly created this or another part of the work; it means that irrespective of the volume appropriated two or more personal non-property rights of the authorship are always violated. The number of victims in this case aren't limited, there may be a different number of people in the crime. As for an exclusive right violation it doesn't matter what has become the object of appropriation – fragments of the work created by co-authors or the whole work – it is obvious that only one exclusive right always suffers even if there are a few co-authors. Therefore an element of appropriation of the authorship in relation to two or more people only shows the number of violated personal non-property rights but not the number of violated exclusive rights.

Besides plagiarism violating the only exclusive right can be of different social danger degree that depends on the scope, methods of application of the work by his authors. For instance, in the case of separate co-authorship, the author has the right to use his own part at his own will, without other authors' consent, if there is no special agreement between them on this point (p. 2 art. 1258 of the RF Civil Code). Therefore the appropriation of the authorship for a part of the work that is used both as a part of the whole work and separately assumes a higher defeat degree of the exclusive right in contrast to using this part only within the bounds of the copyright protected work.

As we see the number of victims is not a proper criterion to determine plagiarism social danger, because it shows neither the number of rights violated nor the degree of their diminishing.

Another example also confirms the statement above. Only the author has the right for authorship, whereas the exclusive right can be transferred to another person: an employer, a purchaser of the right (art. 1295, 1233, 1234, 1240, 1241 of the RF Civil Code).Under part 1 of art. 146 of the RF Criminal Code we consider the author and the owner of the exclusive right as victims, and it means that after transferring the exclusive right for protected work of science, literature and art from the author to another person, the appropriation of the authorship should affect interests of two people: the author and the owner of the exclusive right. As for the degree of the social danger such appropriation of the authorship is identical to plagiarism, that infringes personal non-property right for

authorship and the exclusive right belonging only to one person:to the author. Let's compare: the appropriation of the authorship with regard to several works (objects) protected by the copyright and created only by one author is more socially dangerous than the appropriation of the authorship with regard to one work (the intellectual property object) the rights for which belong to two people: to the author and to the owner of intellectual property rights. It is caused by the fact that for every object of the copyright there arises a set of rights among which we see both right for the authorship and the exclusive right, and this set of rights belongs to the author immediately from the moment of the intellectual property object creation (art.1228 of the RF Civil Code). That's why this example shows that the social danger degree of the criminal appropriation of the authorship is not directly connected with the number of victims.

The third case is "the splitting" of the exclusive right. One intellectual property object can be used under license contract by the unlimited number of people. These people are also owners of the intellectual property rights, and that's why they can also be considered victims. But not in all cases the social danger degree of the copyright appropriation for protected work used by different people will be indeed higher. It depends on numerous circumstances. For example, if a licensor has no right to use the intellectual property object under the contract (art. 1236 of the RF Civil Code), if the right to use this object belonging to different licensors doesn't coincide with the authority given (one licensor has a right to reproduce, the other – to distribute) or the territory of application (art. 1235 of the RF Civil Code), then the social danger degree would be quite the same as if these authorities belonged to one owner of the right (as if they were not splitted).

Therefore an introduction of the following aggravating element – the appropriation of the authorship in relation to two or more people – in art. 146 of the RF Criminal Code doesn't always show the number of broken rights and degree of their diminishing, and consequently it can't serve as a true criterion of the higher social danger degree. That's why we should connect the social danger degree of the appropriation of the authorship with the number of broken rights, the ways and/or degree of their violation, and not with the number of victims.

The extra large damage

The other aggravating element suggested by the legal science – the extra large damage – has the same shortcomings as a constitutive element of the large damage has (p. 1 art. 146 of the RF Criminal Code). There are many such shortcomings today. The appropriation of the authorship means the violation of the personal non-property right for authorship and exclusive (property) right. The infringement of the personal non-property right for the authorship causes physical and moral sufferings (the moral harm), whereas the infringement of the exclusive right causes the property damage. The Plenum of the RF Supreme Court in the resolution № 14 of 26th April, 2007 (p. 28), points that when qualifying actions of the accused under art. 146 of the RF Criminal Code, we shouldn't take into account the victim's moral damage, including his professional reputation damage. Therefore only property damage can be considered as a large one. As the science, literary or art work is an immaterial object, so we can't assess the exact amount of the property damage as it usually consists of loss of profit. Practically in all criminal cases the damage was considered large for it was thought large according to the opinion of the rightholders (Philippov, 2003: 17). But it doesn't fit the principles of equality and justice

fixed in the criminal law. If we abandon the Supreme Court interpretation and begin to treat only moral harm not property damage as large, then there arises a problem how to estimate the size of moral sufferings. A victim's opinion on the gravity of the sufferings experienced can't be used while qualifying an action as it results in free use of the element of the body of the crime. So we should conduct an expert examination to establish the fact of the moral harm infliction. Though researchers today are not unanimous what kind of legal psychological expertise should be scheduled to establish the fact of the moral harm infliction. O.K. Romanenko suggests examining a moral state of a person (Romanenko, 2003: 14). E.V. Kozyreva attaches a great importance to an expertise of personal features of the parties in a litigation (Kozyreva, 2003: 20). Quite recently there has been assigned a new kind of the expertise namely a legal psychological expertise in cases of moral harm compensation. This expertise examines the gravity of the sufferings experienced, the nearest and distant consequences of the sufferings experienced, the causation between the infringement and the moral harm, the measure of the offence influence on the mental and physical state of the person (Yuzhaninova, 2000: 6).

Nevertheless uncertainty of the solution to this question doesn't allow the author to protect his interests effectively. Besides it is necessary not only to establish the fact of the moral harm infliction, but to find the causation between psychological sufferings and the violation of the right for authorship. If the moral damage emerged as a result of the physical harm done it would be much more easier to find the causation between moral sufferings and the breach of the law as the mental and physical spheres have very close links, and that's why the harmful changes that take place in one sphere immediately affect the other.

In our case to find out the causation is much harder because a man's psyche is constantly under stress, and the breach of law may be one of the unfavorable factors that influenced it negatively. If the causation between the breach of law and the moral harm is impossible to find, the experts conclusions are of the probabilistic character, and therefore this sign of the illegal action won't be found for sure. So the large damage after the appropriation of the authorship shouldn't be connected with physical and moral sufferings. M.A. Romanenko suggests defining the damages of violation personal non-property rights by using various immaterial criterions such as violation of professional reputation, loss of profit, unfavourable advertising, demand for software, an author's popularity (Romanenko, 2007: 15). Most of all these consequences are immaterial and are not covered with the notion of the moral harm. But decrease in the demand for the copyright object, decrease in the author's popularity as well as unfavourable advertising are the results of derogation of the professional author reputation. The professional author reputation is not a direct object of the crime specified in art. 146, part 1of the RF Criminal Code. It seems erroneous to consider the violation of the professional author reputation as a large damage and find a wrongdoer guilty for the damage which is not a result of the infringement of the direct object of the plagiarism.

Conclusion

Therefore art. 146 of the RF Criminal Code shouldn't be complemented with such elements as appropriation of the authorship in relation to two or more people and the appropriation of the authorship that causes extra large damage.

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О некоторых квалифицирующих признаках присвоения авторства (плагиата)

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В статье обосновывается нецелесообразность введения в содержание ст. 146 УК РФ таких квалифицирующих признаков плагиата, как присвоение авторства в отношении двух и более лиц, присвоение авторства с причинением особо крупного ущерба. Введение квалифицирующего признака – присвоение авторства в отношении двух и более лиц – в ст. 146 УК РФ не всегда отражает число нарушенных прав и степень их умаления, а потому не может считаться бесспорным критерием, свидетельствующим о повышенной общественной опасности деяния. Поэтому общественную опасность присвоения авторства следует связывать не с числом лиц, в отношении которых совершено преступление, а с числом нарушенных прав, а также способом и/или масштабом их нарушения. Введение квалифицирующего признака – присвоение авторства с причинением особо крупного ущерба – в ст. 146 УК РФ значит, что под особо крупным должен пониматься только материальный ущерб. Однако размер имущественного ущерба, выражающегося прежде всего в упущенной выгоде, не поддается точному исчислению.

Ключевые слова: присвоение авторства, плагиат, квалифицирующий признак преступления, присвоение авторства (плагиат) в отношении двух и более лиц, присвоение авторства (плагиат) с причинением особо крупного ущерба.

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