

УДК 347.78.025

The Object of Criminal Appropriation of Authorship (Plagiarism)

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Received 3.06.2011, received in revised form 11.06.2011, accepted 17.06.2011

In the article a personal non-property right to authorship is argued to be a supplementary direct object of a crime, specified in Art. 146, Part 1 of the Criminal Code of the Russian Federation. It does not allow to provide proper defense of rights of a person by the Criminal Code of the Russian Federation. Thus, the provisions of Art. 146, Part 1 of the Criminal Code of the Russian Federation require revising.

Keywords: criminal law, object of a crime, plagiarism.

Point of View. The opinion existing in the criminal science that a personal non-property right to authorship is the main direct object of the crime as it is described in Art. 146, Part 1 of the Criminal Code of the Russian Federation¹ is debatable. This opinion is based not on the description of actus reus of this crime. On the contrary, while analyzing it we can come to the conclusion that the personal non-property right to authorship plays the role of the supplementary direct object. But it does not correspond to the true value of the right to authorship, therefore no proper defense of the rights of the person can be provided by the Criminal Code of the RF. Thus, the provisions of Art. 146, Part 1 of the Criminal Code of the RF require revising.

Example. Plagiarism if it has inflicted great damage to an author or any other right holder is a criminal offence under Art. 146, Part 1 of the Criminal Code of the RF. Some criminal

scientists notice that the main object of this crime is social relations arising in connection with realization of the right for freedom to create literary, artistic, scientific, technical or other kinds of works (Commentary on the Criminal Code of the Russian Federation (by paragraphs), 2010: 544; Commentary on the Criminal Code of the Russian Federation, ed. by V.T. Tomin and V.V. Sverchkov, 2010). But this right for freedom to create cannot be the object of plagiarism, as creation of a work or performance means that this right has not been violated.

Creation of a work or performance results in different property and non-property rights. But these rights appear *as a result, and not in connection with* the realization of this right for freedom to create.

Thus, it is more correct to consider a copyright and neighboring rights defended and guaranteed by the Constitution of the Russian Federation (Art.

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44, Part 1) as the direct object (Criminal law..., 2006: 434; Criminal law of Russia..., 2007: 400; Criminal law of Russia..., 2008: 260; Bondarev, 2008: 11; see also: Machkovsky, 2005a: 62-63). The obvious merit of this standpoint consists in refusing to consider this right for freedom to create as the direct object of plagiarism, though the frame of rights referred to the direct object is unjustifiably wide.

Let us turn to the Civil Code of the Russian Federation¹. According to Art. 1226 of the Civil Code of the RF a range of intellectual rights emerges as a result of creating a work or performing. These rights include a right to authorship, a right to indicate author's name, a right to maintain identity, a right to make the work public, a right to have an opportunity to realize a right of an art work³ reproduction, an exclusive right to a work or performance and some other rights (Art. 1255, 1315 of the Civil Code of the RF). Not all these rights can be considered the direct object of plagiarism. Only the right to authorship, the right to indicate the author's name that belong to personal non-property rights and the property⁴ exclusive right can play "the role" of the direct object of plagiarism.

There is another opinion in the law literature on this issue: "As the right to authorship is a personal non-property right, plagiarism should be considered a violation of personal non-property rights" (Fedoskina, 2007: 119). Basing on this statement we can consider a personal non-property right to authorship as the main direct object of the crime described in Art. 146, Part 1 of the Criminal Code of the RF.

Despite the differences between the two approaches to the notion of the direct object of plagiarism mentioned above, the right to authorship is believed to be either a *part of the main* direct object of this crime or its *main* direct object. But if we agree with this statement, it

means that this right has to correspond to all the attributes of such an object.

According to the opinion of D.I. Aminov and I. I. Bryka "...the main direct object of the crime *is the most valuable social benefit from the point of view of social interests* (italicized by the author) among those which are damaged by this crime. Moreover, this object should be determinative both for *qualifying* (italicized by the author) the action and choosing a certain place of the criminal rule in the general legislative system" (Criminal law of Russia..., 2009). Formally, recognition of the right to authorship as the main direct object of plagiarism should result from the position of Art. 146, Part 1 of the Criminal Code of the RF in the structure of the Criminal Code of the RF, from its position in the chapter in which crimes against constitutional rights and freedoms are described and should be confirmed by the *name of the article and description of the punishable offence* (Lopatin and Doroshkov, 2010).

Nevertheless, the analysis of the description of the crime's objective part given in Art. 146, Part 1 of the Criminal Code of the RF puts us in doubt that the personal non-property right to authorship is really the main one and not the supplementary direct object of the crime. Art. 146, part 1 of the Criminal Code of the RF prohibits plagiarism. The definition of the notion "plagiarism" is described neither in criminal, nor in civil law. The legal science interprets it in different ways, for example, as "using the works of other authors in one's own work without referring to their names, publishing somebody else's work under one's own name or publishing a work created in co-authorship without reference to the name of the co-author ..." (Serebrennikova, 2006), "distributing to the public somebody else's work or a part of it and representing it as one's own, publishing a work created in co-authorship without referring to the co-author ..." (Commentary on the Criminal Code

of the Russian Federation, 2007), “publishing somebody else’s work under one’s own name or publishing a work created in co-authorship without referring to the co-author etc.” (Commentary on the Criminal Code of the Russian Federation, ed. by V.M. Lebedev, 2010). The resolution No. 14 of the Plenum of the Russian Federation Supreme Court “About the practice of criminal cases trial on the infringement of copyright, neighboring, inventor’s and patent rights and about illegal use of a trademark” of 26th April 2007 says that if the fact of plagiarism which infringes the copyright under Art. 146, Part 1 of the Criminal Code of the RF has been established, the court should bear in mind that this wrongful action can be expressed in particular *in presenting oneself as an author of somebody else’s work, in distributing to the public somebody else’s work or a part of it under one’s own name, in publishing a work created in co-authorship without referring to the names of co-authors.*

It is impossible, of course, to plagiarize the authorship as a personal immaterial benefit, thus plagiarism is usually expressed in giving somebody else’s work or a performance recording as one’s own, and there are various ways of doing that. The most common way is using a work (Khokhlov, 2007) or a performance recording that belong to another person without reference to the author’s name, for example, when a plagiarist copies a title, some phrases or paragraphs of somebody’s work and includes them in his own work, when he publishes someone’s whole work or some parts of it under his own name. Illegal use can affect any element of the form of the work or recording of the performance defended by the law: the text as a whole, some sentences, the title of the work. The next way is less popular: an author does not name his co-authors without their consent, or a person claims oneself to be an author of someone else’s work. All these actions misrepresent a true creator.

Using someone else’s work (wholly or partially) and representing it as one’s own leads to violation of not only the authorship right, but of the exclusive right as well. Irrespective of the illegally used volume of the work *it always* means the infringement of the exclusive right, i.e. the right to use scientific, literary or artistic work at one’s own discretion in any legal way. It is provided by Art. 1229, 1270, 1274 of the Civil Code of the RF. According to Art. 1229, 1270 of the Civil Code of the RF the author has the right to use scientific, literary or artistic work at his own discretion in any legal way, including its reproduction. Other people cannot use this work without the author’s consent, except for the cases provided by the law. Art. 1274 of the Civil Code of the RF enumerates such cases of free use of the work provided that *the name of the author* whose work is used (cited) and the source used *is referred to* with due acknowledgement. Thus, plagiarism is aimed at two objects at once, both of them claim to be the main direct object of encroachment. This conclusion is also fair when the performance recording is illegally used (Art. 1306 of the Civil Code of the RF).

Unlawful presentation of oneself as a single author of a co-work (a performance recording) or announcing oneself as an author of somebody else’s work *does not always* cause infringement of the exclusive right to the work. It *can be* violated indirectly: as a result of violation of the personal non-property right to authorship. If a person just presents himself as an author, but does not intend to publish the work and get fees for it, the exclusive right is not infringed. On the contrary, if he uses the work and gets money for the illegal use, the exclusive right is violated. Plagiarism also results in breach of the right to authorship only, for instance, when the protection period of the authors’ exclusive right is over, and the work or recording of the performance can be used by any person.

Despite the fact that the right to authorship is always an independent direct object of the crime, and the exclusive right is not always infringed, the right to authorship is a fundamental right which results in realization of all other author's rights including the exclusive right; infringement of the right to authorship without violation of the exclusive right is not a crime. This follows from the description of Art. 146, Part 1 of the Criminal Code of the RF in which heavy damage inflicted to the author or any other right holder is an obligatory element of *actus reus*.

There are different opinions in the law literature what kinds of criminal consequences are covered by the notion of heavy damage. According to one of the opinions these consequences are of immaterial character, and therefore some scholars suggest taking into account "the degree of constitutional rights violation, detriment to the business reputation as a result of uncontrollable distribution of counterfeit copies with bad quality recordings etc" (Voshchinsky, 2003: 61). Another point provides for that heavy damage may include not only material but also moral harm (*Russian criminal law...*, 2009: 140-141; Serebrennikova, 2006; Smirnova, 2007: 95). According to the third opinion, it includes only material damage (Mordvinov, 2004: 42). The Plenum of the Russian Federation Supreme Court in its resolution No. 14 claims that heavy damage described in Art. 146, Part 1 of the Criminal Code of the RF is the real damage and loss of profit only; a victim can claim for moral damages by a civil lawsuit in a criminal trial.

The question is what property consequences of this crime refer to the damage.

Detriment of the authorship can inflict directly only moral damage, but indirectly any other harm, including material harm. Thus, feeling anxious and uncomfortable, a person has to apply for medical care, and therefore bear the

expenses to recover his health. Thus, we have to find out whether these expenses that arise as a result of this distress, should be considered as the damage of the crime. But there is no direct correlation between such property damage and plagiarism. It is obvious that an indirect intention which usually accompanies plagiarism does not cover this property loss, while the probability of its emergence is abstract and uncertain. So property damage that arises as a result of inflicted moral damage should not be considered as the damage of this crime.

The damage may cover only those property damages which are caused by infringement of the exclusive right to the work or performance recording. No matter *how* it was violated the material damage caused had been embraced by the criminal intent of the offender.

So, moral damage is not taken into account when criminal proceedings are instituted, only the amount of property damage is important in such cases.

But illegal use of a work or a performance recording not always cause heavy damage. For instance, using some pieces of someone else's work can hardly result in significant material damage, so this action does not constitute the body of the crime. It means that despite the fact of breaking the right to authorship, this object is not defended by the Criminal Code of the RF. Refusal to defend this right means that it is not considered to be the social benefit which is the most valuable from the point of view of social interests. On the contrary, this social benefit is of minor importance like the supplementary object of the crime.

The legal rule fixed in Art. 146, Part 1 of the Criminal Code of the RF is primarily aimed at protection of the author's exclusive right; it is definitely confirmed by the circle of victims described there. Among the victims mentioned in this Article we can see not only authors, but

other right holders as well. In accordance with the current civil law only individuals are entitled to authorship, the right to authorship is inalienable, that is why if this right is broken only the author can suffer moral damage. The property damage is always inflicted on the exclusive right holder: the author or any other right holder under the law or contract. Therefore, a publisher having an exclusive right to reproduce the work, can claim the initiation of criminal proceedings, if this work being the object of the exclusive right has been reproduced by another person without reference to the creator's name. Thus, only in case of property damage there is a sufficient ground to initiate criminal proceedings against a wrongdoer.

Unwillingness of the legislator to give a personal non-property right to authorship the significance of the main direct object of the crime is also seen when we compare the kinds of penalties specified in Art. 146, Part 1 and Part 2 of the Criminal Code of the RF. Plagiarism unlike the illegal use of the work (performance recording) does not result in sentencing to imprisonment. Thus, the encroachment on the two objects at once – the right to authorship and the exclusive right – does not impose punishment as heavy as the punishment provided for violation of only one object – the exclusive right. It should be noted that in comparison with the current Criminal Code of the RF the pre-revolutionary *Regulations of Criminal and Correctional Penalties* of 1845 provided that a person who encroached on two objects at once, i.e. the right to authorship and the exclusive right, could be sentenced to more serious punishment.

The Regulations of Criminal and Correctional Penalties of 1845 described two bodies of crime: forgery of the authorship (an intentional illegal reproducing of someone else's work under one's own name; now it is a kind of plagiarism) and counterfeiting (unlawful

reproducing of someone's whole work; now it is a kind of the illegal use of a work). While committing a forgery of the authorship was punished by deprivation of all special rights and imprisonment up to 16 months, the penalty for counterfeiting was only deprivation of freedom for a term from 3 months to a year.

We can look at the problem from another point of view: low-level legislative value of the personal non-property right to authorship and inefficiency of the defense caused by it, are clearly seen through an extremely high imbalance of the criminal defense of the property right holders. The Criminal Code of the RF in Art. 146, Part 1 and Part 2 provides two bodies of crimes the main direct object of which is the exclusive right. The difference in qualifying a committed act depends on the fact whether it was only the exclusive right that was violated or at the same time the right to authorship was neglected. For example, if someone else's work was illegitimately reproduced under one's own name, it is qualified under Art. 146, Part 1 of the Criminal Code of the RF, but if it was illegally reproduced under the name of the author, this action should be qualified under Art. 146, Part 2 of the Criminal Code of the RF. Institution of criminal proceedings under Art. 146, Part 1 of the Criminal Code of the RF results in greater difficulties as the body of this crime belongs to result crimes. While institution of criminal proceedings under Art. 146, Part 2 of the Criminal Code of the RF is much easier than the previous one, as the body of this crime belongs to conduct crimes. The type of punishment fixed in Art. 146, Part 2 of the Criminal Code of RF is more serious in comparison with the one that may be imposed on a person who committed an offence described in Art. 146, Part 1 of the Criminal Code of the RF. Thus, the publisher whose exclusive right was violated as a result of publication and distribution of the

counterfeit copies of the work is always in a more advantageous position than the publisher whose rights are defended under Art 146, Part 1 of the Criminal Code of the RF. Meanwhile violation of the exclusive right in both examples is *equally* dangerous for the community, but entails different penalties. It appears that the kind and the size of the penalty specified in Art. 146, Part 1 of the Criminal Code of the RF is insufficient even to defend the exclusive right, and speaking about the reality of the defense of the personal non-property right to authorship does not seem to be possible.

Including heavy damage as a criminalizing feature indicates that the right to authorship in the body of the crime specified in Art 146, Part 1 of the Criminal Code of the RF occupies the position of a supplementary, but not the main object. However, the genuine meaning of the authorship right does not conform to the “role” assigned to it.

The right to authorship is a personal non-property right (Art. 150 of the Civil Code of the RF). Therefore, infringing on this right within the framework of classification of crimes against constitutional rights and freedoms of a person and a citizen used in the criminal law should be referred not to crimes that infringe social and economic rights and freedoms (Russian criminal law..., 2009: 133) or economic rights and freedoms (Criminal law of Russia ..., 2008: 260), but to crimes that violate *personal* rights and freedoms. The actual reason of the contemporary description of plagiarism in Art. 146, Part 1 of the Criminal Code of the RF is the priority of authors' property rights over personal non-property rights in the civil law. As the intellectual property is considered, first of all, as a product, so the right to authorship is used to name the author in the trade turnover; that is why it is valued as an obligatory condition to enter other, as a rule, property relations. Maintaining

a normal trade turnover of the intellectual property is an important, but not the only task of the personal non-property right to authorship. Its first aim is to guarantee recognition of an original author or a performer and to give him a proper recognition. Thus, an effective protection of the personal non-property right to authorship means comprehensive defense of the person's interests; so this right must “occupy the place” of the main direct object of plagiarism.

It can be achieved in various ways. Firstly, the interpretation of the notion “damage” can be changed determining only its immaterial consequences. Secondly, the description of Art. 146, Part 1 of the Criminal Code of the RF can be changed in such a way, when immaterial character of the harm caused by plagiarism becomes obvious to everyone. For this purpose some authors in criminal science suggest, first of all, using an attribute of serious violation of rights and lawful interests instead of heavy damage (Oreshkin, 2006: 7); secondly, refusing to name a right holder as a potential victim (Glukhova, 2004: 9; Oreshkin, 2006: 7). But we cannot agree with the first way of solving the problem as it does not correspond to the rule of law and we cannot support the second one because it can violate the principle of fairness. Plagiarism, first of all, causes moral damage. According to Art. 151 of the Civil Code of the RF, moral damage is defined as physical and moral sufferings. Therefore, if the author suffers because of plagiarism it would become a prerequisite for imposing criminal liability on the wrongdoer. But it is very difficult to find out whether a person really suffers from an offence even in civil trials. There is no single opinion in science and practice about the right way of solving this problem now. Very often different courts pass contradictory judgments though the circumstances and facts of the cases are rather similar. But it is even much more difficult for

a court to determine the gravity of sufferings. So, the definition of moral damage given in the Civil Code of the RF does not allow us to provide uncontroversial civil court practice and, consequently, it *should not be* used while deciding if a person is criminally liable or not. Moreover, it is difficult to speak about the direct intention of the offender to cause moral sufferings as a necessary element of the body of the crime because different people react to plagiarism in different ways: one author may become furious, the other remains indifferent.

For this reason it is necessary to refuse including the attribute of consequences of committing a crime in the body of plagiarism. This proposal also corresponds to the true value of authorship as a personal immaterial benefit. We should support L. G. Machkovsky who said: “The criminal liability for a plagiarism of copyright and neighboring rights objects should not be connected with the necessity of establishing the fact of damage, its amount, and assessment of this amount as heavy damage. These actions encroach on fundamental human values and that is why they are very dangerous for the society irrespective of the consequences they have caused” (Machkovsky, 2005b: 46). The scholar reasonably offers to exclude the words “if this action caused great damage to an author

or any other right holder” from the description of Art 146, Ppart 1 of the Criminal Code of the RF (Machkovsky, 2005b: 46).

Finally, making up the body of plagiarism as a conduct crime is one of the world trends in the criminal protection of authorship. Criminal Codes of some states, i.e. the Netherlands and Sweden (Dvoryankin, 2003: 18), Spain (The Criminal Code of the Kingdom of Spain, 1998: 87), Byelorussia, Tajikistan, Kyrgyz Republic, Georgia (Podshibikhin, 2006: 56), Uzbekistan, Turkmenistan (only for computer programmes, databases and some other objects) do not include the consequences of committing a crime in the body of this crime. So, excluding the attribute of heavy damage from Art. 146, Part 1 of the Criminal Code of the RF also corresponds to contemporary tendencies of the criminal law development.

Resume. The personal non-property right to authorship will become the main direct object of the crime provided that the attribute of heavy damage is excluded from the description of Art. 146, Part 1 of the Criminal Code of the RF, and this description will be made up as “Plagiarism”, so plagiarism will become a conduct crime. It will help to eliminate all contradictions and provide efficient protection of the right to authorship.

¹ Hereinafter referred to as the “Criminal Code of RF”.

² That is paintings, sculptures, graphic art, designs, graphic stories, comic books and some other works, applied arts, architecture and park and garden designs are not included (art. 1259 of the Civil Code of the RF).

³ In the opinion of the legislator an exclusive right is a property right (art.1226 of the Civil Code of the RF).

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Объект преступного присвоения авторства (плагиата)

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В статье обосновывается, что личное немущественное право авторства является дополнительным непосредственным объектом преступления, предусмотренного ч. 1 ст. 146 Уголовного кодекса РФ. Это не позволяет обеспечить полноценную уголовно-правовую охрану прав личности, и, следовательно, диспозиция указанной нормы требует изменения.

Ключевые слова: уголовное право, объект преступления, присвоение авторства, плагиат.
