

ANALYSIS OF THE CRIME STIPULATED IN ART. 50 OF LAW Nb. 129/1992 PROTECTING DRAWINGS AND MODELS, AS AMENDED BY LAW Nb. 187/2012 ENFORCING LAW Nb. 286/2009 ON THE CRIMINAL CODE

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Abstract

The study analyzes the changes made by Law no. 187/2012 enforcing Law no. 286/2009 on the Criminal Code for the crime concerning the unlawful acquirement of the authorship of the design or model, a crime stipulated in art. 50 of Law no. 129/1992 on the protection of designs and models. The changes made to the investigated crime are analyzed in terms of the grounds establishing them, as well in terms of the incidence of the legal norms of the current Criminal Code over them. The characteristic elements, i.e. the particularities of the crime, such as those listed below, are approached in a similar way: social relations protected by crime, the material subject matter and the subjects of the crime, the constituent contents thereof. The doctrinarian ideas on the matter are emphasized and re-assessed, and, as appropriate, the author's personal opinions are stated. The study is directed simultaneously towards theoreticians, practitioners, and law school students, based on the assumption that adequate knowledge of the legal provisions ensures the accurate enforcement thereof and, therefore, the fulfillment of the scope for which they were adopted.

Key Words: design and model, authorship, the day-fine system, reconciliation – a cause removing criminal liability.

1. Introductory considerations. Headquarters of the matter

The crime stipulated in art. 50 in Law no. 129/1992 protecting designs and models¹, hereinafter referred to as the Law, was amended by art. 45 section 1 of Law no. 187/2012 enforcing Law no. 286/2009 on the Criminal Code².

Prior to the amendment, art. 50 of the Law read as follows: “**Art. 50.** *The unlawful acquirement, irrespective of the method, of the authorship over the design or model is a crime and shall be punishable by imprisonment from 6 months to 2 years or with a fine ranging from lei 1500 to lei 3000.*”

Following the amendment, the crime incriminated in art. 50 reads as follows: “**Art. 50.** *(1) The unlawful acquirement, irrespective of the method, of the authorship over the design or model is a crime and shall be punishable by imprisonment from 3*

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¹ Republished in the Official Gazette of Romania, Part I, no. 876 of 20 December 2007.

² Published in the Official Gazette of Romania, Part I, no. 757 of 12 November 2012; in force as of 1 February 2014.

months to 2 years or with a fine. (2) Reconciliation shall remove criminal liability.”

The changes made to the analyzed crime are:

- the reduction of the special lower limit of the imprisonment sanction from 6 months to 3 months;
- the rewording of the fine sanction, according to the new system, i.e. the day-fine system introduced under the current Criminal Code;
- the introduction of a cause removing criminal liability, i.e. reconciliation.

We shall briefly analyze such changes and shall underline the characteristic elements of the constitutive contents of the crime, insisting, as necessary, on the implications of the new norms of the Criminal Code in force, in the investigated crime area.

2. Analysis of the changes brought to the crime stipulated in art. 50

2.1. The first change made by Law no. 187/2012 to the analyzed crime concerns *the reduction of the special lower limit of the imprisonment sanction*, from 6 months, as stipulated in the former regulation, to 3 months in the current incrimination.

The reduction of the special lower limit of the imprisonment sanction naturally falls under the general criminal philosophy of the law maker, whose main characteristic consists of decreasing the imprisonment term for most crimes, in parallel with the diversification of the methods on the individualization of the serving of the sentences.

We will, of course, not insist on the matter, as it has been largely underlined and discussed in the doctrine.

2.2. The second change of the examined crime consists of *the rewording of the fine sanction*. Therefore, instead of specifying the fine sanction by indicating the minimum value of lei 1500 and the maximum value of lei 3000, similar to the prior regulation, the law maker drew up the sanction by considering the current regulation of the fine sanction stipulated in the Criminal Code, i.e. the day-fine system.

Therefore, according to the new system, the fine stipulated by the Criminal Code does not take the form of any amount of money, but of a number of days-fine, while the amount afferent to a day-fine shall be established by the judge within certain limits stipulated by law. The number of days-fine for the matter at hand ranges between 120 and 240 days-fine³, as the Law stipulates the fine sanction as an alternative to imprisonment of up to 2 years. Moreover, the amount afferent to a day-fine ranges between lei 10 and lei 500⁴.

Therefore, the fine limits for the crime at hand can range between lei 1200 (120 days X lei 10) and lei 120,000 (240 days X lei 500).

It is easy to notice that, if the special lower limit of the fine sanction has decreased slightly, from lei 1500 to lei 1200, on the other hand, the special upper limit has increased considerably, from lei 3000 to lei 120,000.

Such a mechanism determining the total amount of the fine by the court

³See art. 61 para. (4) letter b) of the Criminal Code.

⁴See art. 61 para. (2) thesis 2 of the Criminal Code.

ensures an improved individualization of the applied sanction⁵, both in terms of proportionality, and in terms of efficiency, as, on determining the value of a day-fine, the material situation and the asset duties of the convict towards the persons under its care shall be considered⁶.

2.3. The third change of the crime concerns the inclusion of the incriminating article of the *reconciliation* institution – a cause removing criminal liability.

The inclusion of the reconciliation institution for the crime stipulated in art. 50 of the Law shall undoubtedly lead to the increase of the prejudiced person's role, i.e. of the design and model author, in terms of holding the suspect accountable, and, particularly, placing the interests of the harmed person first.

Even if, at first sight, the reconciliation occurring between the author of the creation with industrial applicability, a victim of the crime, on the one hand, and the author of the crime, on the other hand, seems to lead to the prevailing of the creation author's interest to the detriment of the interest of society⁷, we believe that the cause removing criminal liability also has effects concerning the observance of the criminal norms at a societal level.

Therefore, the reconciliation occurring between the design or model author and the crime author can contribute to the re-establishment of legal order and to the prevention of potential conflicts that could have occurred following the escaping from Pandora's Box of events that would have smoldered inside the two criminal law subjects⁸.

To have the legal effects for which it was established, the reconciliation must meet a series of requirements, such as⁹: it shall be stipulated by law for the crime to which it is applied; it shall occur between the author of the design or model, on the one hand, and the respective suspect or defendant, on the other hand; it shall be total, i.e. it shall extinguish both the criminal side and the civil side; it shall be final, which presupposes that it is irrevocable; it shall occur on the reading of the ascertainment notice.

Statements have been made in the doctrine¹⁰ that the reconciliation should also be unconditional, i.e. should not be subject to any condition, since that would involve the indefiniteness of the trial up to the meeting of the condition.

A different opinion¹¹, which we adhere to, however stated that “the right to use the public action granted to the civil party is rather dictated by utilitarian interests. However, in relation to the ration authorizing such a right, i.e. to grant priority to the

⁵ Within the same meaning, see C. Voicu, A. S. Uzlău, R. Moroșanu, C. Ghigheci, *Noul Cod penal. Ghid de aplicare pentru practicieni*, Hamangiu Publishing House, Bucharest, 2014, p. 102.

⁶ See art. 61 par. (3) of the Criminal Code.

⁷ To this extent, see C. Ghigheci, *Cauze care înlătură răspunderea penală*, Universul Juridic Publishing House, Bucharest, 2014, p. 182.

⁸ See, to the same extent, V. Dongoroz, *Drept penal (reeditarea ediției din 1939)*. Asociația Română de Științe Penale, Bucharest, 2010, p. 576.

⁹ See C. Ghigheci, *op.cit.*, pp. 187 – 191.

¹⁰ See I.Oancea in V.Dongoroz ș.a., *Explicații teoretice ale Codului penal român. Partea generală. Vol. II*, Academiei Republicii Socialiste România Publishing House, Bucharest, 1970, p. 394.

¹¹ See V. Dongoroz, in I. Tanoviceanu, *Tratat de drept și procedură penală. Vol. IV. Procedură penală*, Edițiunea a doua a Cursului de drept și procedură penală, revăzut și completat de V. Dongoroz, C. Chiselită, Ș. Laday, E. Decuseară, “Curierul Judiciar” Printing Press, Bucharest, pp. 427 – 428.

remedy entitled to the victim, so that, when the victim is declared remedied, either as a result of having decided to pardon the defendant, or by reaching a settlement with the defendant, we see no justification why such reasoning should be trunked and why it should not be allowed to declare itself remedied even if it met the requirement. The argument that the pardon or reconciliation would be haggled before the court is not convincing, as haggling in clear daylight and before the courts is a much better option than blackmail carried out in the dark, but suspected by the authorities of justice.”

We believe that reconciliation during the criminal dispute can be carried out under certain conditions concerning the compensation of the prejudice, registered in a document that the criminal court shall take note of and whose contents shall be included in the operative part of the decision. The criminal decision under which the court takes note of the reconciliation shall establish a writ of execution for the implementation of the civil duties undertaken by the suspect or defendant.

This way, the contradictory interests of the reconciling parties (the creation author and the criminal deed author) initially interweaved and connected through the criminal conflict, find their own area to remove the criminal liability hanging over the defendant and/or the materialization of the pardon or compensation of the moral and/or material prejudice caused to the victim.

Therefore, real options are given to the parties concluding their reconciliation, and to society, to leave, through the emergence of the reconciliation, the criminal area, by finding the personal freeing horizons and the reestablishment of social order.

3. Characteristic elements of the crime stipulated in art. 50

Before moving to the analysis of the particularities characterizing the crime, we believe it is necessary to outline a few generalities concerning the designs and models.

Therefore, *firstly* we would like to indicate that the doctrine has defined designs and models differently, as either creations in two or three dimensions applied to products¹², or combinations of lines or colors of an original nature or voluminous shapes applied to products that can be industrially reproduced or that have a utilitarian function, granting its own and new appearance to the product, setting it apart from other products¹³, or by emphasizing the differences between the two creations¹⁴.

The most complex definition proposed for a design and model can be found in a recent analysis¹⁵ showing the essential features thereof: they represent the external appearance of a product or of parts thereof; it observes public order and principles of morality; they are not determined by the technical function of the

¹² See I. Macovei, *Tratat de drept al proprietății intelectuale*, C. H. Beck Publishing House, Bucharest, 2010, p. 247.

¹³ See V. Roș, *Dreptul proprietății intelectuale. Curs universitar*, Global Lex Publishing House, 2001, p. 495.

¹⁴ See B. Florea, *Dreptul proprietății intelectuale*, Universul Juridic Publishing House, Bucharest, 2011, p. 281.

¹⁵ See T. Bodoașcă, *Discuții privind noțiunea, natura și condițiile de fond pentru protecția juridică a desenelor și modelelor în cuprinsul legislației române în materie*, in *Dreptul* no. 3/2015, p. 95.

product; they are new and individual; they are made in two dimensions (design) and, respectively, in three dimensions (model); they result from the combination between the main characteristics, particularly lines, contours and colors, respectively texture and/or materials of the actual product and/or ornamentation.

Secondly, we would like to underline that certain requirements should be met for the protection of designs and models, respectively¹⁶: the novelty of the design or model¹⁷; the individuality thereof¹⁸; the requirement concerning the dissociation of the design or model from a technical function of the product it applies to¹⁹ and the requirement for the design or model to observe public orders and principles of morality²⁰.

If the abovementioned requirements are met, the State Office for Inventions and Trademarks, after following the legal procedure and examining the application on the registration of the design or model, shall issue the registration certificate, representing the title within the meaning of which the legal protection of the rights derived from the creation of the design or model is ensured.

Thirdly, we would like to specify that the validity period of a design or model registration certificate is 10 years following the establishment date of the regulatory deposit, a period that can successively be renewed with 5 year periods, three times²¹.

Finally, we would also like to show that the exclusive right of operation resulting from the registration of the design or model shall cease²²: on the expiration of the registration certificate validity period; on the annulment thereof; by stripping the rights of the holder and through the holder's waiver to the registration certificate.

Such general aspects have been stated, since, as we shall see, they can better explain some of the particularities of the crime subject to the discussion.

*The legal subject matter*²³ of the crime is established by the social relations formed around the social value, represented by the authorship of a design or model.

¹⁶ See T. Bodoaşcă, *op. cit.*, p. 98 et seq.

¹⁷ See art. 6 par. (2) of the Law: "A design or model is deemed new if no identical design or model was made public prior to the submission date of the registration application or, if the priority was claimed prior to the priority date".

¹⁸ See art. 6 par. (4) of the Law: "It is deemed that a design or model is individual if the global impression it leaves to an informed user is different from the impression left to such a user by any design or model made public prior to the submission date of the registration application, if the priority was claimed, prior to the priority date".

¹⁹ See art. 8 par. (1) of the Law: "A design or model determined exclusively by a technical function cannot be registered".

²⁰ See art. 9 of the Law: "Designs or models contrary to public order or principles of morality are excluded from protection".

²¹ See art. 35 in the Law.

²² See art. 36 in the Law.

²³ As we have also underlined in previous occasions, we believe a distinction should be made between the *special legal subject matter* and the *legal subject matter* of a crime. One can only talk about a special legal subject matter if the analyzed crime is part of a cluster of crimes that, in their own turn, are characterized by a *generic (group) legal subject matter*. In different terms, the *special legal subject* of a specific crime always accompanies the *generic legal subject matter* of a group of crimes, the contents of which include the crime we have referred to. Since the crime stipulated in art. 50 is not incriminated in a group of crimes, but singularly, we are not dealing, in this case, with a special legal subject matter, but only with a legal subject matter. For a contrary opinion, please see C-tin Duvac, *Din nou despre*

Therefore, according to the doctrine²⁴, we believe the crime has no *material subject matter*, as the incriminated deed is directed against non-patrimonial value, i.e. the authorship of the design or model, which is an inseparable and inalienable attribute of the author's creative personality.

As the incriminated criminal deed is not directed against a material entity against which it generates any physical action, which it exposes to any hazard or which it subjects to harm, there is no material subject matter of the crime²⁵.

Specialized literature²⁶ has stated that, assuming that authorship is illegally "acquired", the crime has a material subject-matter. It is established by the certificate issued by the State Office for Inventions and Trademarks (OSIM) proving authorship.

In our opinion, the abovementioned version on the acquirement of the authorship of the design or model does not establish the material subject matter of the examined crime either. The authorship of the industrial creation is not granted by the document issued by OSIM, but by the act of creation, the creative effort included in the performed design or model. The registration certificate issued by OSIM only ascertains the authorship that the suspect (defendant) has fraudulently acquired, by submitting false documents to OSIM, stating that it is the true author of the design or model.

The active subject of the analyzed crime can be any natural person, as long as it meets the general requirements of criminal liability.

Legal literature²⁷ has presented the thesis according to which the active subject of the examined person can also be a legal person. We do not adhere to such an opinion. The reason why we choose to separate ourselves from the doctrinarian opinion is that only a natural person and not a legal person can hold authorship over the design or model, as it is an attribute of a creative personality. However, a legal person has no rationality, intelligence, vocation, inspiration, creativity or imagination to create designs or models meeting the legal requirements necessary for the issuance of the title of protection, and, therefore, its authorship cannot be acknowledged, as it is an exclusive attribute of a human being.

One of the co-authors of the design or model can also be an active subject of the crime. We are considering the assumption where several natural persons have created a design or model (multiple authors), and one of the co-authors unlawfully

însușirea fără drept a calității de autor al desenului sau modelului, in Revista Româna de Dreptul Proprietății Intelectuale, no. 1/2008, p. 74.

²⁴See A. Ungureanu, A. Ciopraga, *Dispoziții penale din legi speciale române*, Vol. V, Lumina Lex Publishing House, Bucharest, 1996, pp. 183; V. Lazăr, *Infrațiuni contra drepturilor de proprietate intelectuală*, Lumina Lex Publishing House, Bucharest, 2002, pp. 143; R. Bodea, *Infrațiuni prevăzute în legi speciale: infrațiuni privind societățile comerciale, infrațiuni contra drepturilor de proprietate intelectuală, infrațiuni în legătură cu protecția mediului*, Hamangiu Publishing House, Bucharest, 2011, pp. 81; C. R. Romișan, *Protecția penală a proprietății intelectuale*, C. H. Beck Publishing House, Bucharest, 2006, p. 241.

²⁵See V. Dongoroz, S. Kahane, I. Oancea, R. Stănoiu, I. Fodor, M. Iliescu, C-tin Bulai, V. Roșca, *Explicații teoretice ale Codului penal român. Partea specială*, Vol. III, 2nd Edition, Editura Academiei Române, All Beck Publishing House, Bucharest, 2003, p. 4.

²⁶See Ghe. Diaconescu in Ghe. Diaconescu, C-tin Duvac, *Drept penal. Partea specială. Noul Cod penal*, Curs universitar, Vol. II, Fundației „România de Măine” Publishing House, Bucharest, 2006, p. 400 *apud* C-tin Duvac, *op. cit.*, p. 75

²⁷See C-tin Duvac, *op. cit.*, p. 75.

acquires the position of sole author of the respective creation²⁸.

At the same time, we are dealing with an active subject of the crime and, if a part of the co-authors of the design or model unlawfully acquire the creative contribution to the performance of the industrial creation of other co-authors. The latter are no longer included together with the former in the acknowledgement of their real contribution to the creation of the design and model, as they are fraudulently excluded from the co-authors and thus become the passive subjects of the crime.

The passive subject of the crime can be the author or co-authors of the design or model. According to the Law²⁹, an *author* is a natural person or a group of natural persons established under an agreement, creating the design or model.

The moral right to the paternity (the right to the name) of the design or model occurs on the submission of the registration application with OSIM, as the last and first name and authorship of the industrial creation is registered in the registration certificate, as well as any other documents or publications on the design or model.

The doctrine³⁰ has rightly noticed that the authorship (co-authorship) of the design or model should not be confused with the position of holder of the creation registration certificate.

The authorship of the design or model can only be held by the natural person whose creative contribution materialized in the performance of the creation. On the other hand, the position of holder of the registration certificate for the design or model can be held by the creation author or by the employer (for creations made under an employment agreement or a creative mission agreement), the author's successors or the assignees of the right over the design or model.

We should also add another distinction, essential for the area of the study: the right to the authorship of the design or model is a non-patrimonial, inalienable and perpetual right, while the position of holder of the registration certificate for the respective creation grants the exercising of patrimonial rights, protected during the protection title validity period.

The material element of the objective side consists of the unlawful acquirement of the authorship of the design or model, in any way.

Within the meaning of the incrimination norm, "acquirement" refers to the appropriation, the taking claim of the authorship of a design or model by a natural person whose creative contribution to the performance of the design or model, or to the entire creation, or to a part thereof is null.

The incriminating norm does not specify the methods for the acquirement of authorship and makes no relative reference to the acquirement of any patrimonial benefit or to the generation of any prejudice in the patrimony of the passive subject of the crime.

The acquirement of the authorship of the design or model can be made by various technical methods³¹, such as: the registration of the name of the infringer in the registration application as the author of the design or model and the submission

²⁸ See C. R. Romișan, *Protecția penală a proprietății intelectuale*, C. H. Beck Publishing House, Bucharest, 2006, p. 242; R. Bodea, *op. cit.*, p. 81.

²⁹ See art. 2 letter b) in the Law.

³⁰ See C-tin Duvac, *op. cit.*, p.47.

³¹ See C. R. Romișan, *op. cit.*, p. 243.

thereof to OSIM; the removal from the author's ownership of the documentation concerning the description of the new elements of the design or model, to the graphical representations of the creation, etc. and the submission thereof to OSIM together with the application for the issuance of the registration certificate.

The material element of the investigated crime is accompanied by an *essential requirement*, respectively for the acquirement of the authorship of the design or model to be made “*unlawfully*”. A negative requirement, “*unlawful*” acquirement should involve, at a first glance, the lack of consent of the person “*stripped*” of the authorship of the creation with industrial applicability.

In our *opinion*, we believe the requirement is useless in terms of the crime subject to our discussion. The uselessness results from the fact that one cannot consider the “*lawful*” acquirement of authorship, i.e. with the permission or consent of the real author of the design or model. Authorship, the right to the paternity of the design or model performance is an inalienable moral right related to the creative personality of the subject participating in the creative act. Therefore, it is elementary that the acquirement of authorship cannot be “*lawful*” or “*unlawful*” or performed by any person that was not involved in the creative effort incorporated in the creation.

The real author of the creation holds the respective position forever, and has no option to waive it, as it shall permanently bear the mark of its creative personality.

The immediate result of the crime consists of a hazard created following the change of the holder of the right of paternity over the design or model and, therefore, the generation of hazard for the social values protected by law (the rights resulting from the creation of the design or model).

The physical causality³², i.e. *the causality relation* between the acquirement of authorship of the design or model establishing the material element and the immediate effect results from the materiality of the infringer's action (*ex re*).

The attempt was not incriminated, as the crime is committed instantly, on the filling in and submission of the application with OSIM, and, therefore, is not capable of committing an attempt.

The subjective side is only performed as direct or indirect intent.

The text of the law does not stipulate essential requirements concerning the *scope* or *motive*. The knowledge thereof helps establish the severity of the crime and the danger level of the criminal for the individualization of the sanction³³.

4. Conclusions.

The analysis of the changes made to the criminal deeds regulated in the special law by the Law enforcing the Criminal Code is a good opportunity to re-assess the constituent contents of the crimes in the investigated sphere.

Equally, the study of the crimes subject to the evoked changes brings to the forefront the doctrinarian opinions expressed in the field and attempts to stir the interest of legal researchers and practitioners to confront opinions and identify the

³² See V. Dongoroz, S. Kahane, I. Oancea, R. Stănoiu, I. Fodor, M. Iliescu, C-tin Bulai, V. Roșca, *Explicații teoretice ale Codului penal român. Partea specială*, Vol. III, Ediția a II-a, Academiei Române Publishing House, All Beck Publishing House, Bucharest, 2003, pp. 7.

³³ See art. 74 para. (1) letter d) of the Criminal Code.

most balanced interpretations and meanings on the enforcement of the incriminating legal norms.