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Scientific Research Center of Forensic Examination
on Intellectual Property

**EXPERT RESEARCH OF SCIENTIFIC
WORKS AS OBJECTS OF COPYRIGHT:
PROBLEMS OF THEORY
AND PRACTICE**

Monograph

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The monograph is devoted to the theory and practice of forensic examinations and expert research of scientific works as objects of copyright. This paper defines the main tasks, subject and objects of expert research of scientific works, establishes the key features of scientific works, classifies them, determines the methods and algorithm of relevant examinations and expert research, and substantiates the features of evaluating their results and criteria of forensic expert research. The monograph based on scientific achievements and generalizations of forensic activities of the Research Center for Forensic Intellectual Property of the Ministry of Justice of Ukraine, other research institutions of forensic science and independent forensic experts and legal scholars in the field of research of literary works of scientific nature.

The monograph recommended for scholars and experts who study scientific works as objects of copyright. In particular, the issue of identifying signs of plagiarism in monographs, dissertations, research reports, articles and other scientific papers.

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ЗМІСТ

INTRODUCTION	4
1. SCOPE OF MONOGRAPH	10
2. OBJECTS OF RESEARCH	13
2.1 The general concept of the object of judicial examination in the field of intellectual property	13
2.2. Objects of judicial examination of scientific literary works and their classification.....	21
2.2.1. The concept of a scientific literary work as an object of judicial examination on intellectual property	21
2.2.2. Classification and main types of scientific works	27
3. METHODS USED TO ACCOMPLISH EXPERT TASKS.....	34
4. THE EXAMINATION PROCEDURE	37
4.1. Preliminary (preparatory) research.....	37
4.2. Discrete (analytical) research	39
4.2.1. Establishing the creative character and originality in the work.....	41
4.3. Comparative research	45
4.4. Establishing the fact of the work’s use	49
4.4.1. Establishing the fact of the full or partial reproduction of a work.....	50
4.4.2. Establishing the fact of a remake of the work	54
4.4.3. Establishing the fact of inclusion of a work as an integral part into collections, textbooks, anthologies and encyclopedias	56
4.5. Assessment (synthesis) of the results of the conducted research and formulation of conclusions.....	57
5. FORMALIZING THE RESULTS OF EXPERT RESEARCH.....	58
6. LEGAL ACTS AND SCIENTIFIC RESOURCES USED FOR EXAMINATION OF SCIENTIFIC LITERATURE WORKS	63
LIST OF SCIENTIFIC SOURCES USED IN THE MONOGRAPH.....	72
REFERENCES	81

INTRODUCTION

The concept of copyright was established after the invention of the printing press by J. Gutenberg in the German city of Mainz in 1450. It had revolutionary consequences for the distribution of works, including scientific works [62, p. 82-85]. Already in 1500, according to N. Ferguson, in Germany alone there were more than 200 printing houses. In 1518, 150 printed works were published in German; in 1520 – 260, in 1520 – 570, and in 1524 – 990 [71, p. 105]. The emergence of printing works in the majority of European cities contributed not only to the publishing of the Bible in many languages but also to the rethinking of the philosophical heritage of ancient philosophers, and to the emergence of new literary and scientific works. Among them are the well-known works like *The Praise of Folly* (1509) by Erasmus of Rotterdam, *Utopia* by T. More (1516), and others.

The emergence and development of printing and book trade in Europe, as well as its commercial success, gave rise to the problem of reprinting works without the consent of authors and their legitimate publishers. Researchers on copyright issues have branded such illegal activity ‘counterfeiting’. ‘In a broad sense, the word *counterfeiting* means any infringement on copyright. In a narrower sense, counterfeiting means unlawful mechanical reproduction of someone else’s copyrighted work and constitutes only one special type of crime against literary and artistic property similar to plagiarism and illegal copying... Counterfeiting (*contrefacon, nachdruck, – or piracy, literary plunder* in English) is referred to in the Censorship Statute as ‘*unauthorized publication*’ [55, p. 64].

Counterfeiting contributed to the spread of plagiarism. During Classical Antiquity and the Middle Ages, literary borrowing was a common practice. As B. Romantsova writes, ‘.... in Antiquity, few people cared what Virgil had stolen from Terence, Eupolis from Aristophanes, Aristotle from Herodotus, Plato from Protagoras, and Cicero from everyone’ [49]. Medieval copyists who copied works by thinkers of Antiquity often omitted the name of the author and wrote their own names instead. However, already in the 17th and 19th centuries in Western Europe

and America, following the fixation of copyright and related rights in law ('The Statute of Anne' 1710 [58, p. 7], 'Saxon Mandate of 1773', etc.), plagiarism was defined as a misappropriation of works or their parts and copyright infringers became liable to prosecution in a court of law ('Donaldson vs. Beckett' case, 1774 [5, p. 353], etc.). Beginning with the 19th century and the development of science, plagiarism also spread to literary works of a scientific nature.

Over time, the problem of protecting copyright and related rights and counteracting their infringement became international. Therefore, in 1886 the Berne Convention for the Protection of Literary and Artistic Works, which is still in force, was drafted and adopted. [4] The provisions of the Berne Convention of 1886 were further developed in other international treaties (Universal Declaration of Human Rights of 1948, International Covenant on Economic, Social and Cultural Rights of 1966, and others) and documents (EU Directive 2001/29 of 29 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society) [1, p. 101], as well as in the national legislation of most countries of the world, including Ukraine.

The Constitution of Ukraine in Part 2 of Art. 3 states, *'Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State'* [27]. The constitutional rights and freedoms include intellectual property rights, including copyright. Thus, parts 1 and 2 of Art. 41 of the Constitution of Ukraine states: *'Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity'* [27]. The right of private property, including copyright, according to Part 1 of Art. 92 of the Constitution, are determined by laws of Ukraine.

Issues related to copyright, its objects and subjects, intellectual property rights to the work, forms of use of the work, as well as cases of the lawful use of the work without the consent of the author are regulated by the Civil Code of Ukraine (Articles 433-448 and others) [73], The Law of Ukraine *'On Copyright and Related Rights'* [40], and other laws of Ukraine.

Concurrent with this trend in 2016–2019 was the settlement of the issue of academic integrity and plagiarism prevention in scientific (academic) works in education law. In particular, the Law of Ukraine ‘*On Higher Education*’ in 2016 established the concept of ‘academic plagiarism’ and the consequences of it during the certification of applicants for scientific degrees (Article 6) [41]. And in 2017, this category was normalized in Part 4 of Art. 42 of the Law of Ukraine ‘*On Education*’ as follows: ‘*Academic plagiarism is the publication (in part or in full) of scientific (creative) results obtained by others, as the results of one’s own research (creativity) and/or reproduction of published texts (published works of art) by other authors without attribution*’ [47]. In addition, in Part 4 of Art. 42 of the Law of Ukraine ‘*On Education*’ the category of ‘self-plagiarism’ was also defined as ‘*...the publication (in part or in full) of one’s own previously published scientific results as new scientific results*’ [47].

The categories ‘academic plagiarism’ and ‘self-plagiarism’ are enshrined in the laws of Ukraine ‘*On Education*’ and ‘*On Higher Education*’; they have an administrative and legal nature and are aimed at ensuring academic integrity and ethics of scientific research and promulgation of its results. In this case, the category ‘academic plagiarism’ has a synthetic character, as it includes borrowing not only previously published texts or their parts, but also ‘*...scientific (creative) results*’ [41], which provides the ground for its broad interpretation [70]. In the longer term, issues related to academic plagiarism and self-plagiarism may be the subject of relevant expert research.

Further development of scientific and technological progress in recent centuries has contributed to an increase in the number of scientific works in Ukraine and abroad. In turn, the increasing prestige of science in the 21st century led to an increase in the number of defended theses in Ukraine. Thus, in 2015, 7283 ‘kandydat nauk’ or candidate of sciences (Ph.D.) and 1146 ‘doktor nauk’ (doctor habilitatus) dissertations were defended in Ukraine. Of these, 847 theses, i.e. more than one-tenth of the total number, were defended in the sphere of pedagogy [60]. According to the Ministry of Education and Science of Ukraine, from January 1, 1993, to June

30, 2016, 17659 'doktor nauk' diplomas and 153650 candidate of sciences diplomas were issued [20]. The dynamics of the increase in the number of defended theses continued in Ukraine in 2016-2019.

The increase in the number of theses and other scientific works in Ukraine, their availability on various electronic Internet resources, the liberality of the current legislation on the possibility of their use, in particular for educational purposes, contributed to the increase in the number of monographs, theses, scientific articles, and other works that contain borrowings from other works, often without a proper reference.

This situation is typical not only for Ukraine but also for many foreign countries, including EU member states, the USA, Canada, Japan, and others. For example, in the USA, every school annually deals with 50-70 cases of violations regarding academic integrity requirements for an average of 10000 students [2, p. 153–154].

The state and society create the conditions for the protection of copyright and the prevention of unlawful borrowing of scientific literary works. Thus, in 2017, the government of Ukraine approved the Regulations on the National Academic Text Repository, the resources of which after its completion should become '*...ancillary means for the examination of academic texts for plagiarism*' [37]. The number of software products aimed at detecting signs of plagiarism in scientific works is increasing [13, p. 68–69]. Institutions of civil society independently detect 'plagiarism' in the theses of scholars and other scientific works authored by officials of public authorities and local authorities, politicians and public figures [79, p. 661–664]. In the media and on social networks, information about plagiarized facts in the writings of scholars is disseminated. Although appropriate academic measures are not always applied, it should be noted that the attention of the scientific community to plagiarism and ways of providing evidence base is increasing [22, p. 92–106].

The consequences of plagiarism found in scientific works might not be limited to reputation losses and revoking of a scientific degree, as stipulated in Part 6 of Art. 6 of the Law of Ukraine '*On Higher Education*' [41], but can also result in lawsuits on copyright infringement. As a result, a person whose work contains

plagiarized materials from other authors may be liable to various types of legal prosecution: civil, disciplinary, material and criminal [22, p. 92–106].

Courts of general jurisdiction, including the Supreme Court, are now increasingly considering disputes over unlawful misappropriations (plagiarism) in scientific works (the ruling of the Supreme Court of January 18, 2018, in Case No. 757/16203/16-П etc.). However, during the pre-trial and judicial review of cases related to the illegal use of works of other authors, it becomes necessary to establish the facts that are relevant for the resolution of the case, in particular as to the full or partial reproduction of a certain work in another work, as well as to detect the signs of plagiarism in academic works.

In accordance with the regulatory content of Art. 1 and 7 of the Law of Ukraine ‘*On Judicial Examination*’, in order to provide opinions on issues that are or will be the subject of judicial proceeding, the law provides for the involvement of certified judicial experts who are employees of specialized state institutions, as well as judicial experts who are not employed by these institutions but possess special knowledge, and other specialists (experts) in the relevant fields of knowledge [48].

Since 2002, in the context of establishing the judicial examination of intellectual property rights, namely, the establishment of a relevant section within the SA&MC (Scientific Advisory and Methodological Council) on issues of forensic expertise at the Ministry of Justice and the establishment of the Scientific and Research Center of Judicial Examination on Intellectual Property of the Ministry of Justice of Ukraine [69, p. 18–19], a judicial examination of scientific literary works started to develop in Ukraine. Besides the aforementioned center, in Ukraine relevant research is carried out by Kyiv Scientific Research Institute of Forensic Expertise, Kharkiv Scientific Research Institute of Forensic Expertise named after Prof. Emer. M. S. Bokarius, Lviv Scientific Research Institute of Forensic Expertise, State Scientific Research Forensic Center (SSRFC) of the Ministry of Internal Affairs of Ukraine, Scientific and Research Institute of Intellectual Property of the National Academy of Legal Sciences of Ukraine, as well as by other judicial experts who are not employed by Scientific Research Institutes of Forensic Expertise.

Determining the circumstances of the case and the actual data on the properties, features, creation patterns and the use of scientific literary works as objects of copyright is carried out by experts within the expert specialty 13.1.1 – ‘Research related to literary and artistic works, etc.’ on issues which are listed in Chapter V ‘Examination of objects of intellectual property’ of Scientific and methodological recommendations on issues of preparation and commissioning of judicial examination and expert research provided in the Instruction on the commissioning and conduct of judicial examinations and expert research, approved by the Ministry of Justice of Ukraine on 8 October 1998 No. 53/5 [43].

During judicial examination and expert research, the characteristics of the objects being compared are examined in order to determine whether there are signs of creativity and originality in the work as well as in parts of the work that are of independent importance; signs of complete or partial reproduction of certain scientific works in other works are established, and other equally important tasks are carried out (for more details see *chapter 1 hereof*).

Generalization of the achievements of science and the practice of judicial examination on intellectual property issues, taking into account the experience of domestic judicial experts and scientists (O. Androshchuk, N. Behush, O. Holikova, O. Doroshenko, V. Drobiazko, N. Kisil, N. Klymova, P. Krainiev, N. Myronenko, S. Petrenko, K. Sopova, V. Fedorenko, H. Prokhorov-Lukin, O. Tverezenko, A. Shtefan, N. Yarkina, etc.), enabled Scientific Research Forensic Center of Intellectual Property of the Ministry of Justice within the framework of the Scientific and Research activity (*VII.1.1-2017/2*) to prepare, test and carry out ‘Methodology for implementing expert research of scientific literary works’, which defines the tasks, subject and objects of expert research of the mentioned works, methods and algorithms for conducting such expert research, the procedure of formalizing results, and also contains a corresponding source base.

1. SCOPE OF MONOGRAPH

The Monograph was developed for direct use by judicial experts in the process of researching scientific literary works as objects of copyright, which is conducted within the expert specialty 13.1.1 – ‘Research related to literary and artistic works, etc.’ The main provisions may also be used by persons who intend to obtain (confirm) the qualifications of judicial experts in this field, as well as by the staff of the pre-trial investigation bodies, by the court and the parties involved in the commissioning of examination (involvement of an expert) and the assessment of conclusions.

The subject of judicial examination of scientific literary works is constituted by the circumstances of the case and the factual data about the properties, features, regularities of creation and use of the mentioned literary works, established through the investigation of information carriers and other sources of information with the use of special knowledge, in order to give a conclusion on issues that are or will be the subject of judicial proceedings [58, p. 30].

The objects of examination of scientific literary works are literary academic works and/or other objects manifested in a certain material form (on paper or electronically), embodied in material media and sources, whose features are investigated with the use of special knowledge in order to make a conclusion on issues that are or will be the subject of proceedings.

Subjects of examination of scientific literary works may include:

- Theses;
- Monographs;
- Scientific and Research Activity Reports;
- Articles;
- Collections;
- Anthologies;
- Encyclopedias;
- Reference books;

- Dictionaries, etc.

A detailed description of the objects that may be subject to research using this Monograph is given in the next chapter.

Subjects of judicial and expert activity are judicial experts who are employees of State Scientific Research Institutes of Forensic Expertise (listed in the *Introduction*), as well as judicial experts who are not employed by these institutions but are qualified as judicial experts in the field of intellectual property, specialty 13.1.1 – ‘Studies related to literary, and artistic works, etc.’; and other specialists (experts) in the relevant fields of knowledge who can carry out judicial expert research in the manner and under the conditions determined by the Law of Ukraine ‘*On Judicial Examination*’ [48]. As of 2018, there were 41 certified judicial experts in the specialty 13.1.1 in Ukraine [69, p. 40].

The main tasks of judicial examination accomplished by this Monograph are as follows:

- to identify the subject of the study or part of it as creative and original;
- to establish the fact of reproduction of a part of a scientific work in the work of another author which is of independent importance;
- to establish the fact of full or partial reproduction of earlier scientific works of other authors when creating the studied academic work;
- to determine the use of the copyright object (reproduction of the whole work or its part which has an independent significance; remaking, translation of the existing work, inclusion in collections, encyclopedias, anthologies, and other composite works);
- to establish the fact of remaking of a scientific work and the way it was remade.

Most common for judicial examination on intellectual property are the *diagnostic tasks* during the accomplishment of which the compliance of the studied objects with certain conditions necessary for granting them legal protection is analyzed. Signs of intellectual property rights are also identified [23].