СУДОВА ЕКСПЕРТИЗА ОБ'ЄКТІВ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

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НАУКОВІ ТВОРИ ЯК ОБ'ЄКТИ СУДОВОЇ ЕКСПЕРТИЗИ З ПИТАНЬ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ: ГЕНЕЗА, ПОНЯТТЯ ТА КВАЛІФІКУЮЧІ ОЗНАКИ

Анотація. У публікації сформовано теоретичні та методичні засади поняття та кваліфікуючих ознак літературних творів наукового характеру, як об'єктів судової експертизи з питань інтелектуальної власності. Досліджені витоки перших друкованих наукових творів в епоху Реформації та Відродження (М. Коперник, Г. Галілей, Й. Кеплер, І Ньютон, Д. Гюйгенс і ін.), поява яких стала продовженням «видавничої революції І. Гутенберга» та прологом наукової революції в Європі. Звернено увагу, що поширення наукових творів у XVII-XVIII ст. в Європі та Америці зумовило постановку питання про авторські права на цей вид творів і їх правовий захист. Найбільш ефективним виявився судовий захист авторських прав на наукові твори. Починаючи з XXI ст. важливим складником механізму захисту авторського права на наукові твори стає судова експертиза об'єктів права інтелектуальної власності.

Встановлюються та характеризуються основні змістовні та формальні ознаки наукових творів, як об'єктів авторського та об'єктів судової експертизи. Наголошу-

ється, що науковий твір має бути: результатом наукової творчості, а тому являти собою певний науковий результат; вираженим у певній об'єктивній формі (дисертація, монографія, науковий звіт, наукова стаття, наукова доповідь і ін.), яка підлягає відтворенню.

Обґрунтовано висновок, що літературний твір наукового характеру або ж науковий твір, як об'єкт судової експертизи з питань інтелектуальної власності, це одержаний в результаті цілеспрямованої творчої наукової або науково-технічної діяльності автора-науковця оригінальний науковий результат, втілений у будь-якій матеріальній формі (монографія, дисертація, науковий звіт, наукова стаття, наукова доповідь та ін.), на яку поширюється правова охорона, передбачена чинним законодавством про авторське право, і який може відтворюватися.

Ключові слова: наука, науковий твір, кваліфікуючі ознаки наукових творів, судова експертиза об'єктів інтелектуальної власності, дослідження літературних творів наукового характеру.

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SCIENTIFIC WORKS AS OBJECTS OF FORENSIC EXAMINATION ON INTELLECTUAL PROPERTY: GENESIS DEFINITION AND QUALIFYING FEATURE

Abstract. The article defines theoretical and methodological foundations underlying the concept and qualifying features of literary works of scientific nature as objects of forensic examination dealing with intellectual property issues. It examines the origins of the first printed scholarly works in the Reformation and Renaissance period (M. Copernicus, G. Galilei, J. Kepler, I. Newton, Ch. Huygens etc.), whose appearance continued the "publishing revolution of J. Gutenberg" and became the prologue to the scientific revolution in Europe. It is pointed out that the dissemination of scholarly

works in Europe and America in the 17-18th century led to the discussion of copyright issues with regard to this type of writings and legal protection of author's rights. Judicial protection of copyright proved to be the most effective type of protection of scientific works. Starting from the 21st century, legal enquiry of intellectual property rights is an important component of scholarly works copyright protection mechanism.

The paper establishes and characterizes basic substantive and formal features of scientific works as objects of copyright and objects of forensic examination. It emphasizes that a scientific piece of writing should be: the result of scientific work, therefore representing a certain scientific result expressed in an objective form (dissertation, monograph, scientific report, scientific article, scientific presentation etc.) which is reproducible.

The article draws and substantiates the following conclusion: a literary work of scientific nature, or a scientific work seen as an object of forensic examination concerning intellectual property is the result of purposeful scientific or scientific-technical work of its author, a scientist, and is embodied in any material form (monograph, dissertation, scientific report, scientific article, scientific presentation etc.) which is covered by legal protection provided by applicable copyright law as well as reproducible.

Keywords: science, scientific work, qualifying features of scientific works, forensic examination on intellectual property objects, examination of literary works of scientific nature.

General formulation of the question under discussion. Copyright was established in Europe after J. Gutenberg's (1397-1468) invention of printing press, which first started working in 1450 in the German city of Mainz and created revolutionary consequences for the distribution of works, including those of scientific nature [1, c.80-92]. The first book printed by J. Gutenberg after five years' work (1450-1455) was a 1300-page long Bible, 180 copies of which were printed. The invention has opened up new perspectives for book publishing and book trade, turning them from an elite hobby of wealthy people into a profitable craft.

Already in 1500, according to N. Ferguson, in Germany alone there were more than 200 printing houses; in 1518 there were 150 printed works in German, in 1519 260 such works were printed, 570 in 1520, and 990 in 1524 [2, c. 105]. The emergence of printing houses in most major European cities not only resulted in the publication of the Bible (both in Latin and in many other languages, including German, English, French etc.) and in the critical rethinking of the philosophical heritage of the thinkers of Antiquity, but also led to the emergence of new literary and philosophical works. To this day, such examples of this category of writings as Desiderius Erasmus of Rotterdam's *In Praise of Folly* (1509), Thomas More's *Utopia* (1516) and others remain well known.

"Gutenberg's publishing revolution" was a prelude to yet another kind of revolution, the scientific one. The latter was preceded by the founding of science in its modern sense. According to A. Giddens and P. Sutton, the very concept of "science" emerged as *"… a description of knowledge as such, but by the fourteenth century in Europe, science or 'natural philosophy' was used in a more limited way to describe knowledge that was written down and recorded"*[3, c. 58]. It is believed that science, separated from medieval meta-

physics and "learning" as such, originated with M. Copernicus' research on the heliocentric system of the universe. His famous work *De revolutionibus orbium coelestium* was published in Nuremberg in 1543, but prohibited from 1616 to 1833 because of the ban imposed by the Inquisition.

The discovery made by M. Copernicus led to the revolutionary scientific works of G. Galilei (O*n Motion*), J. Kepler (*The New Astronomy*) and others. Simultaneously, revolutionary scientific transformations of the time found their counterpart in processes taking place in social sciences, as evidenced by the works of F. Bacon (*The Advancement of Learning* (1605), *Wisdom of the Ancients* (1609), *New Method* (1620) and other writings). However, these were mostly philosophical works engaged in rethinking the legacy of ancient philosophers.

In science studies, it is considered that the first purely scientific work standing apart from metaphysics and natural philosophy and crucial to the "scientific revolution" in Europe was I. Newton's *Mathematical Principles of Natural Philosophy*, published in 1687. In response to this work, Ch. Huygens published in 1690 his *Discourse about gravity* [4, c. 255]. Such a kind of practice contributed to the establishment of scientific discussions conducted through the pages of books. Since then, scholarly works have spread and received legal protection, first in Europe and later throughout the world.

Starting in the 17th century, due to the development of universities (Oxford, Cambridge, Trinity College etc.) and scientific societies (Accademia del Cimento, 1657, Royal Society of London, 1660, Paris Academy of Sciences, 1666 [4, c. 475]) as well as to the improvement of printing technology and the expanding network of printing houses based on J. Gutenberg's invention, scientific works began to embody and disseminate the achievements of science and technology. This contributed not only to scientific progress, but also to the creation of mechanisms for the protection of copyright to scientific works. At the same time, copyright to a scientific work, just as copyright to works of literature and art, was not only meant to ensure the right of ownership for a certain period, but also, as V. Stasevich wrote, "*… to bring forth, from the crowd of labourers, scientists and artists who would take up an important place in the revered group of owners…*" [5, c. 18].

Another achievement of the scientific revolution which took place half a millennium ago was the development of concepts of science and the results of scientific activities. Of course, even in our time the concept of science cannot be narrowed down to a single definition and has many meanings and interpretations. In particular, as Ukrainian scientists point out, "*The concept of 'science' covers both the activity aimed at obtaining new knowledge and the result of this activity – the sum of knowledge acquired over a period of time, whose totality creates a scientific worldview*" [6, c. 50].

The Great Encyclopaedic Legal Dictionary defines science as *"…the sphere of human activity whose function is to develop and theoretically systematize the objective knowledge of reality. It is also a form of social consciousness, an integral part of the spiritual culture of society. The term is also applied to particular fields of science*" [7, c. 501-502].

Summarizing, it can be argued that science is the purposeful intellectual activity of a scientist or a group of scien-

tists aimed at the study of patterns in the development of nature, human beings, society and state, whose results are embodied in ideas, concepts, theories, doctrines, teachings and implemented as new knowledge for the purpose of social progress. The main achievements of science are objectified in the works of science.

To date, copyright to a scientific work, its objects and subjects, the forms of using a scientific work as well as cases of lawful use of a scientific work without the author's consent are regulated by the Civil Code of Ukraine (Articles 433-448 and others) [8], Law of Ukraine *On Copyright and Related Rights* [9] and other Ukrainian laws. At the same time, present-day reality demonstrates that protection of copyright to scientific works does not prevent the misuse of scientific works and the infringement of copyright to such works from happening.

Cases of copyright infringement with regard to scientific works are often resolved in a court of law. In many instances, court decisions in such cases are preceded by legal enquiry conducted in category 13.1.1, "Research related to literary works, works of fiction and others". This causes legal experts certified in this category to solve a number of tasks. One of them is the task of identifying and assessing a scientific work as an object of legal enquiry on intellectual property.

Analysis of latest research and publications bears witness to scientists' considerable and long-standing interest in the problems of research on copyright objects, including scientific works of literary nature. This is evidenced by V. Spasovich's work *Copyright and Counterfeiting* (1865) [5], the publications of such contemporary Ukrainian scholars as O. Holikova [10], N. Kisil [11], V. Fedorenko [13, 14], F. Shtefan [15] and others.

The work of the authors of this publication on the "Methodology of Expert Research on Literary Works of Scientific Character" [16], undertaken together with N. Kisil, N. Klimova, N. Yarkina and others, has been important both in terms of its contribution to the methodology of legal enquiry and expert research on scientific works in Ukraine and as a basis for this article. In February 2020 the aforementioned work will be presented for consideration and approval of the Coordinating Council on Problems of Forensic Examination at the Ministry of Justice of Ukraine.

The overall purpose of this study is to formulate theoretical and methodological foundations behind the concept and qualifying features of scientific works as objects of forensic examination concerning intellectual property.

Main material presentation. As is known, *works of science* are works whose main aim is to create and systematize objective knowledge about reality; this includes works of scientific literature [17, c. 53]. Scientists also use the adjective "scientific" to refer to such works, stating that "*A work of science is a work* where all questions are considered based on the scientific approach" [18, c. 226]. In its turn, the word "*scientific*" is defined in the *Ukrainian Explanatory Dictionary* as "*1.Associated with science, research*; … *2. Based on the principles of science*" [19, c. 699]. This, in our opinion, allows to use the concepts (definitions) "literary work of scientific nature", "a work of science" and "scientific work" as synonyms in expertology and forensic examination on intellectual property rights objects.

Scientific works should be distinguished from other works that are subject to copyright and, accordingly, to legal enquiry. Thus, copyright law contains a principle whereby scientific works are differentiated from other types of works as follows: "*…all types of works, except fiction, such as, for example, works on engineering, reference books, popular science works or practical manuals. At the same time, copyrighted scientific works do not include scientific inventions, discoveries, scientific research*" [18, c. 226].

The main categories whose content should be considered while examining literary works of scientific nature as objects of forensic examination are standardised in Art. 1 of the Law of Ukraine *On Scientific and Scientific-Technical Activities* dated November 26, 2015. Here are the most important ones:

"…*scientific publication* – a work (a generalising scientific work, a monograph, a collection of scientific papers, a collection of documents and materials, theses and materials of scientific conferences, a dissertation abstract, a preprint, a dictionary, an encyclopaedia, a scientific reference work or index, a scientific periodical etc.) of scientific nature which has undergone the procedure of scientific review and approval for publication by a scientific (scientific, scientific-technical, technical) council of a scientific institution or higher educational institution and editorial work, produced by printing, stamping or otherwise, containing information about the results of scientific, scientific and technical, scientific and educational, scientific and organizational activities, theoretical or experimental research (research publications);

scientific (scientific-technical) work – scientific research and scientific-technical (experimental) studies, conducted with the purpose of obtaining scientific, scientific-technical (applied) result. The main types of scientific (scientific-technical) work are research, developmental, design, technology researching, technological, exploratory and design and survey works, production of prototypes or batches of scientific and technical products, as well as other works related to bringing new scientific and scientific and technical knowledge into practical use;

scientific result – new scientific knowledge obtained in the process of fundamental or applied scientific research and recorded on information carriers. Scientific result may take the form of a report, a published scientific article, a scientific presentation, a scientific report on research work, a monographic research, a scientific discovery, a draft of a statutory act, a normative document or scientific and methodological documents whose preparation requires carrying out relevant scientific research or contains a scientific component etc…" [20].

Considering the content of the provisions in current legislation on science, we consider that the result of an individual's purposeful intellectual activity embodied in a particular work can be attributed to the "sphere of science" provided it meets certain criteria. In particular, it must:

1) be obtained as a result of purposeful scientific or scientific and technical activity, in the forms defined by current legislation (research, developmental, design, technological, exploratory and design and survey works, production of research samples or batches of scientific and technical products, as well as other works aimed at obtaining scientific results);

2) objectify the scientific result – the sum of new knowledge about the patterns in the development of nature, society, human beings, state, about their interconnection, obtained in the process of fundamental or applied scientific research;

3) be recorded in any material form: in the form of a report, scientific work, scientific presentation, scientific report on research work, monographic research, scientific article etc., on any material medium (paper, electronic, other) [21, c. 78]. In addition, the relevant form of scientific work must be reproducible.

Not only substantive but also formal qualifying features are important for scientific works. Literary works of scientific nature are characterized by certain features distinguishing them from other works as objects of copyright. The main features were identified and systematized by the authors of this study in their previous publications [13, 14], but are now subject to clarification. Hence, a work is considered "scientific" if:

- *in terms of its nature (origin)* it is the result of purposeful professional scientific activity, and its author (creator), is a young or experienced scientist with a relevant scientific status (scientific degree, academic title, academic position, affiliation with a state or public scientific body etc.);
- *in terms of its content (the subject of scientific research)* it is research relating to a specific established field of science, a group of specialties and a specialty (physical and mathematical sciences, chemical sciences, biological sciences, geological sciences, technical sciences, (engineering science, industrial engineering, aviation and space technology etc.), agricultural sciences, historical sciences, economic sciences etc.) whose exhaustive list has been approved by the Ministry of Education and Science of Ukraine [22];
- *in terms of structure* it has a clear, informative, formal internal structure. *In terms of content* it has a defined research purpose, tasks, subject and object (objects), original methodology of scientific research, theoretical and theoretical and methodological generalizations (conclusions, provisions) and practical recommendations (for example (in law) recommendations on improving law-making and enforcement activities). *In terms of form* it adheres, based on requirements to a specific type of scientific work (monograph, dissertation, scientific report, scientific article, master's thesis etc.), to compulsory division into subject headings (for example, purpose, task, object and subject of research, research methodology, scientific novelty etc. for dissertations). In most scientific works, consistent division of scientific material into completed chapters, parts, sections, subsections, articles, paragraphs using numbers or letters is carried out;
- *in terms of scientific material presentation method* it presents a systematic, consistent and clear presentation of material employing scientific-categorical apparatus, including special scientific terminology characteristic of the field of knowledge to which the scientific work belongs. The work contains a complete and objective analysis of the object and subject under study, and this analysis employs scientific methodology;
- *in terms of text presentation style* it is delivered in the third person, contains no emotionally expressive vocabulary,

no dialogue, except for quoted dialogue that presents the object or subject of scientific research (for example, in the study of a specific literary work). The text of the scientific work and its annexes often contains graphs, tables, diagrams, and other graphical representations of the described research processes and their results;

• *in terms of requirements concerning citation and its types and styles* it contains clear references to original sources (author, title of the work, publisher, place and year of publication etc.) and clearly indicates the beginning and end of the citation. Citation itself should adhere clearly to the types and styles of citation adopted in modern science. For example, Vancouver style, used in medicine and physical sciences; Harvard Referencing Style, commonly used in social sciences and humanities; American Institute of Physics (AIP Style) style, used in physics; ACS style used in chemistry and other natural sciences [24] etc.;

• *in terms of ordering the sources of scientific research* it contains a list of used sources ordered according to a selected principle (alphabetical list of sources or a list compiled based on the order in which they are referenced) and designed in accordance with international, regional or national standards (for example, in accordance with DSTU 8302: 2015, effective in Ukraine as of July 1, 2016);

• *in terms of international classifiers* it is identified by the following international classifiers:

a) *the Universal Classifier UDC* (*Universal Decimal Classification*), which is an international system of document classification. UDC, according to the State Scientific Institution "Ivan Fedoriv Book Chamber of Ukraine", "*...meets the most essential requirements to classification (international character, universality, rememberability) and makes it possible to reflect the latest achievements of science and technology without any significant changes to its structure*" [25];

b) *the International Standard Book Number* (*ISBN*), which is a universal identification code affixed to books and brochures, irrespective of the manner in which they are produced, distributed, circulated or printed. ISBN accompanies published materials starting from the moment they are produced and "*... uniquely and unmistakably identifies only one non-periodical edition by one particular publisher, is unique and used only for that edition. ISBNs are the key to finding the sought-after editions published anywhere in the world within automated systems on national and international levels*" [26];

c) *the DOI* (*Digital Object Identifier*), which is used as part of the standard ISO 26324:2012 to identify electronic versions of scientific works. The DOI index is used, in particular, in international scientific databases (to determine the permanent email address of a specific scientific article – URL (Uniform Resource Locator);

d) *indexes of scientific databases (platforms)* of professional electronic scientific publications (Scopus, Web of Science, SENSE, Copernicus etc.) that contribute to the parameterization of scientific works, mainly scientific articles and monographs, and to their promotion and commercial dissemination;

e) *indexes of scientific activity within search networks for scientists* realising the principle of open access to scientific works available on the Internet (CiteSe-

erX, getCITED, Academia.edu, Google Scholar etc.). For instance, Google Scholar use the h-index, or Hirsch index for scientists. The need to boost the h-index, as one of the indicators of scientific efficiency, motivates scientists to provide access to their works on the Internet and indirectly protects copyright to scientific works, since open access to a scientific work allows to examine it from the point of view of plagiarism.

Today there are also other international, regional, national and specialized classifiers of scientific works, using which allows to identify a specific scientific work as a copyright object. New classifiers of scientific works are emerging, old ones become obsolete. For example, until March 22, 2017, the Library and Bibliographic Classifier (LBC), created in the 1920s in the former USSR, was also utilised in Ukraine. These days, though, it is no longer used since it is outdated and presents a duplicate of global international classifiers.

The abovementioned list of features of a scientific work as a copyright object is, in our view, fundamental, but not exhaustive. It is well known that a scientific work becomes a copyright object and an object of forensic examination in the field of intellectual property after its materialisation in an objective form, provided that it meets two main criteria. Such a scientific work should:

1) be the result of scientific work, and therefore represent a certain scientific result;

2) be realised in a certain objective form (dissertation, monograph, scientific report, scientific article, scientific presentation etc.) which is reproducible.

At the same time, such qualifying elements of a literary work of scientific nature as its creative character and originality can be applied either to the content of a scientific work or to its form, or simultaneously to both form and content. This provision has long been known in connection with copyright. Dwelling on it, V. Spasovich wrote more than 150 years ago: "*Works cannot be required to be absolutely original... It is only required that the work should not be a simple reproduction of another's work, that is, that the author, even while using other people's works as material, should imbue the work with something personal, be it at least the arrangement of the borrowed material, the system of its arrangement. Also entitled to copyright is a translator of a certain work into another language, with regard to the translation, which does not prohibit other persons from making new translations of the same work... a compiler of almanac, collection, textbook and other educational books assembled from articles or fragments from other works, a dictionary compiler, a compiler of a geographical map, logarithmical table, historical table, guidebook...*" [5, c. 42].

The term "original", which applies to a scientific work as a copyright object, is related to the term "new", which means one that has recently emerged, appeared, has never existed, has not been used, has been evolved, created. However, such a qualifying feature as "novelty" is absorbed by originality in forensic examination on intellectual property rights objects. In this sense, we should agree with D. Lipszyc that the ideas embodied in the work may be as old as the world, but this does not prevent the work from being original, since copyright agrees that intellectual creativity can appear on the basis of pre-existing elements [27, p. 58].

Obviously, the scientist creating a scientific work is obliged to use the conceptual and categorical apparatus which has already been developed in the relevant sphere. In addition, the structure of dissertations, research papers and other types of scientific works includes such compulsory elements as the statement of scientific novelty and analysis of previous research on the subject.

Conclusions and prospects for further development. When defining the term "scientific work" in the field of forensic examination concerning intellectual property objects, the provisions of applicable legal acts and national documents (standards) should be taken into account. These are, first of all, the provisions of the Resolution No. 72 of the Cabinet of Ministers of Ukraine as of January 18, 2003 *On the minimum rates of royalty for the use of copyright and related rights* which specify that all types of scientific literature are recognized as such that are produced by creative work, original in nature, aimed at preserving scientific results and subject to copyright [28], and therefore may be objects of forensic examination on intellectual property matters.

Also, in 2018-2019, working at the Research Center on Forensic Examination on Intellectual Property affiliated with the Ministry of Justice of Ukraine, Subcommittee No. 5 on the Examination of Intellectual Property Objects (TC 192 Forensic Examination) prepared a draft of the national document (ND) on DSTU XXXX: 20XX *Forensic Examination on Intellectual Property Rights Objects. Terms and concepts*. In particular, it defines the following concept of a work for the purposes of research within category 13.1.1: "A work (composition) is defined as a result of author's creative activity, a product of human mind, embodied in an objective reproducible form" [29].

Summarizing the results of this study, we conclude that a literary work of scientific nature, or a scientific work, as an object of forensic examination on intellectual property, is an original scientific product obtained as a result of purposeful creative scientific or scientific-technical activity of its author, a scientist, embodied in any material form (monograph, dissertation, scientific report, scientific article, scientific presentation etc.) which is eligible for legal protection under current copyright law, and which can be reproduced.

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