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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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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 (*contrefaçon, 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-ц 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].

However, when considering certain categories of disputes, there arises a need to identify the individually characteristic features inherent in the work under investigation and to establish whether these features are present in another object. To this end, the tasks of the identification plan are accomplished.

Identification tasks for the study of scientific literary works are to identify the individually characteristic set of features of the examined object (i.e. scientific literary work), signs of a copyright object and signs of belonging to a particular type of scientific literary work.

Quite often, the aforementioned expert activities involve the need to solve intermediate and ancillary tasks, so they are of mixed nature. This applies, for example, to the identification of signs of the reproduction of a literary work and determining whether such a reproduction has a creative component (creative character).

In judicial examination, the tasks in each case take the form of questions.

An approximate list of questions that an expert may be asked to decide upon is provided in Chapter V 'Examination of objects of intellectual property' of academic and methodological recommendations on the preparation and commissioning of judicial examination and expert research:

- Is the research object (*title*) (or a part of it that can be used on its own) the result of creative work according to the information provided in the case file?
- Does the research object (or a part of it that can be used on its own) contain the signs of the copyright object according to the information provided in the case file?
- Is the work (*title 1*) a reproduction of the work (*title 2*)? If so, is this remaking creative?
- Is the work (*title 1*) a translation of the work (*title 2*)? If so, is this translation creative?
- Was there a reproduction of the work (*title 1*) (or a part of it that could be used independently) when creating the work (*title 2*)? [43]

This list of questions is not exhaustive. Due to the accumulation of expert practice and the development of methodological support for judicial and expert activities in the field of intellectual property, appropriate changes and additions are being made to the list of questions of this type of judicial examination. This should be taking into account when formulating questions that are presented for examination or when changing these questions.

Questions that an examination of scientific literary works has to decide upon can also be formulated as follows:

- Does a piece of the scientific work have independent meaning or is it original?
- Is the work (*title of work 1*) included as an integral part of the collection, encyclopedia, etc. (*title of work 2*)?
- Does the study object (or a part of it that can be used on its own) contain signs of plagiarism according to the information given in the case file?

In this Monograph, attention is paid to the peculiarities of conducting research of the most common expert tasks submitted to the examination of scientific literary works.

According to established judicial and expert practice, the foremost task of the judicial expert is to establish the fact of full or partial use (in particular, by means of reproduction) of a particular scientific work in the creation of another scientific work and to identify the signs of creative character and originality in the scientific work. Such tasks are solved in virtually every examination related to scientific literary works.

2. OBJECTS OF RESEARCH

2.1 The general concept of the object of judicial examination in the field of intellectual property

Each type of examination in the field of intellectual property shall establish the factual data and circumstances of the respective objects of intellectual property rights. It should be noted that the concept of *the object of intellectual property rights*

and *the object of judicial examination in the field of intellectual property* are different and should not be confused.

Objects of intellectual property, depending on their scope, are conventionally divided into three groups: a) the objects of industrial property; b) the artificially selected non-traditional objects of intellectual property; c) the objects of copyright and related rights. This Monograph applies to the objects of intellectual property such as scientific literary works relating to copyright.

The essence of the concept of *the object of judicial examination* in specialized academic literature is ambiguous. In the 'Dictionary of Basic Terms of Judicial Examination', *the object of examination* (of the expert research) refers to the materialized sources of information defined by criminal or civil law [54, p. 53], i.e. the materials of criminal or civil cases. Objects of the examination are pieces of evidence, materials or fragments from the scene, specimens, and other information contained in the case file.

Other scholars consider that the object of expert research is constituted by a material object that contains the information necessary for the solution of the expert's task. It is noted that the objects of judicial examination, depending on the type and form of the proceedings, are living persons, documents, material pieces of evidence, specimens, information about objects contained in case files, etc. [59, p. 28].

Meanwhile, the vast majority of authors believe that both the materialized sources of information (documents) and materials (things and their totality) may be object of judicial examination [33; 78].

Depending on the purpose of the information carrier, scholars distinguish the following objects of judicial examination:

- objects under study;
- comparative materials (specimens, standards);
- other case files containing information relevant to the subject matter of the examination.

The concept of *the object of judicial examination in the field of intellectual property* is sufficiently explained in modern Ukrainian academic and educational

literature [34; 58]. This Monograph provides only general concepts necessary to understand the properties of objects to be examined by a judicial expert.

When considering the concept of *an object of judicial examination in the field of intellectual property*, it is necessary to consider the nature of the concept of *the object of intellectual property* in general. It is well known that objects of intellectual property are inherently intangible objects. Their use is not related to the physical possession of tangible things in which works, i.e., objects of intellectual property, are embodied.

The Constitution of Ukraine in Part 1 of Art. 41 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]. According to paragraph 1 of Part 1 of Art. 92 of the Constitution of Ukraine, human and citizens' rights and freedoms, the guarantees of these rights and freedoms are determined exclusively by the laws of Ukraine.

According to Part 1 of Art. 418 of the Civil Code of Ukraine, *'Intellectual property right shall be the rights of an entity to the results of intellectual, creative activity or to another object of intellectual property right established by this Code and by the other law'* [73].

Thus, the right to intellectual property is one of the fundamental human rights. This right is standardized and guaranteed by the state in the Constitution and laws of Ukraine and is comprised of the ability to own, use and dispose of the results of one's intellectual, creative activity in academic, literary, artistic, and other fields.

On the other hand, the object of expert research is a category of the material world that has a definite legal framework of its existence. Obstacles to the free use of the object in question are restrictions imposed by law. Certain persons are entitled, during a specified period, to use, grant permission to use or prohibit the use of the intellectual property that has been protected.

However, the relevant legal framework can be extended only to objects that actually exist. For intangible objects there are no procedural provisions. Only tangible objects can be processed and made available to the court expert, and only

with respect to them the court expert is competent. This definition of the object is indirectly reflected in the content of paragraph 3.2. of the Instructions on the commissioning and conduct of judicial and expert research state, ‘...*the expert institution (expert) shall be provided with the following: the document on the commissioning of the examination (involvement of an expert), objects, specimens for comparative research and, at the request of the expert, case materials (inspection protocols with appendices, protocols for the removal of physical evidence, etc.)*’ [43].

Considering the essence of the concept of scientific literary works as objects of judicial examination, it is necessary to take into account their intangible nature and the peculiarities of the process of primary material embodiment carried out by the creator, whereby an intangible object (work) is granted a certain material form which allows reproduction. Accordingly, the objects of judicial examination in the field of intellectual property can be separated into the following groups:

- physical evidence – material information carriers which contain intangible objects;
- documents – objects that contain legally relevant information about intellectual property;
- specimens – material information carriers which contain intangible objects used for comparative research;
- case materials that contain information about the objects being investigated.

Intellectual activity is the mental creative work of a person in the field of science, technology, literature, art, industrial design, design, etc. This is the process and the end result of creating a work.

In this regard, the dictionary ‘Intellectual Property’ states, ‘*The work is the result of the creative activity of the author, the product of the human mind*’ [19, p. 224]. V. Serebrovskiy’s work provides the following definition of this term, ‘*A work is a set of ideas, thoughts and images that have been embodied in the author’s creative activity in a form accessible to the human senses that allows reproduction*’ [53, p. 31].

In the second edition of the national document draft (ND) and the formation of the case of the national document (ND) DSTU XXX: 20XX ‘Judicial examination of objects of intellectual property rights. Terms and Definitions’, prepared by Subcommittee No. 5 on the ‘Examination of Objects of Intellectual Property Rights’ of the technical committee 192 ‘Judicial Examination’, it is stated that, ‘The work (*composition*) is defined as the result of the author’s creative activity, the product of the human mind, expressed in objective reproducible form’ [36].

Therefore, a work as a result of creative activity is an intangible object. The objects of legal protection become works only if they are expressed in a certain material form and in compliance with all legal conditions. It should be noted that copyright protects only those creative results that have objective novelty, that is, are unique.

In its turn, a scientific work becomes an object of copyright starting from the moment of its manifestation in an objective form on condition that it is the result of the creative activity of the author and is original. That is, scientific works have to meet two basic criteria:

1) to be the result of scientific creativity, and therefore to represent a certain academic result;

2) this result must be expressed in a certain objective form, namely, it has to be embodied in a scientific literary work.

The Methodology for implementing expert research of scientific literary works, registered with the Ministry of Justice of Ukraine on March 2, 2012 (registration code 13.1.1.01), describes the essence of the concepts of ‘creative nature’ and ‘originality’ [32]. In particular, it states that in order for a judicial expert to make a decision on whether a particular literary work has signs of originality and creativity, it is first necessary to determine what kind of works the object under research belongs to, since the essence of the concept of ‘originality’ in relation to literary and artistic works and scientific literary works will be different. Thus, E. Havrylov noted that by their nature works of a scientific nature differ significantly from works of fiction and art: the essence of scientific works is expressed by a

system of concepts and the content of artistic works by a system of images [12, p. 105].

The indication of creativity, as V. Ionas once noted, is constituted by ‘productive thinking’. According to the scientist, ‘...the difference between the original production of an idea (creativity) and its reproduction lies in the fact that the reproduction is carried out on finished specimens that were previously created in the process of original production’ [16, p. 17].

The unity of form and content of an academic work is revealed through the set (complex) of elements of form (language, order of presentation, material in general and its separate sections, logic, method of expressing ideas) and content (ideas, methods, observations, experiment, hypotheses, deductive and inductive conclusions, empirical generalizations, theories, laws) [74]. The originality and uniqueness of the combination of these elements in a particular work will always testify to the creative nature of its creation.

Based on the aforementioned feature of creativity, V. Ionas distinguishes between ‘creative works’ that are the result of productive thinking and ‘non-creative works’, which are composed by the reproduction of already prepared thoughts [17, p. 9–10]. In practice, the criterion of creativity is realized as establishing the fact of independent creation of a scientific work. That is, there is a kind of presumption of creative content as the most productive mental activity of the researcher, as well as its results, embodied in scientific works.

An important qualifying feature of a scientific work is its originality. In particular, E. Havrylov once claimed that the term ‘original’ means primary, created as a result of independent creative work, not borrowed, unlike the others, peculiar, unusual [10, p. 25-30].

Modern researchers often use the term ‘original’ in order to describe a copyrighted work [31; 29]. Its lexical meaning derives from the fact that it is a work ‘...which is not a copy, or a forgery, genuine, authentic’ [61, p. 808].

In addition to the original content of a scientific work embodied in a literary form, its characteristic feature is the original verbal and/or graphic form which the

content takes. As V. Ionas noted, a scientific work, on the one hand, is a written academic work, that is, a literary work of academic content, and on the other hand, it is the academic achievement of a scholar which is the essence of a literary work [17, p. 85, 86].

Therefore, scientific literary works may include:

- new manifestation in a new form or interpretation of already existing academic views (known content);
- critique of existing academic views, which is an original academic work with new content outlined in a new form.

It should be noted that in its essence, the term ‘original’ relates to the term ‘new’, that is, one that has recently emerged, appeared, one that did not exist before, was not used, selected or created.

Because of the above, in addition to the creative nature and originality, researchers often highlight academic novelty as a qualifying feature of an academic work. For example, O. Ioffe noted that a distinguishing feature of a creative act is its qualitative novelty; human thought processes reflect the surrounding reality in the form of concepts or images; the creative act is manifested in the novelty of these concepts and images, or in the novelty of their embodiment, or in the novelty of the former and the latter. This novelty is inextricably linked with the uniqueness of the author’s work, which is the direct outcome of the creative abilities of its creator [18, p. 5–7]. E. Havrylov defined qualitative novelty as an integral consequence of human creative activity [12, p. 83]. According to B. Antymonov and K. Fleischitz, novelty (including that of a scientific work) *may consist in the novelty of its content, in the novelty of its form in which not only new, but also already known content can be presented* [3, p. 98].

According to O. Serheiev, in copyright the characteristic of novelty is completely absorbed by the characteristic of creativity [50, p. 41]. Unlike rules in patent law, where novelty is a prerequisite for granting patent protection, a work does not have to be necessarily new. It is sufficient that it be original or individual in character and reflect the identity of the author, and in science, it must reflect the author’s scientific worldview, the level of scientific knowledge.

In particular, D. Lipszyc also emphasizes that the idea embodied by the author in the work may be as old as the world, but this does not prevent the work from being original, since copyright permits intellectual creativity on the basis of already existing elements [28, p. 58]. Obviously, the scholar who creates the work of science, is obliged to use the already developed scientific and categorical apparatus. In addition, scientific works such as theses, research papers, and others, are required to contain a section on scientific novelty and analysis of previous research on this subject.

Therefore, such qualifying elements of a scientific literary work as creative and original character can be applied to both the content of a scientific work and its form, or simultaneously to form and content.

According to Art. 8 of the Law of Ukraine '*On Copyright and Related Rights*', the objects of copyright shall be works in the domain of science, literature and art, namely, both published and not published, both completed and incomplete, in the original language in paper or digital form, regardless of their aim, genre, volume, purpose (education, information, advertising, propaganda, entertainment, etc.). In this case, the legal protection provided by this Law extends only to the form of manifestation of works and does not extend to any ideas, theories, principles, methods, concepts, discoveries, etc. [40].

Unlike other objects of intellectual property rights (except for objects of related rights), the creation and exercise of copyright does not require registration or any other special documentation or certification (legalization), since the copyright for the work arises from the fact of its creation.

Thus, copyright for a literary work of a scientific nature arises as a result of its creation through the creative efforts of the author and the manifestation of such a work in an objective form that allows the possibility of reproduction, for example, in the form of a manuscript, a certain edition of the work or its digital reproduction.

2.2. Objects of judicial examination of scientific literary works and their classification

2.2.1. The concept of a scientific literary work as an object of judicial examination on intellectual property

It is obvious that scientific literary works or ‘scientific works’ are the kinds of works that embody the flow and results of academic research, the most important achievements of science. To the emergence of such works contributed the scientific revolution in the Renaissance and Reformation Europe and the invention and industrial use of the printing press, invented in the late 15th century by J. Gutenberg. It is believed that the first purely scientific work, separate from metaphysics and philosophy, was I. Newton’s printed work ‘*The Mathematical Principles of Natural Philosophy*’ (1687). Since then, scientific works have become widespread and received legal protection in the world, as stated in the introduction hereof.

In its turn, ‘science’ as concept and category has many meanings. Thus, as Ukrainian scientists point out: ‘*The concept of science covers both the activity aimed at obtaining new knowledge and the result of this activity, i.e. the amount of knowledge acquired by a certain period of time, the totality of which creates a scientific picture of the world*’ [14, p. 50].

Dictionaries and reference books offer different definitions of the concept of science. According to the definition given in the ‘Great Explanatory Dictionary of Modern Ukrainian Language’, science is, ‘1. *A form of social consciousness that constitutes an objective reflection of the world; a system of knowledge about patterns of development of nature and society and ways of influencing the outside world. 2. A separate branch of this knowledge*’ [7, p. 741].

The Great Encyclopedic 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 certain branches of science’ [6, p. 501–502].

To summarize, it can be argued that science is a purposeful intellectual activity of a scientist or group of scientists in the study of patterns of the development of nature, humanity, society and the state, the results of which are embodied in ideas, concepts, theories, doctrines, teachings and implemented as new knowledge for social progress. The main achievements of science are objectified in the works of science.

Works of science are works the main essence of which lies in the creation and systematization of objective knowledge about reality, including works of scientific literature [50, p. 53]. Scientists also use the adjective ‘*scientific*’ to refer to such works, stating that: ‘*A work of science is a work in which all issues are considered according to a scientific approach*’ [19, p. 226]. The word ‘*scientific*’ is defined in the ‘Ukrainian Explanatory Dictionary’ as ‘1. *Associated with science, research; ... 2. Based on the principles of science*’ [61, p. 699]. This makes it possible to use the terms ‘scientific literary work, ‘a work of science’ and ‘scientific work’ as synonyms within this Monograph.

At the same time, copyright includes an argument whereby scientific works are distinguished from other types of scientific works: ‘... *all kinds of works, except literary or belles-lettres, such as works in the field of engineering, reference books, popular science publications or practical reference books. At the same time, copyrighted works do not include scientific inventions, discoveries, scientific research*’ [19, p. 226].

The main categories of scientific activity today are normalized in Art. 1 of the Law of Ukraine ‘*On Scientific and Scientific and Technology Activities*’ of November 26, 2015. Here are the key categories for this Monograph:

‘...*scientist* – an individual who carries out fundamental and/or applied scientific research and obtains scientific and/or scientific and technology results;

scientific activity – intellectual creative activities focused on the obtainment and the utilization of new knowledge. Fundamental research and applied scientific research are major forms thereof;

scientific publication – a work (a general scientific work, a monograph, a collection of scientific works, a collection of documents and materials, arguments and materials of scientific conferences, a thesis abstract, a preprint, a dictionary, an encyclopedia, a scientific reference book or index, a scientific periodical, etc.) of a scientific nature which underwent the procedure of scientific review and approval for publication by an academic (scientific, scientific-technical, technical) council of a scientific institution or higher educational institution, editorial and publishing work, produced by printing, stamping or otherwise, containing information about the results of scientific, technical, educational or organizational activities, theoretical or experimental research (research publications);

scientific and technology activities – intellectual creative activities focused on the obtainment and utilization of new knowledge in all areas of engineering and technology. Its major forms (types) shall be the scientific and research, development, design and engineering, research and engineering, engineering, survey and design/survey work, manufacture of test specimens or batches of scientific and technology products, as well as the other work associated with bringing scientific and scientific and technology knowledge to the stage of the practical utilization thereof;

scientific applied result – a new structural or technological concept, experimental model, accomplished test and/or development which is or could be introduced into social practice. The scientific applied result could be presented in the form of a report, published scientific article, scientific paper, scientific report on scientific and research work, monographic research, scientific discovery, draft of a regulation, regulation or research and methodological documentation whose composition involves relevant scientific research or which contain a scientific aspect, etc.;

scientific and technical activity – the scientific activity aimed at obtaining and using new knowledge to solve technological, engineering, economic, social and humanitarian problems, the main types of which are applied scientific research and scientific and technical (experimental) inventions;

scientific and organizational activities – activities focused on methodical and organizational support, as well as at coordination of scientific, scientific and technological and scientific and pedagogical activity;

applied scientific research – theoretical and experimental scientific and scientific and technological activities focused on the obtainment and utilization of knowledge for practical purposes. The result of applied scientific research is new knowledge whose purpose is to create new or improve existing materials, products, devices, methods, systems, technologies, specific proposals for the implementation of current scientific and technical and social tasks;

fundamental scientific research – scientific theoretical and experimental activities focused on the obtainment of new knowledge regarding principles of development of nature, society, human beings, and their interrelation. The result of fundamental scientific research are hypotheses, theories, new methods of cognition, the discovery of the laws of nature, previously unknown phenomena and properties of matter, the identification of patterns of societal development, etc., which are not focused on direct practical use in the field of economics' [46].

In order for the result of human intellectual activity to be attributed to the 'field of science', it must meet certain criteria, namely:

a) to be obtained as a result of purposeful scientific or scientific-technical activity, in the forms specified by the current legislation (research, development, technological, research and design works, production of specimens or batches of scientific-technological products, as well as the other work associated with bringing scientific results);

b) to have a scientific result, that is, new knowledge regarding the principles of development of nature, society, human beings, and their interrelation, obtained in the process of fundamental or applied scientific research;

c) to be recorded in any material form: in the form of a report, scientific work, scientific paper, scientific report on scientific and research work, monographic research, scientific article, etc., on any information carrier (on paper, digitally or in any other form) [68, p. 78].

Concerning the form of literary works of scientific character, they have certain peculiarities that distinguish them from other works that are objects of copyright. The main ones were identified and systematized by V. Fedorenko, O. Holikova, N. Kisil, and others. [25; 63, p. 83-89, 67]. Here are the main ones:

- a scientific work is the result of professional scientific activity, and its author (creator), as a rule, is a scientist with a relevant scientific status (scientific degree, academic title, scientific position, etc.);
- attribution of a scientific work to a specific field of science and a group of specialties the list of which is approved by the Ministry of Education and Science of Ukraine [45];
- identification of the subject of scientific research through the Universal Decimal Classification (UDC), currently used worldwide, or through the Library-Bibliographical Classifications (LBC) which was in force in Ukraine until March 22, 2017;
- a scientific work should clearly define the purpose, task, subject and object (objects) of the research, the original methodology of scientific research, contain theoretical and theoretical-methodological generalizations (conclusions, provisions) and practical recommendations (for example, in the field of law the improvements of law-making and enforcement activities);
- systematic, consistent and clear presentation of material on the use of scientific conceptual categorical apparatus, including special scientific terminology applicable in the field of knowledge for which the scientific work is created;
- peculiarities of the internal composition (structure) of a scientific work that are in accordance with the peculiarities of the type of scientific work

(monograph, thesis, scientific report, scientific article, master's thesis, reference paper, abstract, etc.). Namely, logical division into chapters, parts, sections, subsections, paragraphs, passages using numeric or alphanumeric numbering, mandatory rubrics (purpose, task, object and subject of research, research methodology for theses) [8];

- the presence in the work of a complete and objective analysis of the investigated object and subject using scientific methodology;
- the presentation of the text of a scientific work in third person, the absence of emotionally expressive vocabulary, the absence of dialogue, except for quotations of dialogue which are the object or subject of scientific research (for example, the study of a literary work);
- the presence of references to the source (author, title of the work, publishing house, place and year of publication, etc.), citation with clear quotation marks indicating the quote's beginning and end, including for regulations, although the latter are not copyrighted;
- availability of a list of used sources, compiled in accordance with an international or national standard (for example, in accordance with DSTU 8302: 2015, effective July 1, 2016);
- the presence of graphs, tables, diagrams, and other graphical means, described processes of research in the text of the scientific work and its appendices;
- identification of a scientific work in accordance with the *International Standard Book Number (ISBN)*, etc. [63, p. 87–88].

It should be noted that other features of scientific works are now being approved. Thus, for scientific articles it is the *Digital Object Identifier (DOI)*, which is applied within the ISO 26324:2012 standard to indicate their electronic versions in international scientometric databases.

In determining the 'scientific work' category, one should also take into account the content of the Decree of the Cabinet of Ministers of Ukraine dated January 18, 2003 No. 72 'On approval of minimum rates of royalties for the use of

copyright and related rights’ stating that all types of scientific literature works are recognized as being creative, of original nature, aimed at preserving scientific results and subject to copyright, and therefore such that may be subjected to judicial examination of intellectual property [44].

Thus, a literary work of a scientific nature, or a scientific work, as an object of judicial examination on intellectual property issues, is the original scientific result obtained through purposeful creative scientific or scientific-technical activity of the author/scientist, embodied in any material form (monograph, thesis, scientific report, scientific article, scientific paper, etc.) to which the legal protection provided by applicable copyright law applies and which may be reproduced.

2.2.2. Classification and main types of scientific works

Scientific literary works or works of science are distinguished by the diversity of objectified forms of their existence. The scientific knowledge obtained by authors (co-authors) is embodied in such scientific works as monographs, theses, scientific reports, scientific articles, master’s theses, reference papers, abstracts, etc. [67, p. 216].

Today authors of scientific literature often examine individual groups of works, defining them and describing the varieties they include [39, p. 145-147; 51, p. 126-156; 57, p. 61-75]; also, the classification of works by different criteria is carried out [15, p. 23-38].

At the same time, the classification of scientific works and the systematization of their types are complicated by the fact that the current legislation of Ukraine does not contain an exhaustive list of types of scientific works. In addition, works of a scientific nature can be the objects of expert study as literary works, according to Art. 8 of the Law of Ukraine ‘*On Copyright and Related Rights*’: ‘...both disseminated and non- disseminated, finished and unfinished, irrespective of their purpose, genre, volume, goals...’ [40].

Pursuant to the law in force, the Plenum of the Supreme Court of Ukraine in its Resolution of 4 June 2010 ‘On the Application of the Laws by the Courts in Cases on the Protection of Copyright and Related Rights’ drew attention to the fact that the list of objects of copyright subject to legal protection and defined by Article 433 of the Civil Code of Ukraine and Article 8 of the Law of Ukraine ‘*On Copyright and Related Rights*’ is not exhaustive [42]. The concept of a ‘*work of science, literature, and art*’ covers all kinds of copyrighted works [52].

Thus, scientific works that are not specified in the acts of the current legislation will be subject to copyright protection, provided that they comply with the general criteria for the protection of works, i.e. having creative nature and originality, as well as an objective form of manifestation associated with the possibility of reproduction.

Scientists define different criteria for the classification of scientific works and on their basis substantiate the detailed classifications of relevant works [67].

Classification (literally ‘division into classes’) of scientific literary works is a purposeful intellectual and volitional process of identifying types (classes) of scientific works according to certain criteria (essence, content, subjects of creation, forms of existence, etc.).

Thus, scientific works can be classified depending on:

a) the nature of the embodied scientific result; b) orientation; c) the purpose of its use; d) form in which it is fixed, etc. Regarding scientific and technical works, the list of forms of manifestation can be expanded by the following varieties: 1) technical instruction; 2) patent documentation; 3) regulatory and technical documentation; 4) industrial catalog; 5) design documentation; 6) a report on research, design or technological work; 7) deposited manuscript; 8) translation of scientific and technical literature, other published or not published scientific and technical documents [56, p. 148–149]. While all of the aforementioned objects may contain copyright features, not all of them may be considered literary works of a scientific nature. However, the study of such objects will be conducted in a manner similar to the study of copyright objects defined hereof (*see Chapter 4*).

In national and foreign science there are different approaches to the criteria of classification and systematization of scientific works. It is not uncommon for a system of such works to be built not on the basis of a common criterion for classification, but by listing known forms of consolidation of scientific, educational, and technical knowledge. Among them, the already mentioned Decree of the Cabinet of Ministers of Ukraine No. 72 of January 18, 2003, identifies the following types of scientific works:

- 1) literature on scientific and theoretical issues;
- 2) popular science literature from all fields of science and technology;
- 3) scientific and educational literature;
- 4) production and technical literature in all fields of knowledge and economic activity;
- 5) scientific-technical and other reference books, statistical collections, calendars, catalogs on equipment, travel guides;
- 6) textbooks, educational literature;
- 7) educational manuals for all types of educational institutions and all forms of education;
- 8) lectures and lecture courses for advanced training institutes, general and vocational schools;
- 9) literature on the methodology and organization of the educational process, pedagogical literature for parents;
- 10) visual aids, texts of informational posters for educational institutions and promotional material for lectures;
- 11) articles for encyclopedias, encyclopedic dictionaries, and reference books;
- 12) explanatory dictionaries, dictionaries of special terms, dictionaries of synonyms;
- 13) lexical and spelling dictionaries: dictionaries for languages with alphabetic writing, for rare and ancient languages, for languages ligatured script, special graphics, hieroglyphics, and cuneiform;
- 14) reference papers and reviews;

15) introductory articles, prefaces, afterwords;

16) original bibliographic works, bibliographic indexes, abstracts, calendars of events, chronicles of life and activity;

17) comments, notes, footnotes to works of scientific, production, technical and educational literature.

Summarizing the provisions of the current legislation, the relevant court decisions (Supreme Court Order of September 10, 2019, No 826/13114/16 and others), the results of previous scientific studies of the classification of scientific works conducted by the authors of this Monograph (V. Fedorenko, O. Holikova and others) [67], as well as the practice of conducting judicial examinations of scientific literary works at the Research Center of Judicial Examination on Intellectual Property, Kharkiv Scientific Research Institute of Forensic Expertise named after Prof. Emer. M. S. Bokarius, Kyiv Scientific Research Institute of Forensic Expertise, State Scientific and Forensic Expert Center of the Ministry of Internal Affairs of Ukraine, and other forensic research institutions, as well as the examination experience and expertise of examination experts within the specialty 13.1.1 who are not employed by scientific and research institutions of judicial examination, it is important to note the following provisions for the classification of scientific literary works.

According to the purpose (mission) of a work in the development of science, relevant works can be classified into 1) fundamental and 2) applied. According to Art. 1 of the Law of Ukraine ‘*On Scientific and Scientific and Technology Activities*’,

1) *fundamental scientific research* is constituted by the scientific theoretical and/or experimental activities focused on the obtainment of the new knowledge regarding principles of development of nature, society, human beings, and their interrelation;

2) *applied scientific research* is constituted by the scientific, scientific and technological activities focused on the obtainment and utilization of knowledge for practical purposes [46].

As a rule, when resolving the questions posed to the expert research, determining whether scientific literary works belong to the category of fundamental or applied scientific works is not carried out.

In terms of content (the subject of scientific research) scientific works can be classified according to the Universal Decimal Classification (UDC). These are the following types of scientific research: 1) philosophy; 2) psychology; 3) religion; 4) social sciences, including jurisprudence (code 34); 5) mathematics; 6) natural sciences; 7) applied sciences; 8) medicine; 9) engineering; 10) art; 11) architecture; 12) sports; 13) languages; 14) linguistics; 15) fiction; 16) literary studies; 17) geography; 18) bibliographies; 19) history, etc. In total, the UDC contains more than 1200 categories [67, p. 220].

According to *subjects of creation* of scientific literary works, scientific works can be divided into 1) scientific works created by one author; 2) scientific works created in co-authorship (by two or more authors).

The latter type of scientific works (monographs, educational publications, scientific reports, scientific articles, etc.) is a very common subject of expert research. For the expert study of scientific literary works created in co-authorship (by a team of authors), it is important to identify the part of the scientific work whose authorship (co-authorship) belongs to a specific author. Typically, an indication of the authorship (co-authorship) of a particular person in relation to a particular part of a scientific work (chapter, section, another part of a scientific work) is indicated at the beginning or at the end of the scientific work. In some cases, the authorship (co-authorship) of a part (fragment) of a scientific work can be established by a decision of an academic council of a research institution or educational institution that recommended a specific scientific work for publication [67, p. 220].

According to the *form of embodiment*, scientific works are subject to classification into 1) scientific monographs; 2) thesis research (the manuscript of the thesis and the abstract of the thesis); 3) scientific reports on the results of scientific research work; 4) scientific and practical comments on legislation and scientific

works; 5) scientific articles; 6) introductions, prefaces, afterwords to the works; 7) scientific encyclopedic reference books (encyclopedias, encyclopedic dictionaries, scientific directories, etc.); 8) scientific anthologies; 9) author's translations of scientific works; 10) materials (bullet points) of scientific papers, speeches, reports; 11) scientific abstracts, reviews, overviews; 12) educational and methodological literature (textbooks, manuals, lecture courses, anthologies, methodological guidelines, etc.); 13) master's theses; 14) popular science publications; 15) original bibliographic works and bibliographic indexes, etc. [67, p. 221].

According to the nature of their creation, scientific works are divided into 1) independent (original) and 2) non-independent (dependent).

The original work is defined as the product of independent creative thought and work.

A work is considered **independent** if its form is original and the content is original or (in whole or in part) borrowed.

'A work is considered non-independent if both its form and content are borrowed. **Non-independent** (dependent) works are divided into:

a) derivative works, which include *translations, remakes, abstracts, reference papers, summaries, overviews, and other alterations of works of literature, science, and art;*

b) composite works (collections), which include *encyclopedias, anthologies, and other written works, which based on the selection or arrangement of materials in them are the result of creative work.*

Both of these types of *non-independent scientific works* are copyrighted, *regardless of whether the works on which they are based or which they include are copyrighted works*’.

Derivative work is a product of intellectual creativity based on another existing work (translation, adaptation, remaking, etc.). Its originality lies either in

the creative reworking of a work that has existed before, or in a creative translation into another language [19, p. 226–227].

Simultaneously, the form of the [work] is ‘*the expression of the content of the work in a way that can be reproduced*’. It is possible to identify the work and protect it under copyright law due to its form, which should not be confused with the long-lasting material manifestation of the work. In many countries, works are protected by copyright provided that they are recorded in material form [19, p. 210].

‘The Great Explanatory Dictionary of Modern Ukrainian Language’ defines the word ‘form’ as follows: ‘1. *Outlines, contours, external borders of an object that determine its appearance...* 4. *Type, structure, method of organizing something; external manifestation of any phenomenon related to its essence, content. // Logic: Structure, way of forming a thought. A syllogistic form.* 5. *Philosophy: The mode of existence of the content, its internal structure, organization, and external manifestation. Unity of form and content*’ [7, p. 1543–1544].

Therefore, ***the form of a scientific work is a mode of existence, expression of its content, suitable for reproduction.***

Determining the type of scientific works to which the objects which are subjected to the expert’s research belong, as well as their basic properties and features, is conducted mainly at the stage of discrete analytical research (see *subchapter 4.2* hereof).

When assigning a judicial examination of copyright objects for research, the expert shall be provided with tangible objects embodying the intellectual property right, as well as other materials containing information about the research objects. For example, a specific publication which contains a scientific literary work, the manuscript or material on which the work is recorded. The object of study is a scientific literary work, which is materialized in the appropriate information carrier (a physical object).

3. METHODS USED TO ACCOMPLISH EXPERT TASKS

The Instruction on Commissioning and Conduct of Judicial Examination and Expert Research (Paragraph 1.4.) stipulates that during the conduct of examinations (expert research) judicial experts apply the appropriate research methods, methods of conducting judicial examinations, as well as regulations and normative documents (international, national and industry standards, technical conditions, rules, norms, regulations, instructions, recommendations, lists, statutory documents of the State Committee for Technical Regulation and Consumer Policy of Ukraine), as well as the current national standards of the former Ukrainian SSR and state classifications, industry standards and specifications of the former Soviet Union, scientific and technical reference books, software, etc. [43].

The choice of methods of judicial examination or expert research is within the competence of the judicial expert. The term ‘method’ itself comes from the Greek word ‘μέθοδος’, which means ‘the path of knowledge’ [64, p. 9]. In modern science studies, the method is understood as ‘...a set of principles, techniques, rules, requirements to cognitive and practical activity, predetermined by the nature and laws of the studied object, which one must be guided by in the process of cognition’ [14, p. 242].

When conducting expert research, methods are not used separately. For comprehensive and objective research, a system of contingent methods (referred to as methodology) is used. R. Zippelius wrote in this regard that methodology, first of all, ‘...indicates a way of rational, understandable, and therefore controlled search for answers to unanswered questions’ [75, p. 3]. In essence, a methodology is an intellectual matrix for the study of intellectual property (in our case, scientific works) through the combination (arrangement) of different methods.

Thus, the methodology for implementing expert research of scientific literary works is an orderly system of mutually complementary methods, the complex application of which enables comprehensive study of scientific works as objects of copyright and judicial examination.

Modern science knows many methods of cognition: system and functional method; phenomenological; comparative; historical and retrospective; formal logic (analysis and synthesis); deterministic; hermeneutic; empirical; sociological; predictive; modeling; scaling, etc. Some of them are effectively used in conducting expert research of scientific literary works.

This function is primarily performed by the comparative method, the methods of formal logic, hermeneutic, and others. Let us briefly look at some of them.

The comparative method is one of the basic methods of judicial examination which involves comparing and contrasting scientific works and their parts in order to identify ***similarities (coincidences) and differences in the examined works***. Thus, Ukrainian scientists point out the following about this method: ‘*To compare is to contrast one with another in order to find their interrelation*’ [14, p. 242].

If a scientific literary work is created based on another scientific work, then ‘in the course of comparative research the signs are identified that individualize the object being compared’ [34, p. 420]. It is about logic, system, and sequence of material presented in a scientific work (monographs, theses, scientific articles, etc.). This could be, for example, the use of the same quotes, the same translation of foreign language references, the presence of the same stylistic and spelling errors in the texts.

Formal logic methods (analysis and synthesis; deduction and induction, etc.) is a methodological tool that enables a judicial expert to analyze a scientific work and its parts as a whole and as a set of composed fragments, to distinguish the process of creating a scientific work the results of which are embodied in a monograph, thesis, scientific article, etc., from mechanical combination (compilation) of already existing objects of copyright into a text that does not display signs of creativity and originality. That is, methods of formal logic allow a judicial expert to fully and comprehensively explore the ‘anatomy of a literary work’, the logic of its creation and use: from the whole entity to the constituents, and vice versa.

Analysis is a logical technique, a method of scientific research which consists in the fact that the object of research is broken down into composite elements

(features, interconnections, etc.), each of which is subsequently examined independently as part of the whole [54, p. 25].

Synthesis is a method of researching the phenomenon in its unity and interconnection of parts, generalization, unification of the data obtained from analysis [54, p. 139]. Thus, a synthesis is a unification of previously selected parts of the object into a single unit. The operation of ‘...*division into parts and unification into a whole are called, respectively, decomposition and aggregation*’ [14, p. 272].

For example, the analysis of a scientific literary work consists mainly in a detailed study of the features defined by law for the recognition of the work as an object of copyright or the establishment of its nature, and in the case of the comparative study of two or more works the method consists in finding common and distinct features in them with the aim of establishing the fact of use of a certain work or the fact of changes to the work.

Induction is a logical method of research, the essence of which is the summary of the results of the analysis, during which the expert’s attention transitions from individual phenomena to general entities.

Deduction is a method of scientific research that involves the transition in the process of cognition of an object from the general to the individual, the derivation of the individual from the general. In addition, deduction is also ‘...*the process of logical inference, that is, the transition based on certain rules of logic from certain given suggestions and assumptions to their consequences (conclusions)*’ [14, p. 276].

In the process of expert research of scientific literary works, induction and deduction are inextricably linked. As a rule, however, the method of deduction prevails in the final formulation of a conclusion.

The hermeneutic method is close to the comparative method. It allows you to interpret the way a scientific work is used by adapting or interpreting it. Due to hermeneutics (the art of understanding and interpreting a particular work better than its author), you can identify the internal architectonics of a scientific work, identify and describe the nature of borrowings, paraphrases, etc.

Other methods of scientific knowledge that provide a possibility to answer the questions presented to the judicial expert can be added to the aforementioned system of methods of expert research of scientific literary works.

In order to achieve the best results, other research methods apart from those identified in this chapter are used. In addition, according to the regulations governing judicial expert activity, determining the manner of examination (the choice of certain research methods and methodologies) is within the competence of the expert.

The methods of expert research of scientific literary works are applied in combination and in a certain sequence, that is, according to a certain methodology. Its strategic and tactical features are discussed in the next chapter.

4. THE EXAMINATION PROCEDURE

Any expert methodology consists of successive, logically interconnected stages. Each of these stages has its own tasks and defines which ways can be used to solve them. All stages have their own significance for the achievement of the main goal of each expert methodology, which is to solve the tasks set before the judicial expert.

The establishment of factual data and circumstances of the case on the properties, features, patterns of creation and use of scientific literary works is carried out through certain stages of expert research, described in detail in special literature, namely: preliminary (preparatory) research, discrete (analytical) examination of objects of examination, comparative research, evaluation (synthesis) of research results and formulation of conclusions [54; 75, p. 72, p. 149-151]. Each stage of expert research within the specialty 13.1.1 is accompanied by its own content and features that will be explained later.

4.1. Preliminary (preparatory) research

Preparatory stage. At this stage the expert determines:

1) the correctness (from a procedural point of view) of the registration of the materials specified in the decision (resolution) or cover letter (statement).

The basis for the judicial examination/expert research is the relevant procedural document on its commissioning (decision, resolution); an agreement with an expert or expert institution entered into at the request of a party to the case or upon a written application (letter) of the customer (legal or natural person).

The judicial examination commissioning document should indicate the person/body that appointed or hired the expert, a list of objects and materials submitted for research, as well as questions that are posed before the expert's examination ;

2) suitability and sufficiency of the submitted materials for the solution of the task, as well as compliance with the list, which is indicated in the accompanying letter;

3) the presence of all sheets in the case file and correct page numbering.

If the materials submitted for research are not numbered and not stitched together as required, then the relevant act is drawn up by a commission of experts (if the examination is performed in a specialized state institution) or directly by the expert appointed for the examination;

4) the condition of the objects submitted for research (copies of works): their integrity and absence/presence of damage during transportation, readability of the text; quality and clarity of images, etc., which makes it possible to compare research objects;

5) if among the questions raised there are those concerning an object which has not been submitted for examination, the expert is obliged to request the provision of such an object. If it is necessary to obtain additional materials, the expert also sends a request to the person or body that commissioned the examination (hired the expert). If the objects specified in the request are not submitted within the stipulated time limit, the expert has the right to submit a substantiated response on the impossibility of providing answer to the raised questions.

If the condition of submitted objects makes it impossible to conduct full expert research, the expert shall make an appropriate request for the provision of research objects in proper condition.

If during the preliminary examination it is established that a specialist possessing the relevant specialized knowledge is required to carry out the full examination and to give an objective conclusion, then the expert shall submit a written request to the person or body which commissioned the examination (hired the expert) to involve a specialist from a specific area of expertise in the examination in order to carry out a comprehensive study. The organization of such an examination is carried out according to the rules of an integrated examination.

At this stage, if necessary, the expert takes photos of the objects of study and determines the sequence of research activities.

4.2. Discrete (analytical) research

At this stage, the expert examines the literary works, other objects of research in detail, identifies and analyzes the properties of these objects and copyright protection, if any. This may be, for example, the certificate of copyright registration and an application for copyright registration for the work containing information about the type of work, its author, field of creative activity, date of final completion; statement on its independent or derivative character; information about works or parts of works included into the work for which the rights are being registered in case the work is derived or composed.

For instance: a copy of a certificate of copyright registration for the work No 17777 dated 28 July 2006, a copy of an application for copyright registration for the work No 17777 dated 05 June 2006, a copy of a decision on copyright registration for the work contain the information on the type of work: textbook ‘Fundamentals of Educational Psychology’; on the author: Ivanov Ivan Ivanovich; on the field of creative activity: science, literature; the work belongs to scientific works; final completion of the work is dated 02 August 2005; the work is not derivative; information about the works or parts of the works included in the work for which the rights are being registered is not given; ‘a list of lawfully used literature is added to the work.’

If the information on the registration of the work is not provided (including in response to the request), or the registration of the work was not carried out, then a **description of the works** to be examined is carried out first. The following information has to be included (if available in the copy of the work under research or in documents submitted for examination):

- date of creation of the work (the date of publication and/or the date when the recommendation of the scientific work for publication was issued, date of approval of the scientific report, or other information certifying the date of creation of the work);
- title of the publication in which the work was published;
- name(s) of the author(s). If the work was created in co-authorship, it should be noted which part of the work was created by the particular author (if such information is indicated in the materials);
- the number of pages on which the work is presented, or which pages of the work under research contain the part of the work which is to be examined.

Thus, for scientific literary works, the following is indicated: a complete bibliographic description of the work with the authors (co-authors) names, time and place of publication, the title of the publisher, the total number of pages or specific pages in case the work is published in a collection or a journal. In addition, a list of references or other information that may be necessary for establishing the relevant fact is indicated as appropriate. If the work was not presented in the original, it is indicated in what form it was presented and whether the copy submitted for examination contains the signs of any changes/modifications to the text.

If necessary, it is determined whether the work has been approved according to the proper procedure and whether it is the final version or an intermediate version.

For example:

I. I. Ivanov, 'The Role of Roman Lawyers in the Establishment of the Legal Profession' (digital copy).

The work was submitted for examination in digital form. According to the information provided in the document, I. I. Ivanov is the author of the work. The

work was published in Proceedings of the 5th International Scientific Conference of Young Scientists and Graduate Students dated April 12, 2017, on pages 77–81. The total number of pages is 4.

It is also necessary at this stage to determine **what kind of work** the examined work belongs to and to establish features specific to examined works that identify the type of work or to identify features that indicate the individual manner of presentation of the material by the author (the use of certain figures of speech, specific words, concepts, etc.).

It should be noted that the form of manifestation of scientific literary works (the structure of material presentation, the presence of obligatory structural elements in the work, its design, etc.) is significantly influenced by the type of scientific work in whose framework the work was created.

The examination considers the requirements to the order and form of material presentation established for the corresponding type of work which is to be examined. This is important for the purpose of identifying the required elements which must be present in the work in question, since they are required for the composition of such works, as well as for the purpose of identifying elements which can be considered as such that manifest originality and creativity.

4.2.1. Establishing the creative character and originality in the work

Diagnostic expert tasks (objectives) are formulated mainly in the form of the following questions:

- does the object under research or a part of the object which can be used on its own present the result of creative work according to the information provided in the case file?
- does the object under research (or its part which can be used on its own) contain the attributes of the copyrighted object according to the information provided in the case file?

As already mentioned, the criterion of creativity can be reduced to establishing the fact that the work was created independently, as a result of intellectual activity.

According to the legislation of Ukraine, the works which are granted legal protection should be the result of the creative work of the author himself/herself. Thus, Article 1 of the Law of Ukraine *‘On Copyright and Related Rights’* states, *‘...an author is an individual who created the work by his/her creative effort’* [40]. Therefore, the attribute of creativity distinguishes works that are copyrighted from those that result solely from technical work.

Creative activity is characterized by the conscious intellectual work of the author and, as a consequence, by the uniqueness of the created work. Thus, any result of creative work must have a certain degree of individuality, which is often defined as originality.

The criterion of ‘originality’ is not stated explicitly in the vast majority of copyright laws of different countries, unlike the criterion of ‘novelty’ used in patent law and covered in detail in patent laws of all countries of the world. However, the very copyright system is based on the fact that protection is granted only to original works [11, p. 45–51].

As was already mentioned, the creative element can belong both to the content of the work and its form, or to the form and content at the same time.

During the examination, the expert identifies, describes and analyzes the characteristics of the studied works from the viewpoint of creativity and originality.

Therefore, when examining a scientific literary work from the viewpoint of signs of originality and creativity present in the work (or in its part), it is necessary to separate the elements of the work that result from the author’s creative activity from those that have a technical component, taking into account the nature of the studied work. The originality and creative character of the literary work are manifested in the expression of the work’s content by original linguistic means and the absence of illegal borrowing of original elements from previously created works [23, p.171].

Attributing a work to copyright objects primarily depends on the presence of attributes of creativity within the work. Thus, a work is recognized as a copyright

object if it complies with the legal requirements, namely: the work is expressed in an objective form, is the result of creative work and meets the criterion of originality.

Regarding the originality of a part of work and whether it is the result of creative work, the following should be noted.

The legislation of Ukraine provides for the protection of not only the whole work but also of its parts if they meet the conditions of copyrightability.

According to Art. 9 of the Law of Ukraine '*On Copyright and Related Rights*', 'A portion of a work that can be used independently, including the original title of a work, shall be considered a work and shall be protected pursuant to this Law' [40].

Therefore, the subject of a lawsuit can be constituted either by works in general or by their parts which are structured in the form of an independent work, as is the case with separate co-authorship.

Article 436 of the Civil Code states that '*...Part of the work created in co-authorship shall be deemed as such that has independent significance provided it can be used separately, regardless of other parts of this work*' [73]. At the same time, 'Each co-author shall preserve his/her copyright to the part (of the work he/she has created) characterized by its independent significance' [73].

As for titles of scientific literary works, it should be emphasized that they do not, as a rule, identify the identity of the author. Scientific topics may have the same title, but the content of the works and the form of expression of the content by different authors will be different. As V. Ionas notes in his work '*Criteria for Creativity in Copyright and Judicial Practice*': 'The phenomena of nature, society, spiritual world of humans are inexhaustible in both their content and form of detection and development. Knowledge of the subject has no boundaries, it is constantly evolving and becoming more profound. The subject of knowledge itself is developing. As a result, the laws of presentation require that the image of truth be enriched, demand the novelty of facts and concepts (in science), the means of expression (in literature, art), the means of influencing the world (in technology)... the novelty of the work reflects the inexhaustible diversity of the object, its development, and display of knowledge of the subject which is also constantly

evolving. Such is the epistemological nature of novelty which characterizes a work as a creative component... without novelty, it is impossible to preserve the old. The continuity of true ideas and norms necessitates the novel nature of their presentation' [16, p. 104].

Scientific literary works, which may have the same or similar titles associated with the content of scientific works, may contain both new facts and concepts embodied in new forms of presentation of these facts and concepts, and also express what is already known to science in an original form. However, the titles of literary works do not always identify a particular work of a particular author, and therefore are not parts of the work that can be used independently.

In most cases, disputes about authorship in the scientific circles do not focus on the use of similar titles of certain works; instead, they are associated with the misappropriation of parts of a certain work that does not form a separate object of copyright yet where the individual creativity of the author(s) is manifested. Such parts of works are subject to legal protection.

Borrowings and references to other people's work are mostly widespread in the scientific world. Citation is sometimes understood not only as providing verbatim excerpts, or quotations, but also in a general sense as any references to someone else's text. It is estimated that, on average, each scientific article contains about seven bibliographic references. According to V. Maksymov, a researcher investigating the problems encountered by scientists' and scientific teams, the real process of scientific creativity and its reflection in a certain text do not completely coincide. However, the scientist is obliged (using this or that type of means) not only to clearly define his/her views on the object of study, but also to clearly outline his/her position in relation to the views held by other scientists, while adhering to the rules of citation [30, p. 327–334].

To sum up, the work has no signs of the originality if:

- it contains information that is arranged in a conventional non-original way, for example, in chronological order;
- contains reports (about events and facts) of purely information content;

- the selection and placement of material in a work are determined by the natural or necessary order of things that cannot be arbitrarily altered or supplemented, for example, the list of words in the explanatory dictionary, arranged alphabetically.

4.3. Comparative research

At this stage, an expert draws conclusions about the attributes of the works being compared and analyzes the available coincidences and differences when establishing the fact of the works' use.

Identification and diagnostic expert tasks (objectives) are formulated mainly in the form of the questions outlined below.

- Did a complete or partial reproduction of a literary work (title of work 1) occur when creating another scientific work (title of work 2)?
- Was a part of scientific literary work (the title of the work 1 and its part) which has independent significance reproduced in the creation of the work (the name of the work 2)?
- Is the work (title of work 1) a remake of the work (title of work 2)? If so, is this remake creative?
- Is the work (title of work 1) a translation of the work (title of work 2)? If so, is this translation creative?
- Does the work (title of work 1) form as an integral part of a collection, encyclopedia, etc. (title of work 2)?

Also, the expert may be asked questions about signs of plagiarism in the examined work:

- Are there signs of plagiarism in the work (title)?

The ways and forms of using the works are clearly stipulated by the rules of the current legislation.

According to Article 441 of the Civil Code of Ukraine, *'The use of the work shall be:*

- 1) publication;*

- 2) *reproduction in any form and any manner;*
- 3) *translation;*
- 4) *remake, adaptation, arrangement, and other similar changes;*
- 5) *inclusion as a component into collections, databases, anthologies, encyclopedias, etc.;*
- 6) *public performance or broadcast;*
- 7) *sale, transfer to lease, etc.;*
- 8) *import of its copies, copies of its translations, remakes, etc.* [73].

Glossary of Terms of Copyright and Related Rights of the World Intellectual Property Organization (WIPO) defines the term '*reproduction of the work*' as follows: '*Reproduction of a work is the production of one or more copies of the work or a significant part of it in any material form, including sound and video recording. The most common way to reproduce is to publish an edition of the work. The right to reproduction is one of the important components of copyright.*' Therefore, based on the definition, a work as a whole can be reproduced, as well as a part of it [9].

In Article 1 of the Law of Ukraine '*On Copyright and Related Rights*' the concept of 'reproduction' is considered somewhat differently, '*Reproduction is manufacturing of one or more specimens of a work, its videogram, phonogram in any material form, as well as recording thereof for temporary or permanent storage in electronic (including digital), optical or other computer-readable form*' [40].

Thus, literary works can be reproduced in whole or in part. The legislation of Ukraine provides for the protection of works not only as a whole but also of individual parts that meet the conditions of copyrightability. Thus, according to Art. 9 of the Law of Ukraine '*On Copyright and Related Rights*', '*A portion of a work that can be used independently, including the original title of a work, shall be considered a work and shall be protected pursuant to this Law*' [40].

The legislation attributes these rights to proprietary copyrights to the work.

According to Art. 440 of the Civil Code of Ukraine, '*Proprietary copyrights shall be:*

- 1) *the right to use the work;*

- 2) *the exclusive right to permit to use the work;*
- 3) *the right to prevent unlawful use of the work, including the prohibition of such use;*
- 4) *other proprietary rights of intellectual property established by the law'* [73].

Similar provisions are defined in the Law of Ukraine 'On Copyright and Related Rights'. Thus, according to Art. 15 Law hereof, '1. *The proprietary rights of an author (or another copyright holder) shall include the following:*

- a) *the exclusive right to use a work;*
 - b) *the exclusive right to allow or prohibit the use of a work by other persons*
2. *An author's (or another copyright holder's) exclusive right to use a work shall allow him/her to use the work in any form and any manner.*
 3. *The exclusive right of an author (or other copyright holder) to allow or prohibit the use of a work by other persons shall entitle him/her to allow or prohibit:*
 - 1) *reproduction of works;*
 - 2) *public performance and broadcast of works;*
 - 3) *public demonstration and public display of works;*
 - 4) *any repeated dissemination of works, if carried out by an organization other than the one that carried out the first instance of dissemination;*
 - 5) *translations of works;*
 - 6) *remakes, adaptations, arrangements, and other similar alterations to works;*
 - 7) *inclusion of works as components into collections, databases, anthologies, encyclopedias, etc.;*
 - 8) *distribution of originals of works and their specimens by first sale or alienation by another method or by transferring for property lease or rental, and by other transfer prior to the first sale of specimens of a work;*
 - 9) *general notification of the public of his/her works in such a manner that its representatives can access the works at any place and at any time at their discretion;*

10) transfer for property lease and (or) commercial rental after the first sale, alienation by another method of the original or specimens of audiovisual works, computer software, databases, musical works as sheet music, as well as of works fixed on a phonogram or videogram or in a computer-readable form;

11) import of specimens of a work.

This list is not exhaustive' [40].

As can be seen from the above provisions, a judicial expert can make a decision regarding the following ways of using the work:

- reproduction of the work (full or partial);
- translation of the work;
- making changes to the work (abstract, adaptation, other alteration of the work);
- inclusion of the work as an integral part into collections, anthologies, encyclopedias.

The comparative analysis takes into account the provisions of the Law of Ukraine *'On Copyright and Related Rights'*. Thus, according to Part 3 of Art. 8 of the Law of Ukraine *'On Copyright and Related Rights'*, *'The legal protection stipulated in this Law shall be extended only to the form of manifestation of a work, and shall not apply to any ideas, theories, principles, methods, procedures, processes, systems, manners, concepts, or discoveries, even if they are expressed, described, explained or illustrated in a work' [40].*

Therefore, when conducting a judicial examination of scientific literary works, attention is paid to the peculiarities of manifestation of the internal and external form of the work: composition (logical construction), the language of the work, including special scientific signs and symbols; the system of disclosure of scientific ideas and the sequence of presentation of scientific material, including concepts, judgments, conclusions, categories, etc.

Since copyright protects the form itself, the literal coincidences are crucial to detect copyright infringement through borrowing. For this purpose, it is advisable to

draw up tables of coincidences ('the text on a certain page in one work fully corresponds to the text on a certain page in another work') [52, p. 119].

4.4. Establishing the fact of the work's use

Therefore, in the process of establishing the fact of usage of a scientific literary work or the fact/method of changing it, which are mixed objectives, as well as when solving identification tasks focused on identifying an individual, characteristic set of features of literary works of a scientific nature, establishing the identity of literary works, etc., it is advisable to draw up a table. Drawing up a table of coincidences has become common practice in conducting studies related to literary works, including scientific literary works.

The amount of text placed in such a table depends on the task presented to the expert. The text of the parts (fragments) that are being compared is given verbatim, preserving the spelling and punctuation of the author.

When establishing the fact of the use of a scientific work, the expert analyzes the linguistic elements of the studied works, ways of their selection, usage, mutual combination, and correlation. At the same time, the elements of the content and forms of these works are analyzed, in particular the features of their internal and external form's manifestation. Thus, elements of the content of scientific works are material that includes scientific facts, data from experiments and observation, hypotheses, theories, etc.; and elements of the form are the sequence of presentation of scientific concepts, logic, a system of disclosure of scientific ideas and placement of material (internal form), as well as the language of the work with all lexical features including scientific signs and symbols (external form) [24, p. 24].

Since a scientific work, unlike literary and artistic works, cannot be created without a deep study of the works of other scholars in a particular field of knowledge, the presence of individual fragments that have textual coincidences with fragments of the work of another author is not evidence of unfair usage of someone else's work.

When laying down certain provisions, scientists use the terminology that is inherent in a particular field of science; moreover, in the humanities (especially in

the legal field) linguistic structures typical for regulations are widely used. Therefore, some textual coincidences can often be observed in the works of different authors, and only after studying their nature and size one can establish whether unfair borrowing of fragments of works by other authors has taken place [24, p. 25].

A comparative study of a scientific literary work based on the works of other authors identifies features that individualize the object being identified. The presence in the texts of the same lexical, stylistic or spelling mistakes, the use of characteristic vocabulary, idioms, etc., convincingly proves the fact of a certain work's reproduction [25, p. 484].

Studies of literary works that are considered in disputes about establishing the fact of the use of a work through reproduction, translation, remaking, or other means are conducted taking into account the peculiarities of these uses.

4.4.1. Establishing the fact of the full or partial reproduction of a work

Most often, a judicial expert is tasked with establishing the fact of a work's use through reproduction.

In determining whether the literary work of scientific character is fully or partially reproduced, the expert distinguishes features that individualize the objects of study, identifies coincidences and differences in the works, and identifies features that are natural for this type of works.

Having identified parts (fragments) of text that, together with certain textual coincidences, contain individual differences, the expert analyzes the nature of these coincidences and differences. It should be taken into account that a number of coincidences in the texts of the studied works may be caused by the need to conform to using linguistic means and stylistic norms that are characteristic of this type of works, namely, scientific literary works.

In a comparative study, an expert should pay attention to the following questions:

- Are there features in the work under study that are characteristic of a previously created work that identify it and indicates its use in the creation of the work under examination?

- Can the identified coincidences be caused by the use of texts from regulations or by the use of verbal constructions that are widely used in the relevant field of knowledge?
- Is there any overlap of literary, archival, or other sources used in the compared texts? If that is the case, has there been a transfer of characteristic errors in the design of citations, references to sources, etc. from the original work to the later work?

The reproduction of a work may also be indicated by the following signs: the use of the same quotations in the same volume in the studied works, the presentation of the material in a similar sequence, the presence of the same mistakes in the texts, etc.

Certain coincidences can be explained by the use of the same normative documents, literary sources and archival data when creating the examined works, especially if the facts stated in them objectively existed and are reflected in various documents, including archival ones. However, the form of presentation of known material should be new.

Thus, according to scholars, it is allowed to borrow separate elements, in particular different facts, a conception, theme, system, method, literary style, artistic manner from the work of another author, but borrowing a set of elements that reflect the individual nature of the work is illegal [21, p. 177–178].

When creating works of a scientific nature, the coincidence of individual fragments of texts of the studied works can be caused by the use of quotations (short excerpts) from published works. The legality of such reproduction is evidenced by Art. 21 of the Law of Ukraine ‘*On Copyright and Related Rights*’, ‘*The following shall be permitted without the consent of the author (or another copyright holder), but with mandatory indication of the author’s name and of the source of borrowing: 1) to use quotations (brief excerpts) from published works to the extent justified by the intended purpose, including quotations from newspaper and magazine articles in the form of press reviews, if this is required by the critical, polemic, scientific or informational nature of the work incorporating the quotations; to freely use*

quotations in the form of brief excerpts from performances and works incorporated in a phonogram (videogram) or a broadcast program...'[40].

Differences in fragments of works can consist in applying different word order in particular sentences, removing or adding individual words from/to sentences, replacing verbal units with their equivalents ('equivalent is something that completely corresponds to something, and can replace or fully express it...'). Meanwhile, there is no creativity in replacing verbal units with their equivalents in the text, whether the units in question are words, sentences, or paragraphs, since such substitution can be performed by any person.

V. Ionas emphasized that changing linguistic means (i.e. words in a literary work) that do not require creativity cannot produce a creative independent work: such a substitution is not essential. The language of the work is not borrowable, it can only be cited with the indication of the source, any other case will constitute evident plagiarism [17, p. 46].

Thus, when deciding whether to reproduce a scientific literary work, it is necessary to distinguish features that individualize the objects of study, point out the coincidences and differences in the compared works.

For example, the study found that the text of a scientific literary work contains the following features:

- non-printable characters (the presence of such characters is in itself a sign of mechanical copying of text from the Internet without any processing of the primary text);
- images copied from the Internet, tables with characteristic technical tags that are transferred (copied) into the main body of text;
- fused spelling of individual words (no spaces between individual words, such as transboundary pollution);
- misspellings (for example, spelling of proper names: 'atlantic ocean', 'black sea').

The presence of such errors may indicate the mechanical copying of components of the text under study from public sources, for example, from the Internet.

If at the previous stage it was established that the fact of reproduction of another work took place during the creation of the studied work and this reproduction was done in violation of the principles of fair use of works, it can be a valid reason to conclude that there are no signs of originality and creativity.

The following features may also indicate borrowing, reproduction of a previously created work:

- the use of synonyms, expressions similar in meaning or expressions that do not always accurately convey the content of the original document;
- changing the order of the words in sentences (compared to the original text);
- lack of clear indications of sources of borrowing;
- incorrect indication of the source of the borrowing (for example, links do not correspond to valid sources; links to non-existent tables, figures, diagrams);
- the use of small or larger text fragments that were created earlier than the text under study without indication of the source of the borrowing, that is, the use of texts created earlier by other authors without indicating the source of the borrowing in the list of references;
- changing the order of sentences in the text, changing the order of paragraphs in the text while maintaining the commonly recognizable form of expression;
- lengthening or shortening of sentences (combining simple sentences into complex sentences, or dividing complex sentences into simple sentences), formatting differences, different paragraph division compared to the original text (however, the form of how the text is expressed remains the same, the changes are not creative and do not create a new form);
- transferring errors of the primary text to the secondary text (for example, ‘acceptable’);
- inaccurate use of the texts of official documents, including technical errors;
- using the same titles for different sections of the text, reuse of the same parts in different sections of the text, which indicates the technical, ‘uncreative’, compilatory nature of the work).

Thus, in the comparative analysis of scientific literary works, the expert compares the linguistic elements, the ways of their selection, use, interconnection, and correlation. If the expert finds that a part of the text of a previously created work which has independent significance completely coincides with another text created at a later date, this constitutes a valid reason to conclude that reproduction of this part of the original work has occurred.

Comparative study is concluded by identifying the coincidences and differences which exist between the works, as well as determining whether the established differences are creative in nature or are simply a reproduction.

4.4.2. Establishing the fact of a remake of the work

Remaking is a common practice for creating works based on earlier ones. A characteristic feature of remaking is the borrowing of certain formal elements (linguistic means, imagery, a sequence of material presentation) from a work that existed before [12, p. 176].

A remake is also a change of genre of a pre-existing work as a result of the alteration or remaking of a work within the same genre in order to adapt it to other conditions of use. Remaking of copyrighted works by other authors is only possible with the permission of the copyright owner [19, p. 154].

Types of derivative works created by making changes to a certain work are constituted by translations, adaptations, abstracts, and other similar alterations.

A translation is an expression of the work's form in a language other than the language of the original work. When translating a work into another language, its internal form is preserved, and only the external form is changed since the work must be rendered in an authentic and undistorted form both in terms of its content and the style of the author.

In a comparative analysis, the expert detects coincidences and differences in the form and content of works, examines features of translation of works that arise in connection with the specifics of the original language and the language of translation, the choice of equivalents, translation transformations and untranslated

parts of the original, which, according to linguists [26, p. 37], is a purely individual decision of the translator.

Detection in the object of study of fragments which are a translation of fragments of another work, with equivalents placed instead of the words which are being translated, without syntax changes, gives the expert enough reason to conclude that work has been used [21, p. 179]. According to literature [19, p. 43], the substitution of equivalent words for the original text is a technical task and requires only the knowledge of two languages: the one from which the translation is made and the one into which the text is translated.

Thus, the analysis of the translated work reveals coincidences and differences in the form and content of the works, examines the peculiarities of the translation of the works that arise in connection with the specifics of the original language and the language of translation, examines the expediency and accuracy in the choice of equivalents, the use of translation transformations and untranslated parts of the original. In case of finding parts (fragments) in the object of study which appear to be a translation from another work, with equivalents replacing the original words being translated, the expert has enough reason to conclude that the work has been used even without analyzing the syntax of the text.

It should be noted that, as a rule, issues related to a comparative study of a text and its translation into another language are not addressed by intellectual property examination.

An adaptation is using someone else's work to create a new creative and independent work. In this case, the work of another author is a kind of 'foundation' for a new work. Textbooks and manuals are also adapted by introducing changes or additions to the text in order to make it more accessible [19, p. 33].

An abstract is a brief description of the publication in terms of content, target and purpose, form, and other features. It also includes information about the author. It usually accompanies books, brochures, annotated thematic plans of publication, advertising materials, bibliographic manuals [19, p. 36].

When resolving issues concerning making changes to a certain work, it is also necessary to establish coincidences and differences in the characteristics of the works; the approach to conducting the study is in this case similar to the one used in establishing the fact of a work's reproduction.

However, the coincidence of features is not yet evidence of objects being identical, and vice versa, their differences do not indicate that they are different. It is rare for an expert to make a conclusion immediately; rather, this requires synthesis and assessment of the data obtained during the study [76, p. 78].

As noted above, in addition to the identified coincidences and differences, it is necessary to determine whether these differences are creative and whether they create a new original form of expression of the work.

4.4.3. Establishing the fact of inclusion of a work as an integral part into collections, textbooks, anthologies and encyclopedias

Including a work as an integral part into collections is also a method (way) of using a work. As for the definitions of 'collection', 'reader', 'anthology', 'encyclopedia', it has to be mentioned that they are well known in the legal field and defined in reference publications and encyclopedias. In particular, the dictionary 'Intellectual property. Volume 1. Copyright and Related Rights' (2000) provides the following definitions of these concepts:

Collection is a publication that contains a series of works by one (author's collection) or several (many) authors [19, p. 101].

Reader is a textbook that contains literary, artistic, historical, and other works or excerpts from them, which are the object of study of a discipline [19, p. 242].

Anthology is a collection of selected works or excerpts from them by various authors, collected for a specific purpose. Anthologies belong to composite works, and the rights of their compilers are protected if the ordering of content in the anthology is carried out without infringing on the copyright protection of the works included in them. In order for copyrighted works to be placed in anthologies, the permission of their authors is required [19, p. 38].

Encyclopedia is a scientifically substantiated reference publication that contains systematic (alphabetical or by topics), essential and complete information on the issues of science and practical activity of humankind. Encyclopedias are universal (comprehensive) and special (sectoral). The publisher of an encyclopedia owns exclusive right to use such a publication. Whenever the encyclopedia in general is used, its publisher may indicate the title or require that such an indication be made [19, p. 92].

In the study of composite works, attention should be paid to the selection and placement of known material, i.e. pre-existing works or parts of them; the final result might be a creative and original work.

Composite works do not constitute the result of creative activity if they contain signs of mechanical copying and combining (compiling) parts of previously created texts that are not original in the selection and placement of the known material. Therefore, such works do not contain signs of originality and creativity.

4.5. Assessment (synthesis) of the results of the conducted research and formulation of conclusions

At this stage, coincidences and differences found as a result of comparative studies on the examined works are synthesized. It is also determined whether they are technical or individualizing with regard to a particular object of study, whether they could have occurred as a result of the use (reproduction) or change (remake, translation) of a particular work or its inclusion into a collection.

It is also noted whether the found coincidences were due only to the use of quotations from published works to the extent permitted, with indication of the source of borrowing, or through other methods of free use of works permitted by law; and also whether the identified coincidences could only have occurred through the use of the same literary and archival sources, texts from regulations or verbal constructions that are widely used in the relevant field of knowledge, etc.

5. FORMALIZING THE RESULTS OF EXPERT RESEARCH

The results of expert studies are formalized in the conclusions made by the judicial expert.

The expert's conclusion is drawn up in accordance with the requirements of the procedural legislation, the Instruction on the commissioning and conduct of judicial examination and expert studies, and the Instruction on the peculiarities of conducting judicial expert activity by certified court experts who do not work in state specialized expert institutions (when the examination is performed by an expert who is not employed by a specialized state expert institution). The structure of this conclusion and the requirements to its constituent elements are defined in the Instruction on the commissioning and conduct of judicial examination and expert research, approved by the order of the Ministry of Justice of Ukraine dated 08 October 1998, No. 53/3 [43].

The expert's conclusion must include all of the relevant details, namely:

- name of the document, date and number of the conclusion;
- categories of examination (additional, repeated, comprehensive, by a commission);
- type of examination (in case of examination of scientific literary works, the type of examination is defined as an examination in the field of copyright).

The expert's conclusion consists of three parts: introductory (Introduction), research (Research) and final (Conclusions), each of which is accompanied by the appropriate heading.

Each of these parts of the Expert Conclusion (introduction, research, and conclusions) has its own clearly defined internal structure. When drawing up the Conclusion on the results of the examination of scientific literary works, it is mandatory to state the following.

The introductory part must include:

- grounds for the examination of a scientific literary work: the place and the date of the decision; the position, title, and surname of the person who commissioned the examination (hired an expert); the name of the court; case name and number; the circumstances of the case that are relevant to the examination; other data relevant to the examination;
- date when the institution (or an expert) received the document on the commissioning of examination (involvement of an expert);
- a list of materials submitted for research;
- a method of delivery of materials and objects of study and the type of their packaging;
- a list of objects to be examined and their brief (bibliographic) description;
- the questions the expert examination of a scientific literary work must answer (verbatim in the formulation of resolutions, decisions, appeals, statements, etc.); if the questions are not clearly stated or their wording does not correspond to the recommendations, but the content of the task is clear for the expert, then after writing the questions in the wording given in the document on the commissioning of the expert (involvement of an expert), he/she can provide appropriate explanations and present the questions in the proper wording that meets the recommendations; if several questions are posed, the expert has the right to group them and present them in the order that facilitates the most appropriate research procedure; the questions resolved by the expert on conditions of expert initiative (if any) are also indicated;
- issues that will not be resolved by the expert (legal issues; those that fall outside the competence of the expert in the field of intellectual property; issues that do not require the use of specialized knowledge);
- the information about the expert(s): surname, name and patronymic, position, class of judicial expert, scientific degree and academic rank,

education, educational qualification level, expert specialty (valid expert specialty 13.1.1 ‘Research, related to literary, artistic, and other works’), work experience, date and number of issue of the certificate on the qualification of the judicial expert, the authority it was issued by and the expiration date;

- the information on the warning the expert received about (the expert’s awareness of) criminal responsibility for giving a deliberately false conclusion under Art. 384 of the Criminal Code of Ukraine and for refusing to provide a conclusion under Art. 385 of the Criminal Code of Ukraine (in case of court examination or pre-trial investigation);
- the date of submission of the expert’s request for additional materials, the date of receiving additional materials or information about the consequences of consideration of the request; the circumstances of the case that are relevant to the conclusion, with the mandatory indication of their source;
- in the case of re-examination it is necessary to provide information on preliminary examinations; surnames and initials of experts, names of expert institutions or experts’ places of work, numbers and dates of conclusions, the content of repeated questions; the conclusions of previous expert studies on these issues, as well as the grounds for commissioning a re-examination which are specified in the decision on its commissioning; if such grounds are not specified in the decision, an appropriate record should be made;
- regulations, scientific and reference literature used in the examination.

The research part of the Conclusion indicates the methods and techniques used during the examination, as well as the technical means (techniques) used for the research of scientific literary works:

- a description of the research objects and basic concepts and definitions (if applicable).

This part also describes the logical sequence of the research, namely:

- the characteristics and properties of the studied scientific literary works, their structure, features, the presence of attributes of copyright objects are stated;
- the external and internal forms of manifestation of the work are compared, etc.;
- the results of individual research are summarized and evaluated, which is the basis for formulating (synthesizing) conclusions, i.e. answers to the questions posed;
- facts that are relevant to the case and those which were not formulated are indicated.

The text of the Conclusion includes references to legal acts and literature used in the research.

Illustrations, pictures, graphs, diagrams, and photographs are placed right after the text where they are mentioned for the first time, on the next page, or separately in the Appendices. All illustrations should be referenced in the text. Illustrations may have a title placed below the illustration. An illustration is indicated by the word ‘Figure __’ and is numbered in Arabic numerals.

Example: ‘Figure 3 – Layout...’

The tables are placed directly after the text where they are first mentioned, on the next page or separately in the Appendices. All tables should be referenced in the Conclusion. A table can have a title that is typed in lowercase letters (except for the first capital one) and is placed above the table. The title should be concise and reflect the main content of the table.

The final part of the Conclusion provides conclusions drawn from the results of the examination.

A clear and concise answer to the posed questions is given; alternatively, the Conclusion states why such an answer cannot be provided and substantiates such an answer.

The re-examination shall state the reasons explaining differences from the conclusions of previous examinations, if any.

The expert(s) Conclusion shall be signed by the expert(s) who conducted the research.

Detailed requirements to the formulation of the examination results are set out in the Instructions on the commissioning and conduct of judicial and expert research.

6. LEGAL ACTS AND SCIENTIFIC RESOURCES USED FOR EXAMINATION OF SCIENTIFIC LITERATURE WORKS

The list of fundamental legal acts

1. *The Constitution of Ukraine* of 28 June 1996, No 254к/96-BP // *The Journal of the Verkhovna Rada of Ukraine*. – 1996 – No 30. – Id. 141.

2. *Berne Convention for the Protection of Literary and Artistic Works*, adopted by the World Intellectual Property Organization on July 24, 1971 // *Collection of current international treaties of Ukraine*. – 2006. – No 5. – Id. 1247.

3. *The Universal Copyright Convention (revised)*, adopted by the United Nations Educational, Scientific and Cultural Organization on 24 July, 1971 // *The Information Referral System 'Pravo', The Information Analysis Centre 'BIT': www.legal.com.ua*

4. *The Civil Code of Ukraine* of 16 January 2003, No 435-IV (Book IV). // *The Journal of the Verkhovna Rada of Ukraine*. – 2003. – No 40. – Id. 356.

5. *Copyright Treaty of the World Intellectual Property Organization*, adopted by the Diplomatic Conference on 20 December 1996 // *The Information Referral System 'Pravo', The Information Analysis Centre 'BIT': www.legal.com.ua*

6. *On Copyright and Related Rights*: Law of Ukraine dated 23 December 1993, No 3792-XII. // *The Journal of the Verkhovna Rada of Ukraine*. – 1994. – No 13. – Id. 64.

7. *On Higher Education*: Law of Ukraine dated 01 July 2014 // *The Journal of the Verkhovna Rada of Ukraine*. – 2014. – No 37–38. – Id. 2004.

8. *On State Registration of Copyright and Contracts Concerning the Author's right to a Work*: the resolution of the Cabinet of Ministers of Ukraine dated 27 December 2001, No 1756. // *The Official Bulletin of Ukraine*. – 2001. – No 52. – Id. 2369.

9. *On Certain Issues of the Practice of Resolving Disputes Related to the Protection of Intellectual Property Rights*: the resolution of the Plenum of the

Supreme Economic Court of Ukraine dated 17 October 2012, No 12. // *Bulletin of Economic Justice* – 2012. – No 6. – Id. 57.

10. *On Certain Issues of the Practice of Commissioning Judicial Examination in Disputes Related to the Protection of Intellectual Property Rights*: the resolution of the Plenum of the Supreme Economic Court of Ukraine dated 23 March 2012, No 5. // *Bulletin of Economic Justice*. – 2012 – No 3. – Id. 29.

11. *On Certain Issues of the Practice of Commissioning of Judicial Examination*: the resolution of the Plenum of the Supreme Economic Court of Ukraine dated 23 March 2012, No 4 (edited). // *Bulletin of Economic Justice*. – 2012 – No 3. – Id. 15.

12. *On the Application of Legislation by the Courts in Cases on the Protection of Copyright and Related Rights*: the resolution of the Plenum of the Supreme Court of Ukraine dated 4 June 2010, No 5. // *Bulletin of the Supreme Court of Ukraine*. – 2010. – No 6. – Id. 4.

13. On approval of the Instruction on the peculiarities of conducting judicial expert activity by certified court experts who are not employed by the specialized state expert institutions: the order of the Ministry of Justice dated 26 December 2011 // *The Official Bulletin of Ukraine*. – 2011. No 98. – Id. 3591.

14. On approval of the Instruction on the commissioning and conduct of judicial examinations, expert research and scientific and methodological recommendations on the preparation and commissioning of judicial examinations and expert research: the order of the Ministry of Justice dated 8 October 1998 // *The Official Bulletin of Ukraine*. – 1998. – No 46. – Id. 172.

15. On Scientific and Scientific and Technology Activities: the Law of Ukraine dated 26 November 2015 // *The Journal of the Verkhovna Rada of Ukraine*. – 2014. – No 37 – 38. – Id. 2004.

This list is not exhaustive.

List of recommended scientific and reference literature

1. *Авторське право і суміжні права в Європі* : монографія / Ю.М. Капіца, С.К. Ступак, О.В. Жувака. – Київ : Логос, 2012. – 696 с.
2. *Бентли Л. Право интеллектуальной собственности: Авторское право* Л. Бентли, Б. Шерман . Пер. с англ. В.Л. Вольфсона. – Санкт-Петербург : Юридический центр Пресс, 2004. – 535 с.
3. *Винберг А.И. Судебная экспертология (общетеоретические и методологические проблемы судебных экспертиз)* : учеб. пособие [Текст] / А. И. Винберг, Н. Т. Малаховская. – Волгоград : ВСШ МВД СССР, 1979. – 183 с.
4. *ВОИС. Глоссарий терминов по авторскому праву и смежным правам* . Published by the World Intellectual Property Organization, 1981. – 228 с.
5. *Гаврилов Э.П. Авторское право. Издательские договоры. Авторский гонорар* / Э.П. Гаврилов. – Москва : Юрид. лит., 1988. – 176 с.
6. *Гаврилов Э.П. Советское авторское право (Основные положения. Тенденции развития)* / Э.П. Гаврилов. – Москва : Наука, 1984. – 224 с.
7. *Галич О. Теорія літератури* : підручник / О.Галич, В. Назарець, Є. Васильєв; за наук. ред. О. Галича. – 4-те вид., стереотип. – Київ : Либідь, 2008. – 488 с.
8. *Гордон М.В. Советское авторское право* / М.В. Гордон. – Москва : Госюриздат, 1955. – 232 с.
9. *Дроб'язко В.С. Право інтелектуальної власності* : /В.С. Дроб'язко, Р.В. Дроб'язко. – навч. посібник Київ : Юрінком Інтер, 2004. – 512 с.
10. *Енциклопедія інтелектуальної власності* / За ред. проф. П.П. Крайнева. – Київ : Старт-98, 2012. – 660 с.
11. *Жилінкова, О.В. Договори в сфері реалізації авторських прав на музичний твір* / О.В. Жилінкова. – Харків : Інформ.-прав. центр «Ксилон», 2008. – 212 с.
12. *Загальна методика призначення та проведення комплексних судових експертиз, що виконуються комісією експертів (із змінами,*

внесеними рішенням Координаційної ради від 12.09.2014 р.) (zareєстровано в Міністерстві юстиції України 06.02.2009 р., реєстраційний код 0.1.16).

13. *Захист авторського права і суміжних прав* : практич. посібник для працівників правоохоронних органів / Упор. В.В. Ілінг, І.А. Михайлов, А.І. Ручкін. – Київ : [б.в.], 2005. – 162 с.

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17. *Интеллектуальна власність* : словник-довідник – / За заг. ред. О.Д. Святоцького. – У 2-х т.: Т. 1. Авторське право та суміжні права / За ред. О.Д. Святоцького, В.С. Дроб'язко ; уклад. В.С.Дроб'язко, Р.В. Дроб'язко. – Київ : Вид. дім «Ін Юре», 2000. – 356 с.

18. *Интеллектуальна власність* : словник-довідник. – У 2-х т. / За заг. ред. О.Д. Святоцького. – Київ : Вид. дім «Ін Юре», 2000. – 628 с.

19. *Кисиль Н.В. Экспертиза как средство доказывания обстоятельств о нарушении прав интеллектуальной собственности.* Практика Украины / Н.В. Кисиль // Криминалистика и судебная экспертология: наука, обучение, практика: Vilnius, 2017. Часть II. – С. 64 – 77.

20. *Кісіль Н. В. Особливості проведення експертних досліджень, пов'язаних з літературними творами наукового характеру* / Н.В. Кісіль // Криминалистика и судебная экспертиза : междуведом. науч.-метод. сб. – Вып. 58. – Ч. 1 / Отв. ред. И. И. Емельянова. – Киев : Мин-во юстиции Украины, 2013. – С. 385 – 390.

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