



producibility as terms for legal protection of objects of copyright.

Exposing the terms of protection of objects of copyright their conditional division into basic and additional should be marked. The basic terms of legal protection include the sign of creative character of work and the sign of its expression in the objective form, and additional terms of legal protection – the sign of content of work, the sign of completeness of work and the sign of its [1, p. 119] publicity. Some of the researchers pays attention to the possibility of his recreation [2, p. 51]. Additionally its originality [3, p. 54] is also pointed out.

To define the maintenance of the concept «creation» due to the absence in the Law of Ukraine «About the copyright and contiguous rights» the proper norms is difficult enough. In connection with it there is a necessity to develop approximate determination of work (as it is done in relation to the concept of moral harm in default of this determination in the CC of Ukraine) at the level of generalizations of judicial practice and proper decision of Plenum of the Supreme Court of Ukraine.

In determination of the object of copyright which was given in the civil legislation of the Soviet union, also there has not been a direct pointing on the creative character of labour of the authors of works, that gave some authors the foundation to assert that «new, creatively independent works – it only a part of works which are protected by a copyright» [4, p. 222]. The determination of the object of copyright in the item of article 8 the Law of Ukraine «About a copyright and contiguous rights» is more clear: «A copyright spreads on works of science, literature and art which is the result of creative activity, regardless of the purpose and dignities of work, and also from the method of its expression» [5].

The condition of the creative character means that a work must be the result of creative labour of his author. This condition is absent in the international agreements, however it is often set in the national legislation. The indirect pointing to the condition of the creative character of work is in the article 2(5) Bernskiy convention in accordance with which made works are protected, if they are as to selection the result of intellectual creation and location of materials. Thus materials are understood as works included in a composite work. Works are Therefore the works included in to the collection can also be considered as the result of creation.

The category «creation» at first sight it can seem easy enough for understanding, but at the same time degree to represent it fully within the framework of the unique concept is very difficult. Both in a pre-revolution and soviet legislation and in the modern one the concept «creation», «creative activity» found

no legislative condiction. In science this question causes frisky discussions as well. Some authors determine creation as a conscious and in most cases labour intensive process which aims at achieving a certain result [6, p. 34]. Others consider «creation» mainly as a result of creating something new [7, p. 5], high-quality new and distinct in uniqueness, originality and unicity, distinct in novelty.

It is considered that as a result of the creative activity all high-quality new and original, inimitable and unique, including works of science, literature and art are created. The creative character is expressed in the novelty and originality of work both in a form, and on content.

Despite the fact to that in the Law of Ukraine «About the copyright and contiguous rights» the sign of creation hasn't been revealed in this connection a lot of determinations are given in the legal literature. Yet V.I. Serebrovskiy marked that creation is a conscious and mainly intensive labour process which has the purpose of achievement of a certain result [9, p. 34]. In O.S. Ioffe opinion creation is an intellectual activity completed by a realizable act, as a result of which new concepts, images and (or) forms of their embodiment which is the ideal reflection of objective reality appear. A conscious intellectual character of work of the writer shows up in the fact that till any work acquires the objective form of expression, it is being formed, ripens in his imagination.

For us the nearest is the approach of the Anglo-Saxon system of right, where the work is acknowledged as creative, if an author found out enough ability, reasonableness and labour or carried out a selection, estimation, verification [10, p. 124 – 126].

It is thought V. Ya Ionas, that come close the nearest to the correct understanding of the concept of creation who subdivides on intellectual activity into productive (creative) and reproductive. Thus an important conclusion for the civil law: can be made there are two types of works – creative and uncreative. It means that the concept of work from the point of psychology of thought is wider than the concept «work of creation». The work of creation is the special case of the concept «work» (works of idea) [11, p. 9 – 10]. A similar opinion has E. P. Gavrilov who determines creation, as «activity man's as a result of which something high-quality new appears, that differs by uniqueness, originality and social-historical unicity». Creation is incident to the man, in fact only a man who is the unique subject of creative activity can create. Nature sometimes also creates unique masterpieces, but there is the process of development in nature, but not of creation. Creation is realized and purposeful process and as usual unpredictable.



The second condition for legal protection is an objective form of work.

The condition of objective existence of work means actual existence of work regardless of its author. So that any work could be accessible to other people without mediation of an author, it should be in such an objective form which can be perceived by the human feelings, that is by sight and ear, and in default of sight – by a touch (works for the blind created by the special methods) regardless of the author.

So that an idea could be receptive, it must be shown in a certain transmitter: a manuscript, a picture, any thing that is to named a work. The work itself in such posing is a unity of maintenance (ideas) and form – transmitter. Thus the first always comes forward as single, and a form can be most various, and here it can also change. The works of science, literature and art are the objects of copyright. Then a suitable question, arises up that is how protected can be intellectual property on created, but not written read to nobody poem if it arises up from the moment of creation? An idea, unlike its transmitter, is not the subject of replication, but exactly through replication and bringing circulation to the greater circle of consumers there could be got any benefit. When the work is intended for the general public, a property right depends on the skill (class) of performance. The higher the performance level, the higher the skill and confession of the performer, the more the fees. In turn the greater the number copies [15, p. 109].

Taking into account the norms of the Law of Ukraine «About the copyright and contiguous rights», judicial practice such forms: are acknowledged written (a manuscript, typing etc.), verbal (a public speech, a public implementation etc.), sound or videotape recording (mechanical, magnetic, digital, optical etc.), image (a picture, a sketch, a painting, a plan, a draft, a film, TV, video photo still etc.), volume spatial (a sculpture, a model, a replica, a building etc.).

The indicated list is not exhaustive, as in the process of development of technique and appearance of new technologies, which provide fixing of the results of man's activity, there can appear and appear actually new not known before forms of expression of author's ideas.

In other words a work must exist in form, which is dissociated from face author's personality and acquired an independent existence. Thus, for confession of work as the object of copyright the completeness of work is not required. The law of Ukraine «About the copyright and contiguous rights» equally protects both completed and uncompleted works, in particular sketches, plans and other

intermediate results which are used by the authors at creation of works.

The objective form of work expression is closely connected with the possibility of its reproduction. In relation to the character of this connection there are two positions in legal literature. In of one group of author's, opinion an objective form and producibility of work make up the unique sign of protectable work, that is there is no necessity to talk about, the producibility of work as the presence in at work of the objective form testifies about the possibility of its reproduction [16, p. 80 – 81].

Other researchers consider that a producibility is the independent sign of work, that the Law of Ukraine «About the copyright and contiguous rights» protects only such works where the objective form provides the possibility of their reproduction without the participation of the author himself. But, in opinion of this group of scientists, such form is not unconnected with any material transmitter, and is extremely unsteady, thus can be easily lost and disfigured. No listener or spectator, except for, the, cases of the special genius, unable to memorize and reproduce in all detail a publicly recited work. Therefore separate examples of reproduction from memory once heard or seen works which are given in literature, can prove nothing. They are related to the personages and can not serve as the basis for developing the rules of conduct, counted on ordinary people.

The Ukrainian legislation does not specify on the criterion of producibility of the objective form of work as an obligatory condition for protection.

An attention should be paid, that while researching the criterion of perception of work it goes about the perception of work by the senses (it is widespread enough in Anglo-Saxon countries). In this case the possibility of work perception is a basic criterion for protection. Accordingly, it covers all the cases of work performance in the case of absence of its fixing on a material transmitter. However in this case considerable difficulties are connected with the use of a number of modern methods of distribution of works. A broadcasted work ether will not be considered existing in an objective form, because the radio waves themselves can not be perceived as the mains senses. For a certain period of time the digital form of a certain work can become the unique form of its fixing [17, p. 148].

The law of Ukraine «About the copyright and contiguous rights», settling this long-term dispute, is limited to pointing on the necessity of objective work shaping and does not mention here that a given form must allow to reproduce the result of creative activity of the author. In other words, a legislator acknowledged that any works expressed outwardly are protected by the copyright, including



those the objective form of which is not connected with a material transmitter. Certainly, the protection of similar works, for example, public by proclaimed, but nowhere fixed speeches, lectures, reports, especially protecting them from distortion, appears more difficult, than the protection of works, related to some material transmitter. But it in principle can be done, in connection with which the exception from the norms of current legislation of the special mention about the possibility of reproduction of creative activity result as the special sign of work which is protected is considered to be justified.

In our view, basing on the provisions of modern legislation the objective form of expression means that the work is accessible for perception of other persons. And, as E. P. Gavrilov notes correctly the work is considered to be expressed in an objective form regardless of whether such form of expression can be perceived by sense-organs directly or by means of some hardwares.

In legal literature there has been expressed an opinion, that one of criteria of protectability of work is its public utility. However this position hasn't been supported in science and was ignored by the majority of scientists. Neither former nor current legislation did not contain and does not contain such a requirement to works. Moreover, the Law of Ukraine «About the copyright and contiguous rights» highlights, that a copyright spreads on all the works, regardless of their purpose and dignity. It means that a copyright both protects highly artistic works and the works whose artistic dignities are low. It is clear, as another decision of question would open the wide field for subjectivism, because it is impossible to find out some objective indexes of utility and special dignities of work. The question concerning the qualities of work is determined decides on the stage of the use of work, when the feasibility of edition, public show or other use of work is estimated, the scope of authority and the size of author's fee is determined etc. But even when the work is to impractical to use because of its artistic weakness, the errors or in connection with its uselessness for other reasons, it does not mean that such work should not get a legal protection.

In accordance with p. 2, article 433 CC of Ukraine it is foreseen, that the works are the objects of copyright without implementation of any formalities in relation to them and regardless of their completeness, purpose, values etc. and also the method or form of their expression. Consequently any legislator, at first sight of it as though stepped back from the legislative fixing of the purpose signs, dignity and public utility. A copyright protects both works of low creative quality and highly artistic works,

without making any differences in the mode of their protection.

R.B. Shishka a cone considers that not every creation and not all works must be protected. An international community considers that the works which are protected by a copyright must to be original, that is created in the creative laboratory of the author. But the circumstance is overlooked, that such works must be oriented on progress of the humanity and not to call to violence, elimination, not to contain propaganda of hatred to the human. Taking into account the last events in the world it is under a sufficient reason, to be represented in the right of intellectual ownership, and in the copyright in particular.

At the same time, in accordance with p. 2 article 442 CC of Ukraine a work can not be published, if it violates the human right to privacy of his personal and family life is detrimental to public order, health and morality of the population. The Morality of work is close to the sign of dignity, but these concepts are not identical. An attention should be paid that requirements of morality are determined by the right, but by public opinion of this epoch.

The bases of morality understood as moral norms which are supported by a right. In other case a judge will be deprived of the possibility to allude to the legal norms, that will inevitably result in abolition of decision. If a moral norm is fastened by right, accordingly, it objectively exists in a kind, accessible for public perception and is well-known (and it applies the legal principle, that its ignorance does not release from responsibility); and because of its fastening by right, assumes its general acquisition.

The law of Ukraine «About protection of public moral» forbade in Ukraine the production and turn out in any form the products of pornographic character (article 2). Herewith at the criteria of relating the products to such which have a pornographic character, are set by specially authorized organ of executive power in the field of culture and arts. The production and turn out the products of erotic character and products which contain the elements of violence and cruelty are allowed exceptionally, on condition of observance of limitations, set by the legislation.

In our view, there is a successful determination of work as an aggregate of ideas, thoughts images, which as a result of the creative activity of the author acquired the expression in the form accessible for perception by the human senses which assumes the possibility of their reproduction. Thus, creation needs to be examined as activity of man, which creates something high-quality new and excellent from the point of its uniqueness, originality and unicity.

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## АНОТАЦІЯ

**Кирилюк А.В. Критерії (умови) надання правової охорони об'єктам авторського права.** – Стаття.

Стаття присвячена розгляду питання щодо визначення умов правової охорони об'єктів авторського права. Досліджено різні точки зору щодо визначення кожної з умов правової охорони об'єктів авторських прав, визначені основні та додаткові умови правової охорони об'єктів авторського права.

**Ключові слова:** літературні твори, об'єкти авторських прав, творчий характер, об'єктивна форма вираження, зміст твору, результат творчої діяльності, оригінальність.

## АННОТАЦИЯ

**Кирилюк А.В. Критерии (условия) предоставления правовой охраны объектам авторского права.** – Статья.

Статья посвящена рассмотрению вопроса относительно определения условий правовой охраны объектов авторского права. Исследованы различные точки зрения относительно определения каждого из условий правовой охраны объектов авторского права, определены основные и дополнительные условия правовой охраны объектов авторского права.

**Ключевые слова:** литературные произведения, объекты авторского права, творческий характер, объективная форма выражения, содержание произведения, результат творческой деятельности, оригинальность.

## SUMMARY

**Kirilyuk A.V. The criteria for legal protection of the objects of copyright.** – Article.

The article is devoted to consideration of the question in relation to determination of the terms of legal protection of the objects of copyright. There have been investigated different points of view in relation to determination of each criteria of legal protection of the objects of copyright, the basic and additional criteria of legal protection of the objects of copyright.

**Keywords:** literary works, objects of copyright, creative character, objective form of expression, maintenance of work, result of creative activity, originality.