

THE RIGHT TO FREEDOM OF CREATIVITY IN THE SYSTEM OF HUMAN RIGHTS AND FREEDOMS: INTERNATIONAL AND NATIONAL LEGAL REGULATION

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INTRODUCTION

In the context of the development of the information society, the right to freedom of creativity acquires special significance, is an indicator of democratic transformations in the state and society. Freedom and creativity have a dialectical relationship in their unity as a whole and a part. Free creativity is an element of freedom. Freedom is a fundamental characteristic of human existence in general and a prerequisite for the creative process, in particular. Freedom is not the result of intellectual creation, it is a characteristic of human existence. And creativity implies the possibility of a person's free choice from a variety of possibilities, it is one of the forms of realizing freedom.

Freedom of creativity is the principle of functioning of spiritual and cultural relations, according to which a person can freely choose the direction, sphere, content and form of manifestation of creativity. This is the starting point, the fundamental idea that determines the content and directions of legal regulation of creative activity. Freedom of creativity is the basis of law-making, law enforcement and law enforcement activities. Freedom of creativity is a broader concept than the right to freedom of creativity. From the point of view of legal construction, freedom of creativity is a principle of a democratic society and finds its expression in the subjective right to freedom of creativity. Legislation establishes the boundaries of freedom of creativity and regulates the relationship with public morality, religion, and state policy.

The right to freedom of creativity is an established, guaranteed, and sanctioned by the state opportunity for a person to create literary, artistic, scientific, and other works, conduct scientific research, engage in inventive, teaching, acting, and other creative activities. When implementing the right to freedom of creativity, the creative result is a probable goal of creativity and not always its consequence. The right to creativity is one of the fundamental human rights, which does not depend on the creation of a qualitatively new result. Characterizing creativity as a category of law, it should be noted that the legislation equally protects both the right to engage in creativity (the creative process) and the results of creativity, regardless of how significant the element of creativity is, in what it is manifested and to what extent. The right to creativity stems from the very biological essence of a person, belongs to him from birth, that is, dictated by nature itself, therefore, ultimately, it is natural.

The phenomenology of the right to freedom of creativity is the correlation of the phenomenon of creativity, the creative process, the essence of the rights of the right to freedom of creativity. Creative activity as a process may not end with a creative act, the result of creative activity or an object of intellectual property, despite this it must be guaranteed and stimulated. The essence of the phenomenology of the right to freedom of creativity is manifested in the structure of rights: the right to one's own actions, the right to the actions of others, the right to protection. The purpose of the right to freedom of creativity is to ensure the possibility of satisfying the needs of realizing the creative potential of a person and the results of his creative activity. The social purpose of the right to creativity consists in performing specific tasks determined by its purpose and social value, in particular: creating conditions for the implementation of the right to freedom of creativity; developing creative abilities; encouraging creative activity, the intellectual potential of the nation, society; ensuring equal opportunities in the implementation of the right to freedom of creativity; ensuring the optimal combination of freedom of creativity and justice in the field of creative activity.

The purpose of the subjective right to freedom of creativity is the interest of the individual, which consists in the fullest expression of the individual's creative abilities, as well as in the use and disposal of the results of his creative activity. Society and the state are interested in the creation of literary, artistic and other works, because such a process ensures scientific and technological progress and social development, achieving high cultural and economic development of the state. A creatively formed individual is an active subject of social relations. The result of creativity is the primary goal of the mechanism for ensuring the right to freedom of creativity, which must be formed in such a way that the process of realizing the individual's creative abilities is effective. The realization of the individual's creative abilities is the priority goal of the subjective right to freedom of creativity. The subjective right to freedom of creativity is the measure (limit) of the possible (permitted) behavior of an individual in the field of literary, artistic, scientific, technical and other types of creativity, with the aim of the fullest expression of the individual's creative abilities, the use and disposal of the results of creative activity.

1. The content of the right to freedom of creativity: conceptual principles

The study of the right to freedom of creativity is important because it reveals its place in the system of human rights and freedoms, highlights the interaction of this right with other rights and freedoms, which are quite diverse in content and purpose. The relevance of the study of the classification identification of the right to freedom of creativity in the system of rights and freedoms is determined by the need for free creative self-expression of a person, access to cultural heritage and

the development of one's creative potential.¹ The presence of various classifications of human rights and freedoms allows us to better characterize the content and features of a particular right. In the study of the right to freedom of creativity, we consider it appropriate to use the most established classification of the distinction between human rights and freedoms by sphere of life, which distinguishes rights and freedoms into: civil (personal), political, economic, social and cultural.

The right to freedom of creativity, which belongs to the second generation of human rights, is closely related to the rights of the first generation, which encompass the basic personal rights and freedoms of a person². The right to freedom of creativity is closely related to personal rights. Personal rights are the possibilities of a person, provided to ensure his physical and moral-psychological individuality. They serve as a guarantee of individual autonomy and freedom, a means of protecting subjects from arbitrariness on the part of the state and other people, their purpose is to guarantee the possibilities of physical existence and spiritual development of a person. The content of freedom of thought and speech is that no one can forbid a person to adhere to his thoughts, to reflect objective reality in his ideas in a certain way and to publicly express these materialized conditional reflections, in particular views and beliefs in any sphere of foreign policy, state power, economic processes, education and culture, the development of legislation, etc. The right to freedom of thought and speech does not apply to any thought, but only to that which has an external expression. Since, in addition to views and beliefs, there are also other forms of thinking, this freedom applies to the expression and other of its "products": rationalized feelings, attitudes, orientations, concepts, theories, etc.

In addition, the right to freedom of thought and speech includes the possibility of using any means of expression of thought – both traditional (oral, written, visual, etc.) and modern technical. Freedom of creativity is an important prerequisite for freedom of speech, and vice versa, without freedom of speech, freedom of creativity will be impossible. After all, one of the spheres of expression of thoughts, views, beliefs, rationalized feelings, attitudes, orientations, concepts, theories, etc. is creative activity³. Freedom of speech, self-expression, creativity is the source of democracy. Democratic power does not restrict creativity and freedom of speech. The unity of the right to freedom of

¹ Аналітичний Звіт. Свобода слова в Інтернеті. Законодавчі ініціативи та практика розгляду кримінальних справ в Україні в 2014-2018 рр. Л. Опришко, В. Володовська, М. Дворовий ГО «Платформа прав людини». Березень 2019. URL: <https://www.ppl.org.ua/wp-content/uploads/>

² Белкін М. Л. Держава та свобода творчості у світлі рішень Європейського Суду з прав людини. *Актуальні питання цивільного та господарського права*. 2008. № 5 (12). С. 6-15.674.

³ Білозьоров Є. В. Правові гарантії захисту прав і свобод людини в Україні: реалії та проблеми. *Адвокат*. 2009. № 8. С. 26-30

creativity and freedom of speech is manifested in the fact that their restriction is a sign of an anti-democratic regime.

Thus, the correlation of the right to freedom of creativity with the right to freedom of thought and speech is that freedom of creativity is one of the spheres of realization of freedom of thought and speech, because the creative process involves the expression of thoughts, views, beliefs, rationalized feelings, attitudes, orientations, concepts, theories, etc. Freedom of creativity is impossible without freedom of thought and speech⁴. On the other hand, the right to freedom of creativity is the most important prerequisite, one of the manifestations of freedom of speech. The fundamental natural human right – the right to life – is of decisive importance in the process of studying the right to freedom of creativity, because the purpose of human life is to satisfy biological and spiritual needs. Creativity is a spiritual need of every person, it is an attribute of human life, allows a person to assert himself as a person and feel the fullness of life and freedom. The correlation of the right to life and the right to freedom of creativity is manifested, on the one hand, in the fact that the right to life is primary in relation to all other rights, including the right to freedom of creativity⁵. On the other hand, the right to freedom of creativity is a means of satisfying the spiritual needs of a person's life.

The human right to respect for dignity and the right to freedom of creativity are interconnected. The human right to respect for dignity is embedded in the content of both international and national legal acts. Human dignity and human dignity require legislative coordination with freedom of creativity. On the one hand, respect for human dignity objectively requires restrictions on freedom of creativity. Human dignity is the limit where freedom in creative activity ends. Creativity, the content of which is disrespect for human dignity, belittling the value and social significance of a person as a socio-spiritual being, is prohibited by law. However, when it comes to human dignity as an internal assessment of one's own value, which is based on the moral self-awareness approved by the dominant part of society and the readiness to protect it under any conditions, freedom of creativity requires additional guarantees and protection⁶.

Creativity helps a person to realize their abilities, talent, and self-affirmation. That is, ensuring freedom in creativity is a guarantee of human dignity, because

⁴ Білозьоров С. В. Міжнародно-правові гарантії як елемент механізму забезпечення прав і свобод людини та громадянина. *Науковий часопис НПУ імені М. П. Драгоманова. Серія 18: Економіка і право*. 2011. Вип. 14. С. 63-68.

⁵ Бочарова Н. В. Значення конституційного забезпечення свободи творчості та права на результати творчої діяльності в умовах інформаційного суспільства. *Науковий вісник Міжнародного гуманітарного університету. Серія: Юриспруденція*. 2014. № 7. С. 69-72.8.

⁶ Волинка К. Г. Механізм забезпечення прав і свобод особи: питання теорії і практики: Автореф. дис.... канд.юрид.наук: 12.00.01. Ін-т держави і права ім. В.М. Корецького. К., 2000. С. 8-9.

it gives the opportunity to both increase one's own self-esteem and receive an assessment of one's creativity from other people. The need to guarantee freedom in creativity to ensure human dignity is evidenced by historically known facts, when brilliant ideas, inventions, and scientific discoveries did not receive due appreciation from society due to the low cultural level of the era. On the one hand, the right to human dignity implies certain restrictions on freedom of creativity. Creativity, the content of which is the humiliation of the value and social significance of a person as a socio-spiritual being, is prohibited by law. However, on the other hand, creativity helps a person to realize their abilities, talent, and self-affirmation. When it comes to the category of "human dignity," ensuring freedom in creativity gives the opportunity to both increase one's own self-esteem and receive an assessment of one's creativity from other people⁷.

When determining whether the right to freedom of creativity belongs to the second generation of human rights, it is necessary to pay attention to the fact that this is one of the opportunities for a person to enjoy spiritual, cultural benefits and achievements, to participate in their creation according to his abilities. The right to freedom of creativity is associated with human activity in the sphere of culture and spiritual life, that is, in terms of its scope of implementation it belongs to cultural human rights and freedoms and the second generation of human rights⁸. The study of the right to freedom of creativity will be incomplete without highlighting the interaction of this right with other human rights and freedoms that belong to the second generation and are quite diverse in content, purpose, possibility of implementation, etc.

The vast majority of researchers highlight cultural rights as a group of constitutional rights and freedoms of a person and a citizen aimed at ensuring the cultural and spiritual needs of a person. These rights, for the most part, include the right to education, the right to freedom of literary, artistic, scientific and technical creativity, the right to the results of intellectual, creative activity⁹. Cultural (humanitarian) rights are the possibilities of preserving and developing one's ethnic identity, access to the achievements of the spiritual and material culture of the nation, people, and humanity, their assimilation, use, and participation in their further enrichment (in particular, the right to education and upbringing; use of cultural and artistic achievements; scientific, technical, and artistic creativity). Cultural rights are the state-guaranteed opportunities for intellectual development, creative realization, and self-expression of an

⁷ Гришук О. В. Право на свободу вираження поглядів: проблеми обмеження. *Бюлетень Міністерства юстиції України*. 2003. № 7. С. 16–17.

⁸ Добрянський С. Права людини в Європейському Союзі: можливості удосконалення юридичного гарантування. *Право України*. 2019. № 6- С. 108-125.

⁹ Колодій А. М., Олійник А. Ю. Права, свободи та обов'язки людини і громадянина в Україні: підручник. К.: Всеукраїнська асоціація видавців «Правова єдність», 2008. С.257-255.

individual, access to the achievements of the culture of the nation, people, and humanity, their assimilation, use, and participation in their further enrichment.

Given that creativity and education are inextricably linked with the development of science and form the basis of social progress, the right to freedom of creativity is closely interconnected with the right to education. Ensuring the right to education involves creating conditions for the comprehensive development of the individual, the development of his or her talents, mental, and physical abilities, and the enrichment of the intellectual, creative, and cultural potential of society on this basis. Obtaining education is inextricably linked with a person's creative self-realization. The educational process involves participation in scientific research, design and other types of scientific activity, conferences, Olympiads, exhibitions, competitions, etc. Thus, by entering an educational institution, a person pursues the goal of obtaining an education, and by fulfilling the tasks of the curriculum, he can simultaneously realize himself as an artist, singer, scientist, etc. For this, conditions must be created that would guarantee a person freedom of creative activity. In turn, in order to write a work of art or perform other creative work, a person needs to acquire new knowledge, form certain skills, abilities, and personal qualities¹⁰. The close connection between the right to education and the right to freedom of creativity is seen in the fact that it is the right to education that should ensure the development of a person's creative abilities. It is necessary to note the importance of integrating education and science. The learning process combines scientific research work, the educational process is based on scientific research carried out by teachers together with students.

The right to education is closely related to the freedom of teaching. This is the principle of academic freedom, which is an element of the right to freedom of creativity and applies mainly to higher education¹¹. This concept refers to the freedom of members of the academic community (persons who teach, study, engage in research and work in a higher educational institution), individually or collectively, to engage in activities, develop and disseminate knowledge through research, study, discussion, documentation, production, creation, training, teaching. Therefore, the right to education is one of the means of ensuring the right to freedom of literary, artistic, scientific and technical creativity and one of the ways of its implementation. Obtaining new knowledge, developing skills and natural talents of a person occurs in the process of obtaining education.

That is, the right to education is a means of ensuring creative activity. In the process of learning, a person can engage in creative activity in the form of research work, teaching, artistic or other creativity, that is, to exercise the right to

¹⁰ Культурні права в прецедентній практиці Європейського Суду з прав людини. 2011. URL: https://www.echr.coe.int/Documents/Research_report_cultural_rights.pdf.

¹¹ Лисенков С.Л. Культурні права. К.: Либідь, 2001. С.431.

freedom of creativity. In this case, the right to education is one of the ways to realize the right to freedom of literary, artistic, scientific and technical creativity¹². The right to freedom of creativity is in a dialectical relationship with the right to access to the cultural achievements of the nation, people, and humanity. The realization of the right to freedom of creativity is impossible without access to the cultural achievements of the nation, people, and humanity. Often, the content of creativity is subjects related to historical events, the development of society and the state, history, science, and culture. Sometimes the creative process involves the need to study old books and other publications that are of historical, artistic, scientific, and literary value, or to turn to original works of art of painting, graphics, and sculpture, and traditional folk art. Without ensuring access to the cultural achievements of the nation, people, and humanity, the realization of the right to freedom of creativity is impossible¹³.

The dialectical connection between the right to freedom of creativity and the right to access the cultural achievements of the nation, people, and humanity is manifested in reproduction. Social progress, the dynamics of culture, and spiritual values are the result of creative activity. Therefore, there is a dialectical connection between the right to freedom of creativity and the right to access the cultural achievements of the nation, people, and humanity. The right to freedom of creativity determines the need for the right to access the cultural achievements of the nation, people, and humanity. The creative process involves turning to cultural values: the study of ancient books, original works of art, folk art, etc. On the other hand, the consequence of the absence of creative activity is cultural regression. Conversely, the implementation of the right to freedom of creative activity leads to the further enrichment of the cultural achievements of the nation, people, and humanity. In terms of its scope of implementation in public life, as a criterion for classifying the rights and freedoms of an individual, the right to freedom of creativity belongs to the cultural rights and freedoms of a person, since it is closely related to human activity in the sphere of culture and spiritual life¹⁴. Cultural rights are state-guaranteed opportunities for intellectual development, creative realization and self-expression of a person, access to the cultural achievements of the nation, people, and humanity, their assimilation, use, and participation in their further enrichment. These include: the right to education; the right to freedom of literary, artistic, scientific, and technical creativity; the right to access the cultural achievements of the nation, people, and humanity.

¹² Мілова Т.М. Конституційне право людини і громадянина на свободу наукової творчості в Україні: дис. к.ю.н. 2008. 211 с. 11.

¹³ Мушак Н.Б. Концептуальні підходи до класифікації прав людини в умовах глобалізаційних процесів. *Часопис Київського університету права*. 2011. URL: http://kul.kiev.ua/images/chasop/2011_2/298

¹⁴ Паліюк В. П. Особливості застосування судами України Конвенції про захист прав людини та основних свобод: навч.-практ. посіб. Миколаїв: Атол, 2003. 130 с.

The right to freedom of creativity is closely related to the right to work and the right to rest, because creative activity can be both a form of work and rest. The connection between the right to work and the right to freedom of creativity is manifested in the case when the creation of an intellectual product is part of the employee's direct labor duties¹⁵. The right to freedom of literary, artistic, scientific, technical creativity, freedom of teaching in interaction with the right to work can be transformed into a labor duty. This interaction should not be considered as a restriction of the right to freedom of creativity, because the peculiarities of labor relations provide for the rules of internal labor regulations, work regime. In free time from work, a person can exercise the constitutional right to freedom of creativity in full. The guarantee is the right of workers to rest. That is, during rest time, which includes the right to a lunch break, the right to days off, the right to vacation, the employee has the right to freely engage in creative activities.

The right to freedom of creativity is closely related to the right to receive creative leave, which is granted to complete a dissertation for a scientific degree, as well as to write a textbook, monograph, reference book or other scientific work. In addition, creativity is an activity that can be both work and rest. Creativity as a form of rest satisfies a person's needs for self-expression, self-affirmation, which contributes to the restoration of both physical and spiritual strength. In other words, when an employee is temporarily, with pay, released from his main job to engage in creative activity, the primary needs of the person (physiological) are ensured. The right to freedom of creativity is related to the right to the results of creative activity¹⁶. That is, the right to freedom of creativity is a phenomenon that may result in the right to the results of creativity. The peculiarities of such a connection are the sequence of these rights in time: the right to freedom of creativity always precedes the right to the results of intellectual activity. Even in the case when the right to the results of intellectual activity is transferred to secondary subjects, the act of creating an intellectual property object remains primary in time. The connection between the right to the results of creative activity and the right to freedom of creativity is also seen in the fact that the first is intended to promote the development of initiative in the realization of a person's creative abilities through the ability to obtain a means of subsistence.

As a result of the right to freedom of creativity, the right to the results of creativity, the right to intellectual property, may arise. The right to freedom of creativity always precedes the right to the results of intellectual activity. On the other hand, the right to the results of creative activity and intellectual property are

¹⁵ Проблеми реалізації прав людини та громадянина в Україні: монографія / кол. авторів; за ред. Н.М. Оніщенко, О.В. Зайчука. К.: ТОВ «Видавництво "Юридична думка"», 2007. С. 69-70.

¹⁶ Пунда О. О., Колобова Я.Ю. Проблеми здійснення права на свободу творчості. *Університетські наукові записки*. 2011. № 2. С. 81-86.9.

intended to promote the initiative in the development and realization of a person's creative abilities through the ability to obtain a means of subsistence. In addition, a close connection is evident between the right to freedom of creativity and the right to use the cultural potential of humanity. Reflecting on their relationship, it is worth recalling the history of the evolution of mankind and individual scientific discoveries that have had a cardinal impact on the process of social development.

The importance of solidarity rights in science and creativity has been observed since the dawn of human development among different peoples, discoveries have been repeatedly repeated and confirmed in practice, becoming the property of all mankind. The correlation between the right to access to the cultural heritage of humanity and freedom of creativity is also manifested in the moral responsibility of scientists to society, in the need for broad international cooperation of scientists. As a result of ensuring access to the cultural heritage of humanity, new creative results, objects of intellectual property, are created by the joint efforts of scientists, and scientific and technological progress occurs¹⁷.

In addition to access to the use of the common heritage of humanity, the right to freedom of creativity is closely related to the right of the community to political, social and cultural self-determination. Awareness of the imperfection of the institution of human rights is felt in the process of solving ethnic problems of legal regulation of traditional knowledge. Traditional knowledge is an important creative heritage of the people, a separate community, which is of decisive importance for the cultural identification of a particular community. The problem of legal regulation of traditional knowledge as a result of the creative activity of the community is extremely relevant. Traditional knowledge is the heritage of the community, the people, and it is necessary to create incentives for its preservation and guarantees of transmission to future generations through legislation¹⁸. However, today there are many problems in the field of international cooperation on issues of harmonizing the ownership of traditional knowledge, determining its owners, identification and use. Knowledge of folk culture, ethnogenesis, the origins of national mentality are components of traditional knowledge. Rich folk traditions, museums, where samples of folk art, folklore (both oral folk art and music, singing, dancing, etc.) are collected, archives with folklore recordings need protection. The state should take care of solving these problems. In the world, traditional knowledge is taken care of by the World Intellectual Property Organization. Traditional knowledge today belongs to new objects of intellectual property, which are not sufficiently studied as such (what kind of protection they require, how to provide them with protection).

¹⁷ Рабінович П.М. Міжнародні стандарти прав людини. *Право України*. 2015. № 10. С. 58–64.

¹⁸ Рабінович П.М. Права людини і громадянина: навч. посібник. К.: Атіка, 2004. С.158-159.

2. Mechanism for ensuring and restricting the right to freedom of creativity

The effectiveness of the mechanism for ensuring the rights, freedoms, and interests of a person protected by law is determined by the effectiveness of their guarantee, the system of conditions and means that allow the full realization of the entire set of rights and freedoms. Guarantees of the right to freedom of creativity are a system of socio-economic, political, cultural, and legal means and conditions that ensure protection, realization, and defense in the event of violation or non-recognition of the right to freedom of creativity and contribute to the expansion of its content and scope. The system of guarantees of the right to freedom of creativity is represented by general and legal (special legal) guarantees. General guarantees are divided according to the characteristics of the sphere of social relations that is the basis of their functioning into socio-economic, political, and cultural. Socio-economic guarantees for ensuring the right to freedom of creativity are the creation of favorable conditions for socio-economic development and equal opportunities for the realization of the creative potential of each person. Socio-economic guarantees are important in ensuring the right to freedom of creativity, because if they are declarative, a person's will (desire) to realize creative abilities may be absent. Political guarantees for ensuring the right to freedom are the creation of conditions for ideological pluralism, the formation of civil society, the rule of law, freedom of activity of creative unions, public associations, and the absence of censorship¹⁹.

Cultural guarantees for ensuring the right to freedom of creativity include the existing system of cultural and ideological values, the general level of public consciousness, the level of awareness of the nature and purpose of the right to freedom of creativity, the level of public activity, and education. Among the factors that influence the effectiveness of ensuring the human right to freedom of creativity, legal guarantees occupy a key place, which are divided into domestic and international legal. They are represented by regulatory and institutional guarantees for ensuring the right to freedom of creativity. Regulatory and legal guarantees of the right to freedom of creativity are presented in the norms-principles and norms that establish legal responsibility, as well as norms that establish a system of legal obligations in the field of creative activity. Institutional guarantees for ensuring the studied right include the system of state authorities, local governments, public organizations and political parties, as well as the individuals themselves, whose activities are aimed at the implementation of freedom of creativity²⁰.

International legal instruments ensuring the right to freedom of creation include the American Bill of Rights of 1791, the Universal Declaration of

¹⁹ Ромовська З. Право на свободу творчості. *Право України*. 2016. № 11. С. 131-143.

²⁰ Скрипнюк О.В. Свобода думки і слова: конституційно-правові гарантії в Україні. *Юридична Україна*. № 3. 2011. С. 28 -32.

Creative Freedom of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, the International Covenant on Civil and Political Rights of 1966, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the Charter of Fundamental Rights of the European Union of 2000, the UNESCO Declaration on Race of 1978, the Declaration on Social Progress and Development of 1969, the Declaration of Principles "Building the Information Society – a Global Challenge for the New Millennium" of 2003, the Paris Convention for the Protection of Industrial Property of 1883, the Berne Convention for the Protection of Literary and Artistic Works of 1971, the Universal Copyright Convention of 1952, European Cultural Convention of 1954, EU Directive 2019/790 of 17 April 2019 on copyright and related rights in the digital single market. Effective international legal guarantee of freedom of creative activity is possible only if regulatory and institutional means of ensuring it interact. International institutional guarantee of the right to freedom of creativity is carried out through bodies and legal procedures within the framework of which the activities of international institutions are implemented. International institutional means of ensuring the right to freedom of creativity include the United Nations Educational, Scientific and Cultural Organization UNESCO, the UN Human Rights Council, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the European Court of Human Rights, and the World Intellectual Property Organization.

In order to improve the international legal protection of the right to freedom of creativity, it is advisable to develop a single international document guaranteeing freedom of intellectual expression at the international level, which will meet the requirements of the information society, where the driving force of development and transformation is human intellectual creativity. Effective international legal guaranteeing of freedom of creative activity is possible only under the condition of interaction of regulatory and institutional means of ensuring. International institutional guaranteeing of the right to freedom of creativity is carried out through bodies and legal procedures within the framework of which the activities of international institutions are carried out. The disadvantage of international legal standards is that freedom of creativity is not defined as a separate category. In current international legislation, freedom of creativity is considered as a component of freedom of speech, which complicates the international legal protection of freedom of creativity²¹. We consider it advisable to develop a single document that would guarantee the provision of freedom of intellectual expression at the international level. Therefore,

²¹ Скрипнюк О.В. Конституційно-правове регулювання обмеження прав і свобод людини і громадянина в Україні. *Публічне право*. 2011. № 3. С. 5–11.

international protection of creative freedom within the framework of international guarantees of intellectual property rights (as well as within the framework of freedom of speech) is partial, as it does not cover all creative results.

Restrictions on the right to freedom of creativity are the limits established by international law and national legislation for the exercise of freedom of creativity and measures and means expressed in prohibitions, suspensions, obligations, responsibility and meet the requirements of legality, expediency, proportionality, ensuring the necessary balance between the interests of the individual, society and the state²². The limits of freedom of creativity are the interests, rights and freedoms of other persons, as well as the system of legislation that establishes prohibitions and responsibility to prevent abuse of freedom by the individual. Restrictions on the right to freedom of creativity can take place only if there is a direct indication in the legislation and is a justified provision of the highest good. The highest social values are human life, his freedom, dignity, health, morality of society, support of state security, ensuring public order, etc. International law, national legislation protects these benefits from encroachment, establishing the limits of freedom of creativity. Restriction of the right to freedom of creativity is the establishment of a legitimate (legal) scale of freedom of creativity through current legislation. Regulatory and legal acts that establish restrictions on the right to freedom of creativity are an indicator of the progress of the achieved level of development of social reality, values and guideline²³s.

The criteria for the legality of restrictions on the right to freedom of creativity are: legitimacy (legality) – restrictions on the right to freedom of creativity must be provided for by international and national legislation; purpose – restrictions on the right to freedom of creativity must be justified, commensurate with the goal, comply with the principle of proportionality and not go beyond what is absolutely necessary; content – restrictions on freedom of creativity cannot be interpreted broadly, comply with the main content of freedom of creativity and its social purpose. The possibility of restrictions on fundamental human rights and freedoms by the state is provided for in virtually all international legal acts regulating human rights and fundamental freedoms²⁴. Each treaty defines the limits of possible restrictions and an exhaustive list of grounds for them. Recognizing human rights and freedoms as the highest social value, the international community does not reduce them to an absolute, establishing restrictions in order to achieve a balance between the rights of the individual and the interests of society as a whole. The issue of lawful restrictions on human rights

²² Селівон М.Ф. Критерії обмеження прав людини у практиці конституційного правосуддя. *Вісник Конституційного Суду України*. 2005. №3. С.41.

²³ Шемшученко Ю. Свобода наукової творчості як конституційне право людини і громадянина. *Вісник Національної академії наук України*. 2008. № 3. С. 36-43.

²⁴ Шишка Р. Б. Природа та зміст права свободи творчості. *Вісник Харківського національного університету внутрішніх справ*. 2002. Вип. 19. С. 206-210.

and freedoms by state institutions has acquired particular importance in the context of the concept of a state governed by the rule of law. The subject of constant concern of the international community is the establishment of lawful restrictions on the right to freedom of creativity and uniform criteria for such restrictions. The Convention for the Protection of Human Rights provides for freedom of artistic expression within the framework of the freedom to receive and impart ideas. This right includes the freedom to hold opinions, to receive and impart information and ideas without interference by state authorities and regardless of frontiers.

However, this article does not prevent states from requiring licensing of radio, television or cinematographic enterprises. That is, the exercise of the right to freedom of creativity by one person should not violate the rights of other people. Unlimited freedom of creativity is one of the prerequisites of social progress, the main priority of the cultural policy of the state, a democratic society. Freedom of speech, information, communications, creativity and culture are the main elements of democratic government. The value of creativity, intellectual development implies the need to protect them from encroachments and interference by the state. However, despite the fact that society has acquired the most intensive evolutionary and innovative, cultural development during periods of the least restrictions on freedom of creativity, in some cases a person needs protection from the results of creative activity, their dissemination and implementation. The lawful restriction of the right to freedom of creativity is one of the most urgent political and legal issues throughout the development of mankind²⁵.

The right to freedom of expression is provided for in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR or the Convention), which is part of national legislation as a valid international treaty. Certain restrictions on the right to freedom of expression, established by international law as a legal means of regulating the limits of state interference in the exercise of a subjective right by an individual, are not always interpreted unambiguously in practice. Compliance with the right to freedom of expression provided for by the Convention is ensured by a supervisory mechanism – the European Court of Human Rights, whose decisions have a precedential nature for the participating states. Thus, the main criteria for the legality of restrictions on the right to freedom of expression for the ECHR are: legitimacy (lawfulness), purpose, content. However, in the practice of the European Court of Human Rights there are different legal positions on restrictions on the right to freedom of expression.

²⁵ Яременко Л. Креативність як творчість: спільне та відмінне. *Вища освіта України*. 2010. № 4(39). С. 117-123.

That is, in cases concerning the exercise of the right to freedom of creativity, the ECHR holds the opinion that in cases where the religious feelings of a part of the population could be offended as a result of the exercise of freedom of artistic expression, the subjective right to freedom of creativity should be limited. One of the criteria in the case law of the ECHR is the method of quantitative risk assessment. It is impossible to satisfy the realization of the freedom of a few individuals by violating the rights of millions, because democracy is still an indicator of the will of the majority. In each case considered by the ECHR, there are grounds for making a decision both in favor of the complainants and in support of governments regarding the restriction of freedom of creativity²⁶.

The importance of the above restrictions on the right to freedom of creativity in the case law of the European Court of Human Rights is that: 1) they concern topical issues regarding the restriction of freedom of creativity as the legitimacy of the right to freedom of expression, which is enshrined in Article 10 of the Convention; 2) in the cases of the ECHR, the court ruled that the convictions in these cases did not violate Article 10 of the Convention and supported the positions of the national courts regarding interference with the freedom of expression of artists; 3) the ECHR decision indicates the absence of a single international concept of "public morality", from which it can be concluded that it is appropriate to determine general trends in the development of modern morality of mankind; 4) the ECHR decision in complaints regarding the restriction of the right to freedom of creativity, which encroaches on the religious feelings of a part of the population, the norms of public ethics and morality, provided that the state intervention was carried out with a high degree of conviction in its expediency, the court sides with the national courts. Relevant restrictions on freedom of creativity are considered legitimate if they are aimed at preventing contempt for the feelings of national minorities or believers, at protecting the most vulnerable categories of the audience (children), if there is a danger that they may gain access to this information.

However, these are considered decisions, because under the same slogans, censorship and other undemocratic institutions can be introduced, and here the opinion of the ECHR as the guarantor of the Convention is important. So, summarizing the practice of the ECHR on restrictions on freedom of creativity, which are necessary in a democratic society, it is worth noting that the Court disapproves of restrictions on the freedom to express creative views and assessments, disagreement with the political opinion of the authorities, politicians, political institutions, if reliable information of critical content is covered in a literary, artistic or other creative form. However, when it comes to defamation, humiliation of honor, dignity of real persons, the ECHR supports the

²⁶ Ярмол Л. В. Європейські правові гарантії забезпечення свободи вираження поглядів людини: поняття, види. Державотворення та правотворення в Україні: проблеми та перспективи розвитку: матер. учасн. III наук.-практ. конф. (Львів, 11 квіт. 2016 р.). Львів: ННІПП НУ «Львівська політехніка», 2016. С. 193–197.

intervention of governments in the implementation of the right to freedom of creativity. Therefore, in the European legal tradition, freedom of creativity is closely related to restrictions, the need for which must be proven with a high degree of their legitimacy (legality), proportionality (proportionality) and expediency (purpose)²⁷.

Analysis of the decisions of the European Court of Human Rights on the violation of Article 10 of the Convention makes it possible to generalize the case-law of the ECHR in the field of restrictions on the right to freedom of creativity and divide, depending on the grounds for state interference in freedom of creativity, into the following groups: 1) restrictions on the right to freedom of creativity for the purpose of protecting the health or morals of others; 2) restrictions on the right to freedom of creativity that are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime; 3) restrictions on the right to freedom of creativity for the purpose of protecting the reputation or rights of others. When restricting the right to freedom of creativity for the purpose of protecting the health or morals of others, the case-law of the ECHR recognizes a wide margin of appreciation for states. When deciding on the limits of state intervention in order to protect public morality, the Court proceeds from the absence of a single, agreed-upon international concept of “public morality”. The limits of freedom of creativity are established by states in accordance with the norms of public ethics and morality. Appropriate restrictions on freedom of creativity are considered legitimate if they are aimed at preventing insult to the feelings of national minorities or believers, at protecting the most vulnerable categories of the audience (children), etc. Comparatively narrower are the restrictions on freedom of creativity in the practice of the ECHR in cases related to encroachments on the democratic principles of society in the interests of national security, territorial integrity or public safety, to prevent riots or crimes.

The precedent of such decisions in assessing the justification of government actions, their necessity by an urgent social need, proportionality and compliance with a legitimate aim. When interfering with the right to freedom of creativity, the fairness of the balance between the restrictions that are necessary in a democratic society and the right to freedom of expression of creative views is analyzed. Summarizing the practice of the ECHR on restrictions on freedom of creativity, which are necessary in a democratic society, it can be concluded that the Court disapproves of restrictions on the freedom to express creative views, disagreement with the political opinion of the authorities, if the creative form reflects reliable information of critical content. In decisions on restrictions on the right to freedom of creativity for the purpose of protecting the reputation or rights of others, the ECHR indicates that creators are not immune to the possible restrictions specified in paragraph 2 of Article 10 of the Convention, and a person

²⁷ Ярмол Л.В. Світові міжнародно-правові стандарти свободи вираження поглядів та гарантії її забезпечення. *Публічне право*. 2017. № 2 (26). С. 163–173.

who exercises the freedom of expression of his creative opinion assumes, in accordance with the conditions established in the specified paragraph, obligations and responsibilities. In cases where the content of the creativity is defamation, humiliation of the honor, dignity of real persons, the ECHR supports proportional interference by governments in the exercise of the right to freedom of creativity.

Summarizing the decisions of the ECHR in the field of restrictions on the right to freedom of creativity, the following assessment criteria can be distinguished in the case law of the ECHR: 1) the method of quantitative risk assessment (the realization of the freedom of creativity of a few individuals cannot be satisfied by violating the rights of millions); 2) interference with freedom of creativity due to probable harm (the Court disapproves of restrictions on the freedom of expression of creative views due to probable harm, which does not exist); 3) mass access to the results of creativity (special attention is paid to whether the work is intended for a wide audience or a narrow circle of readers); 4) the form of expression of creativity (the coverage of ideas in a literary metaphorical style should be assessed in this context); 5) the content of creativity is real facts or fiction (the coverage of factual material in the work or the use of fiction with the aim of humiliating the honor and dignity of real persons). Having analyzed the decisions of the European Court of Human Rights on the violation of Art. 10 of the Convention, it can be determined that interference by states with the freedom of creativity is considered justified by the Court if it is lawful, proportionate to the purpose of the restriction and has a justified aim. For the most part, the ECHR justifies restrictions on the right to freedom of creativity for the purpose of protecting the health or morals of others; restrictions on the right to freedom of creativity that are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime; restrictions on the right to freedom of creativity for the purpose of protecting the reputation or rights of others. The main criteria for assessing the justification of interference by the state in the case-law of the ECHR: the method of quantitative risk assessment; justification of interference with freedom of creativity due to probable harm; mass access to the results of creativity; form of expression of creativity; content of creativity.

CONCLUSIONS

The vocation of intellectual property law is not only to protect property and personal rights of intellectual property, but also to protect the right to freedom of creativity, as well as to regulate relations that arise in connection with the implementation of this right. A creative approach allows you to overcome difficulties in conditions of sharp changes in modern social life, to outline a new goal caused by changes, to create freedom of choice, to reveal your creative potential to each individual. Creativity leads to the development of the individual, forms a connection between generations and influences historical development.

Human activity only becomes creativity when it contributes to the development of the human personality, culture and, above all, the spirituality of the individual.

Creativity is always determined by the principles of goodness, truth, beauty and their synthesis – spirituality. Based on the conducted study of the category of "creativity", its features and essential dimensions, we consider it necessary to formulate the following conclusions. In its positive expression, freedom is both creativity and a source of novelty. Freedom and creativity are closely connected, since freedom is the key to creativity, and creativity opens up new opportunities for freedom. The right to freedom of creativity is a right that a person exercises freely and at his own discretion, since the exercise of the right to freedom of creativity concerns primarily the sphere of his private life. The peculiarity of creativity is that it seeks to go beyond even its creator. The author cannot reliably predict or control the reaction that his creation will cause in the audience, as well as what his product of creative activity will inspire others to in the future, therefore it can be said that the product of creative activity as a result acquires its own freedom. In the legal plane, the object of intellectual property rights acquires its own freedom after the expiration of intellectual property rights.

Creativity is reflected in various approaches, but there are also common features that can be distinguished: creativity is inherent in human activity; creativity arises in the process of human activity or a combination of different types of human activity; the result of creativity is the creation of new qualities of material and spiritual being; is based on the understanding of existing experience; creativity is realized in society and is a source of cultural values of society. We believe that the vocation of intellectual property law is not only to protect property and personal rights of intellectual property, but also to protect the right to freedom of creativity. As well as to regulate the relations that arise in connection with the implementation of this right. Creative activity is one of the spheres of cultural activity. Activity in the sphere of culture is much broader than creative activity and is not always of a creative nature. The ways and forms of expression in art, as in any other creativity, are different. The results of creativity can give rise to contradictions of emotions, feelings and thoughts. One of the general tasks of creativity is to touch in artistic form or through ideological and emotional content to various emotions and thoughts of a person.

Therefore, ensuring freedom of creativity is of equal importance for creators as the protection of intellectual property rights. As a result of studying creativity, we can conclude that it is reflected in different approaches, but there are general features of creativity that can be distinguished, namely: creativity is inherent in human activity; creativity arises in the process of human activity or a combination of different types of human activity; the result of creativity is the creation of new qualities of material and spiritual existence; creativity is based on the understanding of existing experience; creativity is realized in society and is a source of cultural values of society. Each human action is conditioned by the desire to satisfy a certain need or interest. When a person exercises the right to

freedom of creativity, he also seeks to satisfy his interests, among which the following can be distinguished: in cognition; in reform, improvement, modernization; the need to convey his idea, creative result to the world; to be useful; in recognition; in self-realization; in material reward.

Supporting innovation inevitably leads to progress in society, the field of intellectual property is rapidly developing and new objects of intellectual property law appear that require recognition and legal protection. Many constitutions of modern states refer to intellectual property related to creative work, which is reflected in a certain set of relevant rights and obligations. This circumstance emphasizes the importance of freedom of creativity and intellectual property in the modern world, the relevance of research on the topic of creativity, since creativity is not a stable phenomenon, it is rapidly developing and on its way encounters contradictions that need to be resolved. The basis for the creation of any object of intellectual property law is the cultural heritage of previous generations. But the results of intellectual creative activity that are created today and will be created in the future are no less important.

SUMMARY

The study of the right to freedom of creativity is important because it reveals its place in the system of human rights and freedoms, highlights the interaction of this right with other rights and freedoms, which are quite diverse in content and purpose. The relevance of the study of the classification identification of the right to freedom of creativity in the system of rights and freedoms is determined by the need for free creative self-expression of a person, access to cultural heritage and the development of one's creative potential. The presence of various classifications of human rights and freedoms allows us to better characterize the content and features of a particular right. In the study of the right to freedom of creativity, we consider it appropriate to use the most established classification of the distinction between human rights and freedoms by sphere of life, which distinguishes rights and freedoms into: civil (personal), political, economic, social and cultural. The effectiveness of the mechanism for ensuring the rights, freedoms, and interests of a person protected by law is determined by the effectiveness of their guarantee, the system of conditions and means that allow the full realization of the entire set of rights and freedoms. Guarantees of the right to freedom of creativity are a system of socio-economic, political, cultural, and legal means and conditions that ensure protection, realization, and defense in the event of violation or non-recognition of the right to freedom of creativity and contribute to the expansion of its content and scope.

References

1. Аналітичний Звіт. Свобода слова в Інтернеті. Законодавчі ініціативи та практика розгляду кримінальних справ в Україні в 2014-2018 рр.

Л. Опришко, В. Володовська, М. Дворовий ГО «Платформа прав людини». Березень 2019. URL: <https://www.ppl.org.ua/wp-content/uploads/>

2. Белкін М. Л. Держава та свобода творчості у світлі рішень Європейського Суду з прав людини. *Актуальні питання цивільного та господарського права*. 2008. № 5 (12). С. 6-15. 674.

3. Білозьоров Є. В. Правові гарантії захисту прав і свобод людини в Україні: реалії та проблеми. *Адвокат*. 2009. № 8. С. 26-30.

4. Білозьоров Є. В. Міжнародно-правові гарантії як елемент механізму забезпечення прав і свобод людини та громадянина. *Науковий часопис НПУ імені М. П. Драгоманова. Серія 18: Економіка і право*. 2011. Вип. 14. С. 63-68.

5. Бочарова Н. В. Значення конституційного забезпечення свободи творчості та права на результати творчої діяльності в умовах інформаційного суспільства. *Науковий вісник Міжнародного гуманітарного університету. Серія: Юриспруденція*. 2014. № 7. С. 69-72. 8.

6. Волинка К. Г. Механізм забезпечення прав і свобод особи: питання теорії і практики: Автореф. дис.... канд.юрид.наук: 12.00.01. Ін-т держави і права ім. В.М. Корецького. К., 2000. С.8-9.

7. Гришук О. В. Право на свободу вираження поглядів: проблеми обмеження. *Бюлетень Міністерства юстиції України*. 2003. № 7. С. 16–17.

8. Добрянський С. Права людини в Європейському Союзі: можливості удосконалення юридичного гарантування. *Право України*. 2019. № 6 С. 108-125.

9. Колодій А. М., Олійник А. Ю. Права, свободи та обов'язки людини і громадянина в Україні: підручник. К.: Всеукраїнська асоціація видавців «Правова єдність», 2008. С.257-255.

10. Культурні права в прецедентній практиці Європейського Суду з прав людини. 2011. URL: https://www.echr.coe.int/Documents/Research_report_cultural_rights.pdf.

11. Лисенков С.Л. Культурні права. К.: Либідь, 2001. С.431.

12. Мілова Т.М. Конституційне право людини і громадянина на свободу наукової творчості в Україні: дис. к.ю.н. 2008. 211 с. 11.

13. Мушак Н.Б. Концептуальні підходи до класифікації прав людини в умовах глобалізаційних процесів. *Часопис Київського університету права*. 2011. URL: http://kul.kiev.ua/images/chasop/2011_2/298

14. Паліюк В. П. Особливості застосування судами України Конвенції про захист прав людини та основних свобод: навч.-практ. посіб. Миколаїв: Атол, 2003. 130 с.

15. Проблеми реалізації прав людини та громадянина в Україні: монографія / кол. авторів; за ред. Н.М. Оніщенко, О.В. Зайчука. К.: ТОВ «Видавництво “Юридична думка”», 2007. С.69-70.

16. Пунда О. О., Колобова Я.Ю. Проблеми здійснення права на свободу творчості. *Університетські наукові записки*. 2011. № 2. С. 81-86. 9.

17. Рабінович П.М. Міжнародні стандарти прав людини. *Право України*. 2015. № 10. С.58–64.

18. Рабінович П.М. Права людини і громадянина: навч. посібник. К.: Атіка, 2004. С.158-159.
19. Ромовська З. Право на свободу творчості. *Право України*. 2016. № 11. С. 131-143.
20. Скрипнюк О.В. Свобода думки і слова: конституційно-правові гарантії в Україні. *Юридична Україна*. № 3. 2011. С. 28 -32.
21. Скрипнюк О.В. Конституційно-правове регулювання обмеження прав і свобод людини і громадянина в Україні. *Публічне право*. 2011. № 3. С. 5–11.
22. Селівон М.Ф. Критерії обмеження прав людини у практиці конституційного правосуддя. *Вісник Конституційного Суду України*. 2005. №3. С.41.
23. Шемшученко Ю. Свобода наукової творчості як конституційне право людини і громадянина. *Вісник Національної академії наук України*. 2008. № 3. С. 36-43.
24. Шишка Р. Б. Природа та зміст права свободи творчості. *Вісник Харківського національного університету внутрішніх справ*. 2002. Вип. 19. С. 206-210.
25. Яременко Л. Креативність як творчість: спільне та відмінне. *Вища освіта України*. 2010. № 4(39). С. 117-123.
26. Ярмол Л. В. Європейські правові гарантії забезпечення свободи вираження поглядів людини: поняття, види. Державотворення та правотворення в Україні: проблеми та перспективи розвитку: матер. учасн. ІІІ наук.-практ. конф. (Львів, 11 квіт. 2016 р.). Львів: ННІПП НУ «Львівська політехніка», 2016. С. 193–197.
27. Ярмол Л.В. Світові міжнародно-правові стандарти свободи вираження поглядів та гарантії її забезпечення. *Публічне право*. 2017. № 2 (26). С. 163–173.

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