

# Is it in the Public Domain?

**A HANDBOOK FOR EVALUATING THE COPYRIGHT STATUS  
OF A WORK CREATED IN THE UNITED STATES  
BETWEEN JANUARY 1, 1923 AND DECEMBER 31, 1977**

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This Handbook provides general legal information about the copyright status of works created in the United States between January 1, 1923 and December 31, 1977. The Handbook was created by the Samuelson Law, Technology & Public Policy Clinic at the University of California, Berkeley, School of Law. We gratefully acknowledge the Alfred P. Sloan Foundation for its generous financial support of this project.

The handbook was originally developed for the Student Nonviolent Coordinating Committee Legacy Project (“SLP”), a 501(c)(3) nonprofit organization that was organized “to preserve and extend SNCC's legacy . . . in ways that continue the struggle for freedom, justice, and liberty.”<sup>1</sup>

**NO LEGAL ADVICE:** This Handbook provides general legal information about how to evaluate the copyright status of works created in the United States between January 1, 1923 and December 31, 1977. It does not apply this information to any individual work or specific situation; it is not legal advice, nor is it a substitute for legal advice. Using this Handbook does not create an attorney-client relationship. This Handbook also is not a complete discussion of all legal issues that arise in relation to making works available to the public. The authors make no warranties regarding the general legal information provided in this Handbook and recommend that you consult a lawyer if you are unsure of how the information in this Handbook applies to your particular facts.



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## INTRODUCTION

Copyright protection and the public domain are two sides of the same coin. On the one side, when a work is protected by copyright, the owner of the work owns and controls the “exclusive rights” with respect to that work during the term of the copyright. These rights include the right to reproduce the work, the right to distribute copies of the work to the public, the right to create “derivative works,” the right to perform the work publicly, and the right to display the work publicly. With some exceptions, such as “fair use,” the copyright owner has the exclusive right to grant permission to others to do any of these things with the work.

On the other side, when a work is not protected by copyright, it is said to be in the “public domain.” A work may enter the public domain either because it does not meet the requirements for copyright protection or because its term of copyright protection has expired. Public domain works are not subject to the exclusive rights associated with copyright and thus can be freely copied, distributed, used in derivative works, publicly performed, and publicly displayed by anyone without charge and without permission.

Knowing whether a work is in the public domain—and free to be used without authorization of the copyright owner—or protected by copyright, is an important first step in any decision regarding whether or how to make use of a work.

As such, this Handbook identifies a series of questions to ask when evaluating the copyright status of a work that was created in the United States<sup>2</sup> between January 1, 1923 and December 31, 1977. This specific date range is important because, with a few exceptions, works created prior to January 1, 1923 are in the public domain because any copyright protection that the work may have had has expired. Works created on or after January 1, 1978 are subject to a dramatically different legal regime—see

the *Legal Framework* section on page 5—and deciding whether these works are in the public domain requires a very different analysis, not covered in this Handbook.

### **What this Handbook is**

This Handbook is intended as an educational tool to describe generally when a work created in the United States between January 31, 1923 and December 31, 1977—the range of dates that covers most works that were created under the Copyright Act of 1909 (“1909 Act”) and that may still be protected by copyright—is likely to be protected by copyright today and when it is likely to be in the public domain.

### **What this Handbook is not**

This Handbook generally describes when a work created in the United States between January 31, 1923 and December 31, 1977 is protected by copyright, and when it is not. It does not describe how the law might apply to any specific work. It is not a complete discussion of all legal issues that may arise when deciding whether or how to use a work, nor is it a substitute for legal advice. Further, two courts may reach different conclusions about the copyright status of a work based on the same set of facts. Accordingly, using this Handbook does not guarantee the accuracy of any assessment of copyright status with respect to an individual work, and does not shield you from liability for copyright infringement. You should consult an attorney if you have questions regarding the copyright status of a specific work.

This Handbook does not address legal restrictions on using works outside of federal copyright law. For example, a work that is not protected by federal copyright law may still be protected by individual states’ laws or “common law” copyright; this Handbook does not address any of this state law. As such, when this Handbook refers to “copyright protection,” this term does not

include any protection granted by a state. Further, even if a work is in the public domain with regard to copyright, using it may raise legal concerns outside of copyright, such as concerns related to privacy rights or contractual restrictions on the work's use. This Handbook does not cover any of these other legal issues.

Further, this Handbook does not provide information about what to do once you have evaluated the federal copyright status of a work. For example, because of a lack of factual information about a work or because the law is indeterminate, even after the evaluation, it may be unclear whether the work is protected by copyright, or not. In addition, there may be options for using a copyright-protected work without infringing on the exclusive rights of the copyright owner, such as by obtaining permission or making "fair use" of the copyrighted work. This Handbook does not address such issues.

Finally, because copyright law changes periodically, this Handbook is only accurate up to the date it was published—August 10, 2012.<sup>3</sup>

## **How to use this Handbook**

This Handbook is broken up into six Chapters, which cover six general categories of questions that are relevant in assessing copyright status: *Chapter 1: Subject Matter and Thresholds*; *Chapter 2: Publication Status*; *Chapter 3: Date of General Publication*; *Chapter 4: Notice Requirement for Generally Published Works*; *Chapter 5: Registration Status of Unpublished Works*; and *Chapter 6: Duration and Renewal*. Each category of questions is explained further in the relevant Chapter and is illustrated in the accompanying Copyright Status Flowcharts ("flowcharts"). Relevant sections of the flowcharts are included throughout the text, and are also included as Appendix A.

Each chapter and accompanying flowchart presents questions that will walk you through the process of determining the copyright status of a work. The flowcharts are intended to be used in conjunction with the text of this Handbook—in general, you will not be able to answer the questions on the flowcharts without referring to this Handbook.

To begin, if possible, you should gather a number of facts regarding the work you wish to assess. Examples of these facts include:

- the date of creation of the work (see *Chapter 6*);
- whether and how the work has been expressed to the public (see *Chapter 2*);
- if the work was generally published, the date of general publication (see *Chapter 3*);
- whether a copyright notice is present or legible on the work (see *Chapter 4*);
- whether the work was registered with the Copyright Office and whether a renewal was filed with the Copyright Office (see *Chapters 5 and 6*); and
- the author of the work, including whether the work was created by a known person, group of people, or organization, or whether the work was created anonymously or under a pseudonym and the name of the person or organization considered to be the work's author (see *Chapter 6*).

Note that it is possible that one work can include multiple works within it, such as a periodical that includes various articles, photographs, or other items. In this case, there are likely "layered" copyrights, and you will need to gather facts about the copyright status of each individual work, as well as the copyright status of the whole. See *Chapter 1: Subject Matter and Thresholds*.

Start with *Chapter 1* and proceed through the questions. The answer to each question will help you determine which Chapter and question to go to next. In most cases it will not be necessary to work through every single question in the Handbook in the order presented. As you work through the Handbook, you may discover that you need additional facts in order to answer questions about the copyright status of a work. However, you may find that you do not have access to all of the facts that you need to find an answer to a question. In some cases, the answer to another question in the Handbook will be enough to help you decide whether the work is protected by copyright; in other cases, however, it may be impossible to know.

Further, although this Handbook and accompanying flowcharts present many questions with “yes” or “no” answers, copyright law is very nuanced, and sometimes courts disagree on how similar facts should be viewed. As such, for some works, there may well be more than one plausible answer to the questions posed in this Handbook. When this happens, you may want to walk the work through each separate path of the flowchart that results from this uncertainty in order to decide whether the area of uncertainty influences the final assessment of the copyright status of the work.

Because copyright law can be complicated and highly fact-specific, and because it may be the case that records surrounding works from this era are incomplete or inaccurate, some questions may not yield definitive answers. In such cases, you may wish to gather additional facts or consult an attorney.

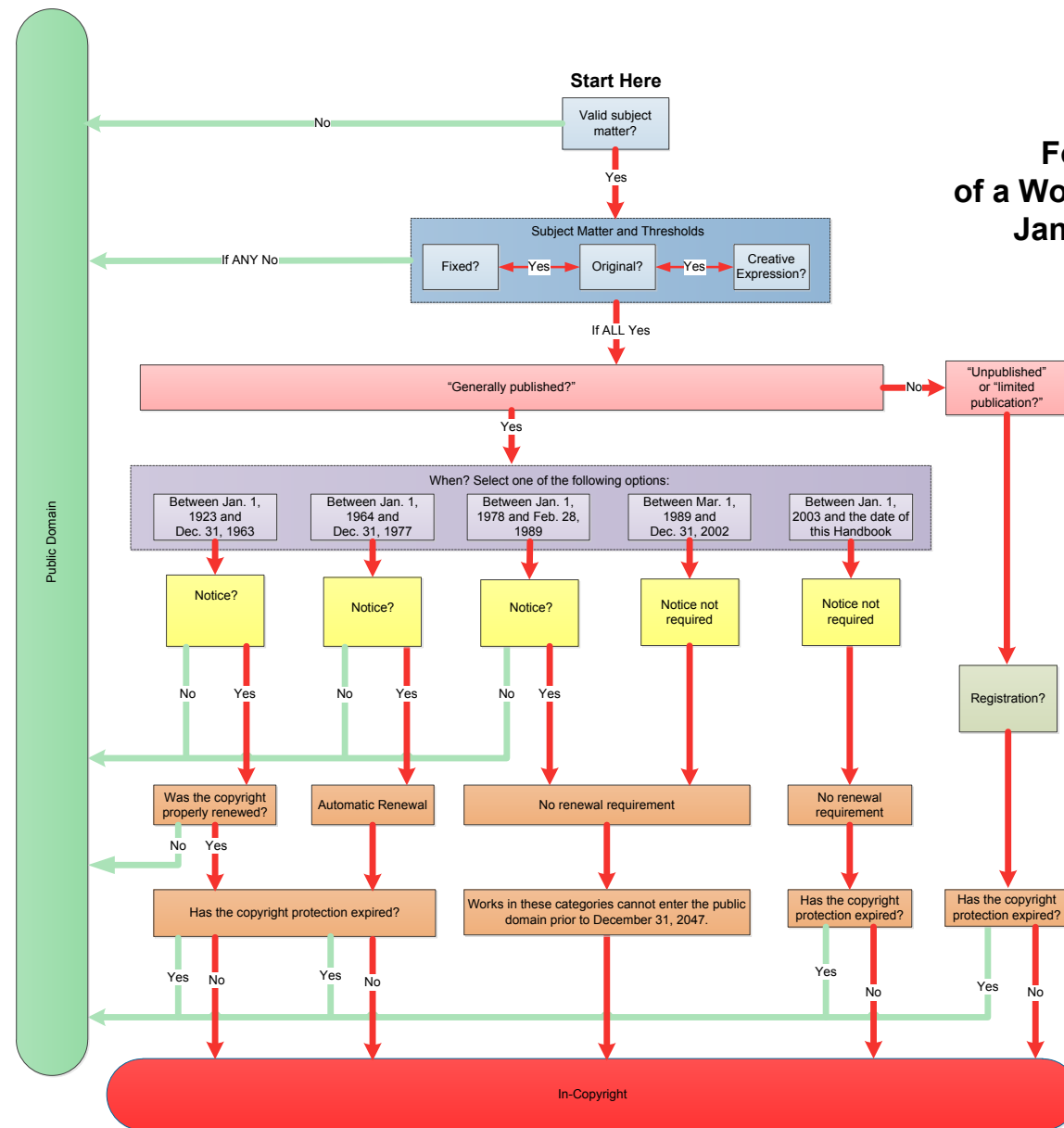
Throughout this Handbook, some important information will be highlighted in boxes:

✓ **Tips:** These boxes identify questions of copyright law that are relatively easy to answer, flag copyright terminology that is easy to define, or provide simple statements that may avoid unnecessary confusion.

⚠ **Traps:** These boxes identify important and sometimes counterintuitive areas of copyright law.

🎵 **Special Case - Sound Recordings:** Prior to February 15, 1972 sound recordings were not eligible for federal copyright law protection but they may continue to be protected under state law until February 15, 2067. Because of this complexity, these boxes point out when you need to pay special attention to sound recordings. These boxes are interspersed throughout the Chapters, so be sure to check for them, even if you are not working through to the end of the Chapter.

➔ These boxes let you know which Chapter or question to go to after you have answered a question posed in the Handbook. These boxes also indicate when the copyright status is determined by the answer.



# MASTER FLOWCHART

## For Evaluating the Copyright Status of a Work Created in the United States Between January 1, 1923 and December 31, 1977

Legend	
Chapter 1: Subject Matter and Thresholds	
Chapter 2: Publication Status	
Chapter 3: Date of General Publication	
Chapter 4: Notice Requirement for Generally Published Works	
Chapter 5: Registration Status of Unpublished Works	
Chapter 6: Duration and Renewal	

For more detailed information, please refer to the flowchart of each color-coded step and the corresponding Chapter in the accompanying Handbook.

## Legal Framework

A brief description of how copyright works may be helpful in understanding the legal information in this Handbook. Federal copyright protection is granted under Title 17 of the United States Code; it applies throughout the country and is the dominant form of protection for creative works. In some cases, separate state laws still cover some aspects of creative works. The federal copyright statute underwent two major revisions in the twentieth century: the 1909 Act, and the Copyright Act of 1976 (“1976 Act”), which went into effect on January 1, 1978. There are important differences between the two Acts. In general, the 1909 Act was much stricter, and made it much more difficult to obtain and keep copyright protection, than the 1976 Act does today. Specifically, the 1909 Act granted copyright protection only to “generally published” works that met the formal notice requirement and to certain categories of unpublished works that were registered with the United States Copyright Office. The 1976 Act expanded copyright protection by loosening the notice requirement, extending protection to unregistered unpublished works, and for most works, making the term of protection longer.

Works covered by this Handbook were all created when the 1909 Act was in effect. It is likely that many of these works are still governed by the 1909 Act, meaning that the 1909 Act’s rules apply to them, and the newer 1976 Act rules do not. Because of changes in the law since their creation, however, some works covered by this Handbook will be governed by the 1976 Act. For example, the 1976 Act extended protection to unregistered unpublished works, including those that were created before it took effect, and relaxed some of the formal requirements for copyright protection for these and other works. As such, unregistered unpublished works, including all works created between January 1, 1923 and December 31, 1977 that were not published or registered before January 1, 1978, are governed by the 1976 Act. This

Handbook refers to both the 1909 Act and the 1976 Act, as relevant.

In addition to federal copyright protection, individual states provide some “common law” rights; these rights vary from state to state, but most protect creative works indefinitely. As such, some works may be covered by state protections. This Handbook is limited to federal copyright issues and does not address state common law copyright issues.



## CHAPTER 1: SUBJECT MATTER AND THRESHOLDS

### Chapter Overview:

Not all works are eligible for copyright protection. In order to qualify for copyright protection initially, a work must meet four threshold requirements: it must be valid **subject matter**, it must be **fixed** in a tangible medium, it must be **original**, and it must contain **creative expression**, not merely facts or ideas.

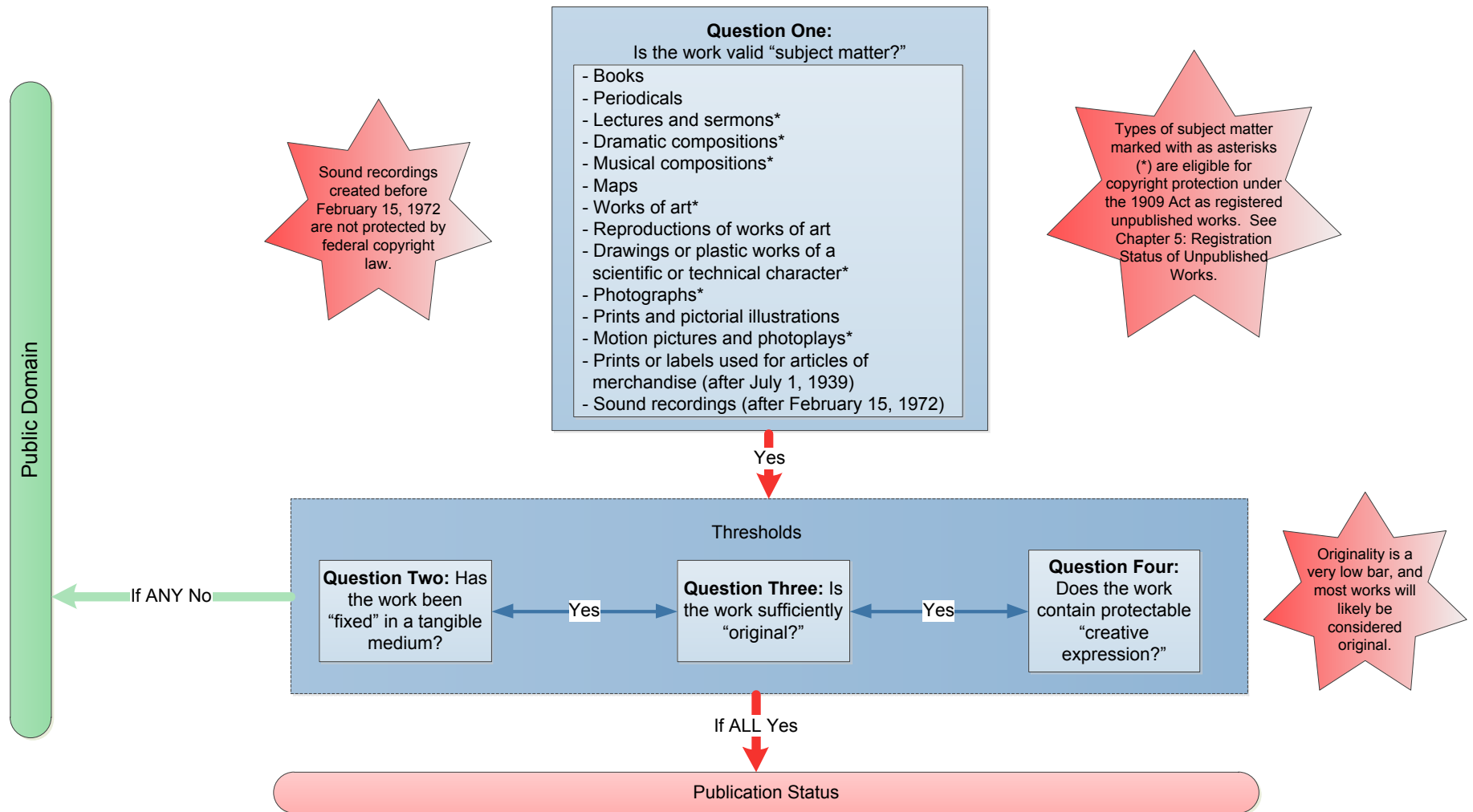
Most works created between January 1, 1923 and December 31, 1977 that still exist today will fall into a subject matter category that is protectable by copyright. Because of this, after a brief discussion of subject matter, this Chapter focuses on how to determine whether a work meets the other three threshold requirements: fixation, originality, and creative expression. These thresholds are not high; many works are likely to meet them as well as the subject matter requirement. However, some may not.

It is important to note that a single object may contain multiple “works,” each of which may be separately protected by copyright. An example of such layered copyright occurs with musical works embodied in a **phonorecord**—a physical object in which sounds are recorded, such as an LP, cassette tape, compact disc, or hard drive—which embodies at least two works: the sound recording and the underlying musical composition. The copyright status of each work must be evaluated separately. This is true for any compilation of individual works as well, because copyright protection applies to each of the individual works and also to the compilation as a whole. For example, copyright applies separately to individual articles and photographs in a newsletter as well as to the newsletter as a whole. As such, you will need to assess whether the work you are evaluating has only a single copyright or multiple copyrights associated with it and work through the questions in this Handbook for each individual copyright.

The questions in this Chapter do not need to be asked in any particular order; a single “no” answer to any one of these four questions means that the work is not protected by federal copyright, and you do not have to work through the other questions in this Chapter. On the other hand, if the answer to any of these questions is “yes,” you will then need to consider the other questions in this Chapter to determine whether the work meets *all* the threshold requirements.

➔ If the answer to *each* question in this Chapter is “yes,” then the work may be protected by copyright, and you should proceed to the next chapter, *Chapter 2: Publication Status*. If the answer to *any* of the questions in this Chapter is “no,” then the work is in the public domain.

## FLOWCHART 1: SUBJECT MATTER AND THRESHOLDS



## Question One: Is the work valid “subject matter?”

### Question One: Is the work valid “subject matter?”

- Books
- Periodicals
- Lectures and sermons\*
- Dramatic compositions\*
- Musical compositions\*
- Maps
- Works of art\*
- Reproductions of works of art
- Drawings or plastic works of a scientific or technical character\*
- Photographs\*
- Prints and pictorial illustrations
- Motion pictures and photoplays\*
- Prints or labels used for articles of merchandise (after July 1, 1939)
- Sound recordings (after February 15, 1972)

Both the 1909 Act and the 1976 Act list categories of works that are “subject matter” eligible for copyright protection. The 1909 Act protects “all the writings of an author”<sup>4</sup> including eleven specific categories of works that are eligible for copyright protection: books, periodicals, lectures and sermons, dramatic compositions, musical compositions, maps, works of art, reproductions of works of art, drawings or plastic works of a scientific or technical character, photographs, and prints and pictorial illustrations.<sup>5</sup> Over time, Congress added additional categories to this list: motion pictures and photoplays,<sup>6</sup> prints or labels used for articles of merchandise,<sup>7</sup> and sound recordings.<sup>8</sup> The 1976 Act broadened and generalized these categories to include: literary works, musical works (including any

accompanying words), dramatic works (including any accompanying music), pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.<sup>9</sup>

Nearly all works created between January 1, 1923 and December 31, 1977 will qualify as valid subject matter. Some exceptions include sound recordings created before February 15, 1972, buildings, and purely functional objects, such as a lamp. Note that the design of a functional object, such as a lamp-base in the shape of Uncle Sam, may be copyrightable.

⚠ **Trap:** Remember that a work can contain layered copyrights, for example, the copyright in a sound recording is separate from the copyright in the underlying musical composition.

🎵 **Special Case - Sound Recordings:** Prior to February 15, 1972 sound recordings were not considered valid subject matter under federal copyright law. Sound recordings created before February 15, 1972 are protected by a patchwork of state laws.<sup>10</sup>

➔ For each work you are assessing, if the work, or a component of the work, is valid subject matter, then the answer to this question on the flowchart is “yes,” and you should proceed to Question Two of this Chapter. If the work is not valid subject matter, then the answer to this question on the flowchart is “no” and it is in the public domain.

### Threshold

**Question Two:** Has the work been “fixed” in a tangible medium?

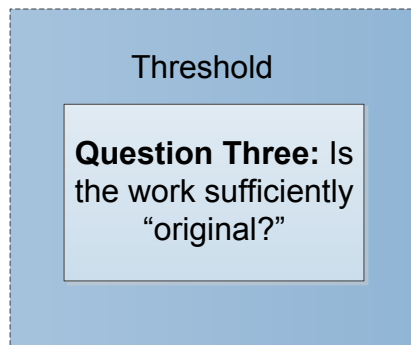
### Question Two: Has the work been “fixed” in a tangible medium?

In order to be protected by copyright, a work must also be “fixed in a tangible medium” of

expression.<sup>11</sup> Examples of sufficient fixation include works that have been recorded on paper, a computer disk, or a phonorecord. Copyright does not protect works that exist only in an author's mind and that have not been committed to paper, to film, to disk, or to some other tangible medium. For example, copyright does not protect conversations, songs, chants, speeches, or performances that are not written down or otherwise recorded.

✓ **Tip:** Any physical work, including anything drawn or written on paper, captured on film, or otherwise recorded, will meet the fixation requirement.

➔ If the work is embodied in some physical form, then the answer to this question on the flowchart is “yes,” and you should proceed to Question Three of this Chapter. If the answer to this question is “no,” then the work is in the public domain.



### Question Three: Is the work sufficiently “original”?

To be protected by copyright, a work must be “original.” Originality for the purposes of copyright is a very low threshold and often means only that the work was independently created and not

copied from other works.<sup>12</sup> For example, a court found that a photographer's posing of a subject and selection of the composition of a photograph met the originality requirement.<sup>13</sup> A photograph of a painting without special composition or lighting would likely add nothing original and would not be copyrightable.

The originality requirement also excludes anything objectively factual, unless it is somehow arranged in a creative way. For example, a compilation of facts organized in a routine or predictable manner—such as a phone book listing names and phone numbers in alphabetical order—does not satisfy the originality requirement.<sup>14</sup> Similarly, if the arrangement of the facts was decided because of standardization, convention, necessity, or only to improve the functionality of the work, then it is not original.<sup>15</sup> If, however, some element of creativity was required in determining how to arrange the facts, then a compilation of facts may be copyrightable.

Since originality is a low threshold, most works will meet this requirement. However, courts have held certain works not sufficiently original to meet this requirement:

- a price list of surgical goods that contained only a list of items described by the terms used by the manufacturers of those articles;<sup>16</sup>
- a map that depicted the streets and squares of downtown Savannah, the churches, houses, and forts near the city, and the highways west of the city where such elements had been taken from a public domain map;<sup>17</sup>
- the factual events underlying a news article; however, a news article describing the factual event is copyrightable.<sup>18</sup>

➔ If the work is original to the author, then the answer to this question on the flowchart is “yes,” and you should proceed to Question Four of this Chapter. If the answer to this question is “no,” because the work does not meet the originality requirement, then the work is in the public domain.

### Threshold

**Question Four:**  
Does the work  
contain protectable  
“creative  
expression?”

#### **Question Four: Does the work contain protectable “creative expression?”**

Only the “creative expression” in a work is copyrightable. This threshold is tightly related to the “originality” threshold, and the reasoning overlaps. Ideas, facts, systems,

processes, and procedures are not protected by copyright. For example, a poem about a flower, or a novel describing purely fictional characters and events, would clearly be expressive and protectable by copyright. On the other hand, a work that explains historical facts or scientific principles may have certain protectable elements, such as the creative expression in the explanations, but the underlying facts, principles or methods are not protected. Some examples of non-copyrightable ideas or facts are:

- a bookkeeping method (although a book explaining the method can be sufficiently creative);<sup>19</sup>
- a description of the rules of a game or a sporting event (for example, how to conduct a race on roller skates);<sup>20</sup>
- historical facts (for example, a description of the Battle of Gettysburg does not preclude another historian from describing the events of the battle but does prevent another historian from narrating the battle in that particular, expressive wording).<sup>21</sup>

The 1909 Act further provided that the following are not subject to copyright: “words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring; mere listing of ingredients or contents.”<sup>22</sup> Although no longer expressly codified in the 1976 Act, these limitations still apply today.<sup>23</sup>

⊗ **Trap:** Like originality, “creative expression” is a low threshold. The creative expression threshold is not a judgment of how subjectively creative a work is, but rather a simple distinction between that which is protected by copyright (expression) and that which is not (facts and ideas).

➔ If the work contains any creative expression, then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 2: Publication Status* to determine if the work is protected by copyright. If the work simply reflects an idea or lists facts, then the answer to this question on the flowchart is “no,” and the work is in the public domain.

## CHAPTER 2: PUBLICATION STATUS

### Chapter Overview:

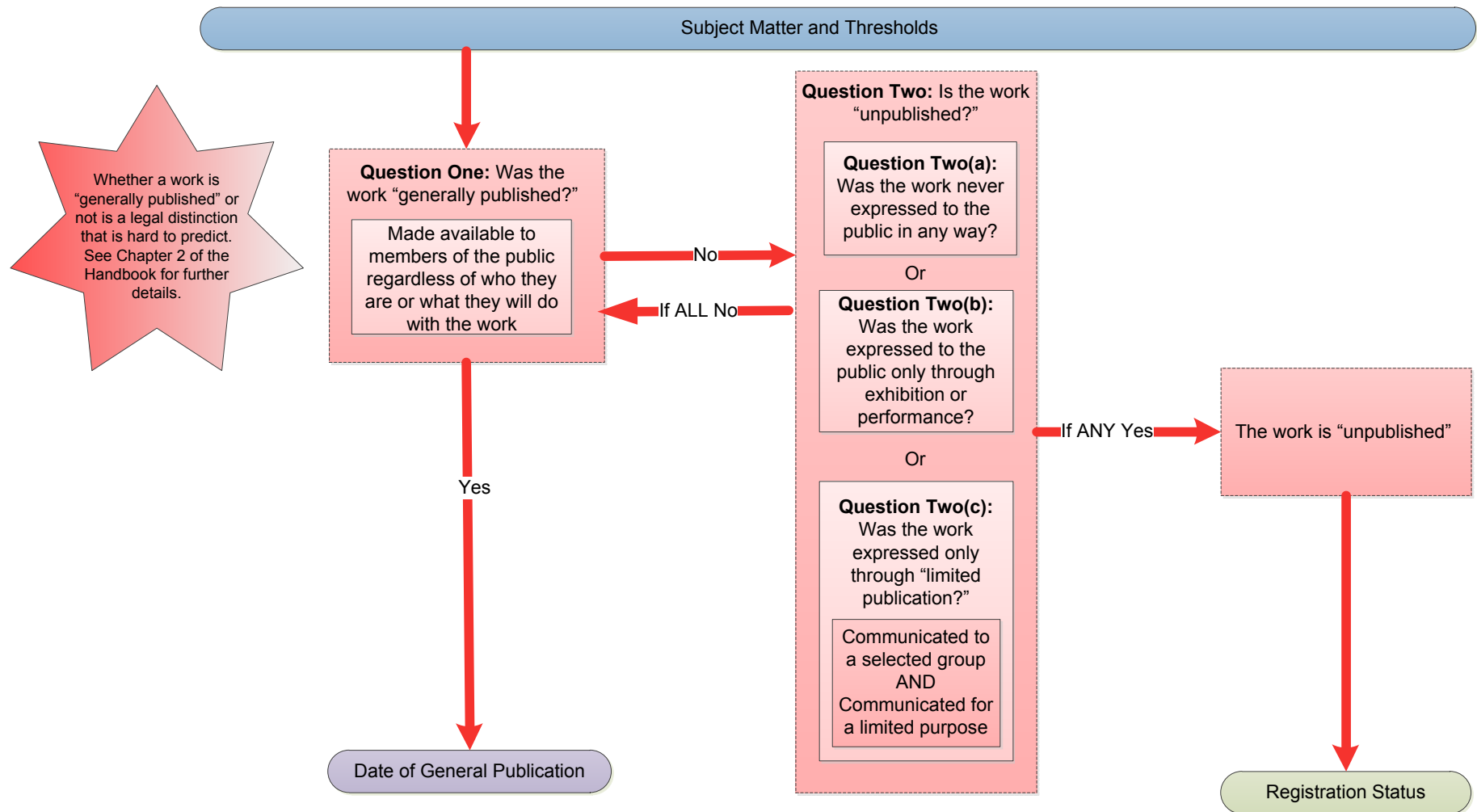
When evaluating the copyright status of a work created between January 1, 1923 and December 31, 1977, whether the work was **generally published** or remains **unpublished** is an important distinction because generally published works were subject to strict requirements under the 1909 Act, while unpublished works were not protected by federal copyright until the 1976 Act went into effect. **As such, a generally published work is more likely to be in the public domain today than is an unpublished work.** A work is considered **generally published** if copies of the work have been distributed to members of the public regardless of who they are or what they will do with it. In order to be considered generally published, the work must have been published with the consent of the copyright owner; an unauthorized publication does not affect the publication status of the work.<sup>24</sup> **All other works are considered unpublished, and as such, are highly likely to still be protected by copyright.** Unsurprisingly, works that have never been expressed to the public in any way are considered unpublished. Importantly, however, works that have only been expressed to the public through exhibition or performance or through a **limited publication** are also treated as unpublished. The distinction between general publication and limited publication can be counterintuitive; this is because courts have sometimes been hesitant to find that a work is generally published, as this often would result in the author losing copyright protection.

Under the 1909 Act, a generally published work was granted federal copyright protection if the owner complied with the notice requirement described below in *Chapter 4: Notice Requirement for Generally Published Works*. If a generally published work did not meet this requirement, then the work entered the public domain. Some types of unpublished works were eligible for federal copyright protection under the 1909 Act if the owner registered the unpublished work with the Copyright Office,<sup>25</sup> as further described in *Chapter 5: Registration Status of Unpublished Works*. Works considered to be unpublished did not have to meet the notice requirement, and, if unregistered, were eventually granted federal copyright protection under the 1976 Act.

This Chapter includes a set of questions to help you to assess whether a work is likely to be considered generally published or unpublished. The questions in this Chapter do not need to be asked in any particular order; a single “yes” answer to one of these questions is determinative. However, because the determination of publication status can be counterintuitive and hard to predict, all questions should be considered carefully prior to making a decision as to whether a work is generally published or unpublished.

➔ If you determine that a work is generally published, then you should proceed to *Chapter 3: Date of General Publication*. If you determine that a work is unpublished (which includes limited publications), then proceed directly to *Chapter 5: Registration Status of Unpublished Works* to determine whether the work is a registered or unregistered unpublished work.

## FLOWCHART 2: PUBLICATION STATUS



**Question One: Was the work “generally published?”**

Made available to members of the public regardless of who they are or what they will do with the work

**Question One: Was the work “generally published?”**

A work is considered “generally published” if the author authorized at least one copy of the work to be made available to the general public without regard to

who would receive a copy and without restriction on further uses of the work.<sup>26</sup> Works such as posters, buttons, newsletters, fundraising letters, and brochures that were widely distributed will likely be considered generally published. Similarly, a book or periodical that was offered for sale will also be considered generally published.

A work may be considered generally published even if it was distributed to a small or limited group of people, if the copyright owner does not implicitly or explicitly limit the recipients from passing the work on to others or restrict the further reproduction or distribution of the work.<sup>27</sup> For example, a court held that customized jingles sold without restrictions preventing the buyer from broadcasting them were generally published.<sup>28</sup>

A work can be considered generally published even if it is not offered in sufficient numbers to satisfy public demand; the distribution of a single copy may be enough to be classified as a general publication.<sup>29</sup> For example, if an author provides a single copy of his book to an arbitrary person without placing restrictions on the further use of the book, it may be considered generally published. In contrast, if an author gives a copy of his book to his editor with the implied restriction that the editor will not further distribute the book, then this is not a general publication.

⊗ **Trap:** A work may be considered “generally published” even if only a single copy is distributed, if that copy was made available without restrictions on further use.

The concept of general publication may also be counterintuitive because works may be considered unpublished despite being made widely available to the public. For example, a court has found that Martin Luther King, Jr.’s famous “I Have A Dream” speech was not published when he delivered it, despite a large public audience being present for the speech and vast media coverage. For more details on when a work that has been disseminated in some manner is considered unpublished, see Question Two of this Chapter.

⊗ **Trap:** Whether a work is “generally published” or “unpublished” is a legal distinction that can be hard to predict and is sometimes counterintuitive. In some situations, works that have been expressed widely to the public may still be considered unpublished. For example, a court found that Martin Luther King, Jr.’s famous “I Have a Dream” speech was unpublished when he delivered it.

It may be difficult to determine from the work itself how widely the work was distributed. For example, it may often be unclear how widely internal organizational documents, such as meeting minutes or organizational memoranda, were distributed. As such, the specific facts about the creation and distribution of the work will weigh in the determination of whether or not a work is generally published.

✓ **Tip:** Before determining that the work is “generally published,” check the next questions in the Chapter to see if you can establish that the work is considered “unpublished.”



⊗ **Trap:** If you are assessing a phonorecord, there are different rules for how general publication is determined. Remember that phonorecords contain at least two works, the sound recording and the underlying musical composition, and each must be assessed independently. (See *Chapter 1: Subject Matter and Thresholds*.) The publication status of a musical composition that is embodied in a published phonorecord depends on the date that the phonorecord was published. Before January 1, 1978, the publication of a phonorecord does not constitute a general publication of the underlying musical composition embodied in the phonorecord.<sup>30</sup> After January 1, 1978, the publication of a phonorecord does constitute a general publication of the underlying musical composition embodied in the phonorecord.

➔ If the work was made available to the public without restriction on further use or distribution, the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 3: Date of General Publication*. If the answer to this question on the flowchart is “no,” then consider the other questions in this Chapter to see if you can establish the publication status of the work.

### Question Two: Is the work “unpublished?”

There are three possible ways a court could consider a work to be unpublished: if the work was never expressed to the public, if the work was expressed to the public only through public performance or exhibition, or if the work’s publication was “limited.”

⊗ **Trap:** If an unpublished work was registered with the Copyright Office prior to January 1, 1978, the work secured federal copyright protection commencing the date of the registration of the work.<sup>31</sup> If an unpublished work was not registered with the Copyright Office, it was granted federal copyright protection under the 1976 Act. Whether copyright protection for an unpublished work was secured under the 1909 Act or the 1976 Act affects the duration of the copyright term. See *Chapter 5: Registration Status of Unpublished Works* and *Chapter 6: Duration and Renewal*.

➔ There are three sub-questions to ask to determine if a work is considered “unpublished.” If the answer to any of these questions is “yes,” then the work is considered unpublished. In this case, the work may still be protected by copyright and you should proceed to *Chapter 5: Registration Status of Unpublished Works* to determine whether the work is a registered or unregistered unpublished work. If the answer to any of these questions is “no,” that is not determinative; you must still consider the other sub-questions to see if you can establish that the work is considered unpublished or consider the previous question in this Chapter to see if you can establish that the work is “generally published.”

### Question Two(a): Was the work never expressed to the public in any way?

#### Question Two: Is the work “unpublished?”

#### Question Two(a): Was the work never expressed to the public in any way?

Works that have never been expressed to the public in any way are considered unpublished and may still be protected by copyright. For example, a personal diary that the author has not shared with anyone has never been expressed to the public and is considered unpublished.

➔ If the work has been shared with even one other person, then the answer to this question on the flowchart is “no,” and you should consider the other questions in this Chapter to see if you can establish the publication status of the work. If the work has not been shared with any person other than the author, then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 5: Registration Status of Unpublished Works* to determine whether the work is a registered or unregistered unpublished work.

**Question Two:** Is the work “unpublished?”

**Question Two(b):**  
Was the work expressed to the public only through exhibition or performance?

**Question Two(b): Was the work expressed to the public only through exhibition or performance?**

A public performance of a work alone is not considered a general publication.<sup>32</sup> The performance of a work, such as a speech, sermon, or lecture, is considered generally published

only when physical copies of the work were distributed to the general public without restrictions.<sup>33</sup> For example, a court held that Martin Luther King Jr.’s “I Have a Dream” speech was not “generally published” when he delivered the speech to a large audience, both live and through extensive media coverage.<sup>34</sup> Copies of the speech were given to the media for contemporaneous coverage, but the court held that distribution to be a “limited publication” (see Question Two(c) below).

⚠ **Trap:** A work that was only expressed to the public through performance is not considered “generally published.” If copies of the work were distributed to the public without restrictions, then the work is generally published.

Similarly, a work of art is considered an unpublished work if it has only been expressed to the public through an exhibition where there is a general understanding that no copying will take place and measures are taken to enforce this restriction.<sup>35</sup> The restriction on copying does not need to be express; it can be implied by the circumstances. For example, if the general public is admitted to view a painting, it may be tacitly understood that no copying shall take place.<sup>36</sup> However, a general publication could result if a work of art was exhibited and there were no restrictions on the copying of the work.<sup>37</sup> For example, a general publication can be found if a work is displayed and visitors are given a policy statement that expressly allows visitors to take photographs and make paintings and models based on the work.<sup>38</sup> If a work was exhibited with express or implied limitations on the copying of the work, and the work was not expressed to the public in any other manner, the work may still be considered unpublished.

⚠ **Trap:** A work expressed to the public only through exhibition is not considered “generally published.” If the public was allowed to freely copy or photograph the exhibited work, it may be considered generally published.

Works that have been expressed to the public only through exhibition or performance, and that are therefore unpublished, may still be protected by copyright.

➔ If the work has been expressed to the public only through exhibition or performance, then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 5: Registration Status of Unpublished Works* to determine whether the work is a registered or unregistered unpublished work. If the answer to this question on the flowchart is “no,” then consider the other questions in this Chapter to see if you can establish the publication status of the work.

**Question Two:** Is the work “unpublished?”

**Question Two(c):**  
Was the work expressed only through “limited publication?”

Communicated to a selected group  
AND  
Communicated for a limited purpose

**Question Two(c): Was the work expressed only through “limited publication?”**

Works that were disseminated only via “limited publication” are also considered unpublished for purposes of copyright law. A work is considered a limited publication when it (1) was communicated only to a selected group; and (2) communicated only for a limited purpose with an express or implied limitation that precludes broadcasting, reproducing, distributing, or selling copies of the work.<sup>39</sup>

⊙ **Trap:** A “limited publication” can occur even when a work has been distributed widely, if the author placed restrictions on the further use or distribution of the work.

The circumstances under which a publication may be limited can be counterintuitive; as such, a few examples may provide guidance. One court held that the distribution of 2,000 copies of a song to radio stations and persons in the music industry for promotional purposes was a limited publication<sup>40</sup> because not a single copy of the song was ever sold, no one had been given permission to play the song publicly, and nothing had been done to give the recipient the impression that he could play the song publicly without first obtaining a license.<sup>41</sup> Accordingly, the court held that the work was protected by copyright.

In another example, a court held that the distribution of the Oscar statuette to 158 recipients without a copyright notice and

without express restrictions on the use or sale of the award was a limited publication because the Oscar was given only to the award recipients and not sold or distributed to the general public. Further, the purpose of the award—to advance the motion picture arts and sciences—was limited and restrictions on the further distribution of the Oscar were implied.<sup>42</sup> As such, the court held that the work was not in the public domain.

It is likely that works that were only distributed internally, such as to employees of an organization, would be considered distributed to a selected group. However, in order to be considered unpublished, the work must have been distributed for a limited purpose, and there must have been express or implied limits on the distribution of the work. For example, an internal memo that is marked as confidential, clearly treated as confidential, or marked with “do not distribute” or similar language would likely be a limited publication.

⊙ **Trap:** Whether the dissemination of a work was to a “selected group” for a “limited purpose” is highly fact specific, and it may be hard to predict how a court would decide this issue with regard to any particular work.

Works that have been distributed only through a limited publication are considered unpublished and may still be protected by copyright.

➔ If the work has only been expressed to the public through a “limited publication,” then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 5: Registration Status of Unpublished Works* to determine whether the work is a registered or unregistered unpublished work. If the answer to this question on the flowchart is “no,” then consider the other questions in this Chapter to see if you can establish the publication status of the work.

## CHAPTER 3: DATE OF GENERAL PUBLICATION

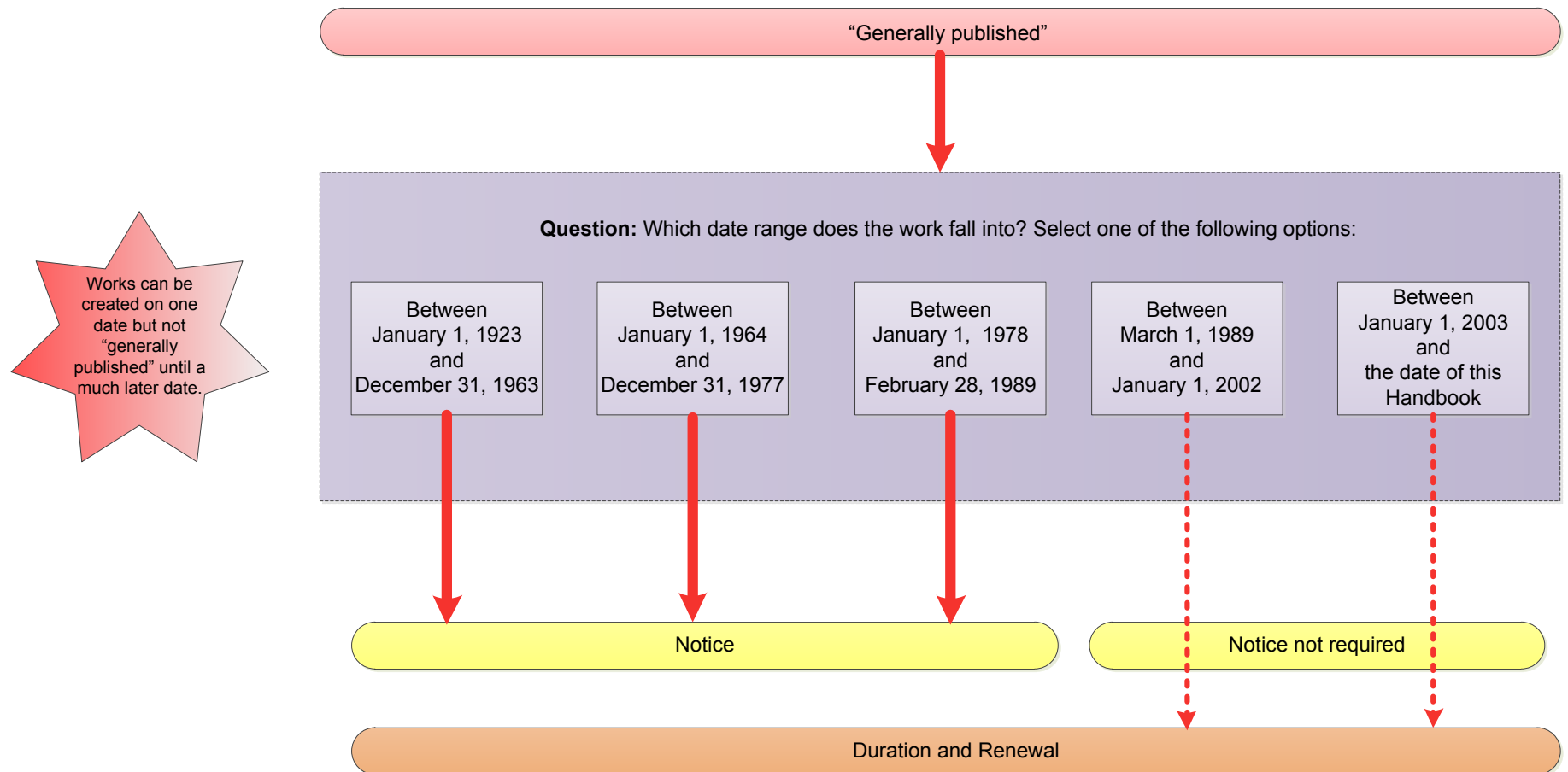
### Chapter Overview:

As mentioned in the Introduction, copyright law has changed substantially over the course of the last century, directly affecting whether the works covered by this Handbook are in the public domain or still protected by copyright. Because of the way these changes operate, generally published works are treated differently depending on the date they were published. Generally speaking, over time, copyright protection has become much easier to acquire and the length of protection has grown much longer. As such, this Handbook describes five discrete date ranges that determine which of the technical formalities, if any, a work had to meet in order to be protected by copyright. The date range of a work also determines how long copyright protection, if any, lasts.

In this Chapter, you need to select which of the five date ranges a generally published work falls into.

➔ This Chapter only applies if you determined that a work was **generally published** in *Chapter 2: Publication Status*. After determining the date of general publication according to this Chapter, you will proceed to *Chapter 4: Formalities* or *Chapter 6: Duration and Renewal* for additional questions that will apply to these works. This Chapter does not apply to unpublished works (including works that are considered unpublished because of a “limited publication”). If you are assessing an **unpublished** work, proceed directly to *Chapter 5: Registration Status of Unpublished Works*.

### FLOWCHART 3: DATE OF GENERAL PUBLICATION



### Question: Which date range does the work fall into?

For a “generally published” work, in order to determine whether formalities apply, whether the work is protected by copyright, and how long that copyright protection lasts, you need to know when the work was published. However, for a variety of reasons, it may be impossible to know the exact date when a work was published. You may still be able to narrow the publication date down to one or more of these date ranges. In that case, you can follow the Handbook for each possible date range.

⊗ **Trap:** Consider the possibility that a work created between January 1, 1923 and December 31, 1977 may have been published many years after it was first created. This scenario can be tricky because it is the date of general *publication*, not the date of creation, that triggers many of the requirements discussed in the next Chapters.

- **General Publication Date Range 1: between January 1, 1923 and December 31, 1963**

Works published during this date range were subject to stringent notice and renewal requirements to be protected by copyright. After January 1, 1964, the renewal requirement was eliminated.<sup>43</sup>

- **General Publication Date Range 2: between January 1, 1964 and December 31, 1977**

Works first generally published on or after January 1, 1964 were still subject to the notice requirement in order to be protected by copyright, but maintaining copyright protection became less burdensome because renewal became automatic.

- **General Publication Date Range 3: between January 1, 1978 and February 28, 1989**

Works generally published during this date range were subject to even fewer requirements in order to be protected by copyright than works published during Date Ranges 1 and 2. Copyright protection for these works lasts longer, as well. Importantly, works published during this period cannot enter the public domain before December 31, 2047.<sup>44</sup>

➔ If the work falls into General Publication Date Ranges 1, 2, or 3, proceed to *Chapter 4: Notice Requirement for Generally Published Works*.

- **General Publication Date Range 4: between March 1, 1989 and January 1, 2002**

On March 1, 1989, the United States implemented an international treaty, which eliminated the final remaining technical requirement for obtaining copyright protection – notice.<sup>45</sup> As such, works generally published during this date range are automatically covered by copyright. Works in this category also cannot enter the public domain before December 31, 2047.<sup>46</sup>

- **General Publication Date Range 5: between January 1, 2003 and the date of this Handbook**

These works are in a separate category because the calculation of the duration of protection for these works is slightly different from Date Range 4.<sup>47</sup>

➔ If the work falls into General Publication Date Ranges 4 or 5, proceed directly to *Chapter 6: Duration and Renewal*.

## CHAPTER 4: NOTICE REQUIREMENT FOR GENERALLY PUBLISHED WORKS

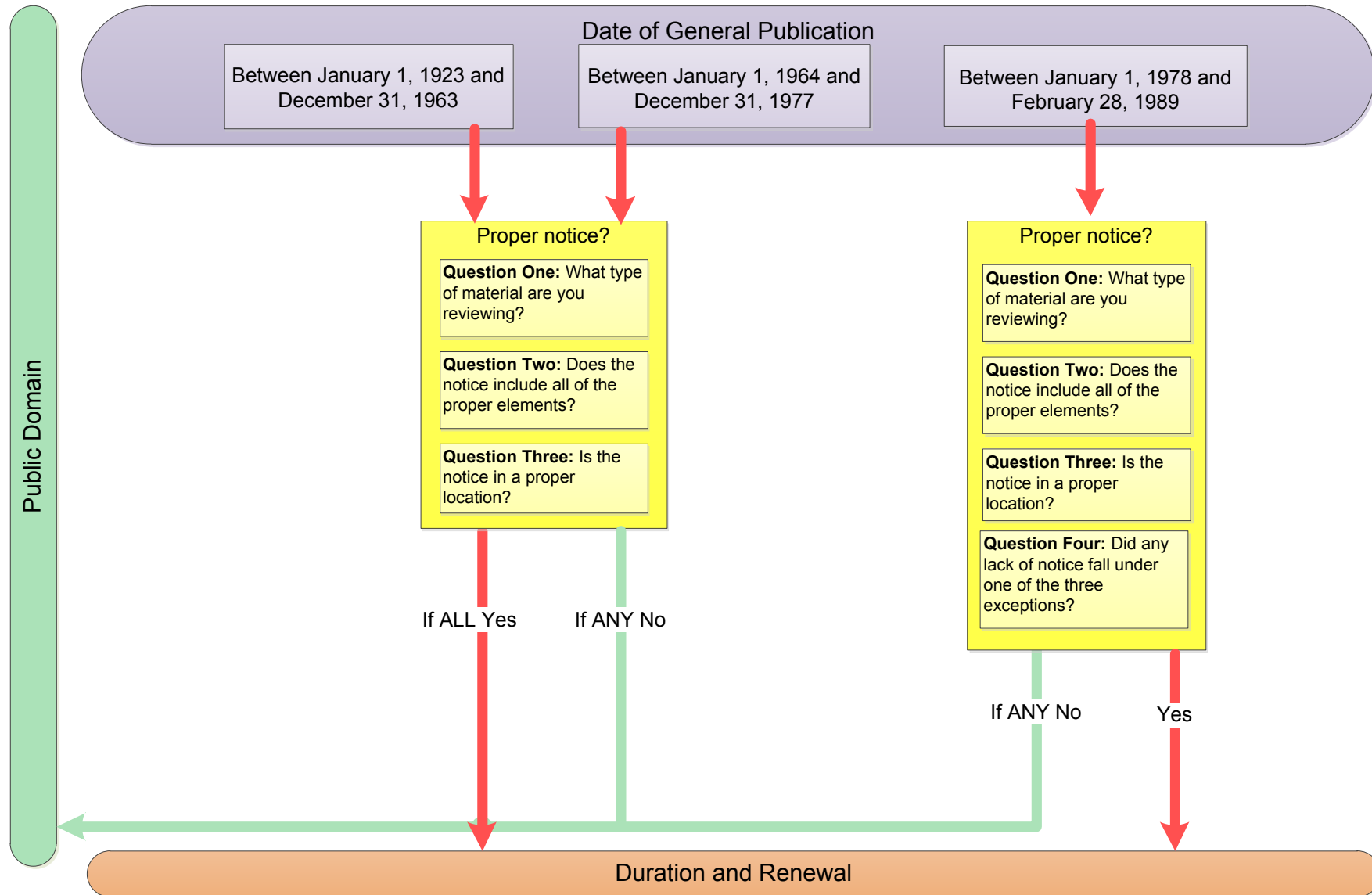
### Chapter Overview:

Works in General Publication Date Ranges 1, 2, and 3 were not eligible for federal copyright protection unless they were marked with a copyright **notice**. Under this notice requirement, a work had to include a visual indicator of its copyright status, such as “Side Effects Copyright © 1975 Woody Allen.”<sup>48</sup> For works in General Publication Date Ranges 1 and 2, the notice requirements are very detailed, and even small technical defects in the form, content, or location of the notice resulted in the loss of copyright protection. As such, if works in Date Ranges 1 or 2 lack proper notice, then they are in the public domain.<sup>49</sup> The 1976 Act, however, created several exceptions to the notice requirement; these exceptions may apply to works in General Publication Date Range 3. On March 1, 1989, the notice requirement was abolished altogether: works in General Publication Date Ranges 4 and 5 do not have to comply with notice requirements in order to be protected by copyright. Importantly, unpublished works, regardless of the date they were created or their registration status, are not subject to the notice requirement.

➔ This Chapter only applies if you determined that a work was **generally published** in *Chapter 2: Publication Status* and if the work falls into General Publication Date Range 1, 2, or 3 as determined in *Chapter 3: Date of General Publication*. For works in General Publication Date Ranges 4 and 5, proceed directly to *Chapter 6: Duration and Renewal*. For **unpublished** works, proceed to *Chapter 5: Registration Status of Unpublished Works*.

➔ For works in General Publication Date Ranges 1, 2, and 3, start at Question One in this Chapter. If you determine that the **generally published** work you are assessing fails to meet the notice requirement and, for works in General Publication Date Range 3, does not fall into an exception to the notice requirement, then the work is in the public domain. If, on the other hand, the **generally published** work meets the notice requirement, proceed to *Chapter 6: Duration and Renewal* to determine if the work is still protected by copyright.

## FLOWCHART 4: NOTICE REQUIREMENT FOR GENERALLY PUBLISHED WORKS



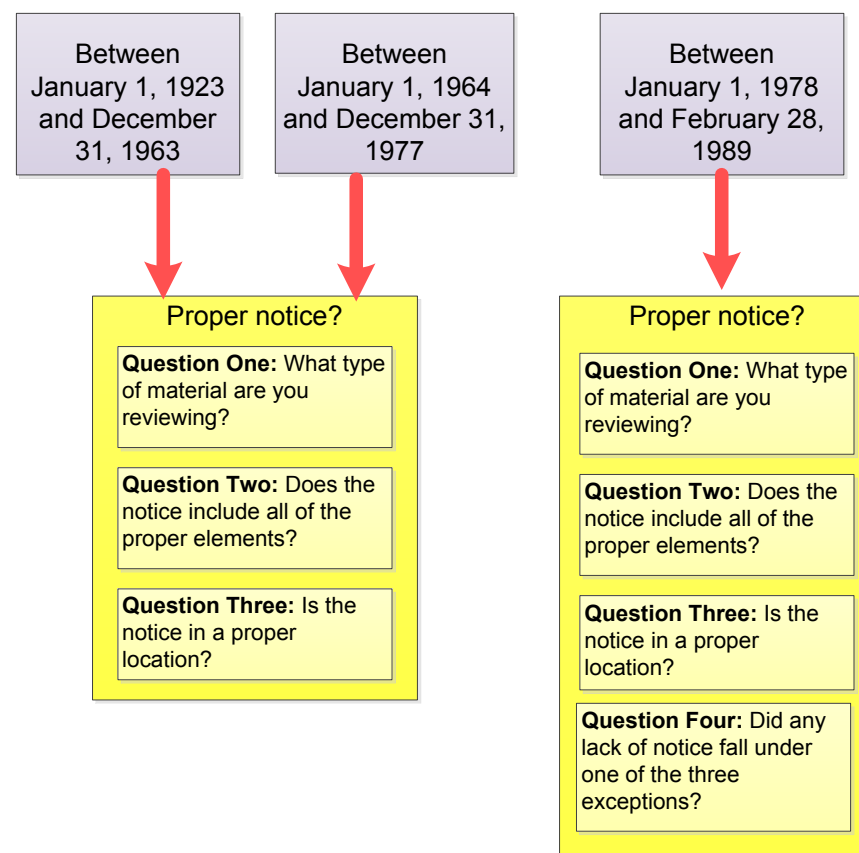


⊗ **Trap:** Copyright protection for works created before January 1, 1978 was secured by *publication with proper notice*.<sup>50</sup> It is a common misconception that registration of the work with the United States Copyright Office was also required to secure copyright in a published work.<sup>51</sup> Under the 1909 Act, registration was not required to *secure* the copyright in a work, but was required in order to bring a lawsuit to *enforce* the copyright.<sup>52</sup> This remains true under the 1976 Act as well.

✓ **Tip:** Although not required to secure copyright protection, a published work may be registered with the Copyright Office. Determining whether the work was registered requires searching the Copyright Office records. Anyone can go to the Copyright Office and search the records to confirm a work's registration. Also, upon request and for a fee, the Copyright Office staff will search the records of registrations and other recorded documents concerning ownership of copyrights for you, and will provide the results in a written report. For more information on how to search for registration records, see *Copyright Circular 22: How to Investigate the Copyright Status of a Work*.<sup>53</sup>

### **General Publication Date Ranges 1, 2, and 3: Works “generally published” between January 1, 1923 and February 28, 1989**

Works generally published during these date ranges must have a visual “notice” of copyright protection in order to be protected by copyright. Further, these works are only eligible for copyright protection if the copyright notice is in the proper form, and is in the correct location on the work. If a work does not meet these notice requirements, then the work is in the public domain. There are three questions to ask when determining whether a work includes proper notice.



⊗ **Trap:** Look out for works created on or before December 31, 1977 but published after March 1, 1989. These works do not require notice for copyright protection to apply. Lack of notice will not inject such works into the public domain. Remember that works can be published long after they are created.

### Proper notice?

**Question One:** What type of material are you reviewing?

### Question One: What type of material are you reviewing?

For the purpose of evaluating notice, works are grouped into one of five different types of materials:

- 1) Books or printed publications, such as Hemingway's *The Sun Also Rises*;
- 2) Periodicals, such as *The New York Times*;
- 3) Musical compositions, such as Gershwin's "Rhapsody in Blue," (this will usually be in the form of sheet music);
- 4) Pictorial, Graphical, or Sculptural Works, such as a photograph by Ansel Adams or the *Iwo Jima Memorial* statue;
- 5) Sound recordings published on or after February 15, 1972, such as David Bowie's "Young Americans."

🎵 **Special Case - Sound Recordings:** As explained above in *Chapter 1: Subject Matter and Thresholds*, only sound recordings first fixed (i.e., recorded) on or after February 15, 1972 are eligible for federal copyright protection.<sup>54</sup> Notice requirements, if any, for sound recordings made prior to February 15, 1972 are dictated by state law. Therefore, the rules in this section only apply to sound recordings first fixed after February 15, 1972. Notice requirements for sound recordings first fixed after February 15, 1972 are listed in Table I on page 26.

➔ Once you have determined which type of work you are reviewing, proceed to Question Two of this Chapter.

### Proper notice?

**Question Two:** Does the notice include all of the proper elements?

### Question Two: Does the notice include all of the proper elements?

Table I on page 26 describes which form and elements of notice are required for each category of work listed above.

There are three forms of notice shown in the second row of Table 1. Most works needed to comply with the "general form" of notice. To minimize disfigurement for works of art, "short forms" are allowed for pictorial, graphical, or sculptural works; for these works either a general form or short form is acceptable. Sound recordings required a "special form" of notice.<sup>55</sup> See Table I.

For this date range, proper notice also had to include three elements. The first element is the symbol "©," the abbreviation "Copr.," or the word "Copyright."<sup>56</sup> The second element, the "author's name," must be the name of the initial copyright owner.<sup>57</sup> The third element, the "date of first publication," must be the year of publication.<sup>58</sup> All of these elements must be present in the proper form for the relevant type of material. These elements are also shown on the second row of Table I below.

➔ If the notice is not in the proper form or is missing any of the proper elements for the type of work you are assessing, then the answer to this question on the flowchart is "no," and the work is in the public domain. If the notice is in the proper form and includes all of the proper elements for the type of work you are assessing, then the answer to this question on the flowchart is "yes," and you should proceed to Question Three of this Chapter.

## Proper notice?

**Question Three:** Is the notice in a proper location?

**Question Three:** Is the notice in a proper location?

In addition to including the proper form and elements, for works in this date range, notice also

had to be in a specific location.<sup>59</sup> The required location for each type of work is shown in the third row of Table I.

⊗ **Trap:** No notice is required on a phonorecord to protect the underlying musical composition embodied in the phonorecord.<sup>60</sup>

✓ **Tip:** Check for common defects of notice. While the most likely notice defect is that the notice lacks one or more of the three required elements described above, deficiencies in notice may be more subtle. Examples of other defects are:<sup>61</sup>

- Notice is not in one of the locations required by law. (See Table I on page 26.)
- The name in the notice is that of someone who had no authority to secure copyright in her name.
- The date in the copyright notice is later than the exact year the work was first published.
- The notice is illegible or so small that it cannot be read without the aid of a magnifying glass.

If the notice on the work you are assessing includes *any* of these defects, then the notice is invalid and the work is in the public domain.<sup>62</sup>

➔ If the notice is not in a proper location according to Table I on page 26, the answer to this question on the flowchart is “no,” and the work is in the public domain. For works in General Publication Date Ranges 1 and 2, if the notice is in a proper location, then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 6: Duration and Renewal*.

For works in General Publication Date Range 3, proceed to the next question in this Chapter to determine whether any exception to the notice requirement applies to your work.

## Proper notice?

**Question Four:** Did any lack of notice fall under one of the three exceptions?

**Question Four:** For works in General Publication Date Range 3, did the lack of notice fall under one of the following three exceptions?

For works in General Publication Date Range 3, there are some narrow exceptions that would keep the work from being in the public domain if the work lacked notice.<sup>63</sup>

(1) The first exception is for cases where the work was registered within five years after general publication without notice, and a reasonable effort was made to add notice to all copies of the work that were generally published in the United States after the omission was discovered. For example,

- if the added notice is defective, this is not reasonable effort.<sup>64</sup>

(2) The second exception is for cases where notice was omitted from only a relatively small number of generally published copies of the work. For example,

- a court held that one percent of the total number of copies (400 dolls out of a total of 40,000 dolls) is a “relatively small” number;<sup>65</sup>
- 25-35 copies is not a “relatively small” number when those copies constitute 100 percent of the copies.<sup>66</sup>

(3) The third exception is for cases where, despite the copyright owner’s express contractual requirement, the publisher omitted notice in the general publication of copies of the work. For example,

- if in her book publication contract, the author required the publisher to publish the novel with notice, but the publisher omitted notice on the copies of the book.<sup>67</sup>

➔If a work in General Publication Date Range 3 fails to meet the notice requirement and no exception applies, then the answer to this question on the flowchart is “no,” and the work is in the public domain. If the work meets the notice requirement, or satisfies one of the exceptions, then the answer to this question on the flowchart is “yes,” and you should proceed to *Chapter 6: Duration and Renewal*.

**General Publication Date Ranges 4 and 5: Works “generally published” between March 1, 1989 and the date of this Handbook**  
**and**  
**Unpublished Works**

Notice is not required for works in General Publication Date Ranges 4 and 5, or for unpublished works. These works are eligible for copyright even if they have no notice.

➔If you are reviewing a work in General Publication Date Ranges 4 and 5, or an unpublished work, then proceed to *Chapter 6: Duration and Renewal*, to determine the length of copyright protection.

TABLE I

<b><u>Type of Material</u></b>	<b>Books or Printed Publications</b>	<b>Periodicals</b>	<b>Musical Compositions</b>	<b>Pictorial, Graphical, or Sculptural Works</b>	<b>Sound Recordings created after February 15, 1972</b>
<b><u>Notice Form and Elements</u></b>	<p><b>General form:</b>            (1) The symbol ©,            “Copr.” or            “Copyright”            (2) Year of first publication            (3) Author’s name</p> <p><b>Example:</b> “© 1974 Jane Doe”</p>	<p><b>General form:</b>            (1) The symbol ©,            “Copr.” or            “Copyright”            (2) Year of first publication            (3) Author’s name</p> <p><b>Example:</b> “© 1974 Jane Doe”</p>	<p><b>General form:</b>            (1) The symbol ©,            “Copr.” or            “Copyright”            (2) Year of first publication            (3) Author’s name</p> <p><b>Example:</b> “© 1974 Jane Doe”</p>	<p><b>General Form:</b>            (1) The symbol ©,            “Copr.” or            “Copyright”            (2) Year of first publication            (3) Author’s name</p> <p><b>Example:</b> “© 1974 Jane Doe”</p> <p><b>or</b></p> <p><b>Short form:</b>            (1) The symbol ©,            “Copr.” or            “Copyright”            (2) Author’s initial, monogram, trademark, or symbol</p> <p><b>Example:</b> “© JD”</p>	<p><b>Special form (required):</b>            (1) The symbol ®            (2) Year of first publication            (3) Author’s name, abbreviation of name, or generally known designation</p> <p><b>Example:</b> “® 1978 XYZ Records, Inc.”</p>
<b><u>Acceptable Locations for Notice</u></b>	On the title page or the page immediately following the title page.	On the title page, on the first page of text of each separate volume number, or under the title heading.	On the title page or on the first page of sheet music.	The author’s name should appear in an accessible place, such as the margin, back, permanent base, or pedestal of the work.	On the surface of reproductions, or on the label or container the phonorecord is in, so long as it gives “reasonable notice.”

## CHAPTER 5: REGISTRATION STATUS OF UNPUBLISHED WORKS

### Chapter Overview:

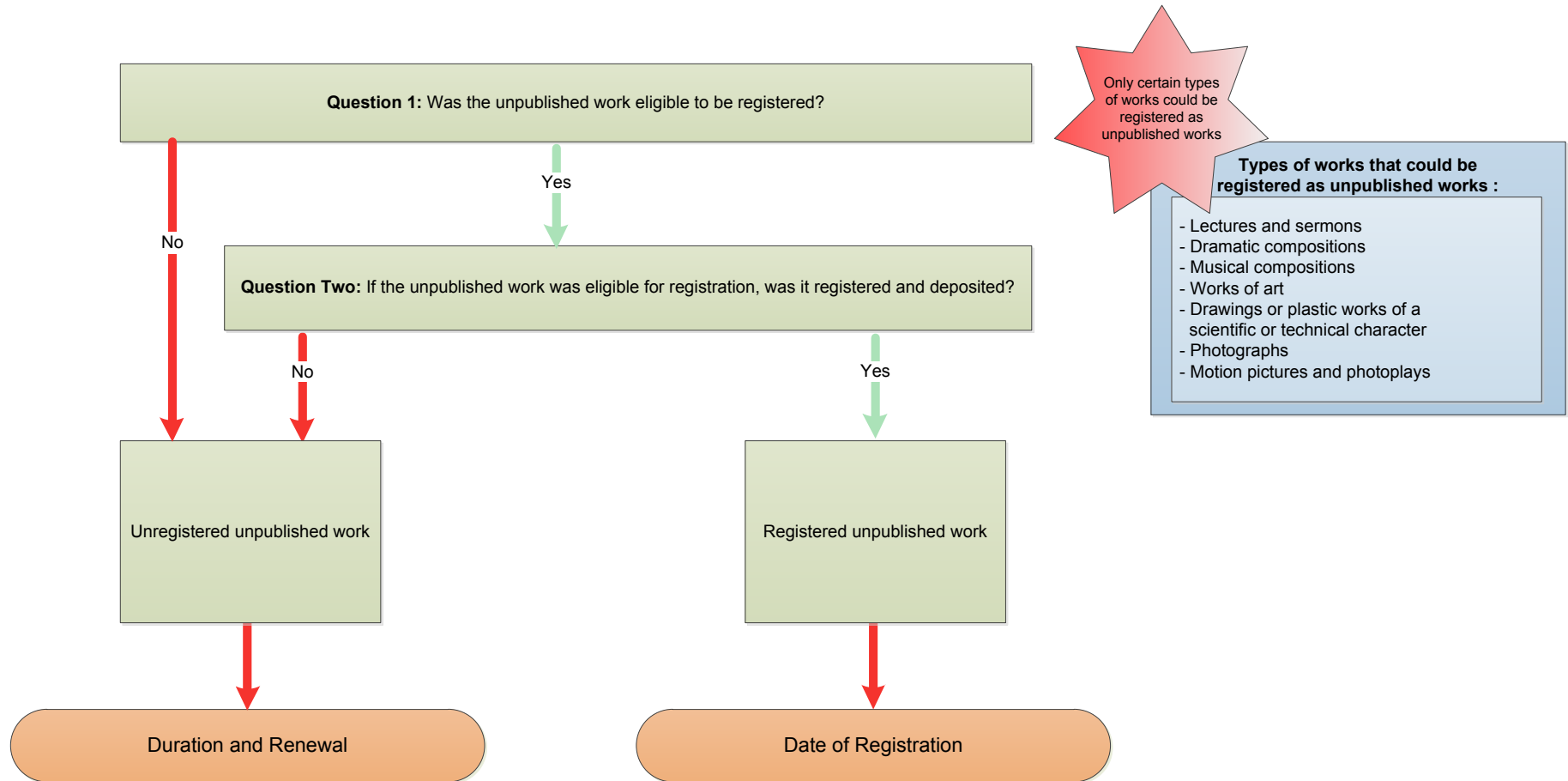
Unregistered **unpublished** works were not covered by the 1909 Act but were automatically granted federal copyright protection by the 1976 Act.<sup>68</sup> However, under the 1909 Act, authors were given an option to register certain types of unpublished works with the Copyright Office to secure federal copyright protection.<sup>69</sup> **Registration** of an unpublished work consists of filling out the appropriate form and mailing it, along with a registration fee, to the Copyright Office along with the **deposit** of one copy of the unpublished work.

Only certain types of unpublished works—see the list on page 29 below—were eligible for registration under the 1909 Act.

If an unpublished work was registered with the Copyright Office before January 1, 1978, the work secured federal copyright protection under the 1909 Act commencing from the date of the registration of the work.<sup>70</sup> If an unpublished work was *not* registered with the Copyright Office, it was not protected under federal law (though it was still protected under state common law) until Congress changed the federal law by passing the 1976 Act. All unpublished, unregistered works created earlier than January 1, 1978 were then granted federal copyright protection under the 1976 Act. Whether copyright protection for an unpublished work was secured under the 1909 Act or the 1976 Act affects the duration of the copyright term, explained in *Chapter 6: Duration and Renewal*.

➔ This Chapter is only relevant to certain types of **unpublished** works. If you are assessing a **generally published** work, proceed to *Chapter 6: Duration and Renewal*. This Chapter will help you determine whether the unpublished work you are assessing received copyright protection as a registered unpublished work under the 1909 Act or as an unregistered unpublished work under the 1976 Act. You will use this information in *Chapter 6: Duration and Renewal* to determine if the work you are assessing is still protected by copyright.

**FLOWCHART 5: REGISTRATION STATUS OF UNPUBLISHED WORKS**



**Question One:** Was the unpublished work eligible to be registered?

**Question One:** Was the unpublished work eligible to be registered?

Unpublished works had to be registered and deposited with the Copyright Office to be protected by federal copyright under the 1909 Act. Registration of unpublished works was optional; if an unpublished work was not registered the work was still protected by common law copyright. If an unpublished work was not registered and deposited before January 1, 1978, the unpublished work was automatically granted federal copyright protection under the 1976 Act on January 1, 1978.

Only certain types of unpublished works could be registered. Federal copyright protection was available under the 1909 Act for the following types of unpublished works<sup>71</sup>:

- lectures or similar productions,
- dramatic, musical or dramatico-musical compositions,
- motion picture photoplays,
- photographs,
- motion pictures and stills from motion pictures, and
- works of art, plastic works, or drawings.

Federal copyright protection was *not* available under the 1909 Act for the following types of unpublished works<sup>72</sup>:

- books,
- periodicals,
- maps,
- reproductions of works of art,
- prints and labels, and
- sound recordings.

If the work was the type of subject matter that was eligible to be registered as an unpublished work, registration and deposit of

the work were required to claim federal statutory copyright protection as a registered unpublished work.

➔ If the unpublished work is of a type eligible for registration, proceed to Question Two. If the unpublished work is not of a type eligible for registration, then the answer to this question on the flowchart is “no,” and the work is in the an unregistered unpublished work and you should use the information from this question and proceed to *Chapter 6: Duration and Renewal* to determine if the work is still protected by copyright.

**Question Two:** If the unpublished work was eligible for registration, was it registered and deposited?

**Question Two:** If the unpublished work was eligible for registration, was it registered and deposited?

To claim federal copyright protection for an eligible unpublished work, the author had to register and deposit the work with the Copyright Office.<sup>73</sup>

To register an eligible unpublished work, the author had to complete a form and mail it along with a registration fee to the Copyright Office. Determining whether the work was registered requires searching the Copyright Office records. Anyone can go to the Copyright Office and search the records to confirm a work’s registration. Also, upon request and for a fee, the Copyright Office staff will search the records of registrations and other recorded documents concerning ownership of copyrights for you, and will provide the results in a written report. In addition to registering the work, the author had to submit (“deposit”) a copy of the work to the Copyright Office in order to protect it as a registered unpublished work.



For more information on how to search for registration and deposit records, see *Copyright Circular 22: How to Investigate the Copyright Status of a Work*.<sup>74</sup>

➔ If a proper registration application for the unpublished work was not filed with the Copyright Office, along with payment of the appropriate fee and a copy of the work, then the answer to this question on the flowchart is “no,” and the work is in the an unregistered unpublished work. If the unpublished work was registered and a copy was deposited with the Copyright Office, then the answer to this question on the flowchart is “yes.” In either case, you should use the information from this question and proceed to *Chapter 6: Duration and Renewal* to determine if the work is still protected by copyright.

⚠ **Trap:** Under the 1909 Act, if a registered unpublished work was subsequently generally published, the work was still required to meet any applicable notice requirements for the date that the work was generally published.<sup>75</sup> See *Chapter 4: Notice Requirements for Generally Published Works* for notice requirements.

## CHAPTER 6: DURATION AND RENEWAL

### Chapter Overview:

Determining whether a work that was once protected by copyright is still protected by copyright is the final step in assessing a work's copyright status. Because copyright protection only lasts for a limited time, the copyright in any given work eventually expires, at which point the work enters the public domain. Congress has changed the requirements for keeping copyright protection, as well as how long copyright lasts, several times. As such, this Chapter explains how to calculate the **duration** of copyright protection for different categories of works.

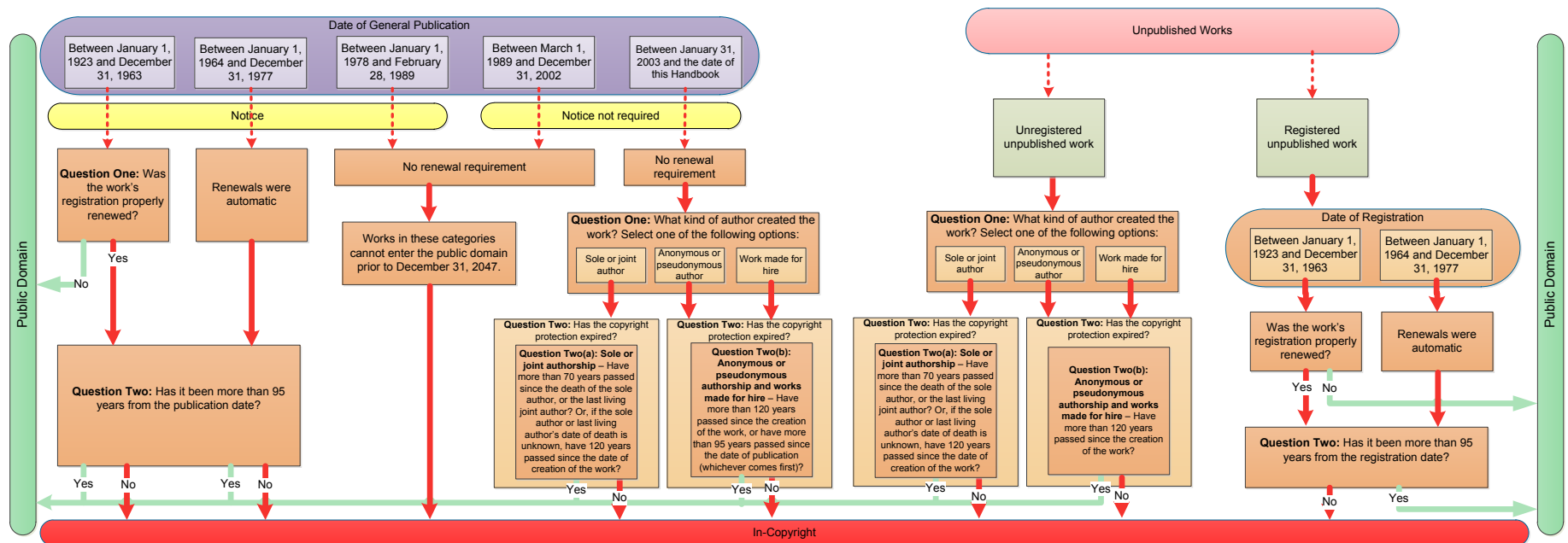
For certain works, how duration is calculated depends upon whether the registration for the work was **renewed**. The 1909 Act had a dual term of copyright, meaning that there was an original 28-year term that could be extended for an additional renewal period at the end of the original term. For **generally published** works in Date Range 1 (January 1, 1923 to December 31, 1963) and for **unpublished** works registered during this same timeframe, renewal registration was mandatory, and accomplishing renewal required filing a new set of forms with the Copyright Office.<sup>76</sup> For **generally published** works in Date Range 2 (January 1, 1964 to December 31, 1977) and for **unpublished** works registered during this same timeframe, renewal was automatic—no forms had to be filed. The 1976 Act did away with the dual term structure, forming a longer, single term of copyright protection. Therefore, renewal is not required for works in Date Ranges 3, 4, and 5 (January 1, 1978 to the date of this Handbook). Because the 1976 Act applied to all unregistered unpublished works, renewal is also not required for works that were not registered or published prior to January 1, 1978.

Duration and Renewal are the last questions in determining whether a work is protected by copyright or in the public domain. If the work you are assessing is **generally published**, you will need to know which Date Range the work falls into from *Chapter 3: Date of General Publication*, and can go directly to the applicable date range to evaluate duration. For **unpublished** works, you will need to know whether and when the work was registered with the United States Copyright Office, or is an **unregistered unpublished** work (see *Chapter 5: Registration Status of Unpublished Works*). With this information, you can go directly to the relevant section to evaluate duration and if applicable, renewal.

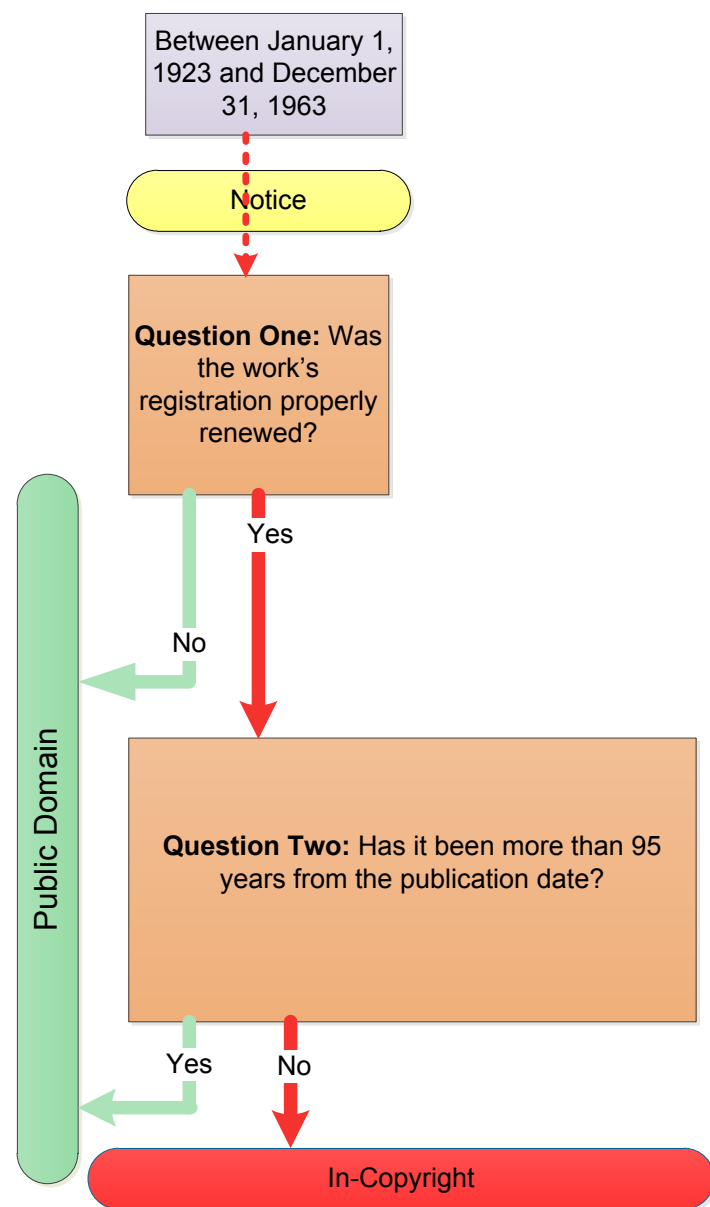
➔For **generally published** works, go directly to the section covering the applicable date range of the work you are assessing to evaluate duration and, if applicable, renewal. If you are evaluating an **unpublished** work, proceed directly to “Unregistered Unpublished Work” on page 39 or “Registered Unpublished Work” on page 43.

➔For all works, if the copyright term has not expired, then the work is protected by copyright. On the other hand, if the term has expired, then the work is in the public domain.

**FLOWCHART 6: DURATION AND RENEWAL**



**General Publication Date Range 1: Works “generally published” between January 1, 1923 and December 31, 1963**



🎵 **Special Case - Sound Recordings:** When sound recordings were brought under the federal copyright regime, Congress decided that sound recordings created before February 15, 1972 may continue to be protected under state law until February 15, 2067. After that date, any state protection will be preempted by federal law, and they will enter the public domain.<sup>77</sup> Given this, be aware that some states have decided to grant protection until 2067; this Handbook does not cover any of those protections.

Sound recordings made on or after February 15, 1972 share the same duration as other works.

**Question One: Was the work's registration properly renewed?**

Works in General Publication Date Range 1 were protected by copyright for 28 years from the date of publication, with an optional renewal period. Works in this date range had to be actively renewed in order to extend the original 28-year copyright term. Initially, the renewal term also lasted for 28 years, but over time the renewal term was extended to give the copyright owner an additional 67 years, for a total term of 95 years.<sup>78</sup> If a work is in this date range, then a valid renewal certificate is required for the work to have been protected by copyright through the second term of protection.<sup>79</sup> For these works, if the renewal requirement was not met, then the work is now in the public domain.

Renewal records are available to the public at the Copyright Office. Anyone can go to the Copyright Office and search their records to confirm a work's renewal status. Also, upon request and for a fee, the Copyright Office staff will search the records concerning ownership of copyrights and will provide a written report. For more information on how to search for renewal records, see *Copyright Circular 22: How to Investigate the Copyright Status of a Work*.<sup>80</sup>

➔ If there is no valid renewal certificate for a work in General Publication Date Range 1, then the answer to this question on the flowchart is “no,” and the work is in the public domain. If a renewal certificate was filed, then the answer to this question on the flowchart is “yes,” and you can proceed to Question Two of this Chapter.

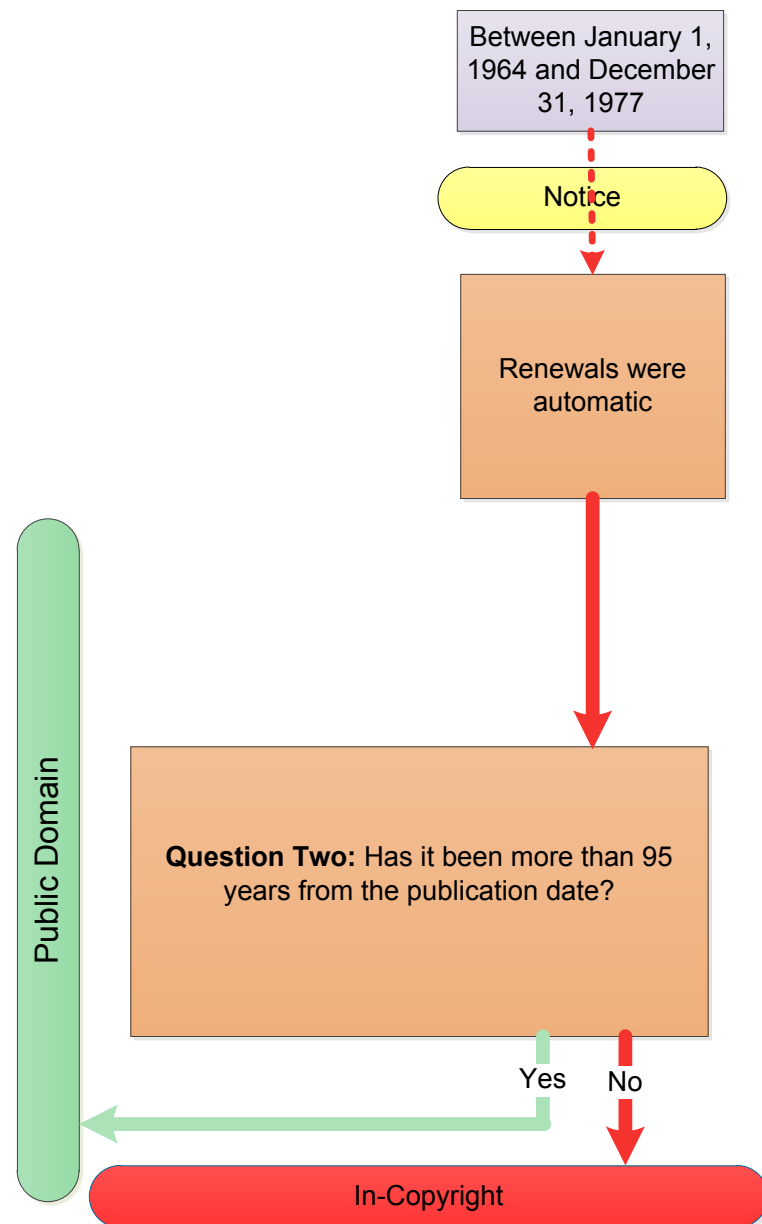
**Question Two: Has it been more than 95 years from the publication date?**

If the copyright to a work in General Publication Date Range 1 was properly renewed, copyright protection expires 95 years from the date of general publication. For example, if a work was published with proper notice in 1960 and the copyright was renewed, then the copyright would expire on December 31, 2055.

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st of the year following the expiration of its copyright term.<sup>81</sup> For example, a work that was published on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

➔ If it has been more than 95 years from the publication date, then the answer to this question on the flowchart is “yes,” and the work is in the public domain. If it has been less than 95 years from the publication date, then the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

**General Publication Date Range 2: Works “generally published” between January 1, 1964 and December 31, 1977**



🎵 **Special Case – Sound Recordings:** When sound recordings were brought under the federal copyright regime, Congress decided that sound recordings created before February 15, 1972 may continue to be protected under state law until February 15, 2067. After that date, any state protection will be preempted by federal law, and they will enter the public domain.<sup>82</sup> Given this, be aware that some states have decided to grant protection until 2067; this Handbook does not cover any of those protections.

Sound recordings made on or after February 15, 1972 share the same duration as other federally protected works.

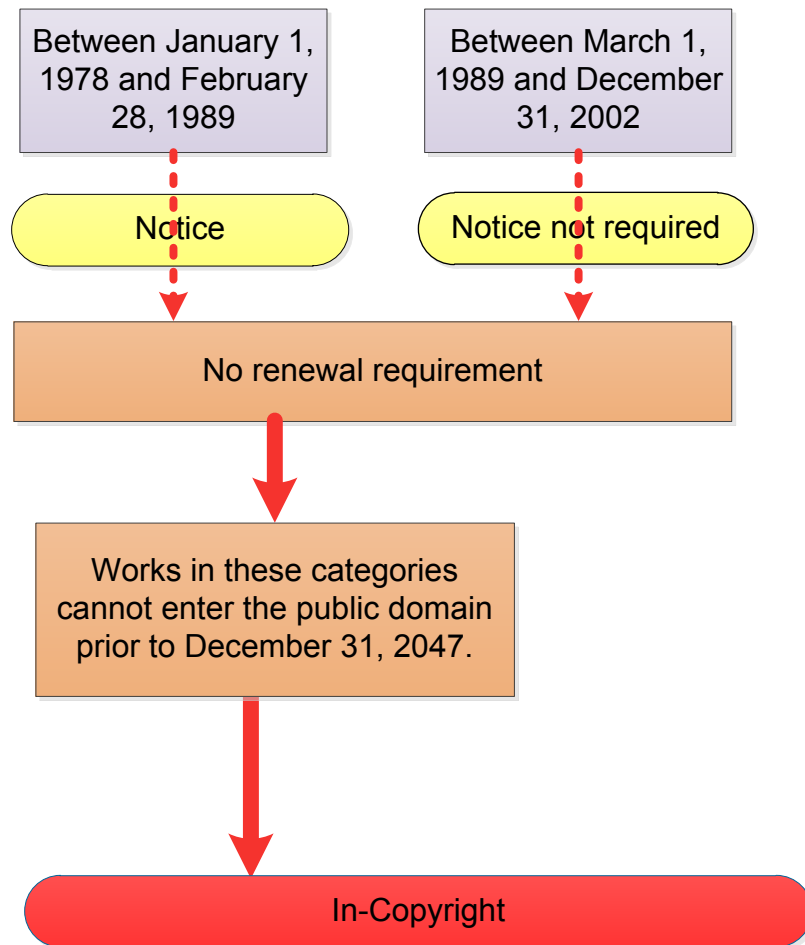
**Question: Has it been more than 95 years from the publication date?**

For works in General Publication Date Range 2, renewal was automatic and there was no need to file a renewal certificate. As such, there is no need to search the renewal records of the Copyright Office for works in this date range. Copyright protection in these works expires 95 years from the publication date. For example, if a work was generally published with proper notice in 1965, then the copyright would expire on December 31, 2060.

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st of the year following the expiration of its copyright term.<sup>83</sup> For example, a work that was published on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

➔ If it has been more than 95 years from the publication date, then the answer to this question on the flowchart is “yes,” and the work is in the public domain. If it has been less than 95 years from the publication date, then the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

**General Publication Date Ranges 3 and 4: Works “generally published” between January 1, 1978 and December 31, 2002**



The 1976 Act dramatically changed how duration is calculated. This change is described in greater detail under General Publication Date Range 5, but importantly, the term of protection for these works is now tied to the status of the author rather than to the publication status of the work.

Calculating the term of copyright protection for works in these date ranges depends on whether the author is known, and whether the author is an individual or an organization. In short, for all works generally published between January 1, 1978 and December 31, 2002, the copyright term for works with known individual authors is the life of the author plus 70 years; for institutional and unknown authors, the term is 95 years from publication *or* 120 years from creation, whichever is *longer*.

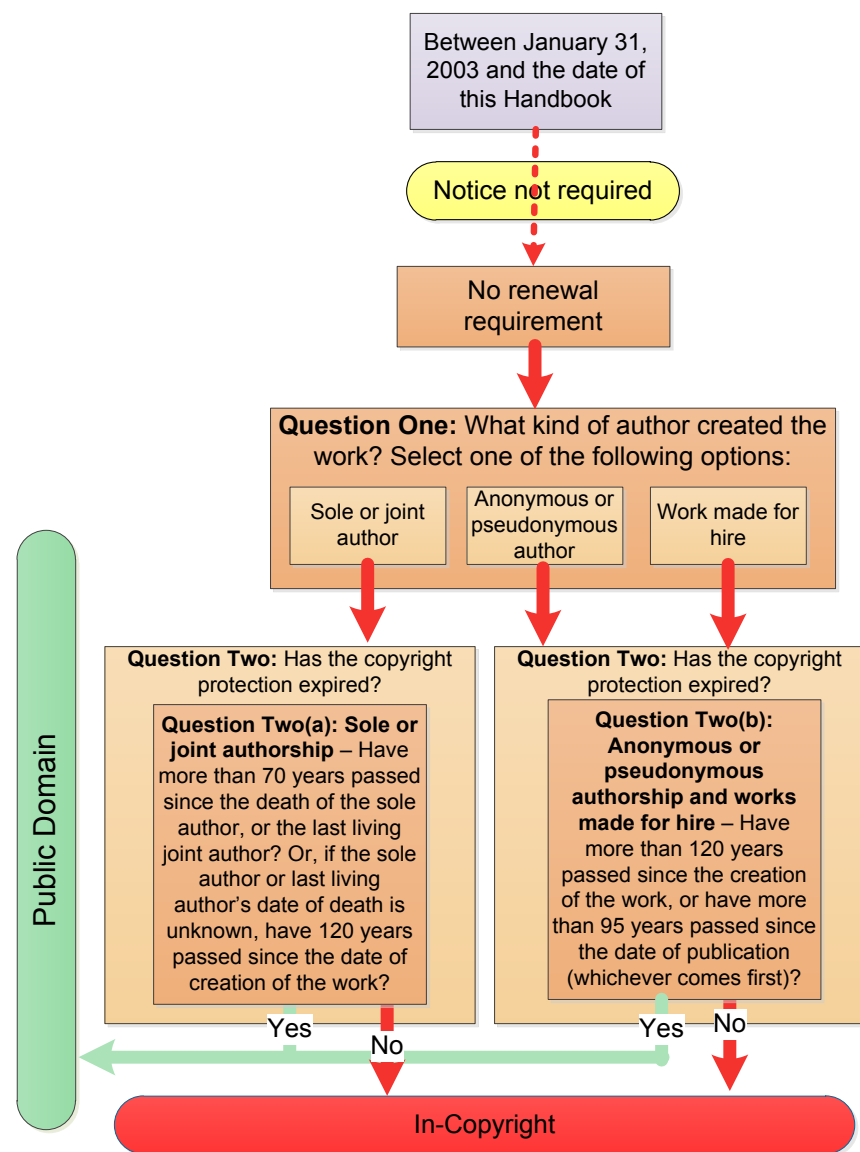
However, this section does not go into detail about this calculation because, for these date ranges, there is a shortcut for deciding whether the work is still protected by copyright. Congress wished to encourage people to publish works that were created before 1978 but had never been published, and as such granted extra time that applies to all works in these date ranges: they cannot enter the public domain before December 31, 2047.

🎵 **Special Case – Sound Recordings:** When sound recordings were brought under the federal copyright regime, Congress decided that sound recordings created before February 15, 1972 may continue to be protected under state law until February 15, 2067. After that date, all state protection will be preempted by federal law, and they will enter the public domain.<sup>84</sup>

Sound recordings made on or after February 15, 1972 share the same duration as other federally protected works.

➔ The earliest that any of the works in Date Ranges 3 and 4 will enter the public domain is December 31, 2047; all of these works will remain protected by copyright until at least that date. If you still wish to calculate the date a work in these date ranges will enter the public domain, go to General Publication Date Range 5 in this Chapter.

**General Publication Date Range 5: Works “generally published” between January 1, 2003 and date of this Handbook**



As explained above under Date Ranges 3 and 4, the term of copyright protection for works in this date range is calculated based on the type of author creating the work.

**♪ Special Case – Sound Recordings:** When sound recordings were brought under the federal copyright regime, Congress decided that sound recordings created before February 15, 1972 may continue to be protected under state law until February 15, 2067. After that date, any state protection will be preempted by federal law, and they will enter the public domain.<sup>85</sup> Given this, be aware that some states have decided to grant protection until 2067; this Handbook does not cover any of those protections.

Sound recordings made on or after February 15, 1972 share the same duration as other works.

**Question One: What kind of author created the work?**

A work can be authored by an identified individual—a “sole author”—or a group of identified individuals, “joint authors.” Generally, the copyright in works by sole and joint authors lasts for 70 years after the last living author’s death.

➔ If the work was authored by identified sole or joint authors, then proceed to Question Two(a) of this Chapter.

A work can also be authored by an anonymous or pseudonymous author. In that case, the term of copyright is the *shorter* of two possible terms: 95 years from the date of publication of the work, or 120 years from the date of the work’s creation.

➔ If the work was authored by an anonymous or pseudonymous author, then proceed to Question Two(b) of this Chapter.



In other cases, a work may be created by an institution, such as a corporation or a non-profit organization. In practice, these works are created by an employee acting within the scope of his or her employment—they are known as “works made for hire,” and the institution is considered the author. In the case of a work made for hire, the term of copyright is the *shorter* of 95 years from publication or 120 years from creation.

➔If the work was created by an institution as a “work made for hire,” then proceed to Question Two(b) of this Chapter.

### **Question Two: Has the copyright protection expired?**

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st of the year following the expiration of its copyright term.<sup>86</sup> For example, a work that was created on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

**Question Two(a): Sole or joint authorship – Have more than 70 years passed since the death of the sole author, or the last living joint author? Or, if the sole author or last living joint author’s date of death is unknown, have 120 years passed since the date of creation of the work?**

For works in General Publication Date Range 5, copyright protection lasts for the life of the author plus 70 years for sole and joint authors.<sup>87</sup> If the death date of the last living author is not known, the copyright lasts for 120 years from the work’s date of creation.<sup>88</sup>

For example, if a work was created in 1965 and generally published in 2005:

- If an author is still alive, then you cannot know when the copyright will expire.
- If the last living author died in 2010, the copyright will expire on December 31, 2080—70 years after the death of the author.
- If no one knows when the last living author died, then the copyright will expire on December 31, 2085—120 years after the date of the work’s creation.

➔If more than 70 years have passed since the death of a sole author or last living joint author, or more than 120 years have passed since the creation of the work, or if the last author’s death date is unknown, then the answer to this question to the flowchart is “yes,” and the work is in the public domain.

If an author is still living, or less than 70 years has passed since the death of the last living author, or less than 120 years has passed since the date of the work’s creation if the last living author’s death date is unknown, then the answer to this question on the flowchart is “no,” and the work is protected by copyright.

**Question Two(b): Anonymous or pseudonymous authorship and works made for hire – Have more than 120 years passed since the creation of the work, or have more than 95 years passed since the date of publication (whichever is *shorter*)?**

⊗ **Trap:** No anonymous or pseudonymous works, or works made for hire, that were created between January 1, 1923 and December 31, 1977 (i.e., the date range covered by this Handbook) but published after January 1, 2002, can enter the public domain before December 31, 2043. This is because the earliest a work created in 1923 could enter the public domain is 120 years from 1923—December 31, 2043. If the 1923 work was published after 2002, then counting 95 years from the date of publication would have the work enter the public domain much later (i.e., 2098).

While no works in this category will enter the public domain prior to December 31, 2043, the following information explains how to calculate when a work will enter the public domain.

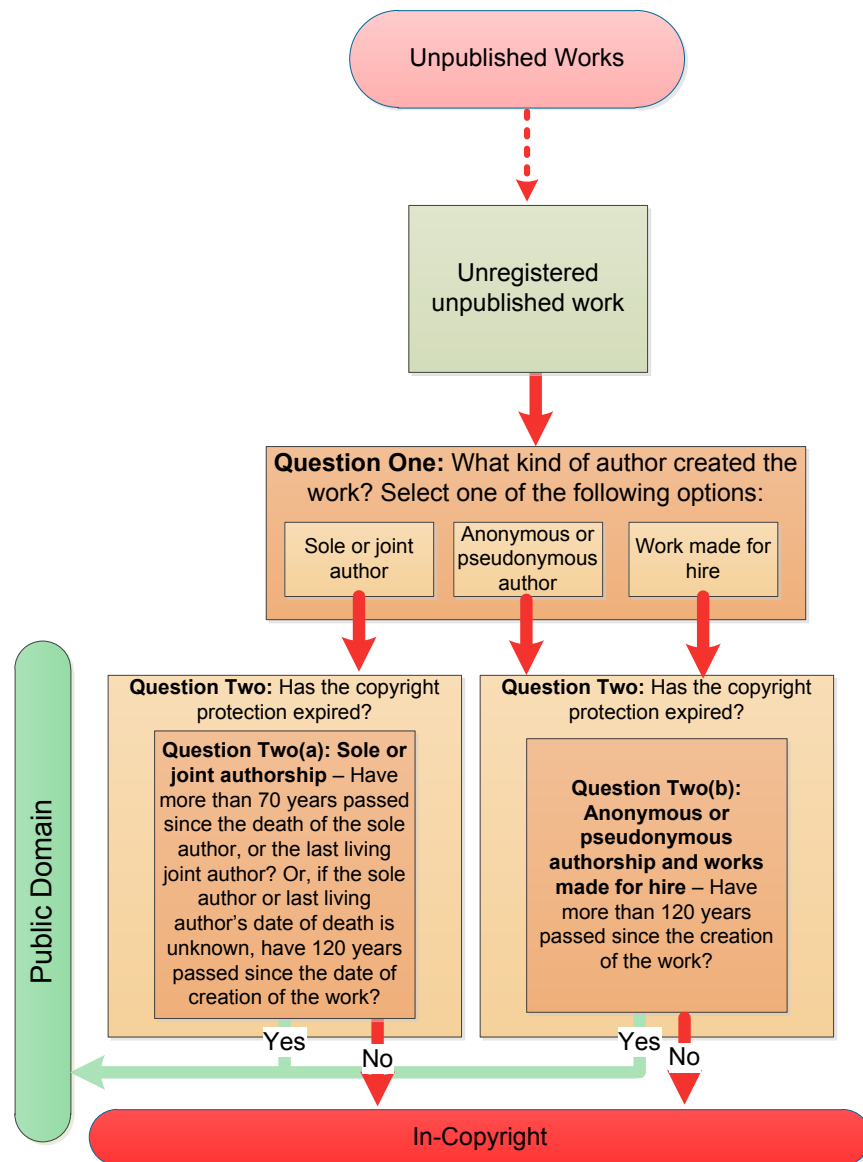
For anonymous works, pseudonymous works, and works made for hire in General Publication Date Range 5, the term is either 120 years from date of creation of the work or 95 years from the date of general publication of the work, whichever term is *shorter*.<sup>89</sup> If the identity of the author becomes known at any point during the time of protection, then the author is treated as a sole or joint author and the calculation changes. In this case, see Question Two(a) above for the appropriate rule.<sup>90</sup>

For example, if a work was created by an anonymous author in 1935 and generally published in 2005:

- 120 years from the date of creation is 2055;
- 95 years from the date of publication is 2100;
- The copyright will expire on December 31, 2055—the shorter of the two terms.

➔ Until December 31, 2043 at the earliest, the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

## Unregistered Unpublished Works:



🎵 **Special Case - Sound Recordings:** When sound recordings were brought under the federal copyright regime, Congress decided that sound recordings created before February 15, 1972 may continue to be protected under state law until February 15, 2067. After that date, any state protection will be preempted by federal law, and they will enter the public domain.<sup>91</sup> Given this, be aware that some states have decided to grant protection until 2067; this Handbook does not cover any of those protections.

Sound recordings made on or after February 15, 1972 share the same duration as other federally protected works.

### Question One: What kind of author created the work?

An unregistered unpublished work can be authored by an identified individual—a “sole author”—or a group of identified individuals, “joint authors.” The copyright in works by sole and joint authors lasts for 70 years after the author’s death.

➔ If the work was authored by identified sole or joint authors, then proceed to Question Two(a) of this Chapter.

An unregistered unpublished work can also be authored by an anonymous or pseudonymous author. In that case, the term of copyright is 120 years from the date of the work’s creation.

➔ If the work was authored by an anonymous or pseudonymous author, then proceed to Question Two(b) of this Chapter.

In other cases, a work may be created by an institution, such as a corporation or a non-profit organization. In practice, these works are created by an employee acting within the scope of his or her employment—they are known as “works made for hire,” and the institution is considered the author. In the case of an

unregistered unpublished work made for hire, the term of copyright protection is 120 years from creation.

➔ If the work was created by an institution as a “work made for hire,” then proceed to Question Two(b) of this Chapter.

### Question Two: Has the copyright protection expired?

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st following the expiration of its copyright term.<sup>92</sup> For example, a work that was created on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

**Question Two(a): Sole or joint author – Have more than 70 years passed since the death of the sole author, or the last living joint author? Or, if the sole author or last living joint author’s date of death is unknown, have 120 years passed since the date of creation of the work?**

For unregistered unpublished works, the copyright term consists of life of the last living author plus 70 years for sole and joint authors.<sup>93</sup> If the death date of the last living author is not known, the copyright term is 120 years from the work’s date of creation.<sup>94</sup>

For example, if an unregistered unpublished work was created by an anonymous author in 1955:

- If an author is still alive, then you cannot know when the copyright will expire.

- If the last living author died in 2010, then the copyright will expire on December 31, 2080—70 years after the death of the author.
- If no one knows when the last living author died, then the copyright will expire on December 31, 2075—120 years after the date of the work’s creation.

➔ If more than 70 years have passed since the death of a sole author or last living joint author of an unregistered unpublished work, or more than 120 years have passed since the creation of the unregistered unpublished work if the last author’s death date is unknown, then the answer to this question to the flowchart is “yes,” and the work is in the public domain.

If an author is still living, or less than 70 years has passed since the death of the last living author, or less than 120 years has passed since the date of the unregistered unpublished work’s creation if the last living author’s death date is unknown, then the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

**Question Two(b): Anonymous or pseudonymous author and works made for hire – Have more than 120 years passed since the creation of the work?**

⚠ **Trap:** No anonymous or pseudonymous works, or works made for hire, that were created between 1923 and 1978 (the date range covered by this Handbook) can enter the public domain before December 31, 2043. This is because the earliest a work created in 1923 could enter the public domain is 120 years from that date—December 31, 2043.

While no works in this category will enter the public domain prior to December 31, 2043, the following information

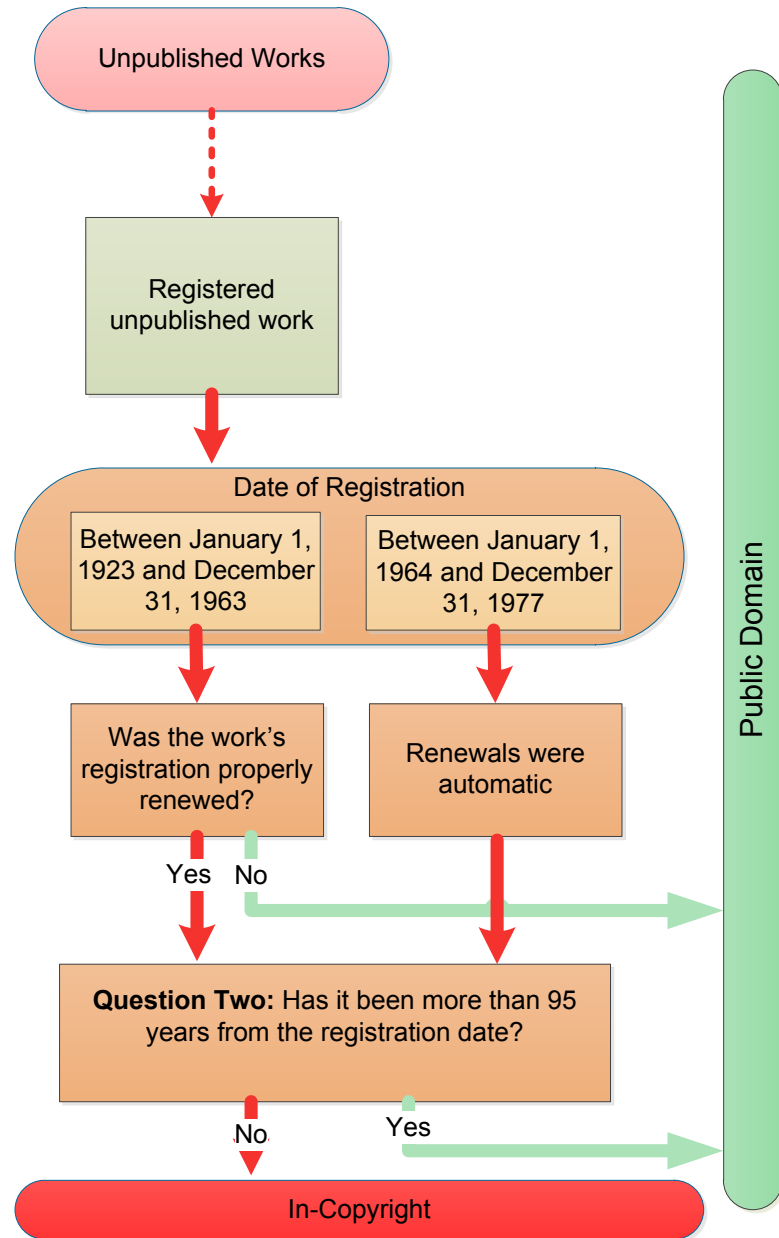
explains how to calculate when a work will enter the public domain.

For example, if an unregistered unpublished work was created in 1935, then the copyright will expire on December 31, 2055—120 years from the date the work was created.

⚠ **Trap:** For unregistered unpublished anonymous works, unregistered unpublished pseudonymous works, and unregistered unpublished works made for hire, the term of copyright protection is 120 years from date of creation.<sup>95</sup> If the identity of the author becomes known at any point during or before copyright expires, and the author is an individual or group of individuals, then the term of protection changes, and is calculated according to the life of the author plus 70 years rule described in Question Two(a) above.<sup>96</sup>

➔ Until December 31, 2043 at the earliest, the answer to this question on the flowchart is “no” and the work is still protected by copyright.

## Registered Unpublished Works:



🎵 **Special Case - Sound Recordings:** Sound recordings were not eligible to be registered as unpublished works under the 1909 Act.

### Question One: When was the unpublished work registered?

Under the 1909 Act, some types of unpublished works could be registered for federal copyright protection. (See p. 29 of this Handbook for more information.) The length of copyright protection for these works varies according to the time period during which the unpublished work was registered.

➔ If the unpublished work was registered between January 1, 1923 and December 31, 1963, proceed to Question Two(a). If the unpublished work was registered between January 1, 1964 and December 31, 1977, proceed to Question Three.

### Question Two(a): For unpublished works registered between January 1, 1923 and December 31, 1963, was the work's registration properly renewed?

Works in this date range had to be actively renewed in order to extend the original 28-year copyright term.<sup>97</sup> If an unpublished work was registered in this date range, then a valid renewal certificate is required for the work to still be protected by copyright. For these works, if the renewal requirement was not met, then the work is now in the public domain.

Renewal records are available to the public at the Copyright Office. Anyone can go to the Copyright Office and search the records there to confirm a work's renewal status. Also, upon request and for a fee, the Copyright Office staff will search the records concerning ownership of copyrights and will provide a written report. For more information on how to search for renewal records, see *Copyright Circular 22: How to Investigate the Copyright Status of a Work*.<sup>98</sup>

➔ If there is no valid renewal certificate for unpublished works registered between January 1, 1923 and December 31, 1963, then the answer to this question on the flowchart is “no,” and the work is in the public domain. If a renewal certificate was filed, then the answer to this question on the flowchart is “yes,” and you can proceed to Question Two(b).

**Question Two(b): Has it been more than 95 years from the registration date?**

If the copyright to an unpublished work registered between January 1, 1923 and December 31, 1963 was properly renewed, copyright protection expires 95 years from the date of the original registration.<sup>99</sup> For example, if an unpublished work was registered in 1960 and the copyright was renewed, then the copyright would expire on December 31, 2055.

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st of the year following the expiration of its copyright term.<sup>100</sup> For example, a work that was registered on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

➔ If it has been more than 95 years from the registration date, then the answer to this question on the flowchart is “yes,” and the work is in the public domain. If it has been less than 95 years from the registration date, then the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

**Question Three: For unpublished works registered between January 1, 1964 and December 31, 1977, has it been more than 95 years from the registration date?**

For works unpublished works registered between January 1, 1964 and December 31, 1977, renewal was automatic and there was no need to file a renewal certificate. As such, there is no need to search the renewal records of the Copyright Office for unpublished works in this date range. Copyright protection in these works expires 95 years from the registration date. For example, if a work was registered in 1965, then the copyright would expire on December 31, 2060.

✓ **Tip:** All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on January 1st of the year following the expiration of its copyright term.<sup>101</sup> For example, a work that was registered on July 31st receives an extra five months of protection, because it is protected through December 31st of the last year of its copyright term.

➔ If it has been more than 95 years from the registration date, then the answer to this question on the flowchart is “yes,” and the work is in the public domain. If it has been less than 95 years from the registration date, then the answer to this question on the flowchart is “no,” and the work is still protected by copyright.

## **ADDITIONAL RESOURCES<sup>102</sup>**

### **1. Copyright Term and the Public Domain in the United States**

Source: Peter B. Hirtle

Explanation: This is a detailed chart of copyright term calculations.

Available at:

<http://copyright.cornell.edu/resources/publicdomain.cfm>

### **2. Digital Copyright Slider**

Source: Michael Brewer and the American Library Association Office for Information Technology

Explanation: This is an interactive tool that allows the user to input facts about a work to calculate whether the work may be in the public domain.

Available at: <http://librarycopyright.net/digitalslider/>

### **3. Circular 22: How to Investigate the Copyright Status of a Work**

Source: United States Copyright Office

Explanation: This is a helpful document drafted by the U.S. Copyright Office describing several methods for assessing the copyright status of a work.

Available at: [www.copyright.gov/circs/circ22.pdf](http://www.copyright.gov/circs/circ22.pdf)



## ENDNOTES

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<sup>1</sup> SNCC LEGACY PROJECT, <http://www.sncclegacyproject.org/index.html>.

<sup>2</sup> Foreign works may be governed by different rules, and the information in this Handbook may not apply to them. *See Golan v. Holder*, No. 10-545, 2012 U.S. Lexis 907, (Jan. 18, 2012) (upholding the constitutionality of section 514 of Uruguay Round Agreements, which granted copyright protection to foreign works that were previously in the public domain).

<sup>3</sup> For example, the Copyright Office issued a report in December 2011 recommending that sound recordings made prior to February 15, 1972 be brought into the federal copyright regime. While recommendation has not been implemented as of the date of this Handbook, it is possible that Congress will act on this recommendation in the future. FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (2011), *available at* <http://www.copyright.gov/circs/circ56.pdf>.

<sup>4</sup> 17 U.S.C. § 4 (1909).

<sup>5</sup> § 5.

<sup>6</sup> Act of August 24, 1912, Pub. L. No. 63-303, 62d Cong., 2d Sess., 37 Stat. 488.

<sup>7</sup> July 1, 1940. Act of July 31, 1939 Pub. L. No. 153-396, 76th Cong., 1st Sess., 53 Stat. 1142.

<sup>8</sup> February 15, 1972. Sound Recording Amendment, Pub. L. No. 92-140, Sec. 3, 85, Stat. 391.

<sup>9</sup> 17 U.S.C. § 102 (2006).

<sup>10</sup> MELVILLE NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT: A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS § 2.10[A]; § 8C.02.

<sup>11</sup> *Id.* at § 2.03[B][1].

<sup>12</sup> *Id.* at § 2.01.

<sup>13</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884).

<sup>14</sup> *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

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<sup>15</sup> Krishna Hariani & Anirudh Hariani, *Analyzing “Originality” in Copyright Law: Transcending Jurisdictional Disparity*, 51 INTELL. PROP. LAW REV. 491, 510 (2011).

<sup>16</sup> *Surgical Supply Serv. v. Adler*, 206 F.Supp. 564, 569 (E.D. Pa. 1962) (reversed on other grounds).

<sup>17</sup> *Moore v. Lighthouse Pub. Co.*, 429 F.Supp 1304, 1310-11 (1977).

<sup>18</sup> *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 F. 797, 798-99 (7th Cir. 1921).

<sup>19</sup> *Baker v. Selden*, 101 U.S. 99, 101-02 (1879).

<sup>20</sup> *Seltzer v. Sunbrock*, 22 F.Supp. 621, 630 (1938).

<sup>21</sup> *Id.* at 627.

<sup>22</sup> 37 C.F.R. 202.1 (1959).

<sup>23</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 34: COPYRIGHT PROTECTION NOT AVAILABLE FOR NAMES, TITLES, OR SHORT PHRASES (2012), *available at* <http://www.copyright.gov/circs/circ34.pdf>.

<sup>24</sup> NIMMER § 4.04[A]. *See also* 17 U.S.C. §9 (1909) (requiring notice on works that are published by authority of the copyright owner).

<sup>25</sup> 17 U.S.C. §12 (1909).

<sup>26</sup> *Acad. of Motion Pictures Arts & Sciences*, 944 F.2d 1446, 1452 (9th Cir. 1991) (citing *Burke v. National Broadcasting Co. Inc.*, 598 F.2d 689, 691 (1979)).

<sup>27</sup> *White v. Kimmel*, 193 F.2d 744, 745-48 (9th Cir. 1952).

<sup>28</sup> *Brown v. Tabb*, 714 F.2d 1088, 1091 (11th Cir. 1983).

<sup>29</sup> *See Werckmeister v. Am. Lithographic Co.*, 134 F. 213, 325 (2d Cir. 1904).

<sup>30</sup> 17 U.S.C. § 303(b) (2006).

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<sup>31</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>32</sup> *See Ferris v. Frohman*, 223 U.S. 424, 435 (1912) (the public presentation of a dramatic work, not printed or published, is not a general publication and does not deprive the owner of his common law copyright).

<sup>33</sup> *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1215 (11th Cir. 1999).

<sup>34</sup> *Id.* at 1217.

<sup>35</sup> *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 298 (1907).

<sup>36</sup> *Id.* at 300.

<sup>37</sup> *Letter Edged in Black Press, Inc. v. Pub. Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1311 (N.D. Ill. 1970).

<sup>38</sup> *Id.* at 1303.

<sup>39</sup> *White v. Kimmel*, 193 F.2d 744, 746-47 (9th Cir. 1952).

<sup>40</sup> *Hirshon v. United Artists Corp.*, 243 F.2d 640, 645 (D.C. Cir. 1957).

<sup>41</sup> *Id.* at 645.

<sup>42</sup> *Acad. of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1452-53 (9th Cir. 1991).

<sup>43</sup> Peter Hirtle, Copyright Term and the Public Domain in the United States, *available at* <http://copyright.cornell.edu/resources/publicdomain.cfm> (Jan. 1, 2012); 17 U.S.C. § 302-304.

<sup>44</sup> Peter Hirtle, Copyright Term and the Public Domain in the United States, *available at* <http://copyright.cornell.edu/resources/publicdomain.cfm> (Jan. 1, 2012); 17 U.S.C. § 302-303.

<sup>45</sup> Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853-2861.

<sup>46</sup> 17 U.S.C. §§ 302-303.

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<sup>47</sup> *Id.*

<sup>48</sup> 17 U.S.C. § 9 (1909).

<sup>49</sup> 37 C.F.R. 202.2 (a)(2).

<sup>50</sup> 17 U.S.C. § 10 (1909) (stating that any person “may secure copyright for his work by publication thereof with the notice of copyright required by this Act...”).

<sup>51</sup> Although there is a requirement under § 13 of the 1909 Act that once copyright had been obtained by publication with notice, “there shall be promptly deposited” the required copies, “promptly” deposited has been interpreted to mean deposit made any time after publication as long as it occurs prior to bringing an infringement action. 17 U.S.C. § 13 (1909); *see also Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 37 (1939).

<sup>52</sup> *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 37 (1939); *see also* Nimmer § 7.16[A][2][b].

<sup>53</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK (2010), *available at* <http://www.copyright.gov/circs/circ22.pdf>.

<sup>54</sup> Sound Recording Amendment: Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971).

<sup>55</sup> 17 U.S.C. § 19 (1909).

<sup>56</sup> § 18.

<sup>57</sup> In the case of a work made for hire, the employer is considered the “author” of the work for purposes of copyright ownership. As such, notice on a work for hire must contain the name of the employer, not the employee. *See* 17 U.S.C. § 18 (1909); *see also* NIMMER § 5.03.

<sup>58</sup> NIMMER § 7.05.

<sup>59</sup> 17 U.S.C. § 18 (1909).

<sup>60</sup> NIMMER § 4.05.

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<sup>61</sup> 37 C.F.R. 202.2 (b).

<sup>62</sup> *Id.* Simply forgetting or not knowing to provide notice does not excuse the omission of notice. While the 1909 Act made an exception for omissions of notice by accident or mistake, this exception applies only to mechanical failures in affixing notice. Furthermore, the copyright owner must have omitted notice only on particular copies; omission of notice from all the copies is not excused. Courts suggest a percentage test, and in general this percentage is quite small. For example a court held that this exception applied where the copyright owner omitted notice from 500,000 out of 22 million copies; only 2 percent of the total copies.

<sup>63</sup> 17 U.S.C. § 405(a) (1976); NIMMER §7.13.

<sup>64</sup> *Disenos Artisticos E Industriales, S.A. v. Work*, 676 F. Supp. 1254, 1263 (E.D.N.Y.).

<sup>65</sup> *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 827 (11th Cir. 1982).

<sup>66</sup> *William A. Graham Co. v. Haughey*, 430 F. Supp. 2d 458, 469 (E.D. Pa 2006).

<sup>67</sup> *See* 17 U.S.C. § 405(a) (1976).

<sup>68</sup> 17 U.S.C. § 303(a) (1976).

<sup>69</sup> 17 U.S.C. §12 (1909).

<sup>70</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>71</sup> *See* 17 U.S.C. §12 (1909); *see also* NIMMER § 7.16 [A][2][c][i].

<sup>72</sup> *Id.*

<sup>73</sup> *See* 17 U.S.C. §12 (1909).

<sup>74</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK (2010), *available at* <http://www.copyright.gov/circs/circ22.pdf>.

<sup>75</sup> *See Hirshon v. United Artists Corp.*, 243 F.2d 640, 644 (D.C. Cir. 1957).

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<sup>76</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15: RENEWAL OF COPYRIGHT (2011), *available at* [www.copyright.gov/circs/circ15.pdf](http://www.copyright.gov/circs/circ15.pdf).

<sup>77</sup> Federal Copyright Protection for Pre-1972 Sound Recordings, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/sound/> (last visited Jan. 27, 2012).

<sup>78</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>79</sup> NIMMER § 9.08.

<sup>80</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK (2010), *available at* <http://www.copyright.gov/circs/circ22.pdf>.

<sup>81</sup> 17 U.S.C. § 305 (2006).

<sup>82</sup> Federal Copyright Protection for Pre-1972 Sound Recordings, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/sound/> (last visited Jan. 27, 2012).

<sup>83</sup> § 305.

<sup>84</sup> Federal Copyright Protection for Pre-1972 Sound Recordings, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/sound/> (last visited Jan. 27, 2012).

<sup>85</sup> *Id.*

<sup>86</sup> 17 U.S.C. § 305 (2006).

<sup>87</sup> § 302.

<sup>88</sup> §§ 302-303.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

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<sup>91</sup> Federal Copyright Protection for Pre-1972 Sound Recordings, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/sound/> (last visited Jan. 27, 2012).

<sup>92</sup> § 305.

<sup>93</sup> § 303.

<sup>94</sup> §§ 302-303.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>; *see also Marx v. U.S.* 96 F.2d 204 (9th Cir. 1938).

<sup>98</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 22: HOW TO INVESTIGATE THE COPYRIGHT STATUS OF A WORK (2010), *available at* <http://www.copyright.gov/circs/circ22.pdf>.

<sup>99</sup> UNITED STATES COPYRIGHT OFFICE, CIRCULAR 15A: DURATION OF COPYRIGHT (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>; *see also Marx v. U.S.*, 96 F.2d 204 (9th Cir. 1938).

<sup>100</sup> 17 U.S.C. § 305 (2006).

<sup>101</sup> § 305.

<sup>102</sup> These resources are provided for informational use only and are not intended as legal advice.