

How to Tell If a Work Is in the Public Domain

By Leigh Augustine

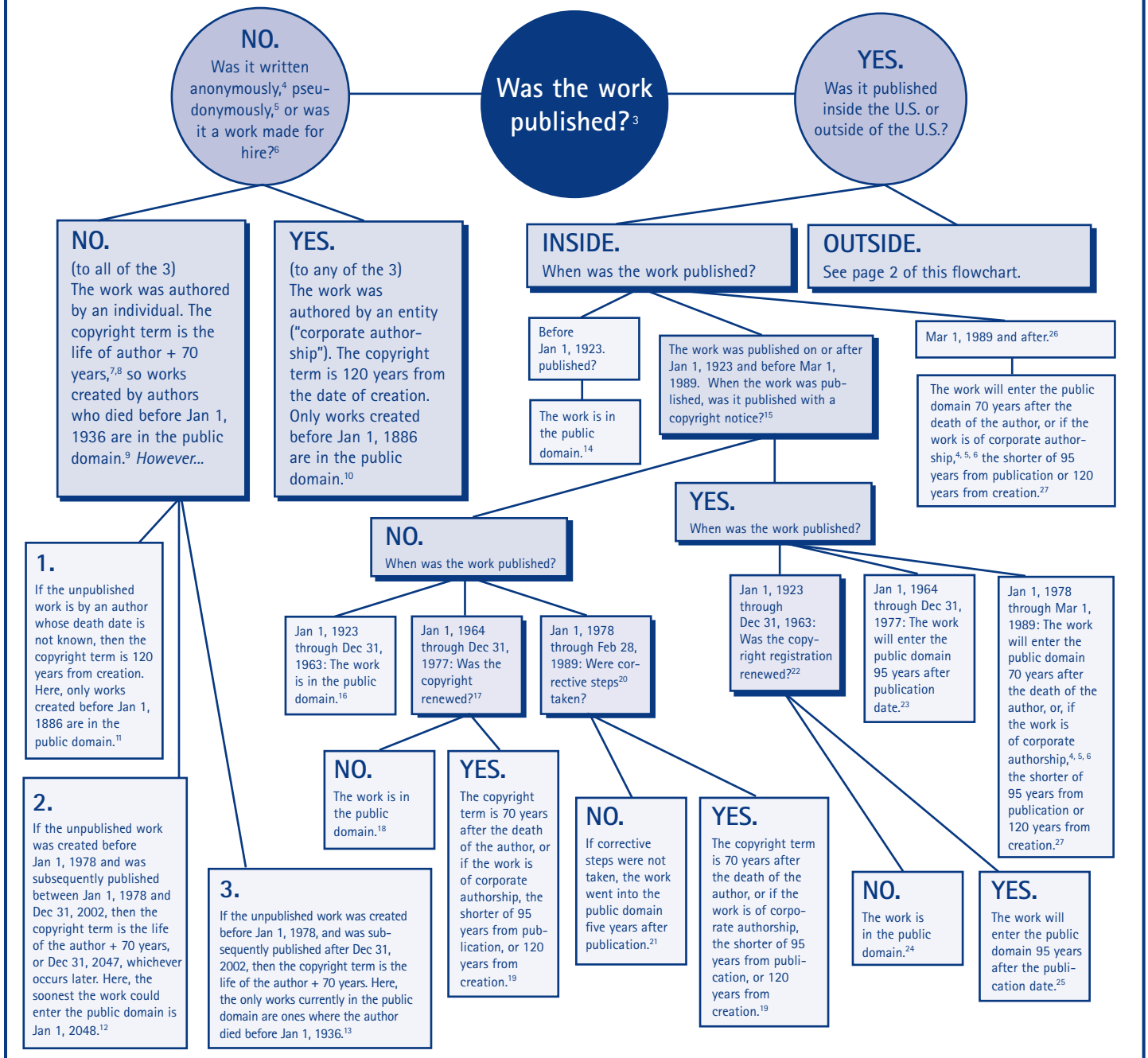
Recently an artist-client of mine asked how and when works can be freely used. He wanted to freely incorporate pieces of other works into his works, specifically photographs and drawings. I explained that he was asking about works in the public

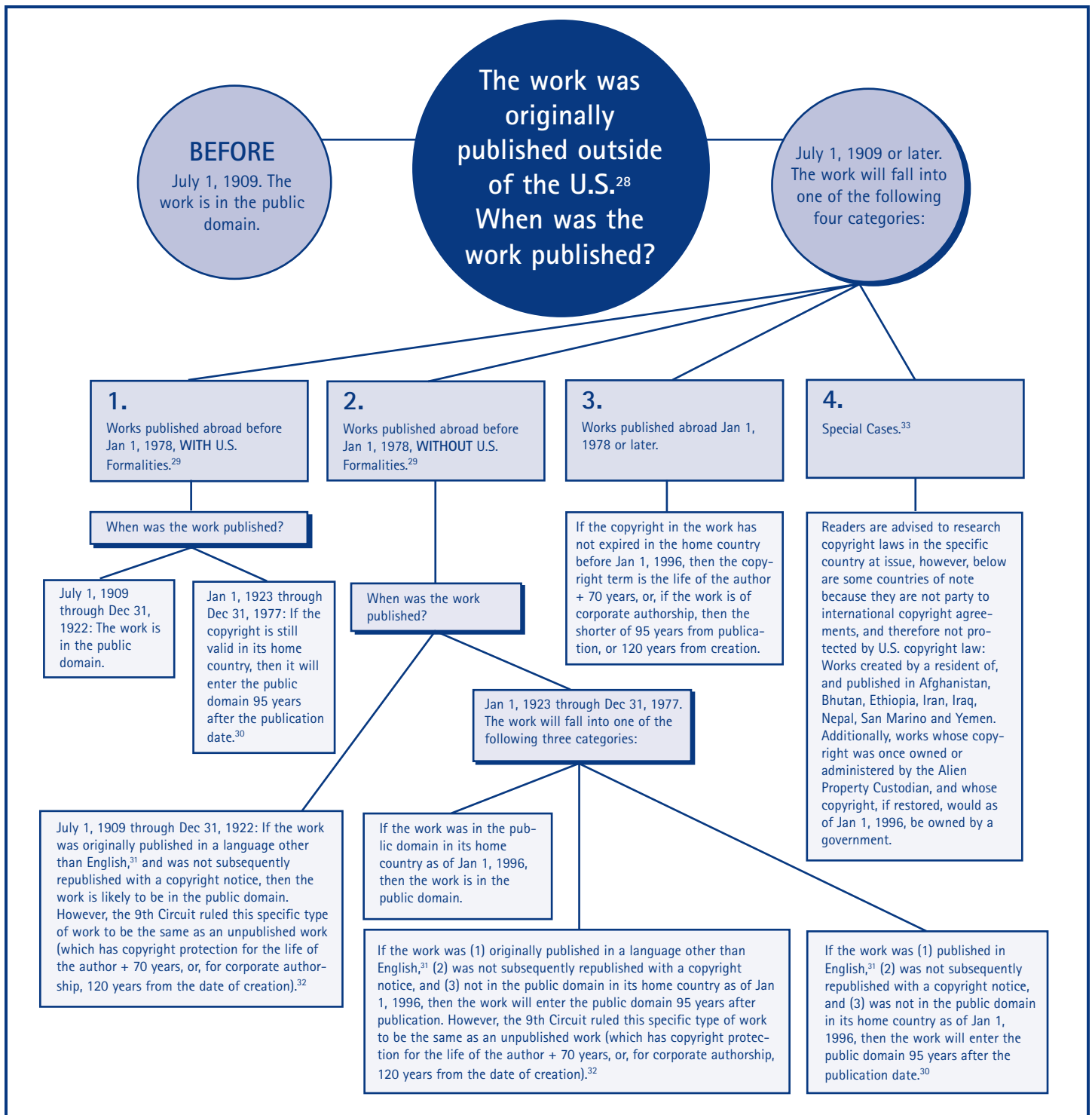
domain. Of course, when a work is available for use without getting permission from a copyright owner, it is "in the public domain." Works generally enter the public domain when their copyrights expire, although an author may formally declare that a work is in the public domain. In addition, some government documents are not copyrightable and may be used freely.

After talking about the basics of what it means to be in the public domain, I then explained to my artist-client that determining whether a copyright is expired depends on whether the piece was published, when it was published, and whether it was published inside or outside the United States. Depending on the answers to this first set of questions, the next questions to ask are if the piece was

Flowchart for Determining If a Work Is in the Public Domain

Effective January 1, 2006 through December 31, 2006^{1,2}





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published with a copyright notice, whether the copyright was renewed, and if corrective steps were taken.

My artist-client was bewildered when he heard terms like “corrective steps,” and he asked me to try again.

I remembered a law school professor’s influential words, “If you can’t explain it to a ten-year old, you probably don’t understand it yourself.” I knew a picture is worth a thousand words and thought that a flowchart would be the best way to explain when and how works can be incorporated freely.

I constructed simple flowcharts for my artist-client to answer his specific question. Then I expanded the charts for my own reference to incorporate as much

basic information about the public domain as possible, since public domain questions seem to creep into my conversations more and more often. What resulted was the two-page reference guide, which is reproduced in this issue of *E&SL* and has been helpful to me in many situations. It is intended to assist attorneys giving advice to clients who want to incorporate photographs, drawings, literary works, music samples, or video clips into their own pieces.

Note that when utilizing the charts there are a couple of things to keep in mind. First, the flowcharts are not exhaustive and will not answer every question that arises regarding the public domain. Second, and possi-

bly more important, the flowcharts do not give information about how to track down authors or copyright holders to know when the work was published, created, or renewed.

The flowcharts can nonetheless help attorneys decide whether clients should incorporate previously-authored pieces into their works. ❖

Leigh Augustine is special counsel for Moye White LLP and represents the business interests of the sports, fine arts and entertainment industries in Colorado. His e-mail address is leigh.augustine@moyewhite.com.

Endnotes

1. All terms of copyright run through the end of the calendar year in which they would otherwise expire, therefore a work enters the public domain on the first of the year following the expiration of its copyright term. For example, an anonymous unpublished book that was created on July 1, 2000 should be afforded 120 years of copyright protection. However, it will receive an extra six months due to its creation date and enter the public domain on January 1, 2021. See 17 U.S.C. § 305.

2. "As a general rule, for works created after January 1, 1978, copyright protection lasts for the life of the author plus an additional 70 years. For an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication or a term of 120 years from the year of its creation, whichever expires first. For works published prior to 1978, the term will vary depending on several factors." See <http://www.copyright.gov/help/faq/faq-duration.html>.

3. Publication is the distribution of copies of a work to the public by sale or other transfer of ownership, or by rental, lease or lending. The offering to distribute copies of a work to a group of persons for purposes of further distribution, public performance, or public display also constitutes publication. A public performance or display of a work does not itself constitute publication. See Circular 1 at <http://www.copyright.gov/circs/circ1.html#pub>.

4. Anonymous works are when the author's identity is not revealed in the records of the Copyright Office. See Circular 1 at <http://www.copyright.gov/circs/circ1.html>.

5. Pseudonymous works are when the author's identity is not revealed in the records of the Copyright Office, specifically, when the author uses a pseudonym or fictitious name. See Circular 1 at <http://www.copyright.gov/circs/circ1.html>.

6. Works made for hire occur when the employer and not the employee is considered to be the author. Section 101 of the copyright law defines a "work made for hire" as: (a) a work prepared by an employee within the scope of his or her employment; or (b) a work specially ordered or commissioned for use as a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or

an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. See Circular 1 at <http://www.copyright.gov/circs/circ1.html>.

7. Life of the author actually means the life of the last surviving author. Therefore, the 70 years starts upon the death of the last surviving author. See 17 U.S.C. § 302(b).

8. If the author's death year is unknown, there is a statutory presumption as to the author's death. After a period of 95 years from the year of first publication or a work, or a period of 120 years from the year of creation, whichever expires first, any person who obtains from the Copyright Office a certified report is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title. See 17 U.S.C. § 302(e).

9. See 17 U.S.C. § 302(a) and 17 U.S.C. § 303(a).

10. See 17 U.S.C. § 302(c).

11. See 17 U.S.C. § 302(e).

12. See 17 U.S.C. § 303(a).

13. See 17 U.S.C. § 304 et seq.

14. See 17 U.S.C. § 304. The Sonny Bono Copyright Term Extension Act added 20 years to copyright terms. Public Law 105-298, 112 Stat. 2827 (1998). This explains why works published after 1922 are "frozen" until 2019. Works published before January 1, 1923 had already gone into the public domain when the law went into effect in 1998. This Act was upheld by the Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

15. Copyright Notice includes notice appearing on the work showing that it has been copyrighted (usually with a "©" symbol), the year it was published, and the author/copyright owner. See Circular 3 at <http://www.copyright.gov/circs/circ03.html>.

16. See 17 U.S.C. § 304.

17. See Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

18. See 17 U.S.C. § 304. See also Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

19. See 17 U.S.C. § 304. See also Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

20. Corrective steps are required to keep works published between January 1, 1978 and before March 1, 1989 out of the public domain. See Circular 3 at <http://www.copyright.gov/circs/circ03.html>, which states:

[N]o corrective steps are required if:

1. The notice is omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or

2. The omission violated an express written requirement that the published copies or phonorecords bear the prescribed notice.

In all other cases of [copyright notice] omission in works published before March 1, 1989, to preserve copyright:

1. The work must have been registered in any form or before the omission occurred, or it must have been registered within five years after the date of publication without notice; and

2. The copyright owner must have made a reasonable effort to add the notice to all copies or phonorecords that were distributed to the public in the United States after the omission was discovered.

21. See Circular 3 at <http://www.copyright.gov/circs/circ03.html>, which states, "If these corrective steps were not taken, the work went into the public domain in the United States 5 years after publication. At that time all U.S. copyright protection was lost and cannot be restored" (emphasis included).

22. See 17 U.S.C. § 304. See also Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

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24. See 17 U.S.C. § 304. See also Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

25. See 17 U.S.C. § 304. See also Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

26. The Berne Convention abandoned the requirement of a copyright notice (see Footnote 15). See http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html for the full text of the Berne Convention. See also 17 U.S.C. § 302 and Circular 15 at <http://www.copyright.gov/circs/circ15.html>.

27. See 17 U.S.C. § 302(a), (b), and (c).

28. This page of the flowchart is for works that were first published outside of the United States. Such works are referred to as "foreign works." This page covers many countries, however, one should check the particular countries' copyright laws before assuming that the work is, or is not, in the public domain. See Circular 38a at <http://www.copyright.gov/circs/circ38a.html>.

29. U.S. formalities are works that were first published abroad and subsequently registered in the U.S. within 30 days of the original foreign publication. Works published abroad and in the U.S. simultaneously are treated as if they are U.S. publications. See Circular 38a at <http://www.copyright.gov/circs/circ38a.html>.

30. Copyrights in certain foreign works whose U.S. copyright protection had been lost because of noncompliance with formalities of U.S. law were restored as of January 1, 1996, under the provisions of the Uruguay Round Agreements Act (URAA). Such works may be registered using Form GATT. For more information, request Circular 38b, "Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA-GATT)." See <http://www.copyright.gov/circs/circ15.html>.

31. The assessment of whether the work was originally published in a language other than English applies, obviously, only to literary and audio works.

32. See *Twin Books v. Walt Disney Co.* (83 F3d 1162, 9th Cir. 1996).

33. See Circular 38a at <http://www.copyright.gov/circs/circ38a.html>.