

THE TERM OF COPYRIGHT AND THE PUBLIC DOMAIN

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It is usually necessary, and generally advisable, to obtain permission to use copyrightable material, unless the material is clearly in the public domain. Determining whether a work is in the public domain is often difficult due to changes made to the U.S. copyright laws over the years. The Copyright Act of 1909 was in effect from 1909 until January 1, 1978, when it was replaced by the Copyright Act of 1976. Beginning on September 19, 1962, Congress made a series of interim amendments to the 1909 Act. The 1976 Act was amended in 1992, and again in 1998. The rules for determining if a work has fallen into the public domain are summarized below.

Under the 1909 Act, the term of copyright began on the earlier of registration or first publication, and continued for at least 28 years. However, a work that was never registered or published was deemed to be protected by common law copyright, which had an unlimited term. Under the 1976 Act, the term of copyright in a work created on or after January 1, 1978 will be determined exclusively by the rules under the 1976 Act. The term of copyright in a work created prior to January 1, 1978 may be determined by the rules under the 1909 Act, or it may be determined by the rules under the 1976 Act, depending on when or if the work was published or registered, and, in some cases, on when or if a renewal registration was filed.

The term of copyright for any work created on or after January 1, 1978 is the author's life, plus 70 years, unless the work is a joint work or a work made for hire. If the work is a joint work, the term of copyright will be the last surviving joint author's life, plus 70 years. If the work is a work made for hire, the term of copyright will be 95 years from publication or 120 years from creation, whichever expires first.

The 1976 Act eliminated the concept of common law copyright, and established limited terms of copyright for works that had never been registered or published. Under the 1976 Act, the term of copyright for any work that was created prior to January 1, 1978 but was never published or registered will last until the later of: the author's life plus 70 years; or

December 31, 2002. If the work was published with the permission of the copyright owner prior to December 31, 2002, the term of copyright will extend until the later of: the author's life plus 70 years; or (ii) December 31, 2047. If the work was a joint work or a work made for hire, then, instead of the author's life plus 70 years, the term of copyright will be the last surviving joint author's life plus 70 years (for a joint work), or the shorter of 95 years from publication or 120 years from creation (for a work made for hire).

The 1976 Act replaced the 1909 Act, effective as of January 1, 1978, but changes were made to the length of the renewal term beginning in 1962, in anticipation of the passage of the new Act. Additional changes were made by the new Act itself and by amendments to that Act in 1992 and 1998, resulting in the following rules for works published or registered before January 1, 1978:

- If the 28 year initial term of copyright in the work expired before January 1, 1992, and no renewal registration was filed before the end of the initial term, the work fell into the public domain after the last day of the initial term.
- If a renewal registration was filed before the end of the initial 28 year term and the work was already in its renewal term on or after September 19, 1962, or if the renewal term began on or after that date, the length of the renewal term was automatically extended from 28 years to 47 years.
- If the 28 year initial term expired in 1992 or later, no renewal registration was required, and the work automatically has a total copyright term of 95 years.
- If the work was in its initial term or its renewal term on October 27, 1998, it is entitled to a total term of protection of 95 years.

Two safe harbors can be distilled from the above rules: any work registered or published prior to January 1, 1923 is now in the public domain; and any work registered or published before January 1, 1964 is in the public domain if a renewal registration was not filed for that work. If a work does not fall into either of these safe harbors, it will be necessary to do additional investigation to determine if the work is in the public domain.

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