

# **Copyright amendments under the Australia – United States Free Trade Agreement: How Australian libraries are affected**

*(This document was prepared by Virginia Morrison of Morrison Legal Pty Ltd on behalf of the State Library of New South Wales for use by Library staff, February 2005)*

## **Overview of the Free Trade Agreement Copyright Amendments**

The Free Trade Agreement between Australia and the United States of America was concluded in 2004 and comes into effect on 1 January 2005. The Agreement requires Australia to make changes to its copyright law in order to strengthen protection for copyright material. The most significant change involves extending the period of protection for most copyright material.

The US Free Trade Agreement Implementation Act 2004, which contains the required amendments to the Copyright Act 1968, was passed by Federal Parliament in August 2004.

The purpose of this document is to provide information about the major changes to copyright law as relevant to staff of the State Library of NSW. The document focuses particularly on the changes to duration of copyright protection and contains detailed information enabling staff to work out if, and how, material they are dealing with is affected.

It is important to note that this document is a guide only and is not intended to replace the specific advice that may be required in some cases.

## **What will not change?**

The changes made to copyright law by the Free Trade Agreement are in a few specific areas and the majority of library practice will remain the same. This section outlines the areas where there will be *no* change.

### **Expired copyright**

The extension of the period of copyright protection made by the Free Trade Agreement amendments (explained in detail later on) does *not* apply to copyright material whose protection expires at or before midnight on 31 December 2004. This means that there will be no revival of expired copyright, and you can continue dealing with material that is out of copyright as before.

### **Unpublished material**

Some unpublished material, including old manuscripts, potentially has perpetual copyright. Copyright in this material will not expire unless it is ever published with the authority of the copyright owner, and until a certain period has elapsed after its publication. This material will continue to have perpetual copyright, although it will benefit from a longer term of protection if and when it is ever published, as explained below under the duration provisions.

## **Published edition and broadcast copyright**

There is no change to the duration periods for published edition copyright (25 years) and broadcast copyright (50 years).

## **Duration of copyright protection for material in which government owns copyright**

There is no change to the periods of protection for copyright material in which the Commonwealth, a State or a Territory owns copyright. The current periods of 50 years from first publication and 50 years from making continue to apply. For example, a photograph in which copyright is owned by the State of New South Wales lasts for 50 years from the year it was taken, if taken before May 1969.

## **Copying for individual clients and other libraries**

There is no change to the provisions in the Copyright Act allowing a library to supply published material from books and journals to individual clients for their research or study, and to other libraries for collection and supply purposes. These provisions apply to material still in copyright, so are not affected by the changes to duration.

## **Copying old unpublished manuscripts 50 years after author's death**

There is no change to the provision in the Copyright Act allowing a library to copy and communicate unpublished material in its collection 50 years after the author's death.

## **Fair dealing for research and study**

There is no change to the provisions in the Copyright Act allowing librarians and library clients to copy published material in libraries and elsewhere for their own research or study.

## **Use of digital resources under licence**

The Library's licence agreements for access to digital resources, such as full text databases, are unlikely to be affected by the amendments. Use of these resources is generally governed by the terms of the licence rather than by provisions in the Copyright Act. However, specific advice may need to be sought in particular cases, depending on the terms of the licence.

## **What will change?**

### **Rules governing when copyright expires**

#### **Background**

Copyright protection for most material protected at 1 January 2005 or created after that date has been lengthened by 20 years. Where copyright protection is calculated according to the life span of the creator, the period is now life

plus 70 years. Where protection is calculated according to the year of first publication, the period is now publication plus 70 years.

These new rules come into force on 1 January 2005. As outlined earlier, the new periods of protection do *not* apply to material whose protection has already expired or to copyright material owned by a government.

Copyright material covered by the new periods will be protected at a minimum up until 2025.

In some cases the period of copyright protection is measured according to the date of “publication” of material. In some other cases it is measured by the date material was made public. In this context “publication” means that copies of the material have been supplied (by sale or otherwise) to the public, and “made public” means performed in public, broadcast, offered or exposed for sale and published.

It is important to note that you will not always have all the information necessary to work out whether copyright has expired. You may not have key pieces of information such as the date of creation or publication of the material, the identity of the creator and the date of the creator’s death. In these situations, you will not be able to safely determine that the material is out of copyright. Making enquiries and assumptions about the copyright status of material is not sufficient to avoid legal liability for infringement. Whether or not you proceed to use material in a way that may infringe copyright may then be a matter to be determined by appropriate Library staff on the basis of a risk assessment.

## **Photographs**

The new periods of protection for photographs apply to all photographs taken on or after 1 January 1955.<sup>1</sup>

The standard period of protection is:

**Life of the photographer plus 70 years**

This period applies regardless of whether the photograph has been published during the photographer’s lifetime or otherwise.

However, if a photograph is first published anonymously or under a pseudonym (whether before or after the photographer’s death, the date of which will not be known in this situation), the period of protection is:<sup>2</sup>

**Year of first publication plus 70 years**

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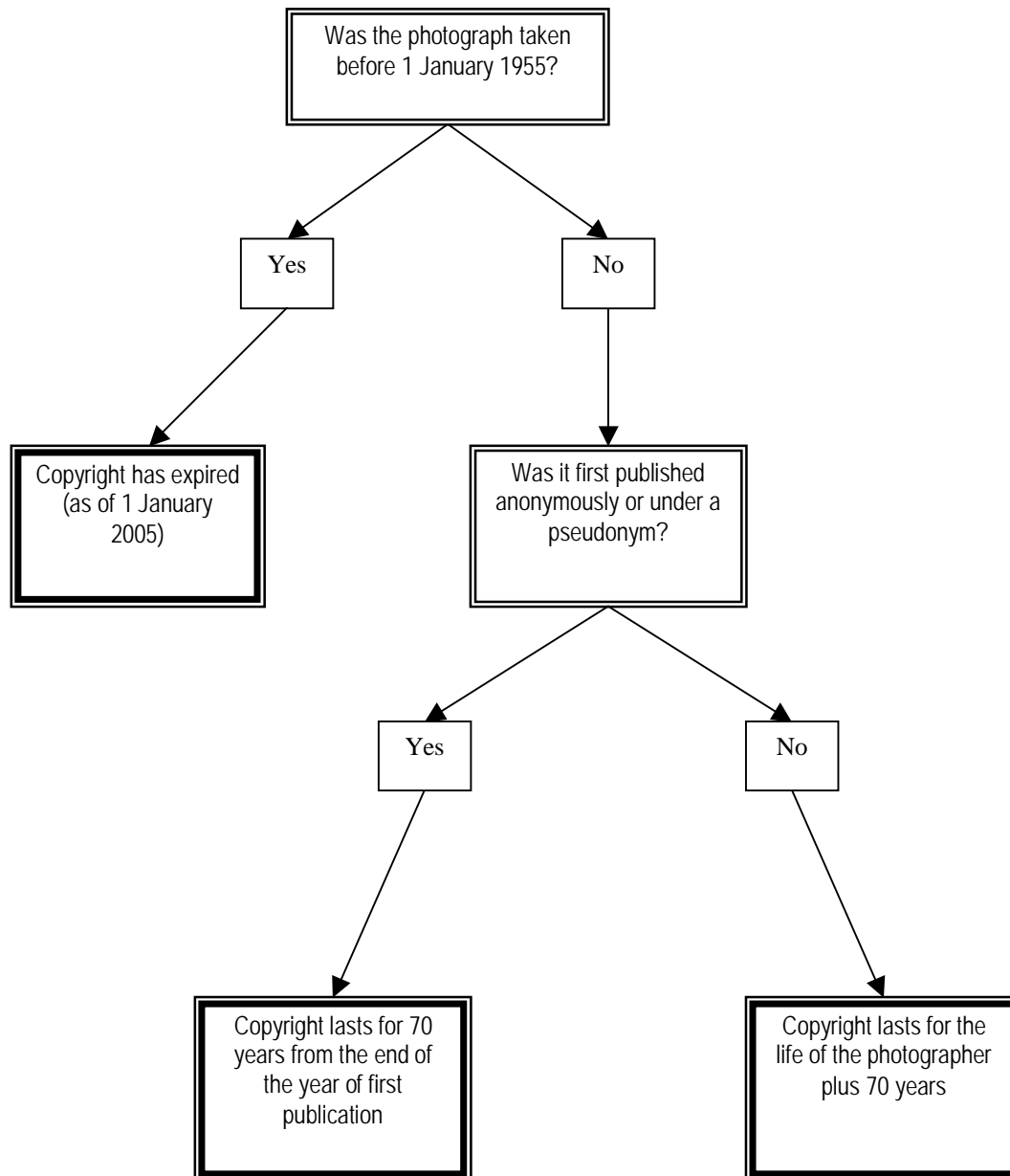
<sup>1</sup> This is because photographs taken on or after this date are still protected by copyright on 1 January 2005, in accordance with the rules applying up until the end of 2004.

<sup>2</sup> Anonymous or pseudonymous publication means that, before the period of 70 years from first publication has expired, the identity of the photographer is not generally known or cannot be ascertained by reasonable enquiry. If the photographer’s identity becomes known before the expiration of 70 years from first publication, the period of duration becomes life plus 70 years.

Note that the date of 1969 is no longer relevant in calculating duration of copyright in photographs (except photographs subject to Crown copyright, as explained earlier).

Photographs published in newspapers, journals and printed books may be copied for research and study purposes

The following diagram is designed to help you to apply the new rules and work out whether and for how long a photograph is protected.



### Literary, dramatic and musical works and engravings

The new periods of protection for literary works (including manuscripts and the spoken word component of an oral history), dramatic works, musical works and engravings apply to:

- ◆ works which (as at 1 January 2005) have never been published, regardless of when they were created;
- ◆ works whose creator did not die before 1 January 1955; and
- ◆ works which were published anonymously or under a pseudonym on or after 1 January 1955.

The standard period of protection is:

**Life of the creator plus 70 years**

However, if a literary, dramatic or musical work was or is not made public during the creator's lifetime, copyright protection continues unless and until the work is first made public with the authority of the copyright owner, in which case the period of protection is:

**Year the work first made public plus 70 years**

If an engraving was or is not published during the creator's lifetime, copyright protection continues unless and until the work is published with the authority of the copyright owner, in which case the period of protection is:

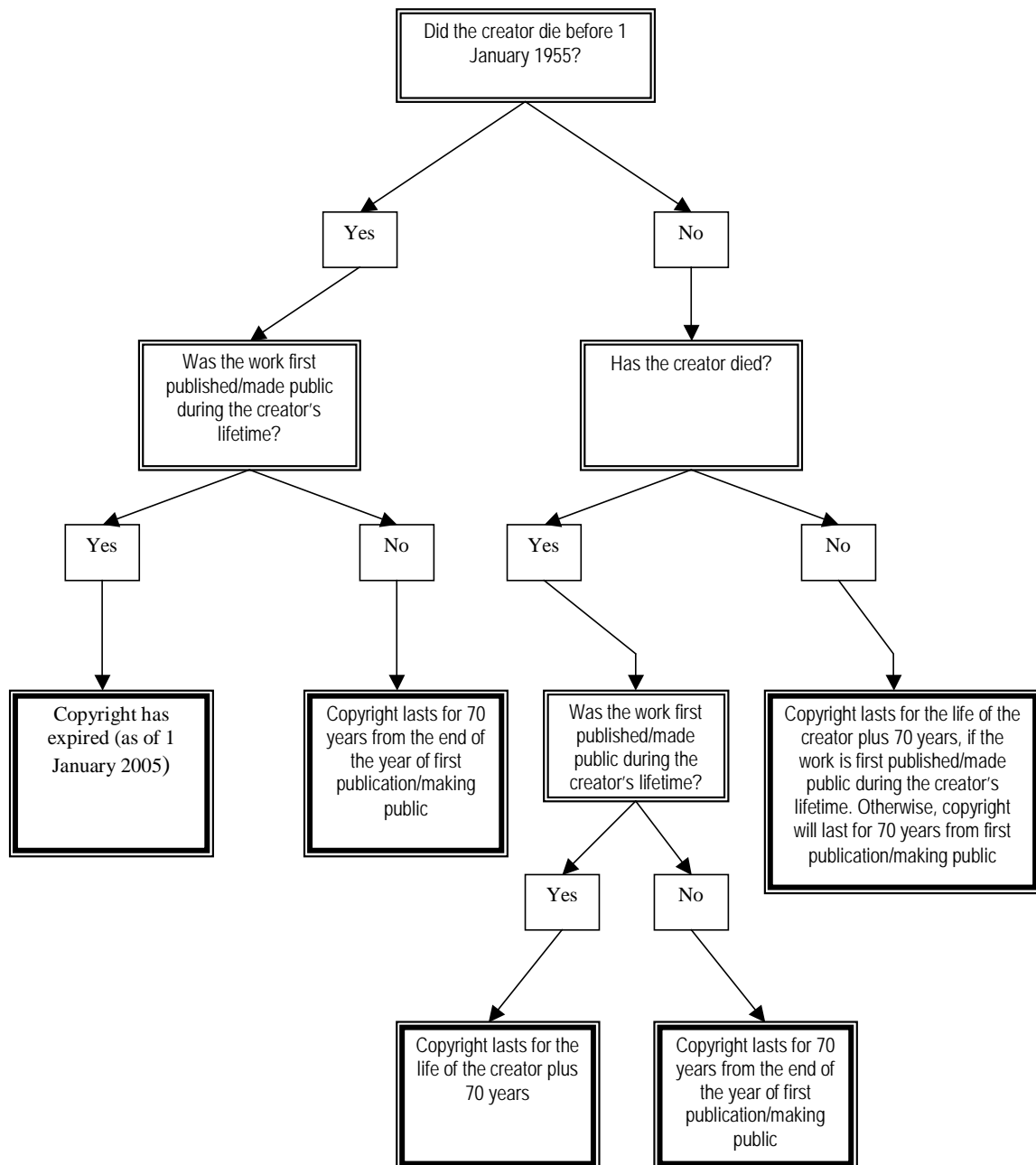
**Year of first publication plus 70 years**

If the first publication of a work is anonymous or under a pseudonym (whether before or after the creator's death, the date of which will not be known in this situation), the period of protection is:

**Year of first publication plus 70 years**

The following diagram is designed to help you to apply the new rules and work out whether and for how long literary, dramatic and musical works and engravings are protected.

Note that the diagram does not deal with anonymous or pseudonymous publication, which is governed by the rule explained above.



### Artistic works (other than photographs and engravings)

The new periods of protection for artistic works (other than photographs and engravings), including architectural and engineering plans, paintings, drawings, sculpture and craftwork, apply to:

- ◆ works whose creator did not die before 1 January 1955; and
- ◆ works which were published anonymously or under a pseudonym on or after 1 January 1955.

The standard period of protection is:

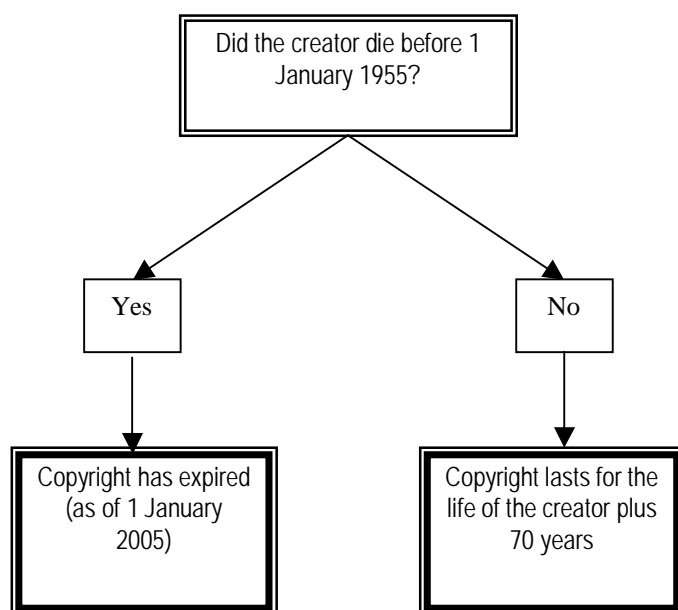
**Life of the creator plus 70 years**

If the first publication of a work is anonymous or under a pseudonym (whether before or after the creator's death, the date of which will not be known in this situation), the period of protection is:

**Year of first publication plus 70 years**

The following diagram is designed to help you to apply the new rules and work out whether and for how long artistic works (other than photographs and engravings) are protected.

Note that the diagram does not deal with anonymous or pseudonymous publication, which is governed by the rule explained above.



### Sound recordings

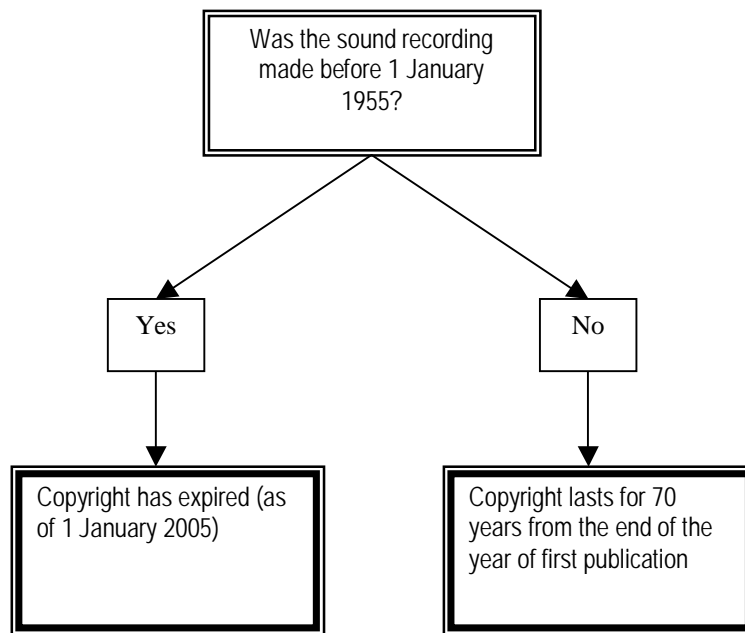
The new period of protection for sound recordings applies to recordings made on or after 1 January 1955.

The new period of protection is:

**Year of first publication plus 70 years**

It is important to note that this rule applies to the sound recording itself and not necessarily to works included on the recording such as a spoken oral history or music, to which different periods of duration (as outlined earlier) may apply.

See the following diagram for further detail.



## Films

The new periods of protection for films apply to:

- ◆ films made on or after 1 May 1969;
- ◆ films made before May 1969 that are “dramatic works”<sup>3</sup> whose creators did not die before 1 January 1955; and
- ◆ films that are not dramatic works which were made on or after 1 January 1955 and before May 1969.

For films made on or after 1 May 1969, the new period of protection is:

**Year of first publication plus 70 years**

For protected films made before 1 May 1969, the new period of protection is:

**Life of the creator plus 70 years<sup>4</sup>**

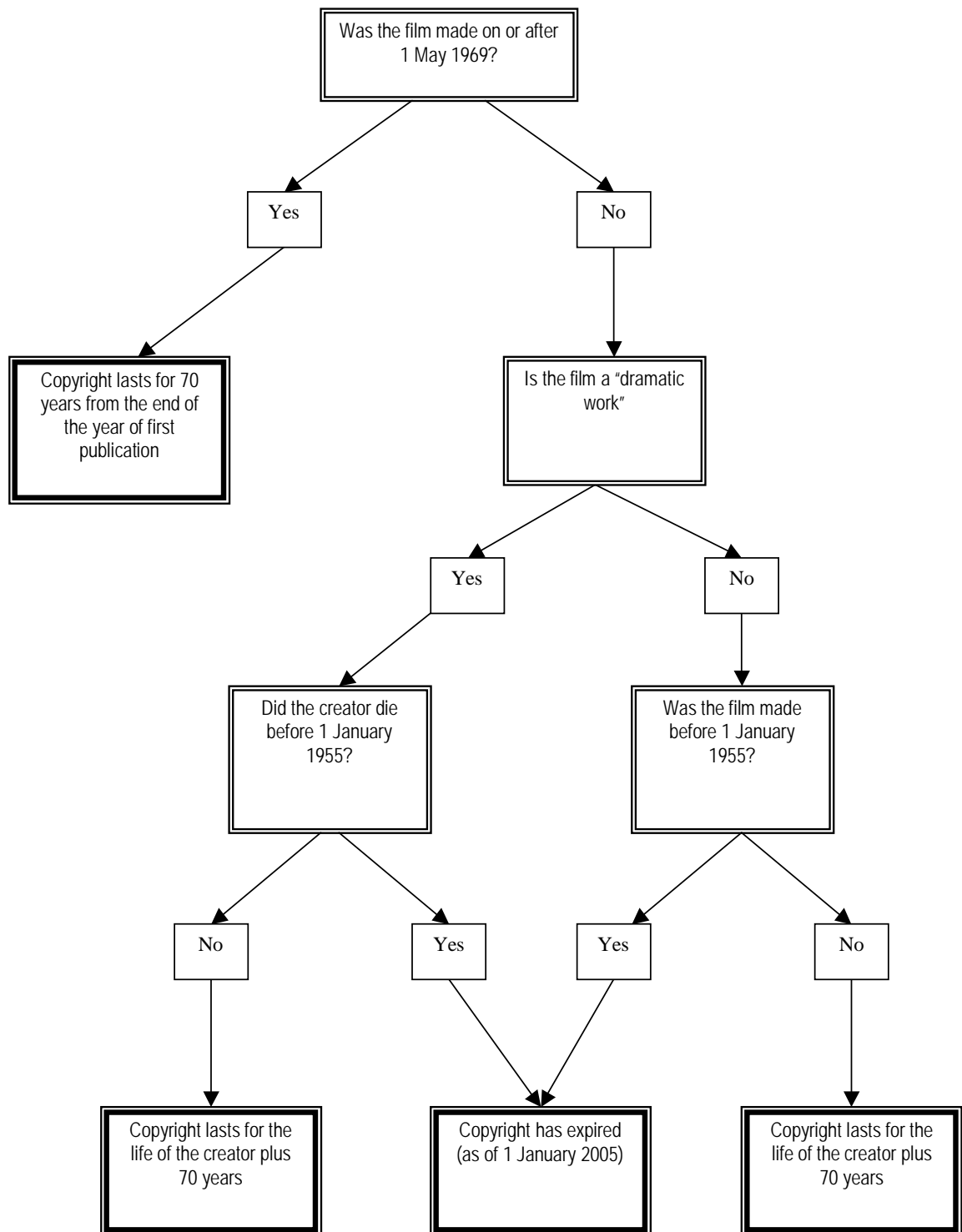
It is important to note that these rules apply to the film itself and not necessarily to works included in the film, such as musical scores and screenplays, to which different periods of duration may apply.

See the following diagram for further detail.

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<sup>3</sup> A film made before 1 May 1969 is a “dramatic work” if “the arrangement, the acting form or the combination of incidents represented gives the work an original character”.

<sup>4</sup> In the case of a dramatic work, duration is measured by the life of the creator of the dramatic work or the cinematographer, whichever is the longer. In the case of a film that is not a dramatic work, duration is measured by the life of the cinematographer.



As the rules of duration for film are complex, it is likely you will need further assistance or advice to work out whether copyright has expired.

### **Use of material which would have come into the public domain by 2006**

The copyright amendments include a compensation scheme in relation to agreements made before 16 August 2004 for the use of material that would

have come into the public domain after 31 December 2005 and that is to take place before 31 December 2006.

This scheme would be relevant to the Library if it had (before 16 August 2004, the date the legislation received Royal Assent) entered into an agreement with another party, such as a publisher, to publish material in its collection which would, under the old rules have come into the public domain by 2006. The copyright in such material would be extended by the new provisions.

Under the scheme, the planned use of the copyright material may go ahead in accordance with the agreement between the parties, unless the copyright owner notifies the party using the material of their objection and pays compensation (to be determined in the absence of agreement by the Copyright Tribunal). The use of the material must take place by 31 December 2006.

### **Ownership of copyright in sound recordings**

The other relevant change to copyright law brought about by the Free Trade Agreement relates to ownership of copyright in sound recordings.

The Copyright Act now provides that a person whose live performance has been recorded on a sound recording is considered to be one of the “makers” of the sound recording and therefore an owner of copyright in the sound recording.

Before the amendment, the maker of a sound recording was the person who owned the record in which the sound recording was embodied (the master tape, for example).

A live performance includes the reading or recitation of a literary work, including an improvised work (an oral history, for example), and a performance of an expression of folklore (which could include Indigenous cultural material, such as traditional ceremonies).

The effect of this amendment is that performers on sound recordings in which copyright subsists on 1 January 2005 (even if made before that date) will become part owners of the copyright in the sound recording with the original maker of that recording.

Example: the person who recounts an oral history on a sound recording becomes part owner of the copyright in the sound recording together with the person who owned the media on which it was recorded.

It is important to note that this new provision does not affect agreements that have been reached between makers of sound recordings and performers about ownership of copyright. Agreements such as these will continue to take precedence over the rules in the Copyright Act.

A further point to note is that the new rules do not affect the following types of recordings:

- ◆ sound recordings in which the Commonwealth or a State or Territory owns copyright; or
- ◆ commissioned sound recordings – for example those made by production studios on behalf of record companies.

Where the provisions do operate, the rights of performers are limited by several factors. Firstly, the “former owner/s” (that is, the maker of the recording) can continue to reproduce the recording and do other acts comprised in the copyright. Also, performers do not own copyright for all purposes and they are not entitled to certain remedies (damages or account of profits, for example) for infringement.

There is a scheme for compensation for acquisition of property (designed to overcome constitutional objections to the provisions). Performers (“new owners”) must pay makers (“former owners”) compensation as agreed between them (or determined by a court).

The new provisions also include moral rights protection for live and recorded performances. Performers will have the following moral rights in respect of their performances:

- the right of attribution of performership;
- the right not to have performership falsely attributed; and
- the right of integrity of performership.

The practical effect of these new provisions is that the Library may have to consider the rights of performers when making use of sound recordings in its collections. However, as the provisions are complex, specific advice may be required in particular cases.

### **More information**

The amendments to copyright law made by the Free Trade Agreement legislation can be found in the Notes section of the online version the Copyright Act 1968 which is available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/)

Background information on the Free Trade Agreement is available at [www.dfat.gov.au](http://www.dfat.gov.au)

The Australian Copyright Council has information sheets on the Free Trade Agreement and duration of copyright at [www.copyright.org.au](http://www.copyright.org.au)