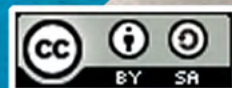




europaana
fashion

FASHION AND INTELLECTUAL PROPERTY

'Best Practice' Guidelines



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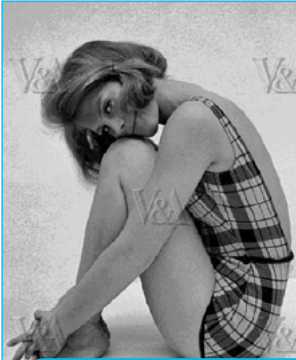
Connected to:




1. Introduction



Outfit made in 1770–1800
NO COPYRIGHT



Photograph
COPYRIGHT



Mass produced fashion
DESIGN RIGHTS AND TRADEMARKS

Left to right: 1. Anonymous; Jacket in shintz, skirt in wool damask; 1750–1800; From the Jacoba de Jonge collection in the MoMu Collection© 2. Hugo Maertens, Bruges Beach wear, photograph by John French, 1960s, ©Victoria and Albert Museum, London 3. T.27–1997 Sleeveless dress; shift or pinafore style in red wool with round neck & centre pleat; by Mary Quant (b.1934); English; 1960. ©Victoria and Albert Museum, London

- 1.1 Europeana Fashion is a best practice network comprised of 22 partners from 12 countries, which represent leading European fashion institutions, designers, photographers and collections. The principle aim of the network is to provide online access and aggregate more than 700,000 fashion related digital objects to the Europeana site. It will bring together share knowledge and expertise and will help strengthen fashions position as an integral part of our cultural heritage and social history, as well as being a leading creative industry.
- 1.2 A key aim of the project is to make content available under open access terms where possible. Content should be accessible free of charge and be re-usable where possible without further permission being required from rights holders, therefore fulfilling open access ambitions.
- 1.3 These Guidelines have been developed with consultation from project partners and aim to provide guidance to project partners on how best to manage rights in content being supplied to Europeana Fashion and the project's Fashion Portal.
- 1.4 The Guidelines explore the challenges of securing permission to use a work, for example when multiple layers of rights exist within one work; and how different works may be subject to different right types and duration of rights protection. Risk management is also considered.
- 1.5 The Europeana Licensing Framework¹ helps to manage the relationship between partners providing data to Europeana Fashion (Europeana site and the Europeana Fashion Portal), and users of the site. These Guidelines outline the key responsibilities for partners contributing data.

Please note

Partners contributing to the Europeana Fashion project are subject to different national law. The intention of these Guidelines is to familiarise partners with international agreements (such as the Berne Convention for the Protection of Literary and Artistic Works 1886) and European Directives (such as **Directive 2001/29/EC**, EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society). However these Guidelines **do not constitute legal advice** and they simplify a complex subject. They are *not* intended to cover the various national legislations, and therefore partners should have some understanding of their own national law.

¹ <http://pro.europeana.eu/documents/858566/7f14c82a-f76c-4f4f-b8a7-600d2168a73d>

2. Terms and definitions

For the purpose of these Guidelines, the following terms and definitions apply:

Collecting Society

Means an organisation created by law or a private agreements, responsible for representing and managing the legal rights of rights holders.

Content

Means the metadata images/audiovisual work being provided to Europeana Fashion.

Creator

The creator of a work which can be protected by copyright or a related right.

Copyright

An exclusive property right, which protects a number of different types of works from being copied and used without permissions of the rights holder.

Data

Metadata and preview images being provided to Europeana Fashion.

Digital representation

The preview image or audiovisual work which may contain tangible works.

Design Rights

An exclusive property right which

protects the three dimensional elements of a number of different types of works from being copied and used without permission of the rights holder.

Due Diligence

The documented efforts for tracing rights holders.

Europeana Fashion

Means the Europeana site and the Europeana Fashion portal.

IPR

Intellectual Property Rights are a form of property and like property, can be sold, bought, inherited or otherwise transferred.

GLAM

Galleries, Libraries, Archives and Museums.

Mass Produced

Artistic works which have been manufactured (over 50 copies) and Artistic Works commercially exploited.

Object

The physical expression of an idea which may be protected by copyright.

Orphan Work

Work in copyright for which the rights holder is unknown or cannot be traced.

Metadata

Data describing an information resource sometimes referred to as ‘data about data’.

Passing Off

A type of common law which allows someone the right to prevent others from misrepresenting them.

Permission

The consent of a rights holder to use his/her works in a number of ways.

Previews

A thumbnail image of an object.

Rights holder

The legal owner of rights in a work whose permission is required for use.

Risk Management

The practical approach taken to decide the level of risk associated with using a work in copyright where permissions has not been sought or where the rights holder cannot be traced.

Trademarks

An exclusive right which identifies the origin of a product and are infringed when someone uses another trademark as their own.

Work of Artistic Craftsmanship

Generally understood to mean something that has artistic or aesthetic qualities, has been hand-crafted and must be understood by the public to be a work of art. The tangible expression of an idea which may be protected by copyright.

3. Key rights issues and considerations

3.1 Intellectual Property Rights and Fashion

3.1.1 Fashion is one of the world's leading creative industries. The fashion industry has seen a shift from garments serving merely social and cultural functions to being an expression of art and aesthetics². As outlined in this document, legal protection (where recognised for fashion) is usually covered by copyright and/or design rights and trademarks. In some cases there may also be performer's rights in recordings.

3.1.2 In addition to Intellectual Property there are many ways in which the law determines how works may be used. These include rights to privacy, data protection³, freedom of information⁴ and obscenity and indecency. The extent of these legal issues will vary from country to country so it is important to refer to relevant national legislation where appropriate.

3.2 Securing permission: What do I need to consider?

3.2.1 The metadata and image previews being provided as part of the Europeana Fashion Project cover a variety of works, including images, text, audiovisual material and other digital content such as

website pages and pdfs.

3.2.2 It is the responsibility of project partners to make reasonable efforts to secure permission from all applicable rights holders. There may be challenges in identifying the copyright status of an object, ensuring that multiple layers of rights are identified or tracing all the rights holder/s. Where permission cannot be sought, partners should use the risk management Guidelines (section 7) in this document to help reduce risks to themselves and all project partners.

3.3 The Europeana Data Exchange Agreement: Rights information relating to digital content and metadata

3.3.1 The Europeana Data Exchange Agreement (DEA), which applies to all project partners, is based on two simple principles⁵:

1. Data providers grant Europeana the right to publish image previews provided to Europeana. However previews may not be re-used by third parties unless the edm: rights field relating to the previews allows such re-use.

2. For all other metadata provided to Europeana, data providers grant

Europeana the right to publish all metadata under the terms of the Creative Commons Zero Public Domain Dedication. This means that all metadata provided to Europeana can be re-used by third parties without any restriction.

3.3.2 Content partners are required to apply a statement about the rights status of the digital objects described in the metadata that is submitted to Europeana. Guidelines on which rights statements to use are outlined in section 5.3.

3.3.3 Partners should note that as outlined in Article 2.3 of the DEA, 'the data provider must make best efforts to provide Europeana correct metadata on the Intellectual Property Rights to the Content, including the identification of Content that is Public Domain as being Public Domain'. Partners should also be familiar with the definition of 'metadata' in the DEA, which defines metadata as 'textual information (including hyperlinks) that may serve to identify, discover, interpret and/or manage Content'.

When are there rights in digital representations of objects?

3.4.1 When considering which licence to use, partners need to be familiar with

their country's legislation with regard to copyright in digital representations of public domain (out-of-copyright) objects. This is necessary in order to identify appropriate licence terms for the work.

² [http://nopr.niscair.res.in/bitstream/123456789/3390/1/JIPR%2014\(2\)%20113-121.pdf](http://nopr.niscair.res.in/bitstream/123456789/3390/1/JIPR%2014(2)%20113-121.pdf) - p116
³ http://ec.europa.eu/justice/data-protection/index_en.htm
⁴ http://europa.eu/legislation_summaries/environment/general_provisions/128091_en.htm
⁵ <http://pro.europeana.eu/documents/10602/560317/Data+Exchange+Agreement+-+Final+-+clean.pdf>

4. Intellectual property rights: general principles

4.1 What is Intellectual Property?

4.1.1 Intellectual Property is a form of property. Like a physical property it can be sold, bought, inherited or otherwise transferred. It is a valuable asset.

4.1.2 The World Intellectual Property Organisation (WIPO) defines IPR as: ‘*Creations of the mind; inventions, literary and artistic works, symbols, names, images and designs used in commerce*’⁶.

4.1.3 The main categories of IP are: **Copyright, Design Rights, Trademarks, Patents and Database Rights**. Please refer to Appendix A ‘What is protected by Intellectual Property?’ for further information.

4.2 What is Copyright and what does it protect?

4.2.1 Copyright protects certain literary, musical or artistic works upon creation in a ‘fixed’ form and grants authors the exclusive right to authorise or prohibit the reproduction, adaptation, distribution or communication to the public of their work. It also protects films, broadcasts, sound recordings and typographical arrangements.

4.2.2 According to article 2 (1) of the Berne Convention for the Protection for Literary and Artistic Works, 1886 (known as the *Berne Convention*), the expression “literary and artistic works” includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as:

- books, pamphlets and other writings;
- lectures, addresses, sermons and other works of the same nature;
- dramatic or dramatico-musical works;
- choreographic works and entertainments in dumb show;
- musical compositions with or without words;
- cinematographic works to which are assimilated works expressed by a process analogous to cinematography;
- works of drawing, painting, architecture, sculpture;
- engravings and lithography;
- photographic works to which are assimilated works expressed by a process analogous to photography;
- works of applied art;
- illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

4.2.3 The Berne Convention leaves it to the contracting parties to determine the extent of the application of their copyright laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. This means that countries may choose to protect works of applied art under either copyright or design law (like Italy), or under both copyright and design law (like The Netherlands). As a result the situation varies across the European Member States. The Court of Justice of the European Union has ruled however that in accordance with the principle of non-discrimination in the EC Treaty, works shall be protected according to the national rules of the Member State concerned, irrespective of their country of origin.

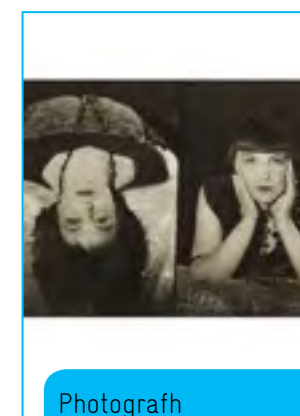
4.2.4 For the purpose of these Guidelines, if a digital image or the object the digital image represents is subject to IP protection, it will be covered by copyright, a design right or a related right. **Appendix B** provides an example of the main categories covered by copyright in the UK, which also reflects most European countries.

4.2.5 The work has to be ‘original’ in the sense that it originated from the author. In civil law countries such as France, this criteria may be referred to as the ‘author’s own intellectual creation’, reflecting a philosophical approach to copyright rather than the economic value of an author’s labour⁷.

⁷Stokes, S, 2001 Art and Copyright, Hart Publishing p 17



Sculpture
COPYRIGHT



Photograph
COPYRIGHT



Product
DESIGN RIGHTS

Left to right: c.109:1–2001 Form – Secret Garden Green Basket Set with Black Lip Wraps by Dale Chihuly; E.1590–2007 photo from Curtis Moffat Archive, M.4–2006 Geometric teapot, design by Christopher Dresser, Made by James Dixons and Sons. All images © Victoria and Albert Museum, London

4.2.6 Copyright applies for a limited amount of time, depending on the type of work. Please see **Appendix B What is protected by copyright and how long does copyright last?** for further guidance.

4.2.7 Copyright can be **assigned** to another person so remember that the legal owner of copyright may not always be the creator.

4.3. Who owns copyright?

4.3.1 As a general rule, the first owner of copyright in a work will be the artist who produced the work. In some countries (like The Netherlands), the law identifies the employer as the first owner of copyright on a work that was made by an employee in the course of his or her employment.

4.4 If someone owns copyright what rights do they have?

4.4.1 When a work is in copyright, the rights holder has certain control over how his or her works are used.

WHEN YOU NEED TO SECURE PERMISSION

- **copying** – e.g. taking a photograph
- **issuing copies to the public** – e.g. printing copies of a book for sale
- **communication to the public** – e.g. publishing an image on a blog
- **performance** – e.g. perform your work on stage or exhibit your work (except artistic works)
- **rental and lending** – e.g. licensing an image
- **adaptation** – e.g. translating some text for the Europeana Fashion site.

The above rights can be:

- **Assigned** – this means giving full ownership of copyright to someone else.
- **Licensed** – this means retaining copyright but giving permission for someone else to use your work in a number of ways. e.g. V&A Enterprises licence our images to others subject to certain terms of use.

4.4.2 There may also be exceptions within national law when a work may be used without securing permission, and partners should refer to their national law for further guidance.

4.4.3 In addition to copyright (sometimes known as an economic right), creators are also entitled to moral rights. Moral rights protect a creator's honour or reputation and the integrity of their work and include the right to be attributed; that is, protection against any derogatory treatment of a work. Moral rights cannot be assigned but in some countries like the UK and Ireland, they can be waived.

4.4.4 Where copyright or moral rights in content (or the work the content represents) belongs to a third party, it is the responsibility of partners to make reasonable efforts to secure permission from the rights holder.

4.5 Design Rights

4.5.1 Fashion garments and accessories may be protected by Design Rights. These give creators the right to commercially exploit their designs (the three-dimensional elements such as shape, lines, texture etc.) for a limited amount of time. Design Rights are a complex area of law. Designs can be registered in the EU unlike copyright,

which is an automatic right, and the law protecting designs in different countries varies. The Council Regulation (EC) No 6/2002 introduced the Unregistered Community Design Act and the Registered Community Design in 2003. The Unregistered Community Design offers protection for up to three years, and by registering a design a creator is able to have up to 25 years to exploit his/her design.

4.5.2 The Council Regulation on Community Design 2003 protects “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation”. A “product” is defined as “any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs”.

4.5.3 A design shall be protected by a Community design to the extent that it is new and has individual character. A registered Community design shall confer on its holder the exclusive right to use it and to prevent any third party not having his consent from using it. This shall cover in particular, the making, offering, putting on the

market, importing, exporting or using of a product in which the design is incorporated or to which it is applied, or stocking such a product for those purposes.

WHEN ARE DESIGN RIGHTS INFRINGED?

To infringe design rights, you would need to make product replicas that copy the design or produce a design drawing to enable others to make product replicas that copy the design for commercial purposes. Design rights (in isolation) will **not be infringed** by simply taking a picture of the work and can therefore content can be provided to Europeana Fashion without securing permission.

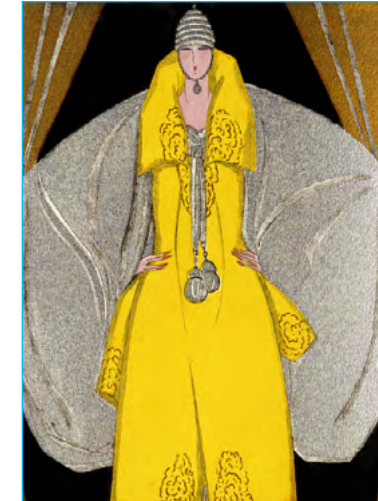
4.5.3 Design rights and copyright can sometimes overlap. For example a shoe is a functional object but if it is covered in a graphic design, it may also have 'artistic qualities'. In this case, permission to reproduce the shoe would be required as the graphic design is protected by copyright.

4.6 Fashion, copyright and design rights

4.6.1 Partners will be providing different types of digital content representing fashion items. As outlined above, most digital images and audiovisual works will (if protected) enjoy copyright protection. To understand how fashion may be protected by IP think of fashion in the following terms:

Copyright

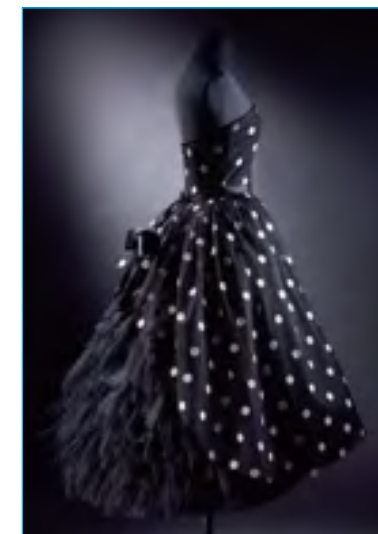
- original graphic and artistic works
- fashion designs
- fashion plates
- fashion photographs
- photographs featuring fashion and textile garments
- fashion accessories
- documents of fashion exhibitions
- fashion blogs
- text based works,
- works of artistic craftsmanship



7059 Plate 19- Atinéa- Manteau du soir de Paul Poiret; from Gazette du Bon Ton, Issue 3; by Jean Bernier (active 1910-1925) & Léon Bakst (1866-1924); French (Paris); c. 1920. © Victoria and Albert Museum, London

This fashion plate will be protected by copyright as an artistic work for life of the creator plus 70 years.

PERMISSION IS REQUIRED TO USE AN IMAGE OF THIS FASHION PLATE



T.54-1974 Short evening dress tulle and white felt spots, Lanvin-Castillo, Paris about 1960

© Victoria and Albert Museum, London/Lanvin-Castillo

This Lanvin-Castillo dress is a couture piece and the V&A would consider that it has 'aesthetic' qualities' and protected by copyright as a 'work of artistic craftsmanship' for **life of the creator plus 70 years**.

PERMISSION IS REQUIRED TO USE AN IMAGE OF THIS DRESS



T.59:2-1992 pair of PVC ankle boots; by Mary Quant (b.1934); English; 1967©Victoria and Albert Museum, London

These shoes have been mass produced and the look, shape and contours of the shoes are likely to be protected by **design rights** for up to **25 years from the date of manufacture**.

PERMISSION IS NOT REQUIRED TO USE AN IMAGE OF THESE SHOES
USE A V&A IMAGE OF THIS WORK

4.6.2 As outlined in Article 2 of the Berne Convention, all two dimensional works will be protected by copyright as artistic or literary works, provided they are original. However the status of protection of three-dimensional aspect of fashion works is more difficult to determine under national and European Law.

For example, whilst Article L.112-2 of the French Intellectual Property Code specifically lists works including “creations of the fashion industries clothing and accessories”⁸ and extends copyright protection to fashion garments as ‘works of art’, the UK Copyright and Design Patents Act 1988 (amended and revised) does not make such a distinction.

In theory, a three-dimensional garment or accessory may be protected in the UK if it is shown to be a ‘work of artistic craftsmanship’.

This is taken to be something that is a one-off hand-made haute couture garment and not intended for mass production. Partners will need to refer to national legislation before using fashion works.

⁸ <http://fashionlawwiki.pbworks.com/w/page/11611162/Copyright%20Protection%20of%20Design%20in%20the%20US%20v%20Europe#footnote-anchor-18>

4.7 Fashion and Copyright: Haute-Couture and Mass Produced Fashion in the UK

4.7.1 It is understood that domestic law in countries represented by project partners may vary from the UK approach.

4.7.2 In the UK fashion is notoriously difficult for the courts to understand in a legal sense and often only the functional purpose (rather than any aesthetic value) is taken into account.

4.7.3 Fashion may be granted different levels of copyright protection depending on the following criteria:

1. Is the fashion garment/accessory a one-off couture piece with artistic qualities?
e.g. a hat by Philip Treacy
2. Has the fashion/garment accessory (as an artistic work) been put into production using an industrial process (50 copies of more)?
e.g. a limited edition dress
3. Is there any artistic quality in the fashion garment/accessory or was it designed purely to be worn
e.g. Dior's New Look range was designed to be worn and compliment a woman's silhouette

4.7.4 If a fashion garment is a ‘artistic work of craftsmanship’ it will be protected for the life of the creator plus 70 years from the end of the year in which the creator dies. If the same fashion garment is mass produced, or a purely functional garment is registered as a design and over 50 copies are made, copyright in the garment lasts for 25 years from the date of manufacture.

4.7.5 For fashion garments/ accessories which are designed to have a purely functional purpose, they will most likely be protected by design rights.

4.7.6 As a guide the V&A wishes to share its current approach to when to secure permission. Following legal advice, the V&A secures permission for using fashion garments and accessories as follows before using images for publications, online and other Museum activities:



WHAT: ONE-OFF HAND DESIGNED HAT

T.182-1986 Hat made of shocking pink goose feathers; by Philip Treacy; British; 1995 ©Victoria and Albert Museum, London/Philip Treacy

PROTECTED BY: Copyright as a ‘Work of Artistic Craftsmanship’ for life of creator plus 70 years.

PERMISSION REQUIRED? For a fashion garment/accessory (as an artistic work) where copyright has not expired, permission will need to be secured before using an image of the work.

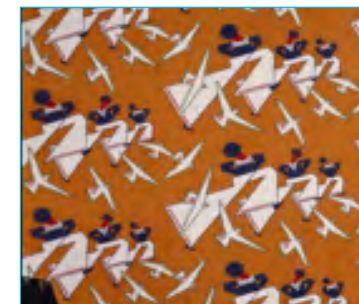


WHAT: MASS PRODUCED BOW TIE

T.362-1979 Bow tie; printed silk with polka-dot design in white on red & red on black; front view; by Turnbull & Asser; English; 1966 - 74. ©Victoria and Albert Museum, London

PROTECTED BY: Design rights for up to 25 years from the date of manufacture and Trademarks which can last forever.

PERMISSION REQUIRED? When an object is functional and probably not original enough to be protected by copyright permission from the rights holder is not required even if the bow tie is still protected by IP.



WHAT: MASS PRODUCED TEXTILE DESIGN

T.244-1987 Printed dress fabric; cotton by Calico printers association; English; 1934 ©Victoria and Albert Museum, London

PROTECTED BY: Design rights for up to 25 years from the date of manufacture. The underlying design drawings will be protected by copyright for life of the creator plus 70 years.

PERMISSION REQUIRED? For a fashion garment (as an artistic work) which is put into production using an industrial process (50 copies or more) where the 25 years has expired but there is a surface pattern e.g. a textile design, permission will need to be secured before using an image of the work.

4.7.7 For a fashion garment/accessory which is a functional object and probably not original enough to be protected by copyright e.g. a pair of socks, **permission from the rights holder is not required** even if the socks are still protected by IPR.

4.7.8 For any commercial use, permission would need to be secured with a rights holder according to the use.

4.7.9 There may also be instances where the Museum makes a risk assessment and publish if the risk is considered to be low, often when the cultural value of a work is greater than any commercial reason.

Pending changes to UK legislation for mass produced artistic works

If project partners hold any works which are made in the UK, please note the following:

There have been some recent changes in UK copyright legislation for mass produced artistic works. Copyright in mass produced artistic works will be extended from 25 years to life of the designer plus 70 years. This means that permission will need to be obtained

from designers for using works where previously this was not required.

This change in legislation will not apply retrospectively. However mass produced artistic works in which copyright may have expired under previous legislation will benefit from this extended period if “life of the designer plus 70 years” period has not yet passed. The date for full implementation is still pending but will come into effect after 29 October 2014, and will be in line with EU legislation.

4.8 Related Rights

4.8.1 Related rights are defined at the European level through Directive 2006/115/EEC which harmonises the provisions relating to rental and lending rights as well as certain rights related to copyright. The neighbouring rights covered by the Directive include the right of fixation, reproduction, broadcasting and communication to the public and distribution. Beneficiaries of rights related to copyright are performers, phonogram producers, film producers and broadcasters.

4.8.2 The related rights of certain beneficiaries may be affected for

example if a piece of music is played at a catwalk show. In this instance the performer and the producer of the sound recording would be protected for up to 50 years after a song is recorded. However, note that a recent change in EC legislation (The Directive 2011/77/EU)⁹ means that from November 2013, performers and creators of sound recordings will enjoy 70 years of protection. Performers all have moral rights in their works.

4.8.3 If content from a third party is being contributed, it is the responsibility of the project partner to check that any necessary agreements have been reached with the performers and the rights holder of the content.

4.9 Database Rights

4.9.1 Website pages, designer’s blogs and other web based content may be protected by database rights, which relate to a collection of data or other material that is arranged so that items are individually accessible. Databases can be protected by database rights (sui generis) or copyright (as a literary work). The difference is that copyright protects the creativity of the author, whilst database rights protect the substantial investment in ‘obtaining, verifying and presenting of information’. An example of when a database would be

protected by copyright is a website page containing carefully selected text and images, whereas a directory of fashion designers contact details is more likely to be protected by database rights.

4.9.2 Database rights last for fifteen years from the end of the year that the database was made available to the public, or from the end of the year of completion for private databases. They can be renewed with any new substantial investment incurred for the update of the database, and so can last forever.

4.10 Trademarks

4.10.1 Trademarks are the strongest type of IP protection for the fashion industry and many recent cases provide examples of the strength of a brand which can last forever. For example *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936 (9th Cir. 2011) which relates to misuse of a Louis Vuitton’s logo on a website page.

4.10.2 A trademark’s essential purpose is to identify the origin of a product and will be infringed by another using the same mark as a guarantee of origins of the goods or services in question, e.g. the Europeana Fashion logo.

4.10.3 When content and the works the digital content represents being provided

⁹ http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm

is protected by IP, they are likely to be protected by copyright. However it is important for project partners to have an understanding of some of the related rights which may need to be considered when deciding which content to provide to Europeana Fashion.

4.10.4 In most cases, if not all, permission is not required for digital representations of works displaying trademarks, as inclusion on the Europeana Fashion Portal would not create confusion within the public about the origin of the goods or services. However, for audiovisual works of fashion designer's catwalk shows or new media digital platforms such as Nick Knight's Showstudio, it is essential that permission is granted from the creator who may have trademarked his/her name.

4.11 Orphan Works

4.11.1 An orphan work is a work protected by copyright where the rights holder is not known or can't be found. Whilst it is advised to trace rights holders and seek their permission in all cases, in some circumstances this will not be possible. Legally, orphan works cannot be used until a rights holder is located. However for cultural institutions that hold a number of orphan works, it means that works cannot be

displayed, reproduced or preserved. To date, organisations have undertaken risk assessment of orphan works, often looking at the reason the work was created. For example if a photograph was taken of a group in the street wearing current fashion trends, it may be that the social and cultural value of the image is greater than any commercial value and an organisation might decide to take the risk to publish it.

4.11.2 The recently adopted Directive of 25 October 2012¹⁰ on certain permitted uses of orphan works is meant to allow the non-commercial use of orphan works after a diligent search to identify/locate the rights holder has been carried out. However, the Directive may have limited impact in the area of fashion for it applies to published literary works, audiovisual works and sound recordings and not to works of applied art. If a literary work contains an artistic work then the Directive will not apply. The Directive must be implemented in the Member States no later than 29 October 2014.

¹⁰ http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm

5. The Europeana Data Exchange Agreement

5.1 What is the Europeana Data Exchange Agreement?

5.1.1 The Europeana Data Exchange Agreement (DEA) helps manage the relationship between partners providing metadata and previews to Europeana Fashion and its users. It sets out how metadata and previews provided by data providers can be used by Europeana and third parties¹¹.

5.1.2 The re-use of previews provided on Europeana to users is subject to the same licensing conditions as the original licensing scheme chosen by data providers.

5.2 Rights information relating to content (edm: rights)

5.2.1 Article 2 of the DEA outlines the requirement for data providers to make best efforts to provide Europeana with the correct metadata on the IPR to the (digital representations of objects); including identifying when content is in the public domain.

5.2.2 Data providers are required to apply a statement about the rights status of an object and this is stored in the Europeana Data Model as edm: rights. The same rights will apply to previews used in the Europeana Fashion portal.

Only one statement can be applied per digital object and this information can be used by users to filter their search results.

5.3 Available Rights Statements

5.3.1 There are four different types of rights statement that represent the rights status of the objects the previews represent:

1. **Public Domain Mark** used when objects the previews represent is not protected by copyright or copyright has expired.
2. **Creative Commons Licence or the CC Zero Public Domain Dedication** A data provider can choose one of 6 Creative Commons Licenses or the CC Zero Public Domain Dedication¹² when the data provider is the rights holder, or permission has been granted by the rights holder and content is available for re-use. See 4.3 below.
3. **Rights Reserved Statements** A data provider can choose one of three Rights Reserved Statements when the data provider is also the rights holder and wants to make content available without authorising re-use (or has been granted permission by the rights holder to do so).

¹¹ The Europeana Licensing Framework page 7

¹² In jurisdictions like the UK, CC zero acts as a licence as it is not possible to waive copyright.

4. ‘Unknown’ Copyright Statement

This statement is used when the copyright status of digital objects is unclear. This should only be used if absolutely necessary.

5.3.2 Further guidance on the different rights statements is available here:
<http://pro.europeana.eu/web/quest/available-rights-statements>
(Note: you must be signed to have access to the resource)

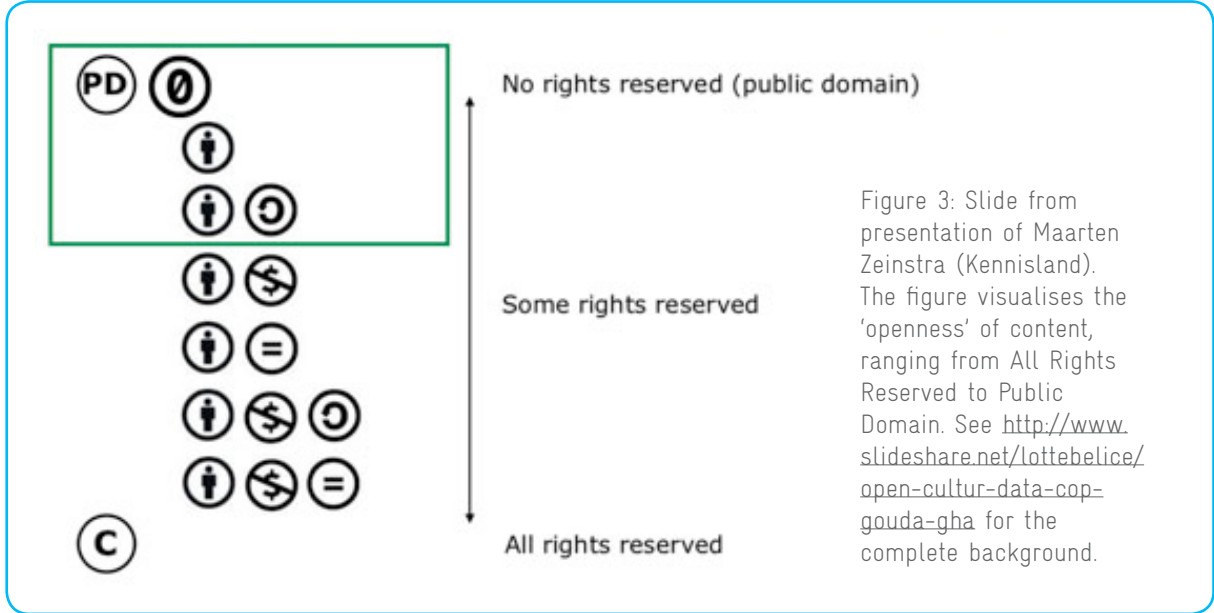
5.4 Creative Commons Licences and Open Licences

5.4.1 Open licenses allow others to re-use your work with few or no restrictions. It means that you are able to openly access and re-use a work without having to seek permission from the rights holder for each use.

5.4.2 Creative Commons Licences are a type of open licence which are used internationally and allow the copying, reuse, distribution, and in some cases, the modification of the original owner's creative work, without needing to get permission each time from the rights holder. The licences have been integrated into the framework of the rights metadata element of Europeana. It is important for partners to understand the benefits of using open licences where possible for content being provided to Europeana Fashion.

5.4.3 There are 6 different types of Creative Commons Licence and further information can be found here:
<http://creativecommons.org/>

5.4.4 The diagram below outlines the ‘openness’ of content, ranging from All Rights Reserved to the most permissive Public Domain status:



5.4.5 It may not be possible to secure permission from rights holders for the most permissive licence, but where possible project partners should consider securing permission for reuse and sharing of content on as many platforms as possible without needing to secure permission each time. The recent success of Europeana Fashion's first Wikimedia edit-a-thon reinforces the benefits of using an open licence.

<http://www.europeanafashion.eu/2013/04/04/europeana-fashion-edit-a-thon-nordiska-museet-sweden-wikimedia-wikipedia/>

5.4.6 Please refer to **Appendix K Creative Commons and Open Licensing F.A.Q.s** for further guidance.

6. How to secure permission from a rights HOLDER

6.1. General Considerations

6.1.1 For all works identified as being in copyright or protected by a related right, it is the responsibility of the project partner to secure permission for the use of any digital representation of the work which belongs to a third party.

6.2. Do I need to secure permission from the rights holder?

6.2.1 When a project partner is selecting works for Europeana Fashion, a number of factors need to be considered such as:

1. Is the work in copyright or protected by another type of IP?
2. When was the work created?
3. If the work is in copyright, is the use permitted by any permitted acts?
4. Is the creator known?
5. What nationality is the creator? (as duration of rights may vary)
6. Has the work been published?
7. Is there more than one layer of rights within one work? e.g. copyright and design

You do not need to secure permission in the following instances:

- If copyright in the work has expired;
- If the work is protected by design rights or trademarks and was primarily created for functional, commercial use e.g. a mass produced bag or pair of shoes
- If the work originates from a country where copyright does not apply;
- If the rights holder of the work is unknown.

**Please refer to your national law for any differences that may apply*

6.2.2 The flowcharts in **Appendices C and D** have been designed to support partners in deciding if works are protected by copyright or a related right, recognising when there are layers of rights in one work and whether permission needs to be secured before using a work and deciding which type of licence to make content available under.

6.3 How much time and effort should I allow to secure permission?

6.3.1 At the start of any project, it is essential that **time, resource and money** are considered for any permission that may need to be secured. One film clip of a fashion show can contain a number of rights holders including the film director, producer and performer.

6.3.2 Some of the content being provided to Europeana may take longer to secure permission than others due to any of the following:

- Before contacting a rights holder, you need to establish if rights exist in the work.
- The work may consist of layers of rights and a number of rights holders.
- The rights holder is unknown or untraceable.
- The rights holder is known but is not responding.
- It can take time to negotiate favourable terms with a rights holder.

6.3.3 Where possible, project partners should identify groups of works by the same creator and secure permission for all works at the same time.

6.3.4 The flowcharts in **Appendices E and F** have been designed to support partners in understanding how to trace a rights holder and how to secure permission. **Appendices G and H** provide sample template letters for securing permission and contacting a rights holder 'out of courtesy'.

6.4. What is due diligence?

6.4.1 Due diligence describes the efforts that should be taken to trace rights holders in order to complete a 'reasonable search'. This is particularly important in situations where rights holders cannot be traced or found and works are known as 'orphan works'. In all cases, keeping paper and digital records of all correspondence and logging phone calls will help reduce any risk on the project partner in infringing copyright. It is important to record the date any decisions were made so that any changes made in law can be reflected. Moreover, any diligent search carried out within the context of the Orphan Works Directive will need to be documented and recorded so that it can be produced as evidence if required.

6.5 How to carry out due diligence

6.5.1 A Due diligence checklist for tracing rights for content being delivered to Europeana Fashion may include the following:

- The organisations own object history files, acquisition files and registries;
- The organisation's collections and asset management systems;
- Other fashion institutions who hold works;
- Other photographers who have represented fashion designers;
- Newspaper press offices/picture desks;
- Broadcasting companies for audiovisual material;
- The WATCH file (US / UK database of certain copyright holders of writers and artists): <http://tyler.hrc.utexas.edu/>
- Berg Publishers (Fashion Library) <http://www.bergfashionlibrary.com>

6.5.2 The list is not exhaustive nor will it eliminate any claims by rights holders but is a reasonable starting point.

6.6 Are there any resources I can use to help me understand when copyright in a work expires?

6.6.1 To help support partners in determining the duration of copyright of objects, The Public Domain Calculator has been developed by Kennisland, the Institute for Information Law and Bibliothèque de Luxembourg as part of the Europeana Connect project coordinated by the Österreichische Nationalbibliothek. A set of 30 calculators (all countries of the European Economic Area) are intended to assist Europeana data providers with what can often be a complex set of rules governing the term of protection.

6.6.2 It is worth noting that there is a limit to how much an electronic tool can replace a case-by-case assessment of the rights status of a work, and for more complicated situations it is always beneficial to seek legal advice.

6.6.3 Further information on The Public Domain Calculator can be found here <http://outofcopyright.eu/> and is the suggested starting point for rights assessments.

6.7 I need to contact a collecting society. What should I consider?

6.7.1 A collecting society (also known as a licensing agency or copyright collecting society) is an organisation created by law or a private agreement. Collecting societies are responsible for representing and managing the legal rights of rights holders. In Europe collecting societies require their members to transfer them exclusive administration rights of all of their works.

6.7.2 For rights holders who are represented by a collecting society, partners are advised to consider the following:

1. Identify all rights holders who are represented by a collecting society.
2. Identify all the different types of use you require permission for.
3. Secure permission for the use of all objects as part of an umbrella agreement.
4. Allocate a sum of money to the project for securing permission from collecting societies as costs are likely to apply.

6.7.3 **Appendix I** is an example of how The Netherlands Institute for Sound and Vision have approached seeking permission from rights holders.

6.7.4 **Appendix J** is a template take down notice which can be published online when using content where permissions has not been secured but where a risk assessment has determined use.

7. Risk management

7.1 What is risk management?

7.1.1 It is important to establish whether there are any third party rights in the content and for the organisation to either secure permission, or take a risk managed approach. Failing to do so could expose the project partner and partner institutions to a number of risks. For example damage to the reputation of the project partners and Europeana and damage to the relationship between rights holders and project partners.

7.1.2 There may be some situations where a decision is made to publish a digital representation of a work based on risk management. For example if a photograph taken by an amateur photographer was considered to represent a significant period of social history without any commercial intentions.

7.2 Are there any resources I can use to help me understand and manage risk?

7.2.1 To help partners assess the level of risk associated with using orphan works, a useful resource as part of a risk assessment is the Web2Rights Rights Management Calculator. The Risk Management Calculator can be used to help understand the types of factors that

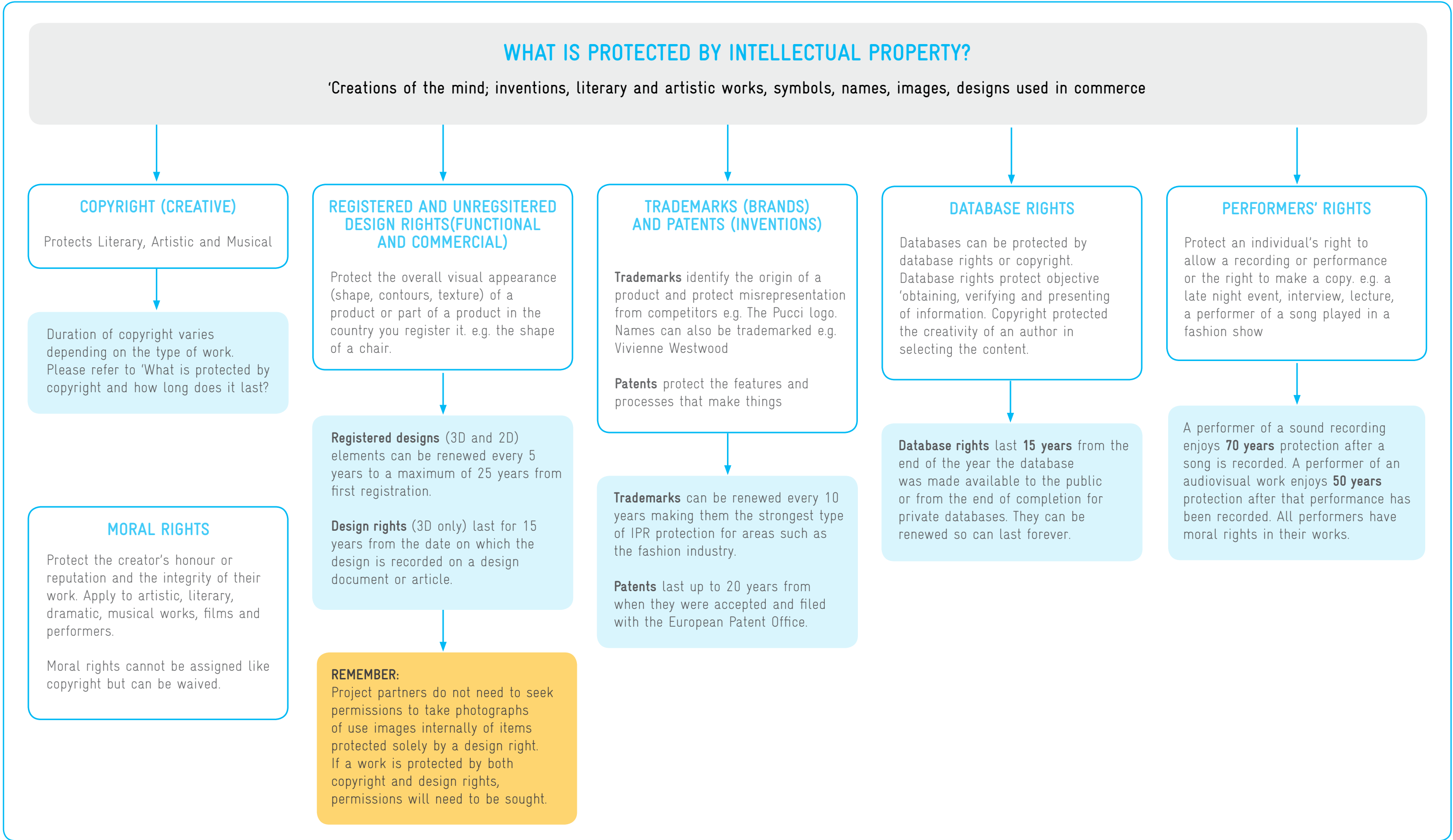
might determine specific types of risk associated with using Orphan works¹³.

Further information can be found here:

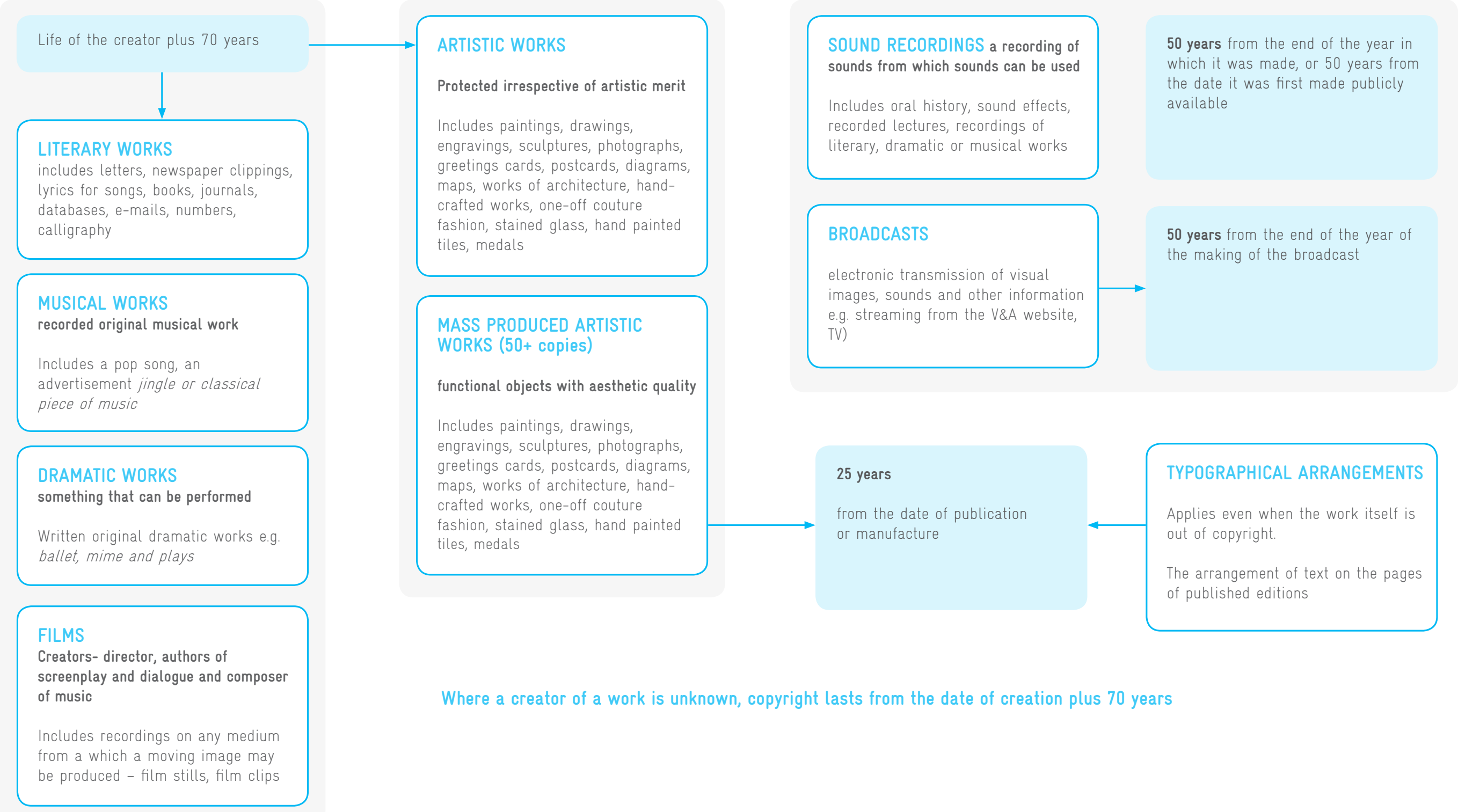
<http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>

7.2.2 Each project partner's organisation may have a policy in place on how it manages risk and this should be the first step in deciding what content can be provided to Europeana Fashion.

¹³ Further information about deciding what is low, medium and high risk can be found here:
<http://www.jisc.ac.uk/publications/programmerelated/2009/scaiprtoolkit/2riskassessments.aspx#assessments>



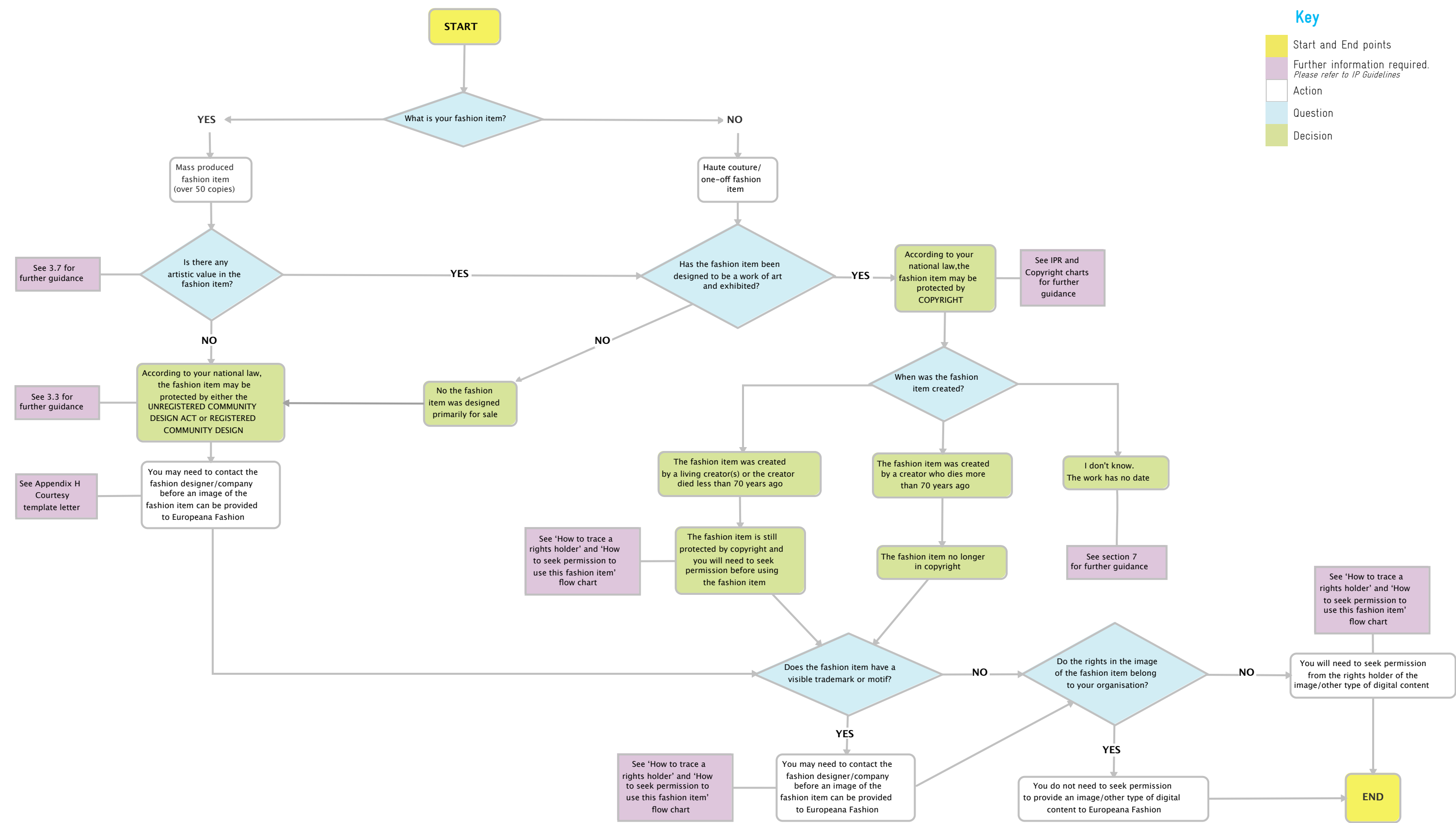
WHAT IS PROTECTED BY COPYRIGHT AND HOW LONG DOES IT LAST?



APPENDIX C

Do I need to secure permission to use this fashion item?

This flowchart should be used to help decide if you need to secure permission to use a fashion item in your collection



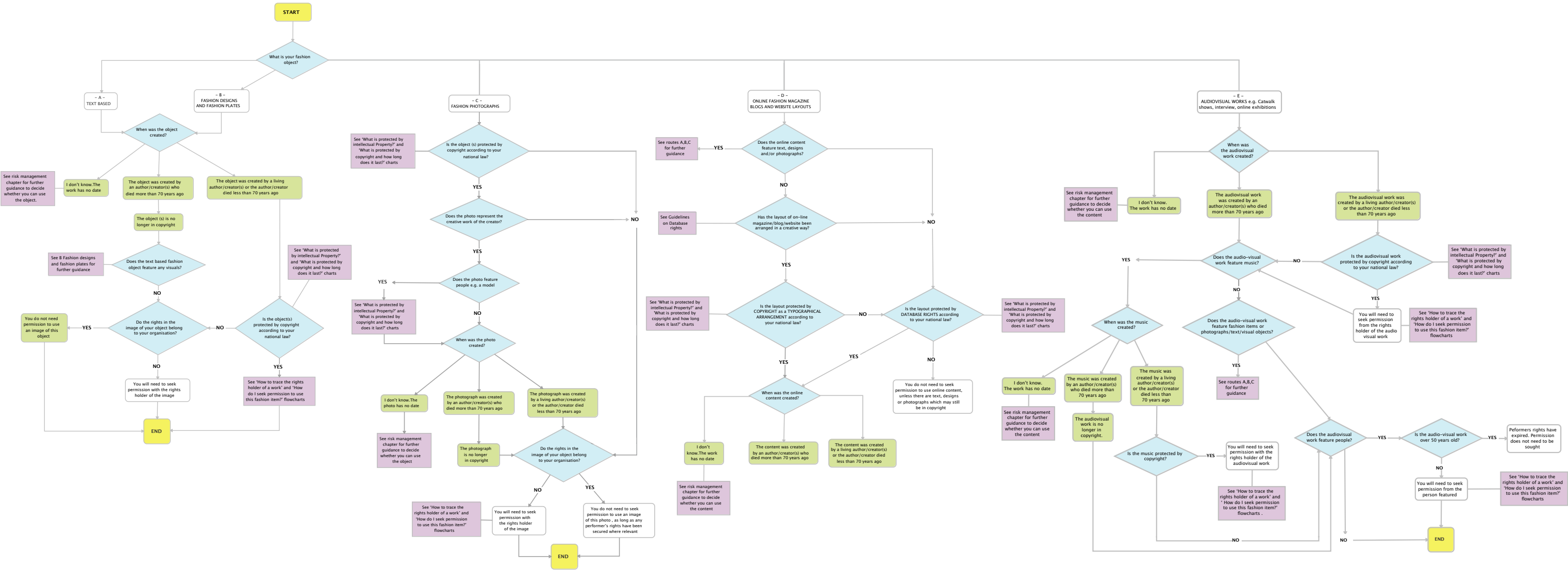
APPENDIX D

Do I need to secure permission to use this fashion object?

Do I need to secure permission to use fashion item?

Key

- Start and End points
- Further information required. Please refer to IP Guidelines
- Action
- Question
- Decision



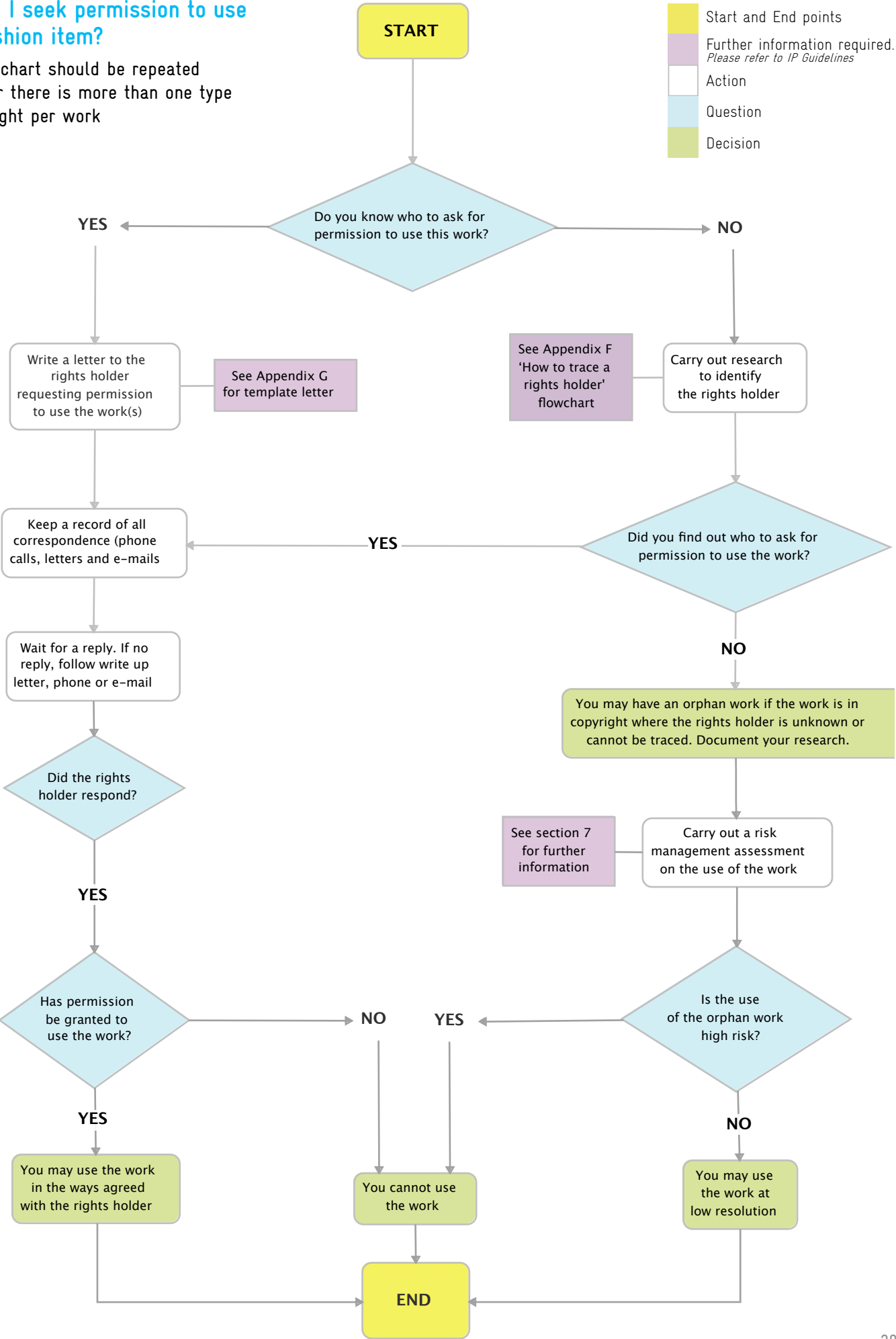
APPENDIX E

How do I seek permission to use this fashion item?

This flowchart should be repeated whenever there is more than one type of copyright per work

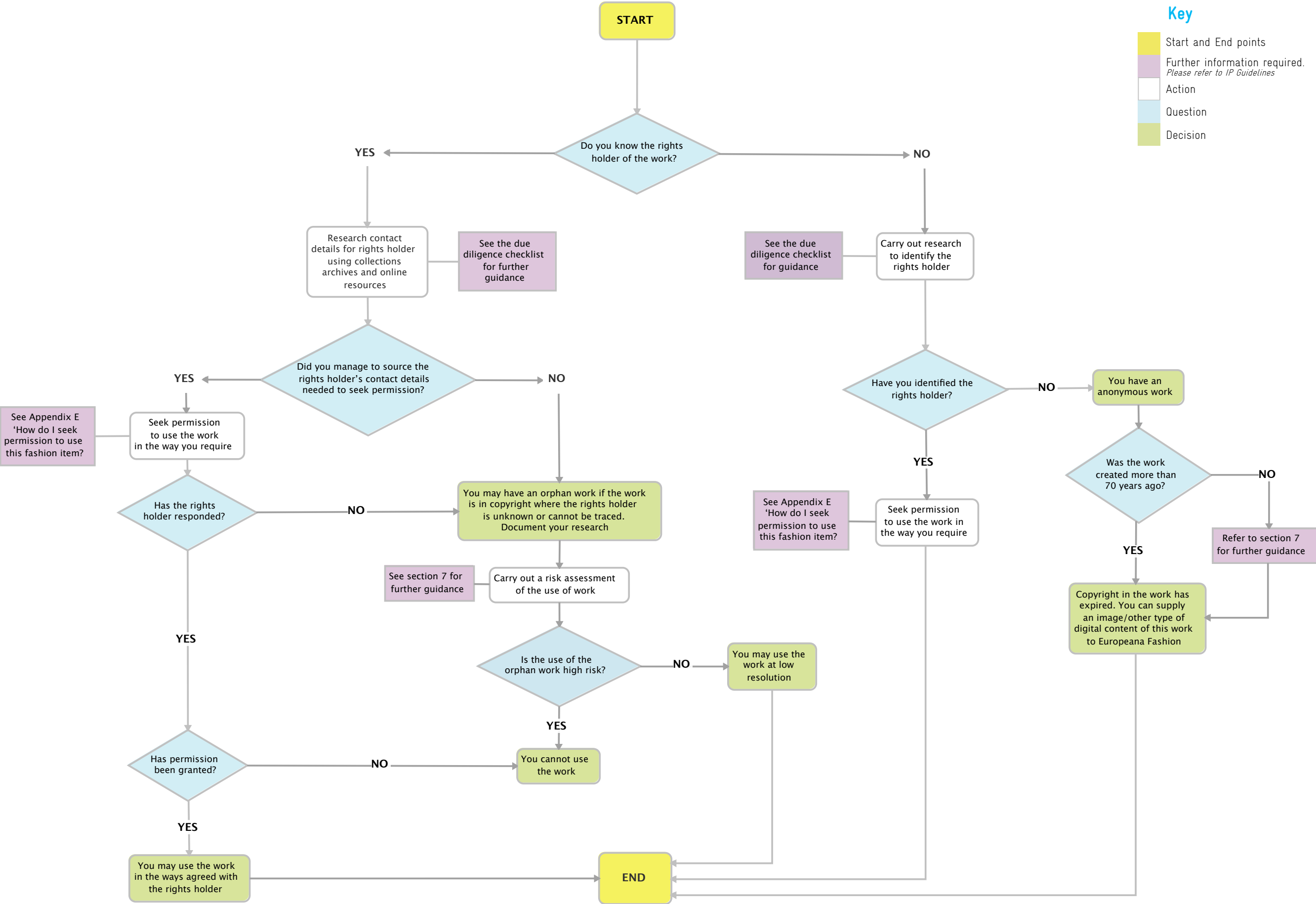
Key

- Start and End points
- Further information required. Please refer to IP Guidelines
- Action
- Question
- Decision



How to trace the rights holder of a work

This flowchart should be used to help you identify the rights holder of a work



APPENDIX G
SAMPLE COURTESY LETTER TO A RIGHTS HOLDER
SEEKING PERMISSION



Dear {add name and title},
Europeana Fashion is a best practice network comprised of 22 partners from 12 countries, which represent leading European fashion institutions, designers, photographers and collections. The principle aim of the network is to provide online access and encourage engagement with more than 700,000 fashion—related digital objects. You can find more information about the project at http://www.europeanafashion.eu/.
We understand that you are the copyright holder or represent the copyright holder of the following Object (s):
{insert full description of Object (s)}
We would like to be able to publish an image/audio visual of the Object (s) on the Europeana and the project Fashion portal using a Creative Commons licence XX, which will maximise their benefit to the fashion community. We would also like to use image/audio visuals for the following purposes within {X} organisation:
{X}
We would be grateful for any permission you are prepared to grant to us.
Neither we, nor any Europeana Fashion partner will seek to assert any rights over the digitised material.
If you are willing to grant permissions, please confirm how you wish to be credited:
©.....
We are working to a deadline of {insert date} and would therefore appreciate a response at your earliest convenience. Please confirm any permission granted by countersigning both copies of this letter and returning to the following address:
{insert your name and address}
Thank you in advance for considering our request.
Yours sincerely,
Signed by {name of project partner}: Date:
Signed by {name of rights holder}: Date:

APPENDIX H
SAMPLE COURTESY LETTER TO A RIGHTS HOLDER



Date:
Dear {add name and title},
Europeana Fashion is a best practice network comprised of 22 partners from 12 countries, which represent leading European fashion institutions, designers, photographers and collections. The principle aim of the network is to provide online access and encourage engagement with more than 700,000 fashion—related digital objects. You can find more information about the project at http://www.europeanafashion.eu/.
We are writing to inform you that we have selected an image (s)/audiovisual featuring name of outfit/fashion item. We are intending to publish an image/audio visual of the Object (s) on the Europeana and the project Fashion portal using a Creative Commons licence XX, which will maximise their benefit to the fashion community. We also intend to use image/audio visuals for the following purposes within X organisation:
X
We are delighted to be including your work as part of the important digital resource.
Neither we, nor any Europeana Fashion partner will seek to assert any rights over the digitised material, and will credit the designer/creator of the work.
Yours sincerely,
xxxxxx

APPENDIX I

CASE STUDY: The Netherlands Institute For Sound And Vision

The Netherlands Institute for Sound and Vision is one of the largest audiovisual archives in Europe. The collection contains over 700,000 hours of television, radio, music and film, 20,000 objects (including costumes) and more than 2.5 million photos.

Sound and Vision intends to make this collection available to as many users as possible but does not own rights to all of the materials. Before any material can be used for a project such as Europeana Fashion, permission must be sought from the rights holders where possible.

Creating an agreement with rights holders

The Netherlands Institute for Sound and Vision have identified key rights holders and have developed umbrella agreements per rights holders for multiple works in the collection. e.g. public broadcasters and the OTP¹⁴. The agreements are based on Dutch copyright law and can be used to seek permissions for all educational uses. The umbrella agreement outlines a set of terms and conditions between the user and the rights holder. This includes the following:

- the user must seek permissions before uploading any content;
- the user is permitted to make content available as a stream only (not downloadable);
- the rights holder will receive a fair compensation of their content.

This agreement was drawn up before any research or permission was sought. By having an agreement in place at the start of a project, The Netherlands Institute for Sound and Vision maximise resource and avoid any duplication of effort.

How The Netherlands Institute for Sound and Vision seek permissions

The Netherlands Institute for Sound and Vision take the following steps to ensure that seeking permissions is efficient and cost-effective:

1. Group all works by one rights holder together so that permissions may be sought for all works once;
2. Identify any problematic areas such as time-consuming correspondence with rights holders, the current condition of a work;
3. Identify any sensitive subjects or privacy issues which may prevent the works from being used.

What happens when permissions is not granted

On the few occasions that The Netherlands Institute for Sound and Vision have been approached for potentially infringing a rights holders' rights, they have successfully managed to reduce any further risk. This is largely due to respecting the rights holder's claim and explaining how the oversight happened. In most cases, an explanation and an apology is sufficient together with any requirements the rights holder may have such as taking the content offline until an agreement is reached.

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¹⁴ Onafhankelijke Televisie Producenten (Independent Television Producers)

APPENDIX J

TAKE DOWN NOTICE (TO BE PUBLISHED ON A WEBSITE)

To: XXX (+ email address)

From: [Name, address, telephone number and email address of complainant.

Reference: [Title and unique identifier to which complaint refers] (subject of complaint).

1) Infringement of copyright/author rights/related rights.

a) The following material is protected by intellectual property law.

i) [Describe the protected material in as much detail as possible so that the specific content, edition and format may be readily identified. Indicate the category for protection under intellectual property law (e.g. original literary, dramatic or musical work, software). Specify exactly the extent of use, e.g. by quoting text that has been reproduced] (The Protected Material).

b)

i) I/we own or am/are authorised to represent the owner of intellectual property rights in the protected material.

ii) I am the creator of and thus have moral rights in the protected material.

c) I/we hereby give notice of:

i) Unauthorised use by reason of reproduction and/or making available the protected material; and/or

ii) Breach of the moral right of [paternity/integrity/right not to have my work subjected to derogatory treatment].

2) A complaint on grounds other than copyright and/or related rights.

a) [Specify the nature of the complaint e.g. defamation, breach of confidence, data protection.]

b) [Specify the law that is alleged to have been infringed].

c) [Describe the infringing content in as much detail as possible e.g. by quoting or otherwise identifying the specific content].

d) [Explain the nature of the infringement with regard to the applicable law, e.g. that an individual may reliably be identified and thus data protection legislation has been breached]

3) I/we hereby request, with reference to the subject of this complaint, you/your organisation:

a) Remove it from the website; and

i) Cease further use of the material; and

ii) Withdraw from circulation any materials that include it.

4) I/we request that you notify me/us when you have complied with my/our request in section 3 above.

5) I/we attach/direct you to the following additional information which supports my complaint:[proof of ownership, etc]

6) In relation to my/our complaint, I/we also inform you [any other relevant information including e.g. other steps taken to protect my rights].

7) The information contained in this notice is accurate and I believe, with good faith, that the publication, distribution and reproduction of the material described in section 1 is not authorised by the rights holder, the rights holder's agent or the law and/or infringes the law as described in section 2 above.

8) This notice is given to you without prejudice to any other communication or correspondence relating to the protected rights or any other right.

CONTACT INFORMATION:

Name:

Address:

Telephone number:

Email address:

If you require any assistance completing this Template, please contact *{ Insert*

name } at: *{ Insert email address }*

This take down notice is taken from the JISC funded web2rights project and further information can be found here:

<http://www.jisc.ac.uk/media/documents/themes/content/sca/templatenicetakedown.pdf>

APPENDIX K

CREATIVE COMMONS AND OPEN LICENSING F.A.Qs

1. What is a Creative Commons Licence and what do the different licences mean?

Please refer to the Creative Commons website

<http://creativecommons.org/>

and also the web2rights resource www.web2rights.com/SCAIPRModule

for further information.

2. What does free culture mean?

Creative Commons Attribution (CC-BY), Creative Commons Attribution Share Alike (CC-BY-SA) and Public Domain (CC0) are considered Free Culture license and are required for uploading images onto Wikipedia and Wikimedia

http://en.wikipedia.org/wiki/Definition_of_Free_Cultural_Works

3. What are the benefits of using a Creative Commons licence without the NC (non-commercial use only) licence type?

CC-BY and CC-BY-SA licences allow your content to be used and distributed through many new media platforms such as:

- Blogs, Wikipedia (and with Wikipedia, search engines), major news sources
- Educational and charitable institutions, educational projects
- Social Networks
- Open Media Archives, Open Source projects

The following document explores the use of Creative Commons licences with and without the NC licence type:

http://openglam.org/files/2013/01/iRights_CC-NC_Guide_English.pdf

4. Are there any examples from the GLAM community of when fashion images have been used successfully on social media sites?

Yes. The following list are a few examples reinforcing the goodwill of rights holders to share and allow others to re-use their content:

<http://www.intothefashion.com/2012/06/finest-2010wednesdayseptember-1.html>

[http://www.facebook.com/pages/CREL-RESTAURACION-DE-](http://www.facebook.com/pages/CREL-RESTAURACION-DE-TEJIDOS/117519681662914)

[TEJIDOS/117519681662914](http://www.facebook.com/pages/CREL-RESTAURACION-DE-TEJIDOS/117519681662914)

<http://www.fashionhistorian.net/blog/>

<https://twitter.com/carminamery/status/304998768439336960>

<http://thehourglassfiles.com/?cat=3>

<http://blogs.smithsonianmag.com/threaded/>

<http://pinterest.com/search/pins/?q=momu>

<http://pinterest.com/mylusciouslife/historical-fashion-incl-edwardian-flapper-fashion-/>

5. Are there any institutions which are already using Free Culture licenses to make their content available online?

<http://openglam.org/open-collections/>

FURTHER RESOURCES

Anon, b. *Understanding Copyright and Related Rights*, WIPO. **Available at:**
http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html

Centre for Fashion Enterprise and Olswang LLP *Intellectual Property in the Fashion Design Industry - Design Rights* **Available at:**
<http://www.fashion-enterprise.com/files/2010/09/CFE-IP-DesignRights-Download.pdf>

Centre for Fashion Enterprise and Olswang LLP
Intellectual Property in the Fashion Design Industry - Copyright

Dierickx, B. & Tsolis, D., 2009. *Overview of collective licensing models and of DRM systems and technologies used for IPR protection and management*, ATHENA consortium. **Available at:**
<http://www.athenaeurope.org/getFile.php?id=665>

Eechoud, M. van e.a., 2009. Chapter 1 – The European Concern with Copyright and Related Rights. In P. B. Hugenholtz, red. *Harmonizing European Copyright Law*. Information Law Series. Alphen aan den Rijn: Kluwer Law International. **Available at:**
http://www.ivir.nl/publications/eechoud/Harmonizing_European_Copyright_Law_chap1.pdf

Korn, N and Oppenheim, C. 2011. JISC, IPR Toolkit. Overview, Key Issues and Toolkit Elements. Section 2. Practical tools. **Available at:**
http://sca.jiscinvolve.org/wp/files/2009/10/sca_ipr_toolkit-v2-03_section02.pdf

Korn, N. and Oppenheim C, 2009. SCA *Intellectual Property Rights (IPR) toolkit*, JISC. **Available at:**
<http://www.jisc.ac.uk/publications/programmerelated/2009/scaiprtoolkit.aspx>

MinervaEC Working Group, 2010.
Intellectual Property Guidelines. Version 1.0, Minerva. **Available at:**
http://www.minervaeurope.org/publications/MINERVAeC%20IPR%20Guide_final1.pdf

Niggemann, E., Decker, J.D. & Lévy, M., 2011.
Europeana Public Domain Charter, Brussels. **Available at:**
<http://www.europeana.eu/publications>

Suk, Jeannie 2009
The Law, Culture and Economics of Fashion, Harvard Law School. **Available at:**
http://lsr.nellco.org/cgi/viewcontent.cgi?article=1416&context=harvard_olin

Padfield, T, 2010 *Copyright for Archivists and Record Managers*

World Intellectual Property Organization. 2004.
WIPO intellectual property handbook: policy, law and use. 2e ed., Geneva: WIPO



**FASHION AND
INTELLECTUAL PROPERTY
'Best Practice' Guidelines
July 2013**