



europæana  
fashion

---

# IPR 'Best Practice' Guidelines

## Deliverable 4.4

---

**CIP ICT PSP 2012 – Call 5**

Deliverable 4.4 IPR 'Best Practice' Guidelines

Project Number: 297167

**Project start - end date (duration)**

01/03/2012 - 28/02/2015 (36 months)

Name of Lead Contractor for this Deliverable: Victoria & Albert Museum, London

Author (s): Roxanne Peters



Co-funded by the European Commission within  
the ICT Policy Support Programme

Connected to:



---

## DOCUMENT INFORMATION

---

Deliverable number: 4.4  
Deliverable title: IPR “Best Practice” Guidelines  
Contractual date of deliverable: M10 (December 2012)  
Actual date of deliverable: 31<sup>st</sup> December 2012  
Author(s): Roxanne Peters  
Participant(s): Heather Caven, Julia Fallon, Julia Guibault, Naomi Korn  
Workpackage: WP4  
Workpackage title: Use Case Development and User Requirements Definition  
Workpackage leader: SPK  
Dissemination Level:  
Version: 1.0  
Keywords: IPR, copyright, rights clearance, risk management, due diligence

### HISTORY OF VERSIONS

Version	Date	Status	Author (Partner)	Description/Approval Level
0.1	05/09/2012	Draft	Roxanne Peters (V&A)	
1.0	31/12/2012	Final	Roxanne Peters (V&A)	Reviewed by Heather Caven (V&A), Julia Fallon (Europeana Foundation), Julia Guibault, Naomi Korn

### Acknowledgment

*“Work partially supported by European Community under the Competitiveness and Innovation Framework Programme as a Best Practice Network with Grant Agreement n°297167. The author is solely responsible for the content of this paper. It does not represent the opinion of the European Community, and the European Community is not responsible for any use that might be made of data appearing therein”*

## Table of Contents

DOCUMENT INFORMATION.....	2
1. INTRODUCTION.....	4
2. KEY RIGHTS ISSUES AND CONSIDERATIONS.....	5
3. INTELLECTUAL PROPERTY RIGHTS: GENERAL PRINCIPLES.....	6
4. THE EUROPEANA DATA EXCHANGE AGREEMENT.....	14
5. HOW TO SEEK PERMISSION FROM A RIGHTSHOLDER.....	15
6. RISK MANAGEMENT.....	18
7. APPENDICES.....	19
8. FURTHER RESOURCES.....	29
9. GLOSSARY.....	30

---

## 1 INTRODUCTION

---

### 1.1 What the guidelines cover

These Intellectual Property Rights “IPR” ‘Best Practice’ Guidelines are designed to support content providers when clearing rights.

Europeana Fashion is a best practice network comprised of 23 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. It brings together shared knowledge and expertise and will help strengthen fashion’s position as an integral part of our cultural heritage and social history, as well as being a leading creative industry.

This document outlines the first version of the IPR ‘Best Practice’ Guidelines. Following the IPR session held in Berlin on 7 September 2012, the Guidelines have been developed to provide guidance to project partners on how best to manage rights in content being supplied to Europeana Fashion and the Fashion Portal.

The Europeana Licensing Framework<sup>1</sup> helps manage the relationship between partners providing data to Europeana Fashion and users of the site. These Guidelines outline the key responsibilities for partners contributing data.

The Guidelines explore the challenges of seeking permissions 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 will also be considered.

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 they are *not* intended to cover the various national legislations, and therefore partners should have some understanding of their own national law.

### 1.2 Value and Open Access

The main aim of Europeana Fashion is to provide online open access and encourage engagement with more than 700,000 fashion–related digital objects. The value the project deliverables is not only in making content available online, but also the open access terms under which the content is available. Content should be accessible free of charge and be re-usable where possible without further permission being required from rights holders, thus fulfilling open access ambitions.

---

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

---

## 2 KEY RIGHTS ISSUES AND CONSIDERATIONS

---

### 2.1 Intellectual Property Rights and Fashion

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 an expression of art and aesthetics<sup>2</sup>. 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 performers rights in recordings. These Guidelines also explore the key areas to consider when clearing rights of fashion works such as where more than one rights holder has created a work or when there are multiple layers of rights in one work.

In addition to IPR, there are many ways in which the law determines how works may be used. These include rights to privacy data protection<sup>3</sup>, freedom of information<sup>4</sup> and obscenity and indecency. The implementation of these legal issues will vary from country to country so it is important to refer to the relevant legislation where necessary.

### 2.2 Seeking permission: What do I need to consider?

The metadata and previews being provided as part of the Europeana Fashion Project covers a variety of works, including images, text, audiovisual material and other digital content such as website pages and pdfs.

It is the responsibility of project partners to make reasonable efforts to seek 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 in this document in order to reduce risks to themselves and all project partners.

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

The Europeana Data Exchange Agreement (DEA), which applies to all project partners, is based on two simple principles<sup>5</sup>:

---

<sup>2</sup> [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

<sup>3</sup> [http://ec.europa.eu/justice/data-protection/index\\_en.htm](http://ec.europa.eu/justice/data-protection/index_en.htm)

<sup>4</sup> [http://europa.eu/legislation\\_summaries/environment/general\\_provisions/l28091\\_en.htm](http://europa.eu/legislation_summaries/environment/general_provisions/l28091_en.htm)

<sup>5</sup> <http://pro.europeana.eu/documents/10602/560317/Data+Exchange+Agreement+--+Final+--+clean.pdf>

1. Data providers grant Europeana the right to publish previews provided to Europeana. However previews may not be re-used by third parties unless the edm: rights property 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.

Data providers 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 will be outlined in this document. 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’.

## **2.4 When are there rights in digital representations of objects?**

When considering which licence to use, partners need to be familiar with their country’s legislation with regards 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.

Europeana Fashion partners must ensure that users have access to metadata about the objects on the Europeana Fashion portal under Creative Commons open access terms as stipulated in the DEA.

---

## **3. INTELLECTUAL PROPERTY RIGHTS: GENERAL PRINCIPLES**

---

### **3.1 What is Intellectual Property?**

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’<sup>6</sup>*

IPR is further identified as either:

---

<sup>6</sup> <http://www.wipo.int.about-ip/en/>

1. **Copyright** which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.
2. **Industrial** property which includes inventions (patents), trademarks and industrial designs.

## 3.2 Copyright

### 3.2.1 What is Copyright?

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

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 labour<sup>7</sup>.

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.

Copyright generally lasts for the creator's lifetime, plus 70 years after the creator's death.

### 3.2.2 What is Protected by Copyright?

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, engraving and lithography;
- photographic works to which are assimilated works expressed by a process analogous to photography;
- works of applied art;

---

<sup>7</sup> Stokes, S, 2001 *Art and Copyright*, Hart Publishing p 17

- illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

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 copyright or design law only (like Italy), or under both copyright and design law (like The Netherlands). As 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.

For the purpose of these Guidelines, if a digital image or the object the digital image represents is subject to IPR protection, it will be covered by copyright, a design right or a related right (outlined in 3.4). Appendix A provides an example of the main categories covered by copyright in the UK, and also reflects most European countries.

### **3.2.3 If a creator owns the copyright, what rights do they have?**

Copyright gives creators exclusive rights to manage the way their works are used. Rights granted to creators fall into two categories: (a) economic rights which include the right to distribute, reproduce, rent, perform and communicate a work to the public and (b) 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.

It is important to remember that the owner of the work is not always the owner of the rights in the work.

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

### **3.2.4 Fashion and Copyright: Two-dimensional and Three-dimensional Objects**

Partners will be providing different types of digital content representing fashion items. As outlined above, for the most part the digital images and audiovisual works will (if protected) enjoy copyright protection. To understand how fashion objects can be categorised, it might be useful to consider the following:

1. **Two-dimensional fashion objects** (includes original graphic and artistic works, fashion designs, fashion plates, photographs featured on textiles and garments, fashion photographs, documents of fashion exhibitions, fashion blogs, text based items, images, audio-visual works)



2. **Three-dimensional fashion objects** (includes the look, shape and contours of a garments e.g. the bias cut of a dress)

As outlined in Article 2 of the Berne Convention , all examples in category 1. will be protected by copyright as artistic or literary works, provided they are original. However, the status of protection of three-dimensional aspects of fashion objects 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 of clothing and accessories”<sup>8</sup> 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. Where necessary, partners will need to refer to national legislation before using fashion objects.

### 3.3 Design Rights

Fashion garments and accessories may be protected by Design Rights, which give creators rights 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 (unlike copyright in the EU) 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 first 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.

The Council Regulation on Community Design 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”. 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. The aforementioned use 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.

---

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

If any of the content being provided to Europeana Fashion represents objects protected only by Design Rights, rights clearance will **not** be required as permission is only required if someone wishes to make a direct three dimensional copy of the object.

There may be situations where design rights and copyright overlap. This can happen when an otherwise functional garment such as a shoe is covered with a graphic design. In this example, permissions to reproduce the shoe would be required as the graphic design is protected by copyright.

### **3.4 Related Rights**

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 on 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.

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)<sup>9</sup> 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

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

### **3.5 Database Rights**

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 being that copyright protects the creativity of the author, whilst database rights protect 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 designer's contact details is more likely to be protected by database rights.

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.

---

<sup>9</sup> [http://ec.europa.eu/internal\\_market/copyright/term-protection/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm)

### 3.6 Trademarks

Trademarks are the strongest type of IPR 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.

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.

For most of the content being provided to Europeana Fashion and the objects the digital content represents, 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.

In most cases, if not all, permission would not be required for digital representations of objects 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 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.

### 3.7 Fashion and Copyright: Haute-Couture and Mass Produced Fashion Garments and Accessories

In the UK, fashion garments may be granted different levels of copyright depending on the following criteria:

1. Is the fashion garment/accessory a one-off haute couture piece with artistic qualities? e.g. A hat by Stephen Jones.
2. Has the fashion garment/accessory (as an artistic work) been put into production using an industrial process (50 copies or 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.

If a fashion garment is considered to be an 'artistic work of craftsmanship', it will be granted the same duration of protection as other artistic, literary and musical works, (life of the creator plus 70 years from the end of the year in which the creator dies). If the same fashion garment is put into production using an industrial process and over 50 copies is made, then the garment does not qualify for copyright protection. If registered as a design, protection is reduced to 25 years from the end of the calendar year in which copies of the design were first marketed.

For fashion garments/accessories which were designed to have a purely functional purpose, they will most likely be protected by Design Rights.

### **3.7.1 Case Study: V&A Fashion Collections: How to decide when to seek permissions for using fashion garments and accessories**

It is understood that domestic law in countries represented by project partners may vary from the UK approach. As a guide, the V&A wishes to share its current approach to when to seek permissions.

Following legal advice, the V&A seeks permission for using fashion garments and accessories as follows before publishing high resolution images:

1. For one-off couture garments/accessories which are still protected by copyright, **permission from the rights holder is required.**
2. For a fashion garment/accessory (as an artistic work) which is put into production using an industrial process (50 copies or more) where the 25 years has expired, **permission from the rights holder is not required.**
3. For a fashion garment/accessory (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 from the rights holder is required.**
4. 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.

For any commercial use, rights clearance would be negotiated according to the use.

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 an object is greater than any commercial reason.

### **3.7.2 Orphan Works**

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 who 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 take the risk to publish it.

The recently adopted Directive of 25 October 2012<sup>10</sup> 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 owner 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.

---

<sup>10</sup> [http://ec.europa.eu/internal\\_market/copyright/orphan\\_works/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm)

---

## 4. THE EUROPEANA DATA EXCHANGE AGREEMENT

---

### 4. The Europeana Data Exchange Agreement

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 parties<sup>11</sup>.

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

#### 4.1 Rights information relating to content (edm: rights)

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.

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

#### 4.2 Available Rights Statements

There are four different types of rights statements 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 License or the CC Zero Public Domain Dedication** A data provider can choose one of 6 Creative Commons Licenses or the CC Zero Public Domain Dedication<sup>12</sup> when the data provider is the rights holder, or permission has been granted by the rights holder and wants to make content available for re-use.
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).

---

<sup>11</sup> The Europeana Licensing Framework page 7

<sup>12</sup> 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.

Further guidance on the different rights statements is available here:

<http://pro.europeana.eu/documents/900548/0d423921-23e0-45fa-82a4-2ac72b3e6f38>.

---

## 5. HOW TO SEEK PERMISSION FROM A RIGHTS HOLDER

---

### 5.1. General Considerations

- 5.1.1 For all objects identified as being in copyright or a related right, it is the responsibility of the project partner to seek permission for the use of any digital representation of the object which belongs to a third party.

#### 5.1.2 Do I need to seek permission from the rights holder?

In order to decide if you need to seek permission, it is important to remember that rights expire for all works protected by IPR. A number of factors need to be considered such as :

1. the type of work ( e.g. graphic, photograph, fashion garment)
2. when it was created
3. if the creator is known
4. if there is more than one creator
5. if there is more than one rights holder if the rights holder is not the creator
6. the nationality of the creator ( as duration of rights may vary)
7. if there is more than one layer of right within one work
8. whether the work has been published.

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 making it available under a Creative Commons Licence.

#### 5.1.3 How much time should I allow to secure permission?

Some of the content being provided to Europeana may take longer to obtain permissions than others due to any of the following:

1. Before contacting a rights holder, you need to establish if rights actually exist in the work.
2. The content may consist of layers of rights and a number of rights holders. For example an audiovisual work of a catwalk may have rights in the complete work itself, the music, the fashion garments, performer's rights. If rights have not been fully assigned to the owner of the audiovisual work, it will take a considerable amount of time to secure permissions.
3. The rights holder is unknown or untraceable.
4. The rights holder is known but is not responding.
5. Where possible, it is beneficial to negotiate favourable terms with a rights holder, and this can take time.

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

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

#### **5.1.4 What is Due Diligence?**

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. Moreover, any diligent search carried out within the context of the Orphan Works Directive will need to be documented and put in evidence in a register.

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>
- Internet search (with most useful results usually coming up within 10 minutes' searching);

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

#### **5.1.5 Are there any resources I can use to help me understand when copyright in an object expires?**

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.

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.

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

#### **5.1.6 I need to contact a collecting society. What should I consider?**

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.

For any content which is managed by a collecting society, partners are advised to consider the following:

1. Identify all objects which are represented by a collecting society.
2. Identify all the different uses you require permission for.
3. Seek permissions for use of all objects as part of an umbrella agreement.

4. Allocate a sum of money to the project for seeking permissions from collecting societies as costs are likely to apply.

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

Appendix J is a template take down notice which can be published online when using content where permissions has not been granted.

---

## 6. RISK MANAGEMENT

---

### 6.1 What is risk management?

It is important to establish whether there are any third party rights in the content and for the organisation to clear these right 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. There may be some situations where a decision is made to publish a digital representation of an object based on risk management.

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

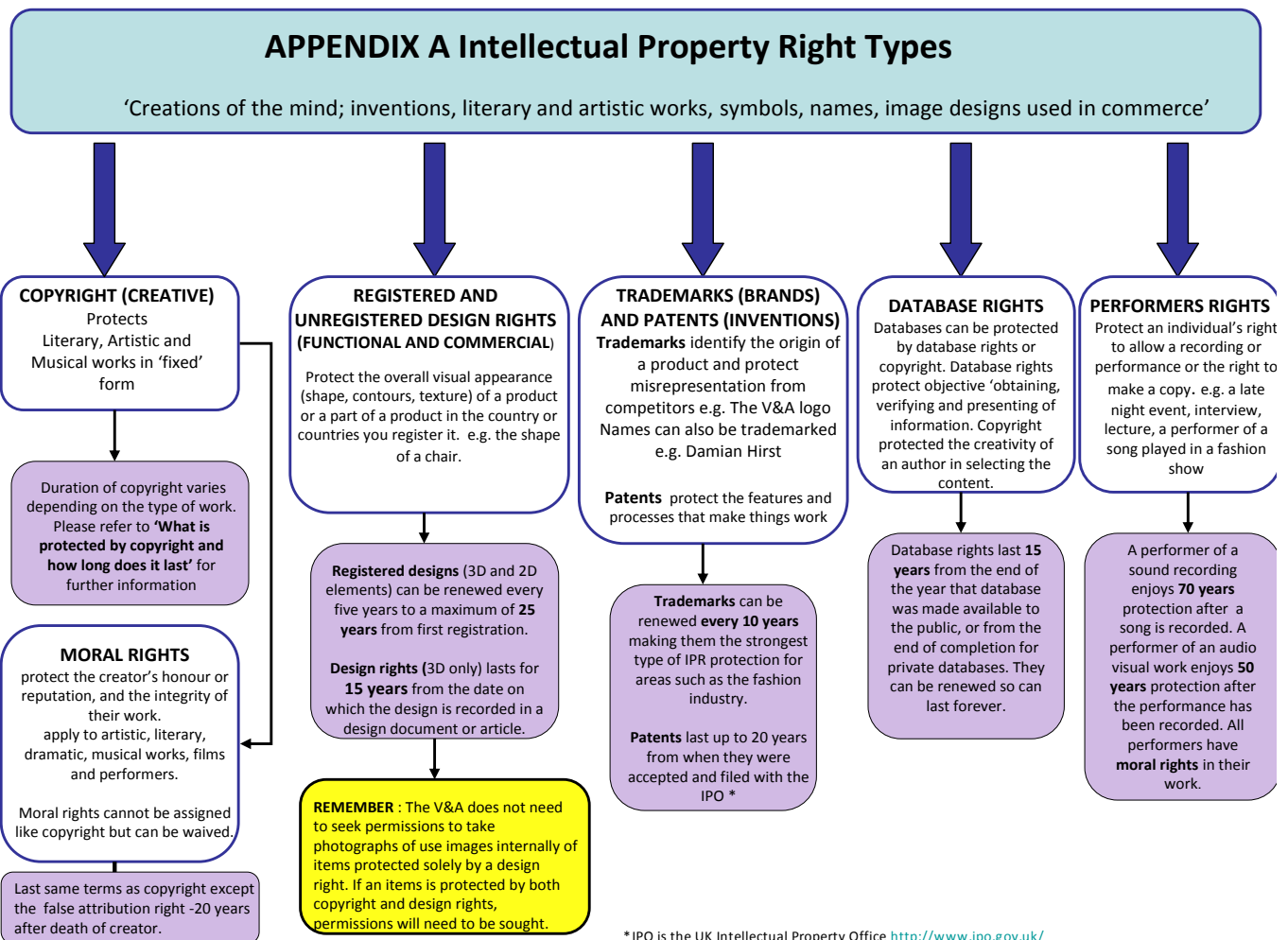
To help partners assess the level of risk associated with using orphan works, a useful resource as part of a risk assessment is the Web2Rights Rights Management Calculator. The Risk Management Calculator can be used to help understand the types of factors that might determine specific types of risk associated with using Orphan works.<sup>13</sup>

Further information can be found here:

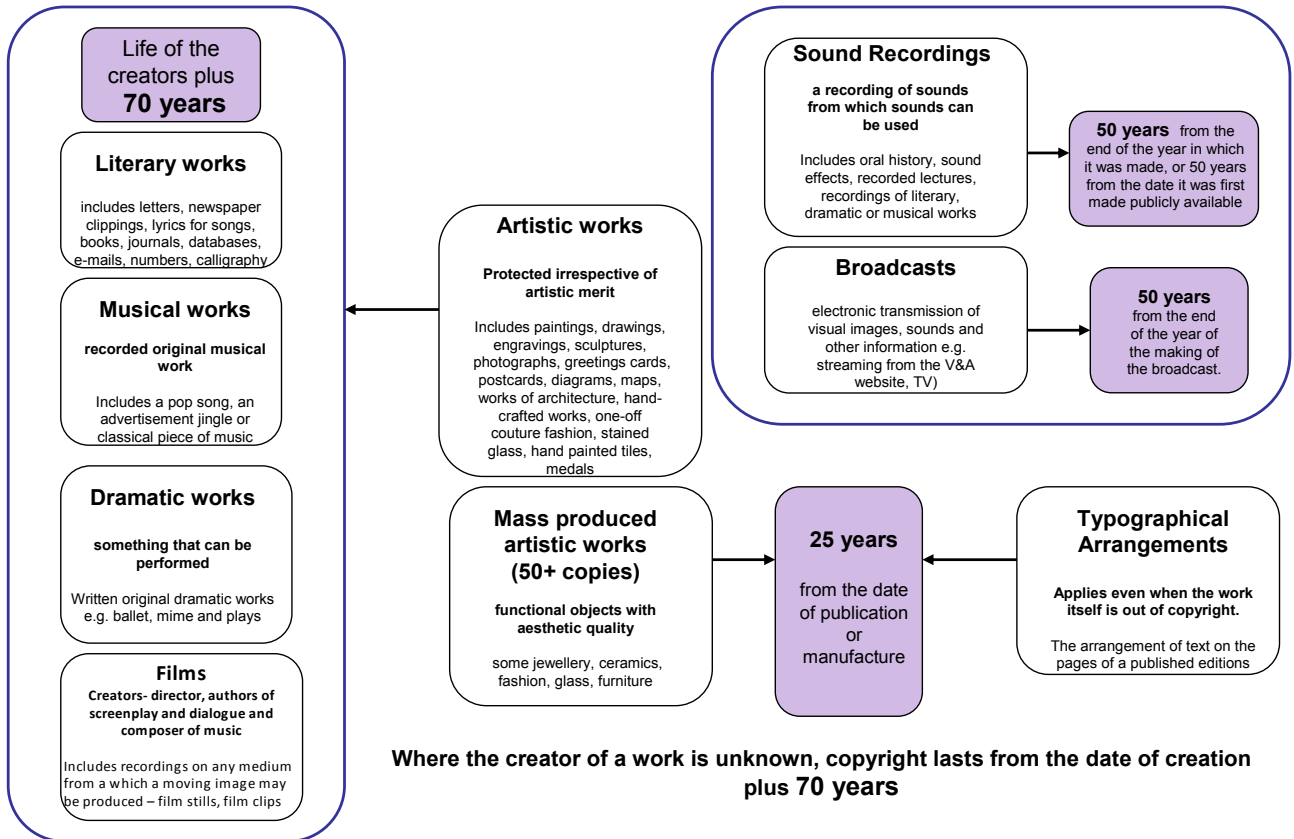
<http://www.web2rights.com/OERIPRSupport/risk-management-calculator/>

---

<sup>13</sup> 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>

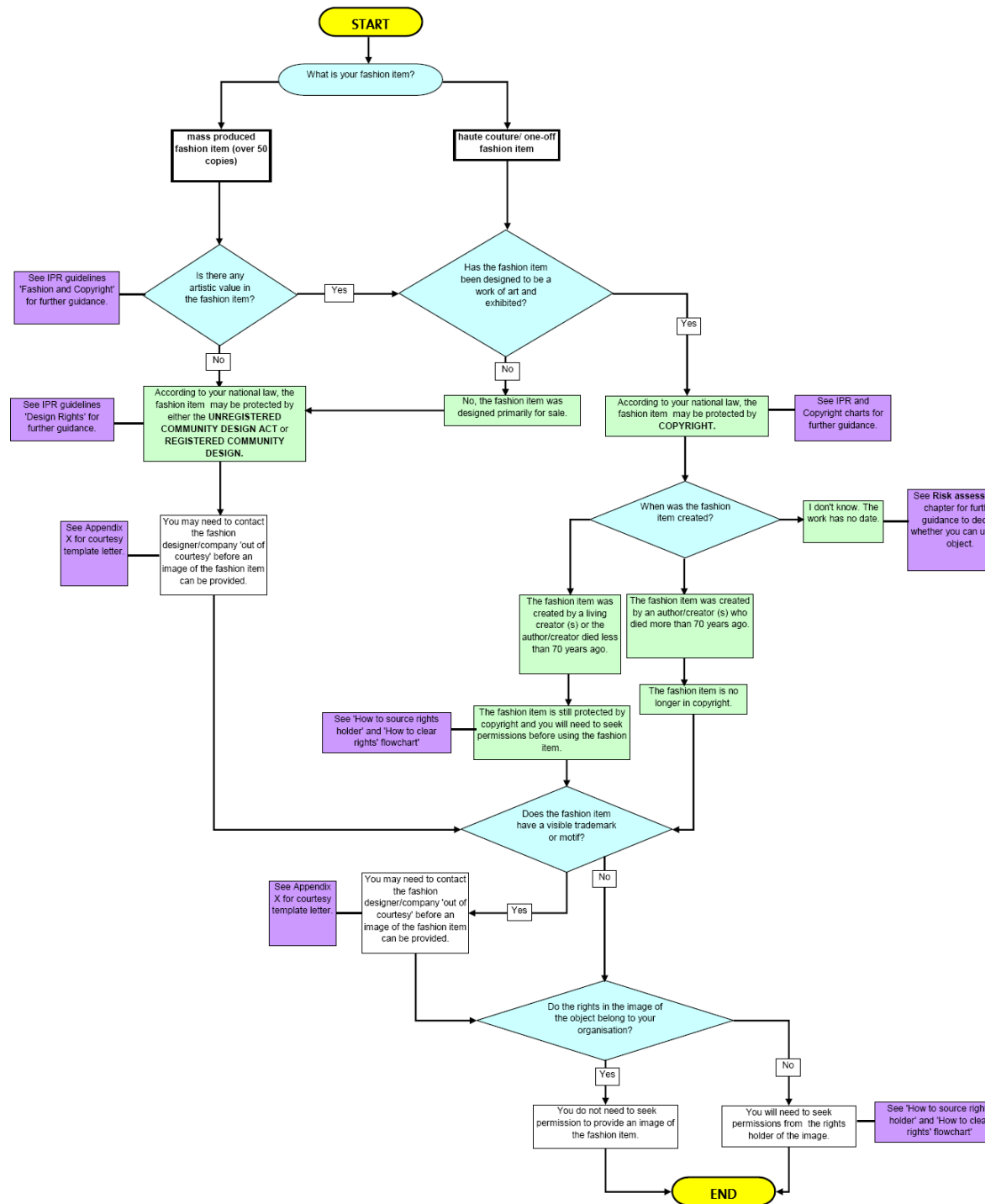
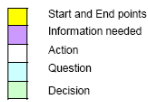


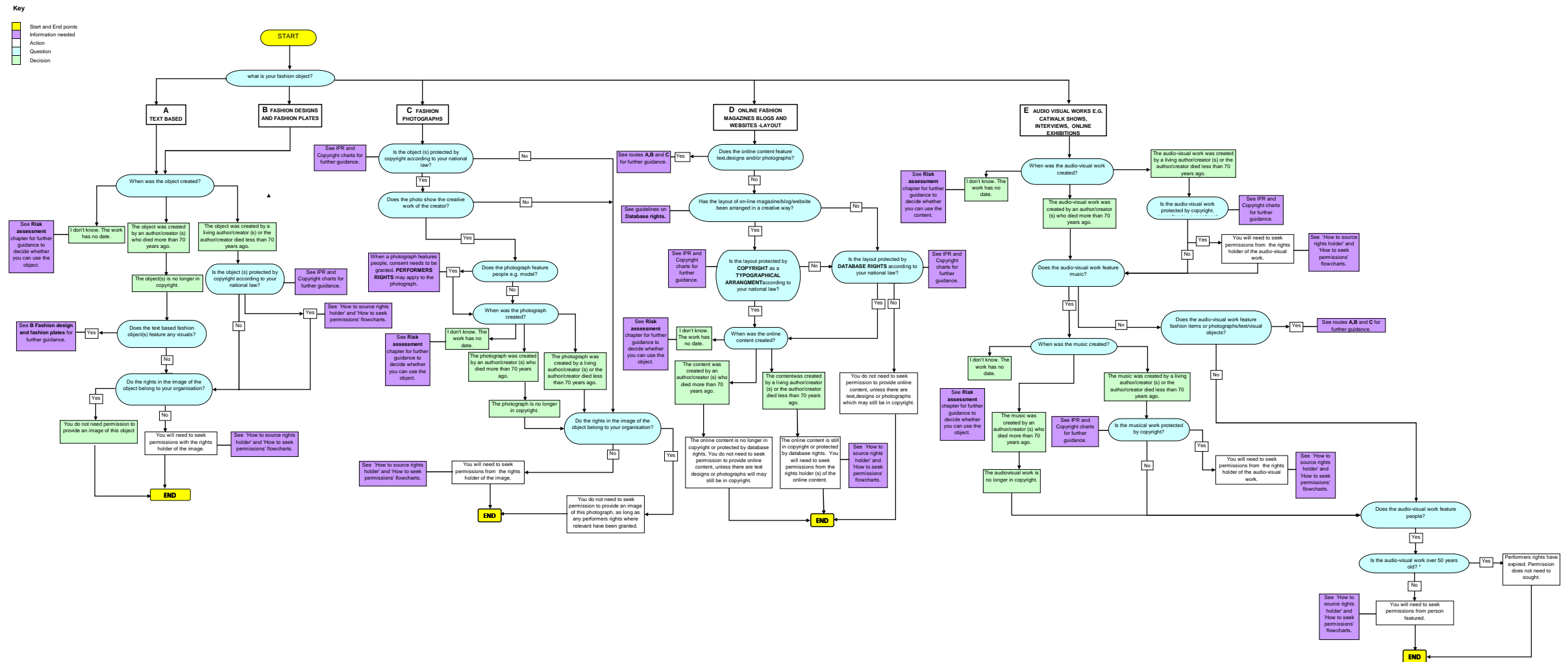
## APPENDIX B What is protected by copyright and how long does copyright last?



## APPENDIX C: Do I need to clear rights for this fashion item?

### Key





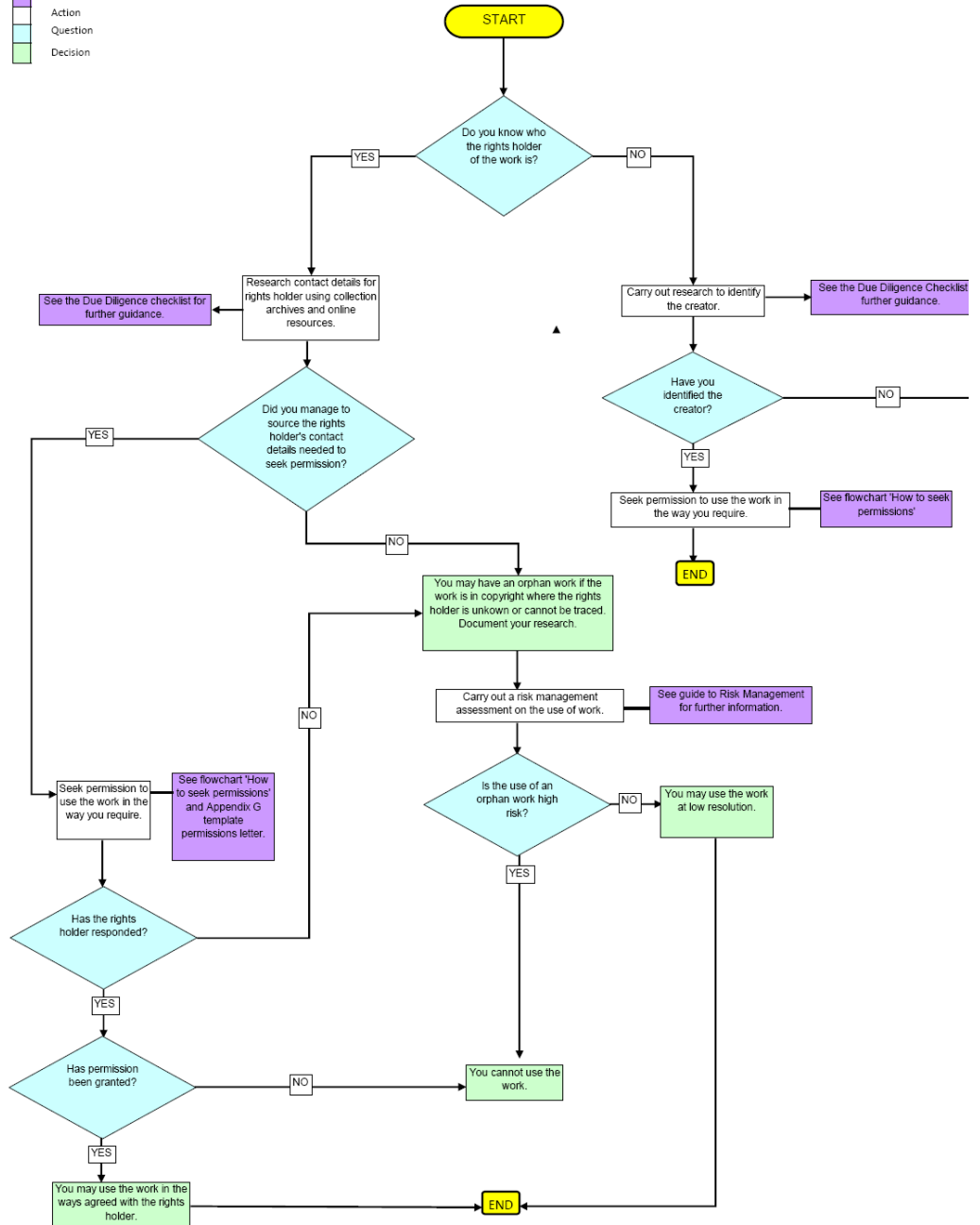
\* note that from November 2013, performers and creators of sound recordings, will enjoy 70 years of protection.

## Appendix E How to trace a rights holder of a work

### Key

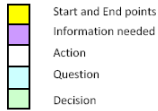
- Start and End points
- Information needed
- Action
- Question
- Decision

This flowchart should be used when you do not know from whom to seek permission to use a work

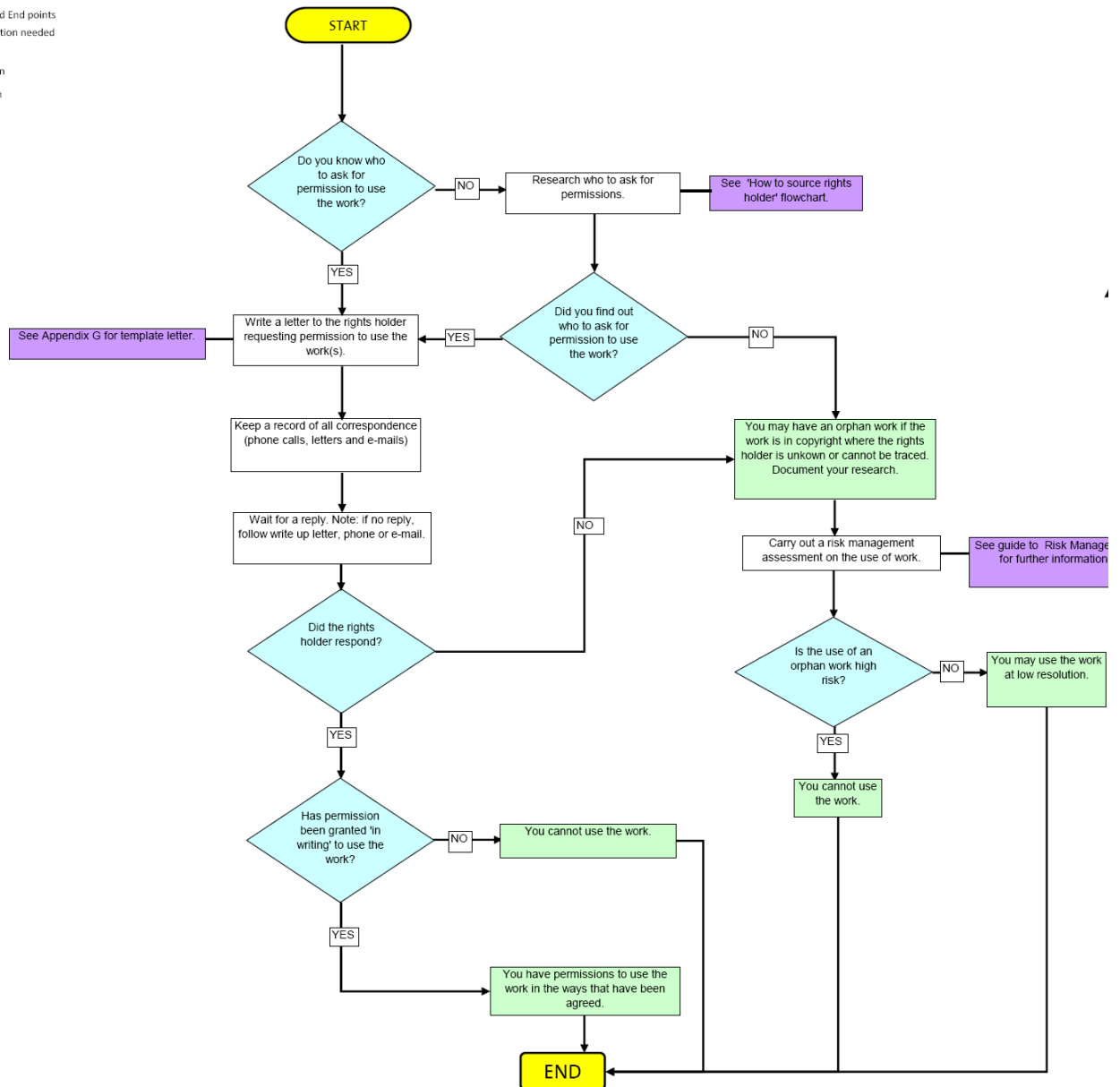


## APPENDIX E How do I seek permission to use this fashion item?

Key



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





## APPENDIX G SAMPLE LETTER TO A RIGHTS HOLDER SEEKING PERMISSION



Dear *{add name and title}*,

Europeana Fashion is a best practice network comprised of 23 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 your consideration.

Signed by: .....Date:.....

Signed by:..... Date:

## APPENDIX H SAMPLE COURTESY LETTER TO A RIGHTS HOLDER



Dear {add name and title},

Europeana Fashion is a best practice network comprised of 23 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.

Thank you in advance for your consideration.

Signed by: .....Date:.....

## 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 OTP<sup>14</sup>. 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 permissions 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 a 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.

*Edited and reproduced with kind permission of Sarah Knuvelde & Erwin Verbruggen*

## 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.]**

---

<sup>14</sup> Onafhankelijke Televisie Producenten (Independent Television Producers)

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 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 XXXX at: [XXXX 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/templatetakenoticedown.pdf>

**FURTHER RESOURCES**

Anon, b. *Understanding Copyright and Related Rights*, WIPO. Available at: [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](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* **Available at:**

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](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](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](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.version1.europeana.eu/web/europeana-project/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](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.

## GLOSSARY OF TERMS

<b>Content</b>	The metadata and/or images/audiovisual work being provided to Europeana Fashion.
<b>Creator</b>	The creator of a work which can be protected by copyright or a related right.
<b>Copyright</b>	An exclusive property right which protects a number of different types of works from being copied and used without permissions of the rights holder.
<b>Data</b>	Metadata and preview images being provided to Europeana Fashion.
<b>Digital representation</b>	The preview image or audiovisual work which may contain tangible works.
<b>Design Rights</b>	An exclusive property right which protects the three dimensional elements of a number of different types of works from being copied and used without permissions of the rights holder.
<b>Due Diligence</b>	The documented efforts for tracing rights holders.
<b>IPR</b>	Intellectual Property Rights
<b>Orphan Work</b>	Work in copyright for which the rights holder is unknown or cannot be traced.
<b>Metadata</b>	Data describing an information resource, sometimes referred to as 'data about data'
<b>Previews</b>	A thumbnail image of an object.

<b>Permissions</b>	The consent of a rights holder to use his/her works in a number of ways.
<b>Rights holder</b>	The legal owner of rights in a work and whose permission is required for use.
<b>Risk Management</b>	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.
<b>Work</b>	The tangible expression of an idea which may be protected by copyright.