

# Digitization and the orphan works problem. Which way forward for UK cultural heritage institutions?

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# Orphan works

= Works in which copyright exists, but where the copyright owner is either unknown or cannot be located.

<http://copyrightuser.org/topics/orphan-works/>

*Why is it a problem?*

- New and potentially valuable uses made possible by digital technology are undermined (e.g. digitization of library and archive collections)
- Permission cannot be presumed or implied (no 'silent consent' rule)
- Exhaustion of rights only applicable to distribution of (physical) copies

# Why are there orphan works?

- ✓ No formal registration system for copyright (Berne Convention, art. 5.2), nor for transfer of ownership
- ✓ Low threshold for protection – ‘unintentional authorship’
- ✓ Protracted terms of protection

# The extent of the problem

- Services offered by 88% of European libraries, 94% of archives and 95% of museums are “seriously affected” by the OW problem (JISC 2009)
- 40% of all print works in the British Library (Gowers Review, § 4.91)

and

- 90% of photographs in the UK archives and 95% of all British newspaper articles written before 1912 (Vuopala 2013)

are estimated to be orphans.\*

- *‘20<sup>th</sup> Century digital black hole’* (Boyle 2009)

\* Cf. UKIPO, Orphan Works Impact Assessment, 2012

# Regulatory options

- Limited liability (limitations on monetary and injunctive relief against good faith infringers)
- Permitted / licensed use with 'opt-outs' (→ Extended Collective Licensing)
- Permitted / licensed use upon unsuccessful 'diligent search' of the rightholder

# The UK orphan works regime

## 1. Licensing scheme – CDPA, s. 116A (ERR Act 2013)

- Applicable to all copyright works and all kind of uses
- ‘Diligent search’ of the rightholder required
- IPO to issue a non-exclusive licence within the UK and for up to 7 years

<https://www.gov.uk/government/collections/orphan-works-guidance>

## 2. Permitted use – CDPA, s. 116D (*impl.* Directive 2012/28/EU)

- Limited to CHI (public libraries, museums and archives)
- Limited to non-commercial uses
- Not applicable to stand-alone photographs
- ‘Diligent search’ of the rightholder required
- ‘Reappearing authors’ entitled to fair compensation

# Diligent search

- Expensive and time-consuming (est. £ 47 to £ 126 per item for books; 3.¼ to 6.5 hours per hour of TV/radio broadcasting material\* – other costs? Fair compensation, Art. 6.(5)?)
- It can be outsourced (Rec. 13: “MS should be permitted to provide that such diligent search may be carried out by organisations referred to in this Directive or by other organisations.”)
- CHIs are ultimately responsible for DS on items in their collections (Art. 3(1): “...the organization ... shall ensure that a diligent search is carried out in good faith ... by consulting the appropriate sources...etc.”)

\* UKIPO, Orphan Works Impact Assessment, 2012

*How can we unlock the potential offered by the combination of legislative efforts and available technologies?*

*How can we make right clearance easier and less expensive?*



# The EnDOW project



Arts & Humanities  
Research Council

## EnDOW: Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance

- 3-years collaborative project funded under Heritage Plus, a programme launched by agencies of 18 European countries and the European Commission as part of the Joint Programming Initiative in Cultural Heritage and Global Change.
- The project is a partnership of four leading European research centres led by CIPPM

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<https://microsites.bournemouth.ac.uk/cippm/2015/06/02/endow/>

# Distributed Orphan Works Clearance

- *Using the ‘wisdom of the crowd’ to overcome the diligent search bottleneck*

“While performing centralized diligent searches on items contained in CHI collections is legally complicated and expensive, EnDOW builds a de-centralised, user-friendly and legally informed platform that allows end users to perform independent diligent searches and provide cultural institutions with the results of these searches.”

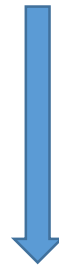
# Crowdsourcing

“Online, distributed problem-solving and production model that leverages the collective intelligence of online communities to serve specific organizational goals” (Brabham, 2013)

- Successfully experimented for ‘information gathering’ tasks (e.g. [‘Peer-to-patent’ project](#)) (Noveck 2006)
- CHI are well positioned to encourage public participation in projects related to their mission (e.g. [Europeana 1914-1918](#), untold stories & official stories of WWI; [Mechanical Curator project](#) of British Library)
- *Problem*: information coming from the crowd might be inaccurate, incomplete or mistaken

# Crowdsourcing

Organization  
(having a task to be performed)



Community  
(willing to perform the task)

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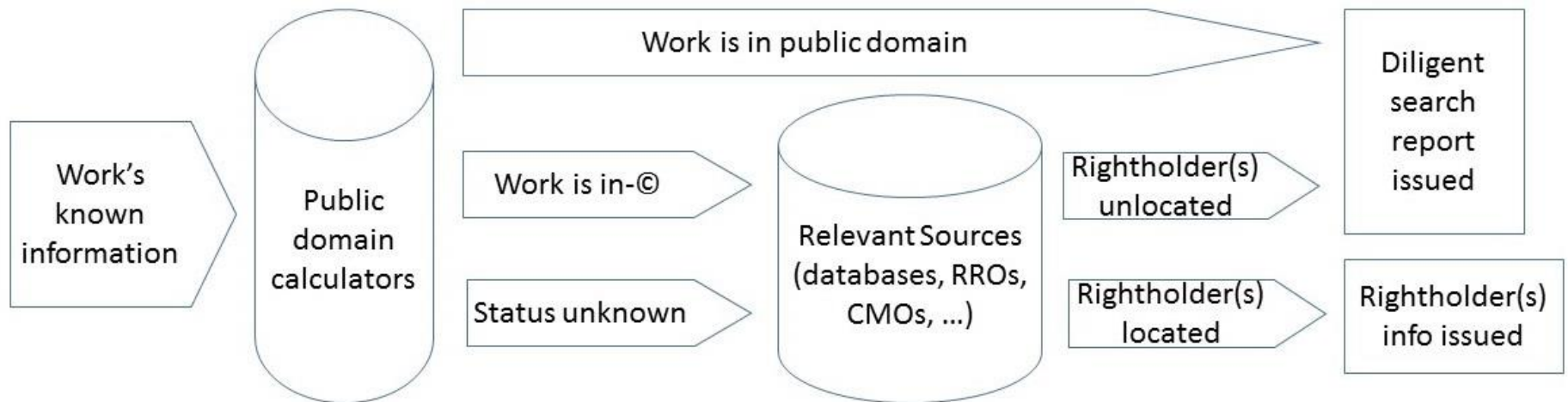
ONLINE PLATFORM  
(to enable performing the task)

Community  
(willing to perform the task)

# The Diligent Search Platform

- Online publicly accessible platform that enables end users to perform “guided diligent searches” on items contained in CHI collections

## *Summary flowchart of the operations*



# Scenario 1 - 'Bottom-up' use of the platform

- The user searching a specific resource online is unable to access the content (legally);
- Link to EnDOW platform to perform a diligent search;
- The result of the search is passed on to the CHI that possess the item

*Examples...*

<http://books.google.com/books?id=yXISAAAAYAAJ&oe=UTF-8>

[http://it.wikipedia.org/wiki/Eduardo\\_Piola\\_Caselli](http://it.wikipedia.org/wiki/Eduardo_Piola_Caselli)

<http://www.archive.org/details/leoperedarteapp00piolgoog>

[http://books.google.com/books?id=\\_CdAAAAAIAAJ&oe=UTF-8](http://books.google.com/books?id=_CdAAAAAIAAJ&oe=UTF-8)

<http://www.treccani.it/enciclopedia/tag/nicola-stolfi/>

<http://www.archive.org/details/laproprietintel00stolgoog>

## Scenario 2 - 'Top-down' use

- CHI to issue a list of works to be cleared and solicit contribution by communities of users
- Registered users to submit results of their searches to the CHI for validation



# Scenario 3 – CHI use

- Institutional users engaged in small-scale digitization projects (e.g. small- and medium-size CHI, public authorities or educational establishments operating research and scientific libraries/archives, ...)
- Use of the platform to clear rights on items in their own collections

# Open issues

- Legal responsibility for false or inaccurate information
- Bad faith use of the platform
- Use of digitized items for indexing and search (but not making available – Google Books model) – permitted in the US, but in EU?
- Beneficiaries of the Directive: small-scale CHI – how small? Educational institutions? Private collections? ...

*Thank you!*

*More on EnDOW on the CIPPM website:*

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