

Digitization, orphan works and the problem of “diligent search”: which way forward for European cultural institutions?

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The EnDOW project

EnDOW (“Enhancing access to 20th Century cultural heritage through Distributed Orphan Works clearance”) is a 3-years project funded under **Heritage Plus**, a programme launched by 18 European national agencies and the European Commission as part of the Joint Programming Initiative in Cultural Heritage and Global Change.

The project is a partnership of four European research centres:

- CIPPM, Bournemouth University (project leader)
- CREATE, University of Glasgow
- IViR, University of Amsterdam
- ASK, Bocconi University, Milan



The EnDOW project

The main goal of EnDOW is...

- ❑ to facilitate the process of right clearance for European cultural institutions engaged in digitization of material contained in their collections.

Specifically, EnDOW aims at...

- ❑ designing, implementing and testing an efficient and cost-effective system for determining the “orphan work” status of library, archive and museum material, according to the requirements of the European Directive.

More information on EnDOW at <http://diligentsearch.eu>

Mass digitization (I): the Google model

- Google Books, Art Project, Google Cultural Institute
- Fair use defence: successful (*AG v HathiTrust*, *AG v Google Inc*)
- Exploiting the computational potential of digitized objects (text and data mining)
- A new digital monopoly?

Mass digitization (II): the European way

- Policy-driven process (Recommendation 2011/711/EU, DSM agenda, Europeana, ...)
- Maximize dissemination
- Rights clearance and the orphan works problem

The orphan works problem: regulatory options

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

The EU orphan works regime – Dir. 2012/28/EU

1. Permitted use
- Cultural Heritage Institutions (CHI) → non-commercial → no stand-alone photographs
- Limitations as to the user (art. 1), the use (art. 6) and the subject matter
 - ‘Diligent search’ of the rightholder required (art. 3) (mutual recognition, art. 4)
 - ‘Reappearing authors’ entitled to fair compensation (art. 6.5)

2. Specific national solutions – (Rec. 4 / MoU 20.09.2011) – e.g.

- ✓ Hungarian compulsory licence system (Act CXII of 2008)
 - ✓ UK IPO licensing scheme (CDPA, s. 116A – ERR Act 2013)
 - ✓ Danish ECL system (DK Copyright Act, s. 50.2 - 2008)
 - ✓ French law on digital exploitation of unavailable 20th Century books (2012/287)
 - ✓ ...
- } Premised upon diligent search

The “diligent search” requirement (art. 3)

- To be carried out on a work-by-work basis
- Member States to determine guidelines and sources to be compulsorily consulted when carrying out a DS
- Expensive and time consuming

Costs of diligent search

Institution	Project	Work
<p>Cost of exhibition development (calendar time, scheduling, space)</p> <p>Knowledge costs related to handling IP</p> <p>PR / reputation costs arising from dispute</p> <p>Fees to access databases used in DS</p>	<p>Labour cost of examining works</p> <p>Labour cost of searching for rightsholders / DS</p> <p>Labour cost of corresponding with rightsholders (Covey (2005; Stobo et al, 2016))</p> <p>Material cost of communicating with rightsholders (Covey, 2005)</p> <p>Alterations to project design incurred by rightsholder requests</p>	<p>Fees paid to rightsholders located by DS</p> <p>Fees paid to license orphan works in UK scheme or ECL</p> <p>Alterations to display of work at request of rightsholder</p> <p>Takedown of work on rightsholder reemergence (Schofield & Urban, 2015)</p> <p>Compensation paid on rightsholder reemergence</p>




Costs of diligent search – empirical evidence (I)

Institution	Study	No. works	Results
Carnegie Mellon University Libraries	Troll Covey (2005)	277 in-copyright books	Unable to identify rightsholder: 19% Rightsholder permission given: 24% Permission not given: 30% No response: 27% Time spent on DS per work: ~3.25 hrs / \$15USD
UK Wellcome Library	Vuopala (2010)	1,400 posters	Unable to identify rightsholder: 30% Rightsholder permission given: 19% Permission not given: 3% No response: 48% Time spent on DS per work: 0.5 hrs / €50
UK National Archives	Vuopala (2010)	1,114 legal documents	Unable to identify rightsholder: 35% Rightsholder permission given: 61% Permission not given: 4% No response: 0% Time spent on DS per work: £31 GBP

Costs of diligent search – empirical evidence (II)

Institution	Study	No. works	Results
British Library	Stratton (2011)	140 books published between 1870 and 2010	Unable to identify rightsholder: 31% Rightsholder permission given: 17% Permission not given: 26% No response: 26% Time spent on DS per work: 4 hrs
BBC	Hargreaves (2011) IPO (2014)	1,000 hours of factual TV programming	Unable to identify rightsholder: assumed 0% Rightsholder permission given: assumed 100% Time spent on DS per work: 6.5 hrs / £91
University of Glasgow Libraries	Stobo et al (2016)	Sample of 433 individual works in a collage / scrapbook	Unable to identify rightsholder: 80% Rightsholder permission given: >8.5% Permission not given: 5% No response: 6.5% Time spent on DS per work: 0.2 hrs

Costs of diligent search – accessibility of sources

						
Sources from	IPO guidelines		EnDOW RA		EnDOW RA	
N. Sources	210	%	357	%	87	%
Free Access online (incl Reg)	147	70%	200	56%	47	54%
Not Freely Accessible Online (incl. all below)	63	30%	157	44%	40	46%
DB Not Accessible online	46	22%	82	23%	36	41%
Paying access online	9	4%	10	3%	2	2%
Free Access on site	5	2%	24	7%	0	0%
Partial Access online	3	1%	33	9%	1	1%
WIP (will be access online)	0	0%	8	2%	1	1%

Source: M. Favale, S. Schroff and A. Bertoni *Requirements for Diligent Search in the United Kingdom, the Netherlands and Italy*, EnDOW Report 1.1 (2016) <<http://diligentsearch.eu/resources>>

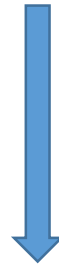
Solution: from centralized to de-centralized DS

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)
- CHIs 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

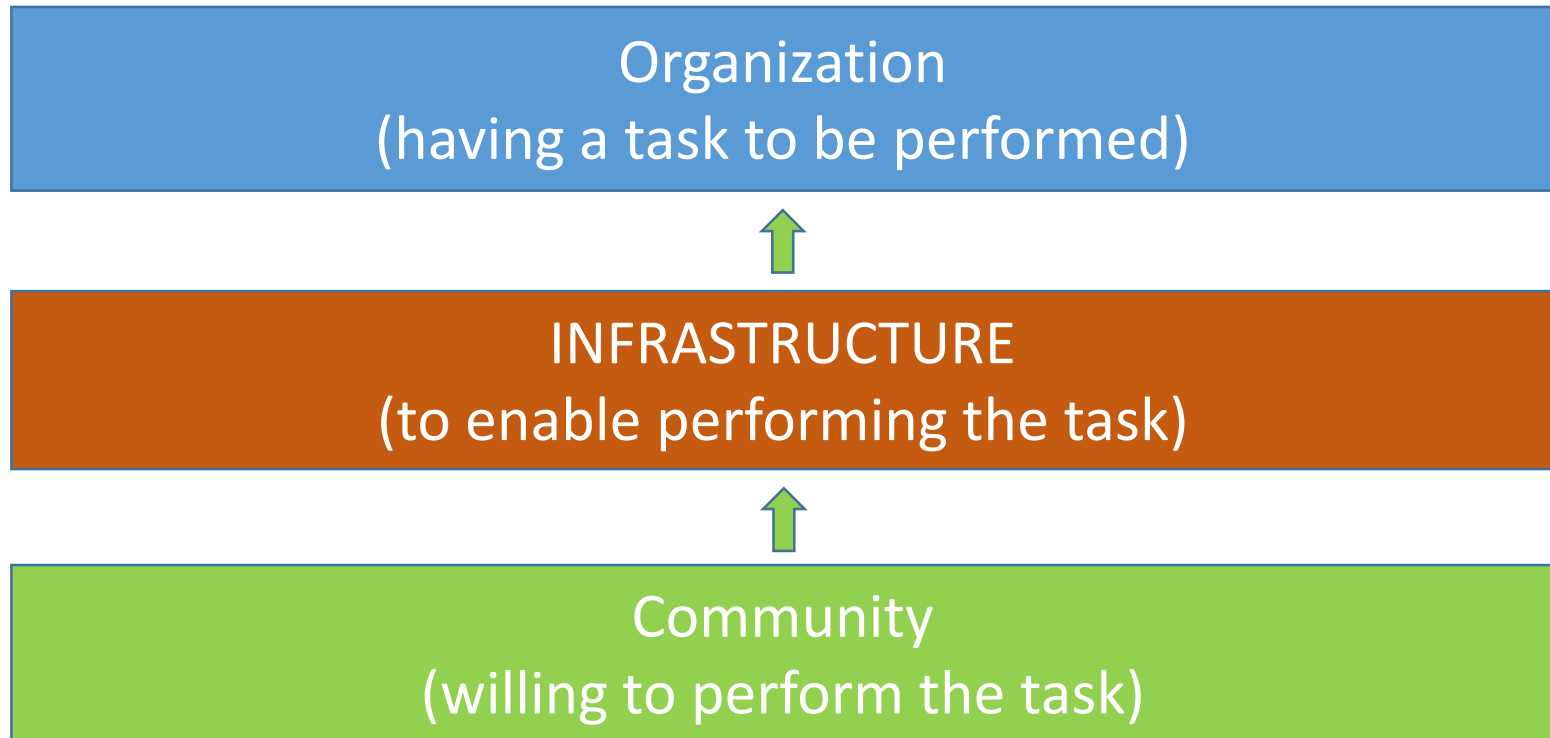
Crowdsourcing

Organization
(having a task to be performed)

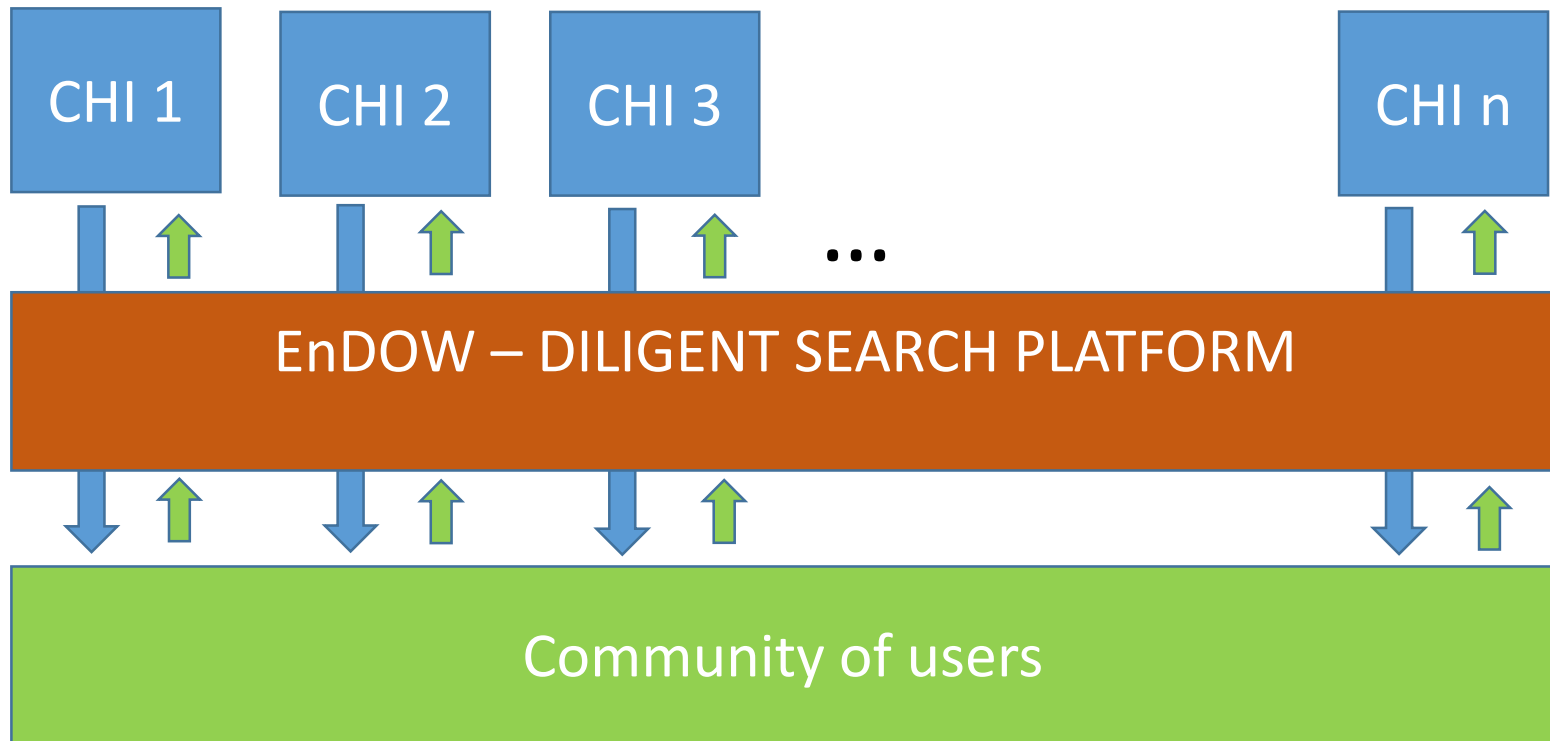


Community
(willing to perform the task)

Crowdsourcing



Crowdsourcing Diligent Searches





DILIGENT SEARCH

Helping cultural institutions digitise collections

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

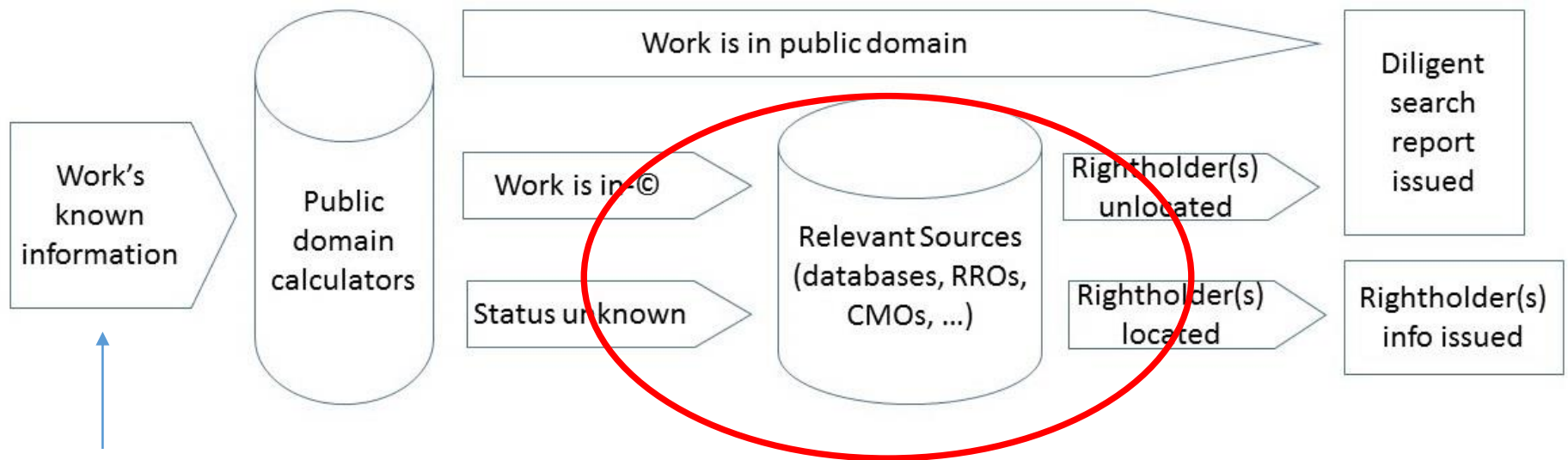
- CHI to issue a list of works to be cleared and solicit contribution by communities of users
- Registered users to submit results of their searches to the CHI for validation
- Small- and medium-size CHI (w/out expertise on copyright management): use of the platform to perform diligent searches on items in their own collections



DILIGENT SEARCH

Helping cultural institutions digitise collections

Summary flowchart of the operations



Work is not included in [OW Database](#)

Open (legal) issues

- Legal responsibility for false or inaccurate information / bad faith use of the platform
- ‘Infringing by searching’: Is it an infringement to see/hear a work for purposes of clearance? Or to access a protected database for the same purpose?
- Digitization for indexing and search (w/o making available) – fair use in the US, but in EU? (example: <https://www.orphanworkslicensing.service.gov.uk/view-register>)