

# 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 20<sup>th</sup> 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 <b>exhibition development</b> (calendar time, scheduling, space)</p> <p><b>Knowledge costs</b> related to handling IP</p> <p><b>PR / reputation costs</b> arising from dispute</p> <p>Fees to <b>access databases</b> used in DS</p>	<p>Labour cost of <b>examining works</b></p> <p>Labour cost of <b>searching</b> for rightsholders / DS</p> <p>Labour cost of <b>corresponding</b> with rightsholders (Covey (2005; Stobo et al, 2016))</p> <p>Material cost of <b>communicating</b> with rightsholders (Covey, 2005)</p> <p><b>Alterations to project</b> design incurred by rightsholder requests</p>	<p><b>Fees paid</b> to rightsholders located by DS</p> <p>Fees paid to <b>license</b> orphan works in UK scheme or ECL</p> <p><b>Alterations to display</b> of work at request of rightsholder</p> <p><b>Takedown of work</b> on rightsholder reemergence (Schofield &amp; Urban, 2015)</p> <p><b>Compensation paid</b> 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	%
<b>Free Access online (incl Reg)</b>	<b>147</b>	<b>70%</b>	<b>200</b>	<b>56%</b>	<b>47</b>	<b>54%</b>
<b>Not Freely Accessible Online (incl. all below)</b>	<b>63</b>	<b>30%</b>	<b>157</b>	<b>44%</b>	<b>40</b>	<b>46%</b>
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>>

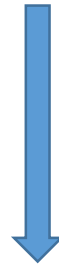
# Solution: from centralized to de-centralized DS

**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

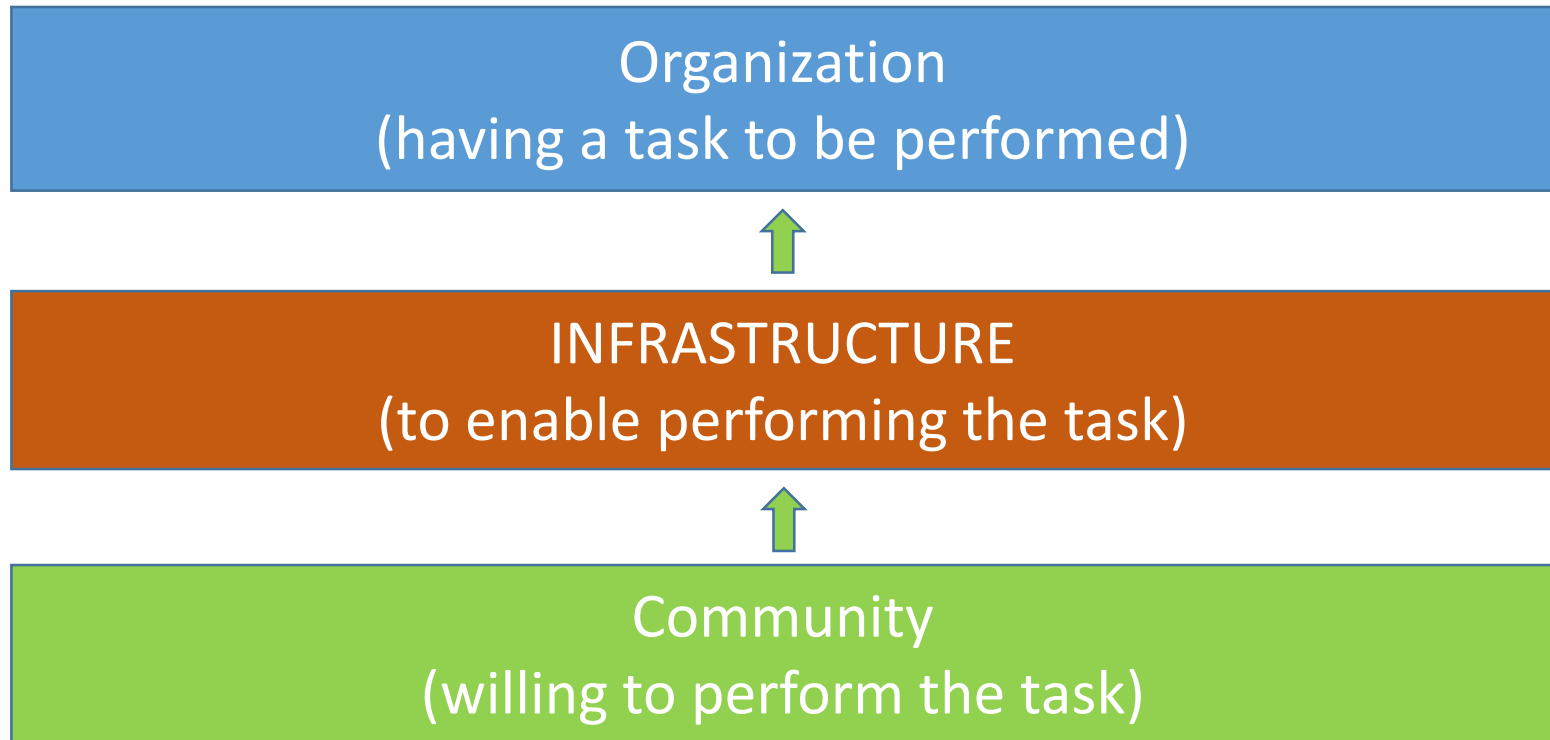
# Crowdsourcing

Organization  
(having a task to be performed)

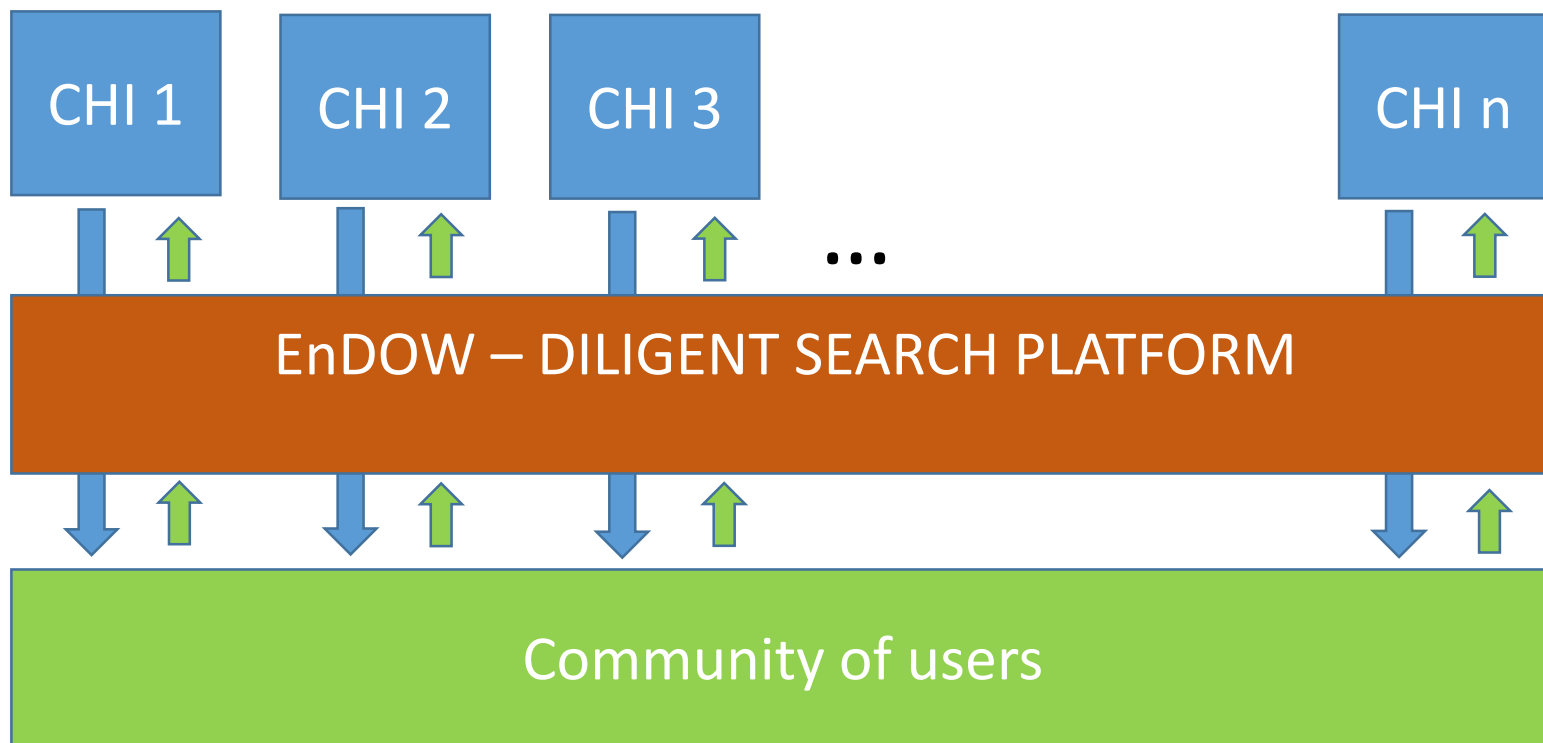


Community  
(willing to perform the task)

# 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*

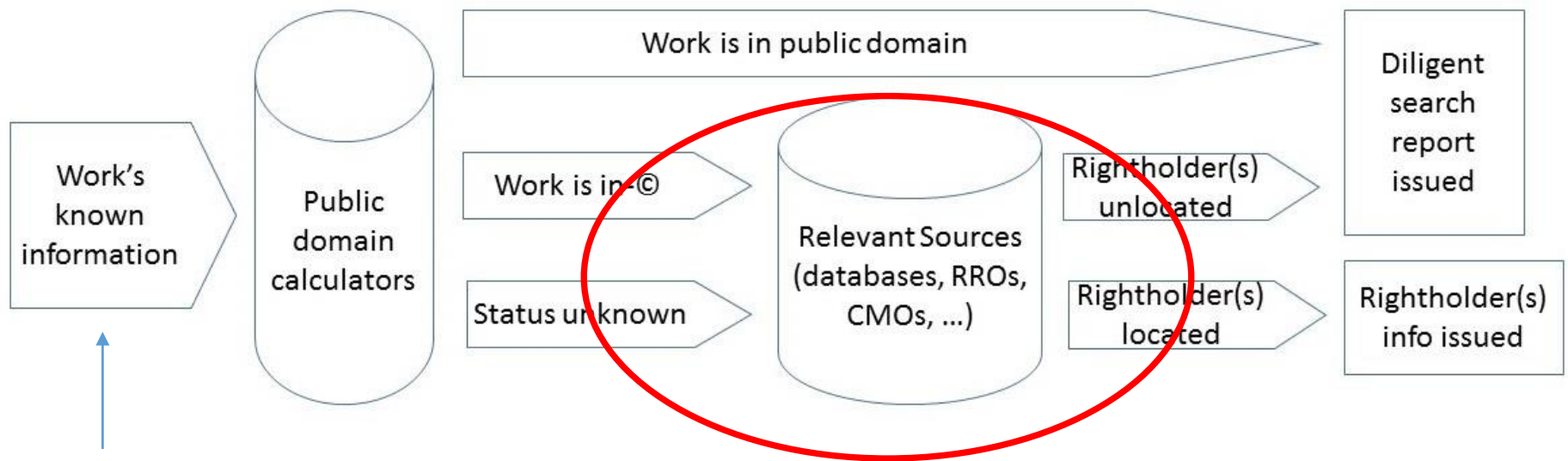
- CHI to issue a list of works to be cleared and solicit contribution by communities of users
- Registered users to submit results of their searches to the CHI for validation
- Small- and medium-size CHI (w/out expertise on copyright management): use of the platform to perform diligent searches on items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