

# 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?

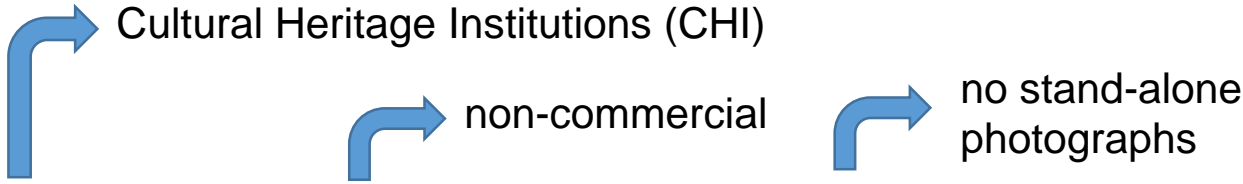
# Mass digitization (II): the European way

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

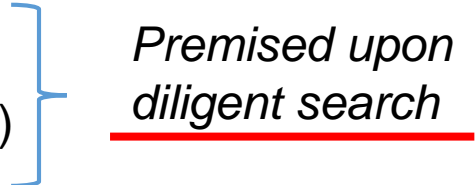
# The orphan works problem: regulatory options

- ☐ 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
- 
- 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%<br>Rightsholder permission given: 24%<br>Permission not given: 30%<br>No response: 27%<br>Time spent on DS per work: ~3.25 hrs / \$15USD |
| UK Wellcome Library                  | Vuopala (2010)     | 1,400 posters          | Unable to identify rightsholder: 30%<br>Rightsholder permission given: 19%<br>Permission not given: 3%<br>No response: 48%<br>Time spent on DS per work: 0.5 hrs / €50        |
| UK National Archives                 | Vuopala (2010)     | 1,114 legal documents  | Unable to identify rightsholder: 35%<br>Rightsholder permission given: 61%<br>Permission not given: 4%<br>No response: 0%<br>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%<br>Rightsholder permission given: 17%<br>Permission not given: 26%<br>No response: 26%<br>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%<br>Rightsholder permission given: assumed 100%<br>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%<br>Rightsholder permission given: >8.5%<br>Permission not given: 5%<br>No response: 6.5%<br>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>>

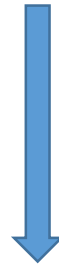
# Solution: from centralized to de-centralized DS

**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

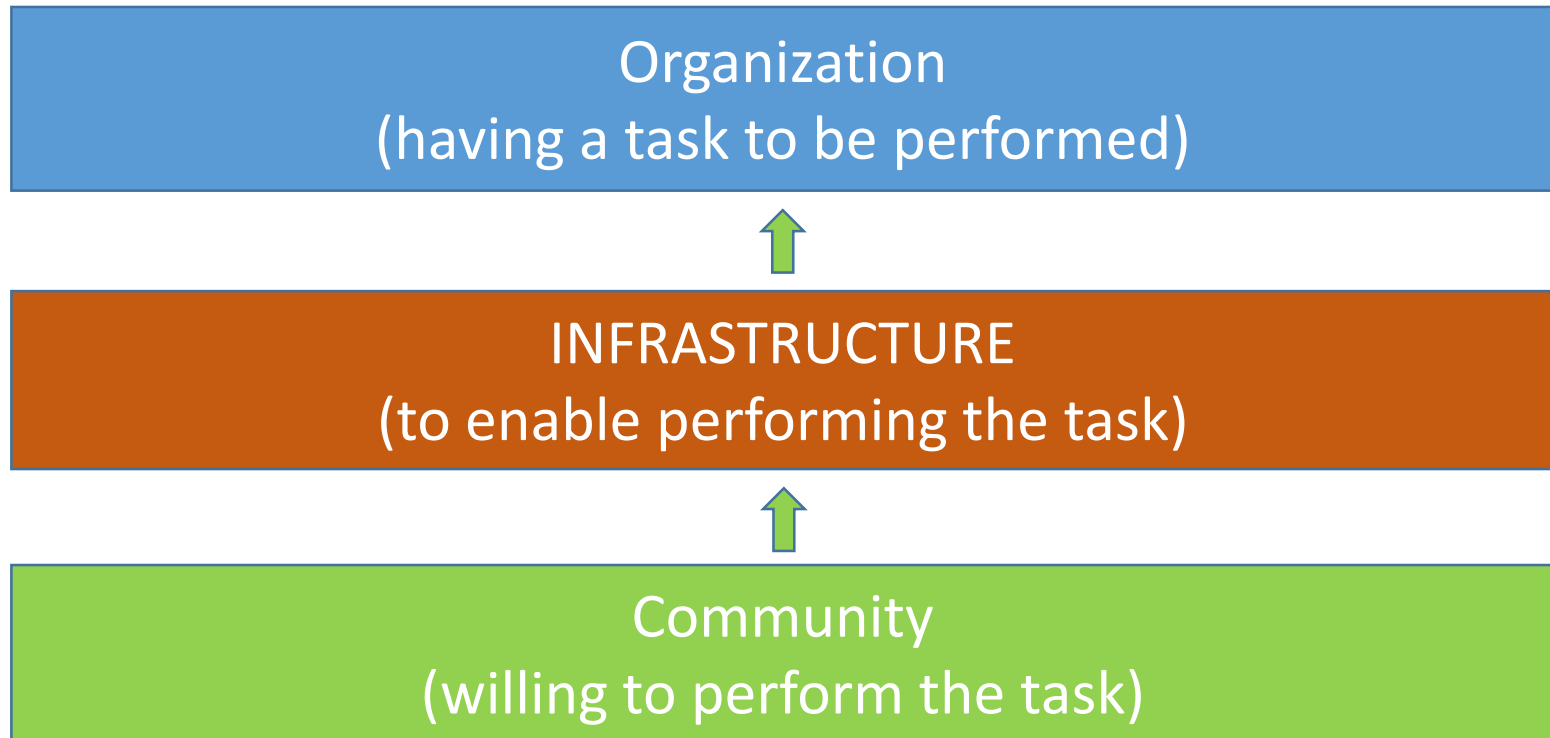
# Crowdsourcing

Organization  
(having a task to be performed)

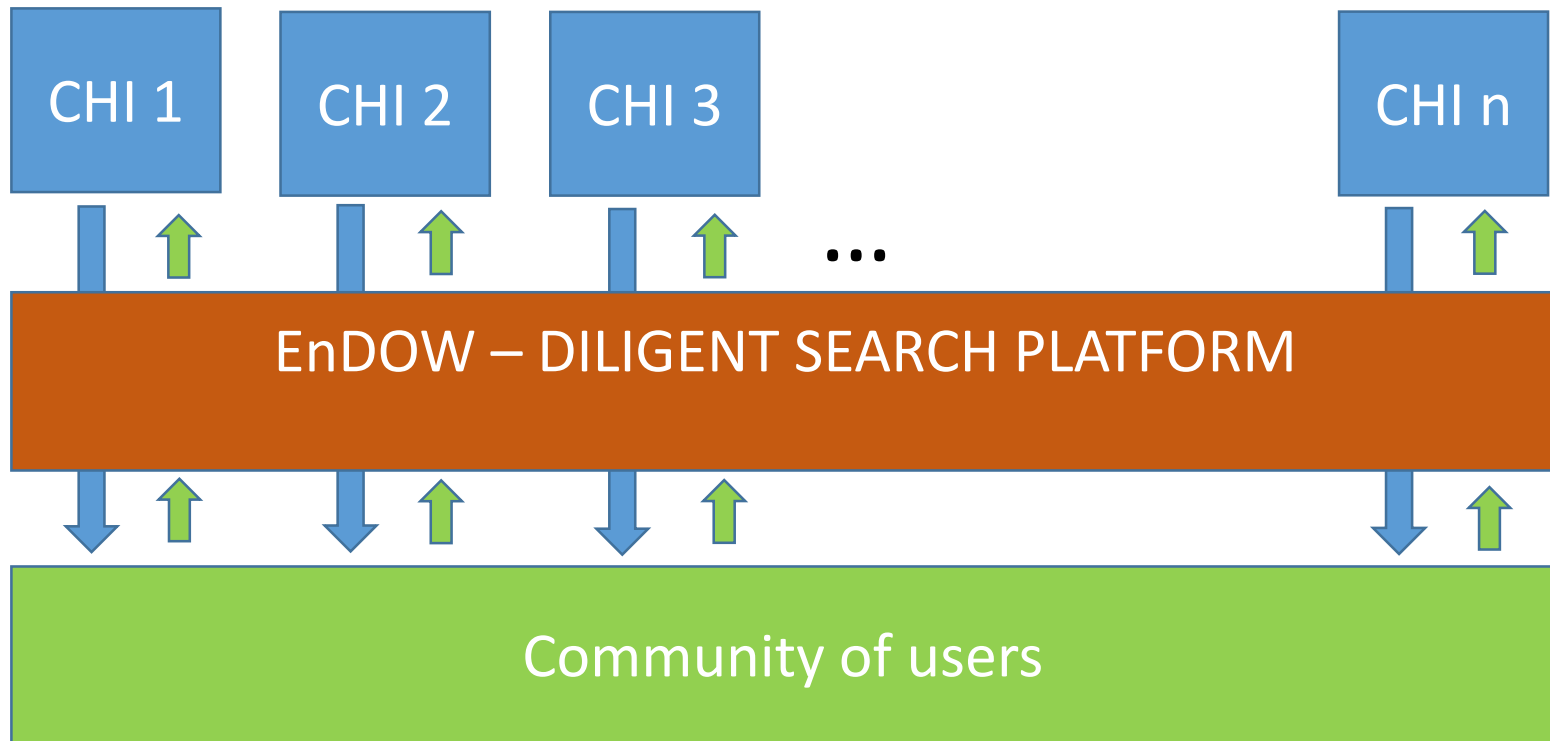


Community  
(willing to perform the task)

# 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

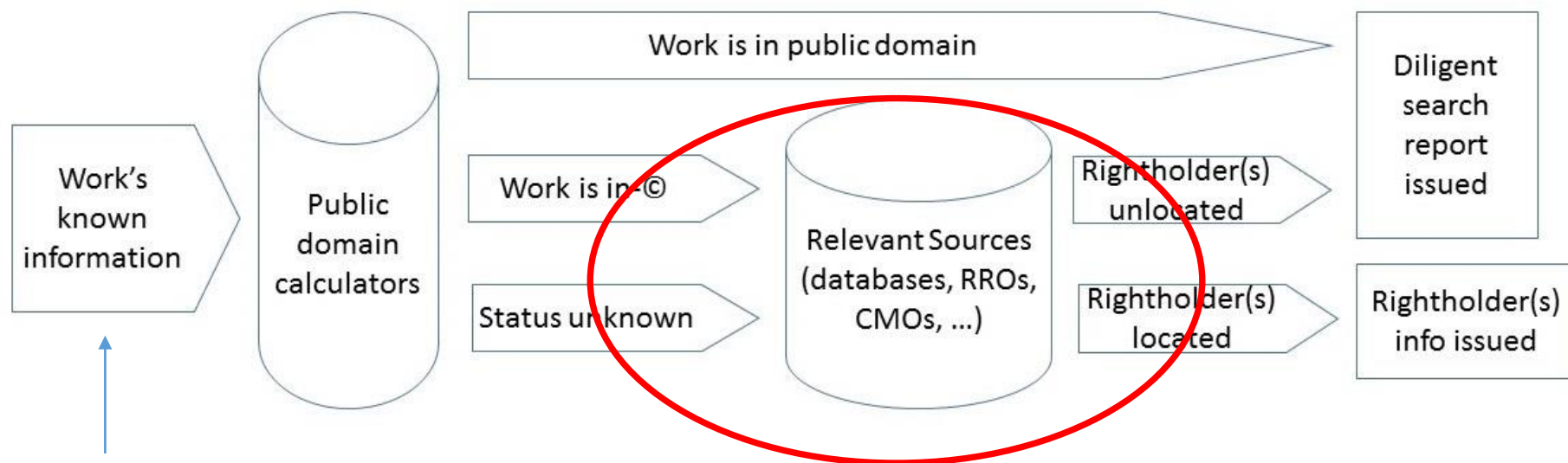




# DILIGENT SEARCH

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>)