

# **Risk Assessment** *and mass digitization*

# Risk continuum



- Is the work protected?
- Do we need permission?
  - Do we have or can we get a license?
  - Does last-20-years rule apply?
  - Is our use a fair use?
- If we seek permission and can't get it, what do we do?
  - *Orphan works, fair use and risk assessment*
- *Harm can result from action -- and inaction!*

# Making business decisions with legal implications

- Parties to the decision
  - The front line
    - People who digitize
    - People who manage digitization projects
  - Administrators
    - Directors; associate directors
  - Lawyers
    - Some with, and without, copyright expertise
- Considerations
  - Sometimes one person wears more than one hat
  - The roles are not interchangeable
  - Individuals have different risk tolerances
- It *must be clear* who has authority to make the final call

# Explicit discussion of risk tolerance

- Two people can examine the same set of facts and come to different conclusions about the best course of action
  - Some variability is due to different points of view or perspective
  - Some variability is due to risk tolerance/aversion
- Recognize that the person who has authority to make a decision will decide in accord with her own personal level of risk tolerance -- that's why she was hired

# Examples

- Fair use analyses are *interpretations of law based on a set of facts*
  - More tolerant: relies on fair use when analysis result is in the gray zone (2/2 split on factors)
  - More averse: when in gray, gets permission
    - No permission? No use
- Orphan works: *likelihood of success/failure*
  - More tolerant: displays work if 2 other universities' search results indicate no known copyright owner, or category indicates low likelihood of success
  - More averse: displays work when own independent search confirms 2 others' results; will not display based on categorical likelihoods

# Summary <sup>1/2</sup>



PD    Licensed    20-yrs

Fair use    Orphan work/fair use

- Risk continuum approach identifies legal risk and places it in context
  - Do you already have authority?
    - Public domain
    - Institutional ownership
    - Institutional rights obtained from owner
    - Fair use; last 20 years
  - If not, is the work an orphan
    - Try to get permission/assess likelihood of failure
    - Effort creates evidence about whether to take risk to digitize and publicly display the work
    - Document effort and share results publicly

# Summary 2/2



PD   Licensed   20-yrs

Fair use   Orphan work/fair use

- Risk assessment affects *every aspect* of the decision-making
  - *Every step of categorization* should involve explicit discussion of risk assessment and tolerance levels, especially of decision-maker
- Clarify respective roles of counsel and library in risk assessment and decision-making
  - Don't let risk be the only consideration -- place it in context of benefits and probabilities