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!"
Overview

Decision-makers

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 1/2

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
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