

MinterEllison



L A W Y E R S



Access to Educational and Cultural materials Following the 2006 Amendments: Are the reforms achieving their intended goals?

Presented by Sarah Waladan

Unlocking IP 2009 Conference

April 2009

Introduction

- A. 200AB - Maximisation of what we have**
 - Different approaches to interpretation

- B. Key remaining issues with legislation including key impediments to A. above**
 - Contracts
 - TPMs



Background: Purpose of additional exceptions introduced by the Copyright Amendment Act 2006

- To allow copyright material to be used for socially useful purposes
- To update Australia's copyright laws and to ensure that the law is better equipped to keep pace with developments in technology
- To ensure technological neutrality
- To ensure users have exceptions to allow them to fulfil their mandates and make socially beneficial uses



Exception or statutory licence?



Permitted purpose?

Educational instruction,
maintenance of
library or archive and
assisting a person with
a disability



Not for commercial advantage / profit?



Conflict with normal exploitation?

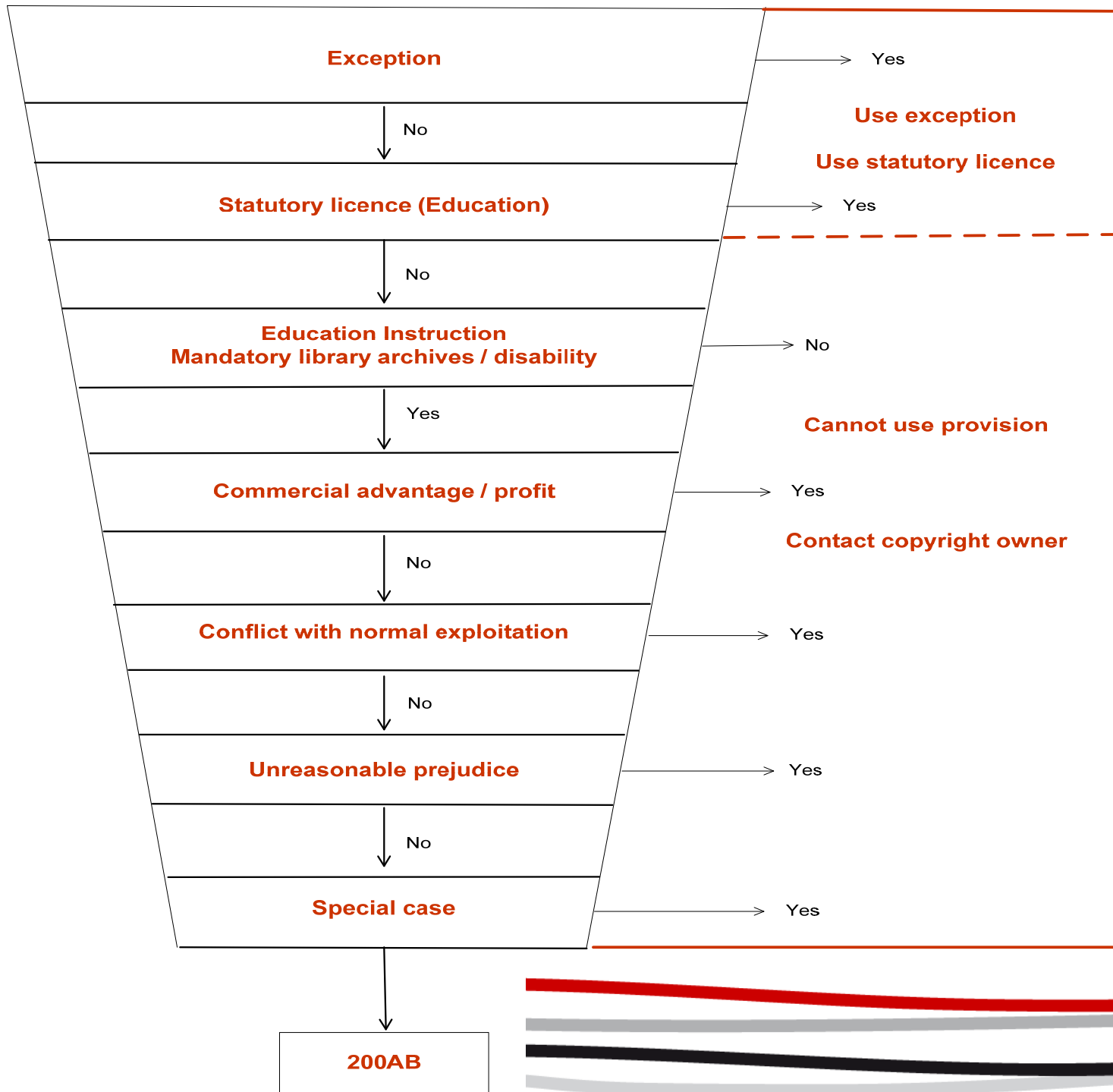


Unreasonable prejudice?

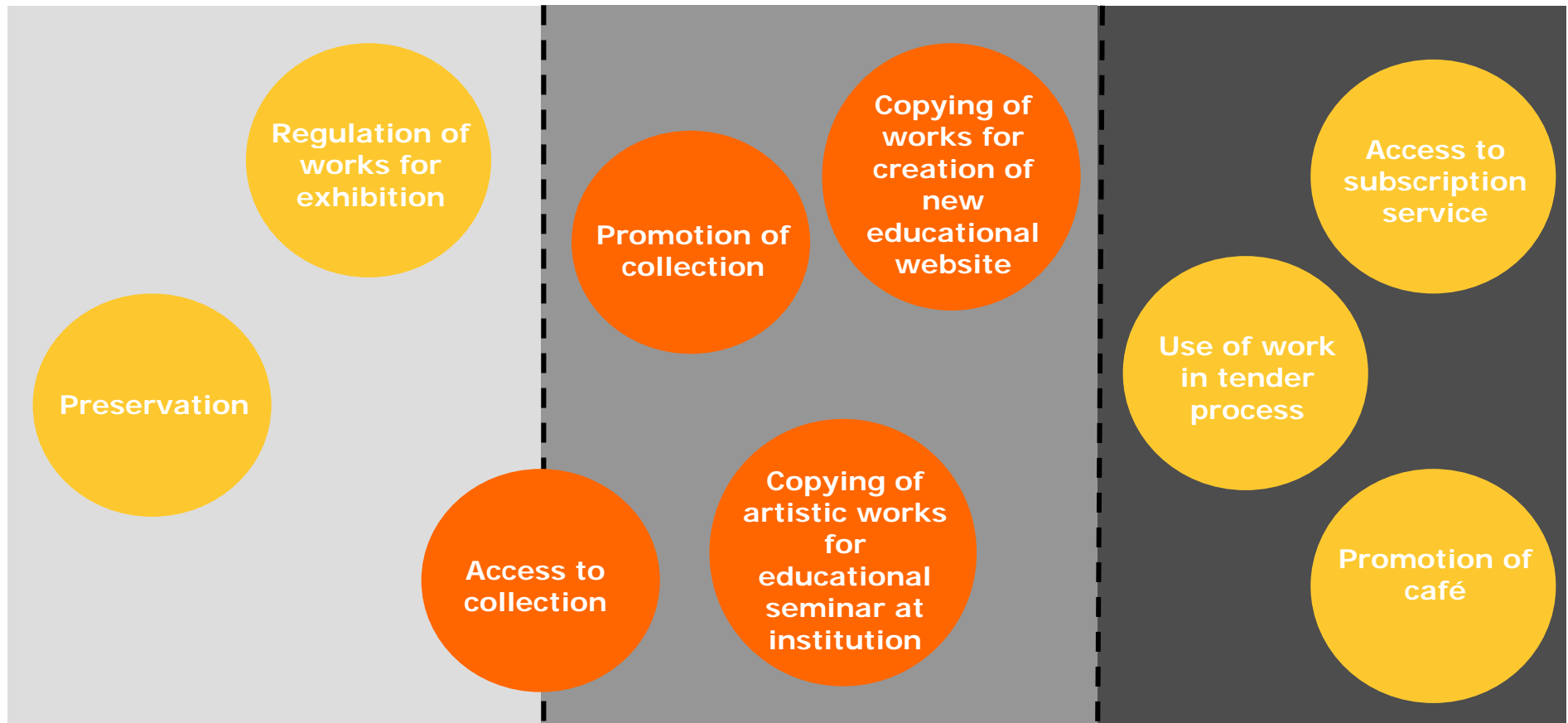


Special case?





Purpose based approach

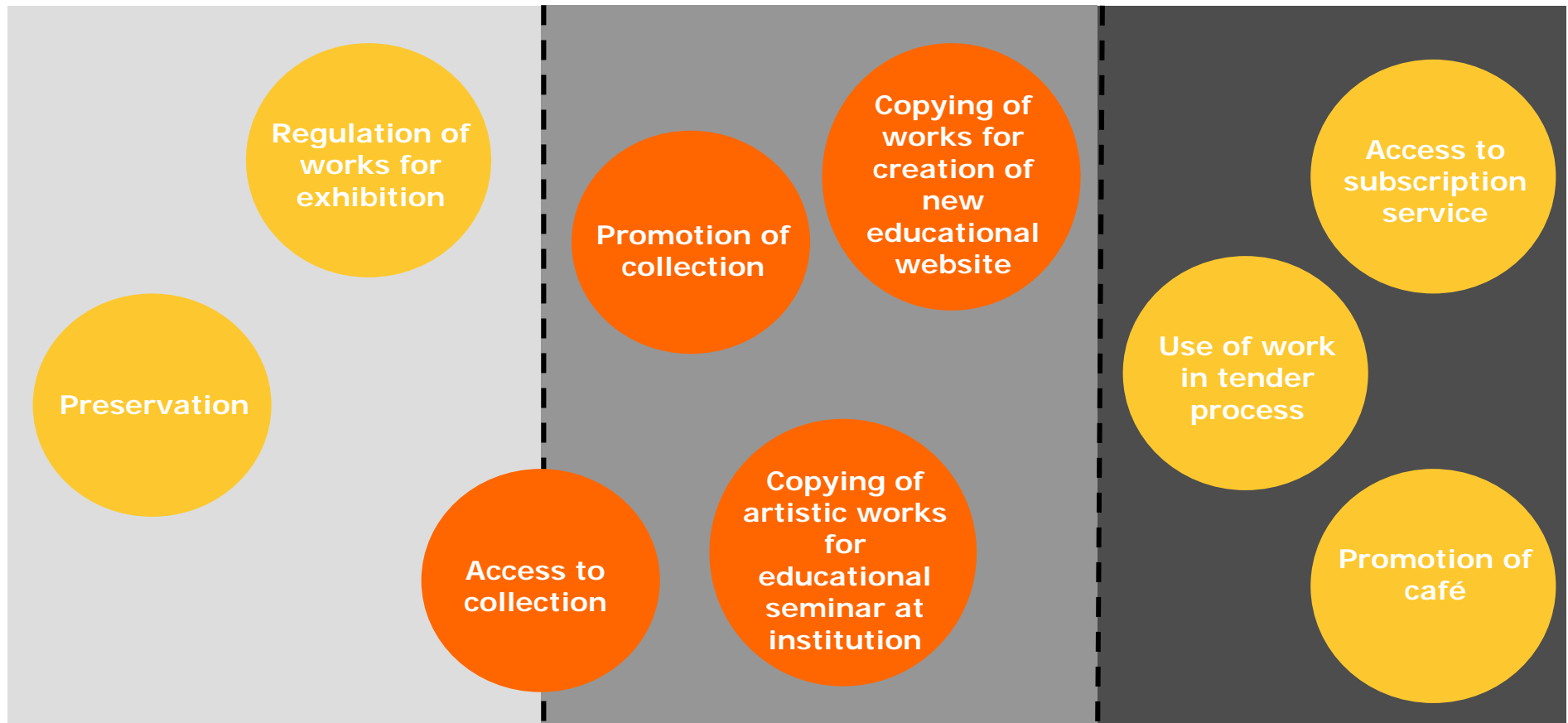


Conflict with 'normal exploitation'

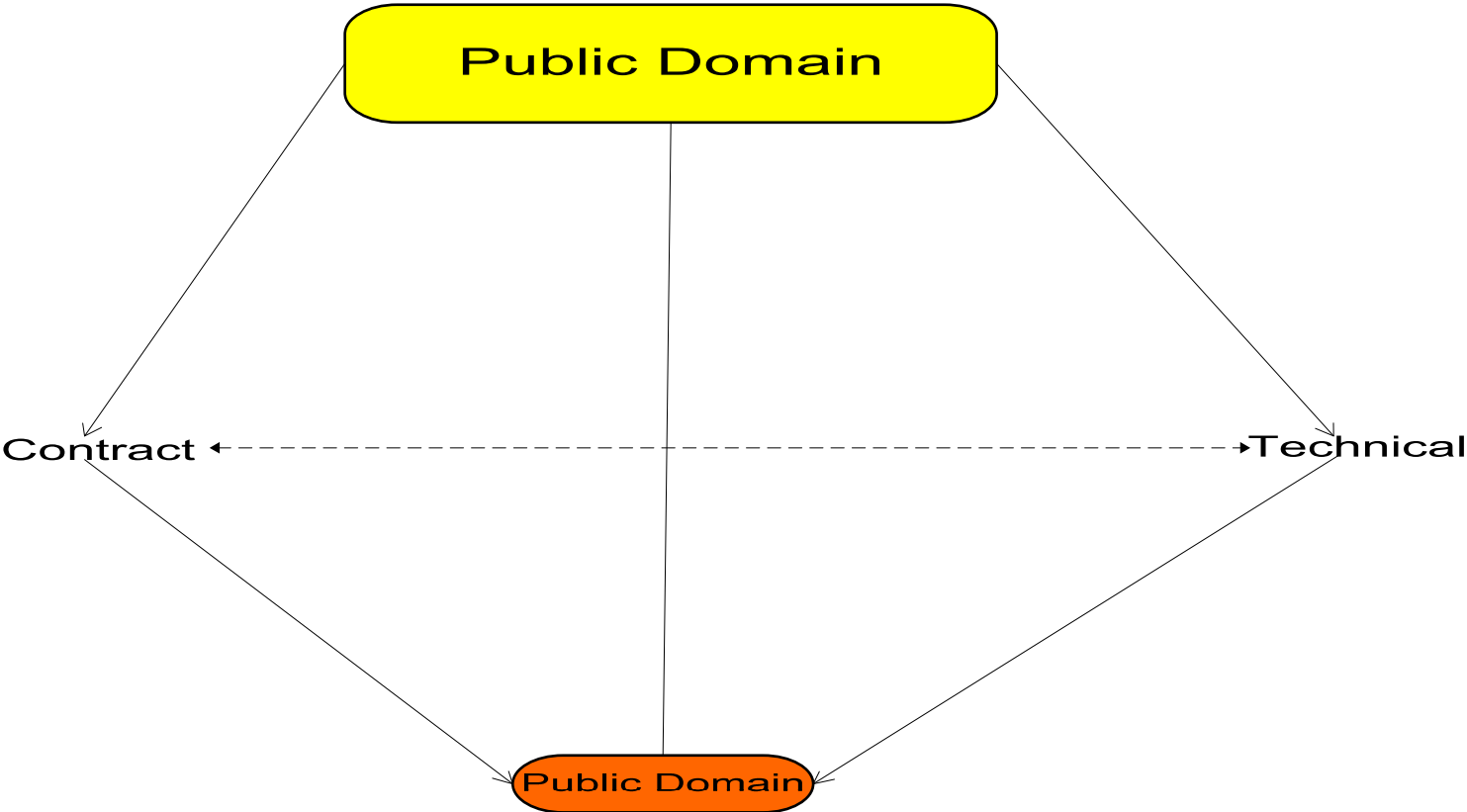
- *“whether the use **closes off** ways that copyright holders **normally** extract economic value from copyright in the Australian market or enters into economic competition with those ways, thereby ‘depriving copyright holders of **significant or tangible** commercial gains. Forms of exploitation which, **with a certain degree of likelihood**, could acquire **Considerable economic or practical importance** may also be considered”.*

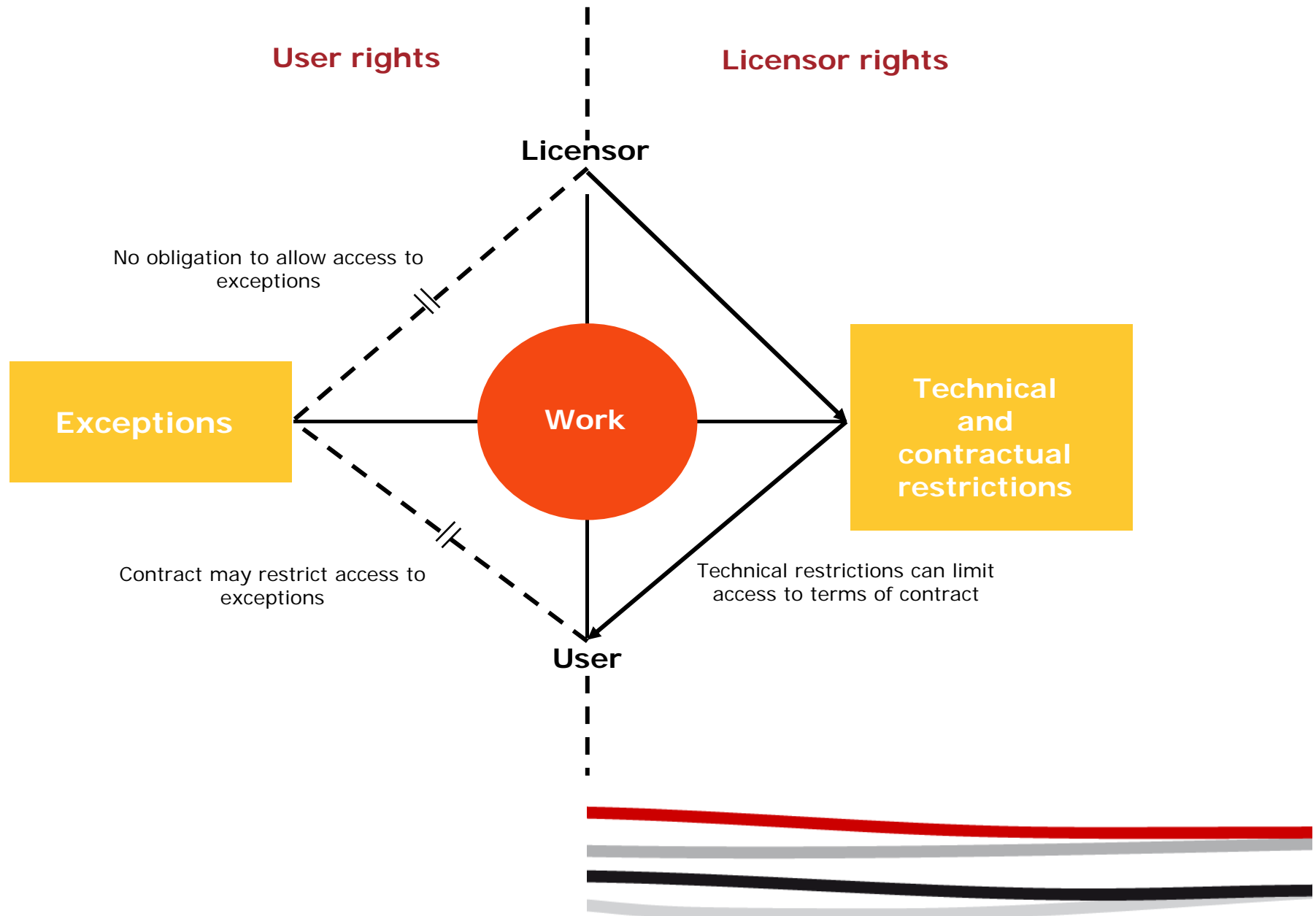


Purpose based approach



Some remaining legislative issues / impediments to utility of exceptions





- **High Court, per Kirby J:** *"To the extent that attempts are made to push the provisions of Australian copyright legislation beyond the legitimate purposes...the Parliament risk losing its nexus to the constitutional source of power. That source postulates a balance of interests such as have traditionally been observed by copyright statutes.."*
- CLRC recommended exceptions be mandated where they are an *"integral component of the copyright interest"*.



Agreements excluding operation of certain provisions

SECT 47H

- An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E, or 47F, has no effect.



CLRC copyright and contract review findings - 2002

- copyright owners are contracting out of the exceptions & detrimentally affecting the copyright balance
- public interest in preservation of copyright balance takes precedence over public interest in freedom of contract
- Whether a particular exception should be mandated depends on the policy basis for the exception and whether it is 'an integral component of the copyright interest'.
- The fair dealing exceptions and library and archive provisions should be mandated;
- The permitted purposes or exceptions to ban on circumventing TPMs should be mandated



Framed text box

Copyright Regulations

- s47D (Interoperability)
- Div.2A, Part VB (Edu. institutions)
- Div. 3, Part VB (Print disabilities)
- s49 (Libraries or archives)
- s50
- s51A
- s110A
- s110B
- s107 (Broadcasting sound recordings)
- s109 (Malfunctioning technology protections)

Additional Recommendations

- Fair dealing for criticism, review, news reporting, judicial proceedings
- Back-up copies
- If further non-infringing uses are introduced in the future, that the Government investigate appropriateness of introducing corresponding TPM exceptions;
 - 200AB
 - 51B, 110BA



Conclusions & Questions

sarah.waladan@minterellison.com

02 9921- 4864



MinterEllison



LAWYERS

