

## 5. What is Copyright II “Use of and Access to Copyright Works”

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### 1. Introduction

In this part of my presentation I will focus on the use of and access to copyright works. Just as there is a public interest in promoting and protecting copyright works and copyright owners there is also a public interest in promoting access to the copyright works of others. Of course, this access must be on terms that do not prejudice the legitimate interests of the copyright owner.

Access to creative works is important, in enabling each of us and through us our society to share in that creativity, to learn from and to experience the thoughts and emotions expressed in those works.

Access to copyright works may encourage us to create new works, thereby enriching our culture, or we may learn from those works increasing our skills and education levels. The works may also entertain us and provide enjoyment.

Achieving the right balance between protecting the rights of creators over their works and the access to those works by others is one of the key objectives of copyright law.

In order to better understand the factors that achieve the balance in a copyright law, I will firstly consider the “checks and balances” in the copyright system itself – the limitations on the scope of copyright protection, some common exceptions to copyright and the adoption of compulsory licensing by governments as a means of promoting access to copyright materials.

I will consider the matters to be taken into account when entering into contracts for the use of copyright material.

I will also look at some particular issues in respect to accessing copyright materials on digital networks such as the internet. The question here is -does the increased ease with which copyright works can be accessed and copied through digital networks change the existing balance between the rights of creators and owners on one hand and users or consumers of copyright material on the other? If so, does the copyright system also need to change?

In the final part of my presentation I will touch on some of the new ‘open access’ movements, which originate from the perspective that the current

balance between ownership and access in copyright needs to shift towards greater access to copyright works.

### 2. Using Copyright Works

As I discussed earlier copyright is a property right, and similar protections for copyright owners exist as exist for the owners of other property rights – such as property in land and physical items.

This means that it is an offence, sometimes a criminal offence, to use a copyright work in any of the ways protected by copyright unless you have either:

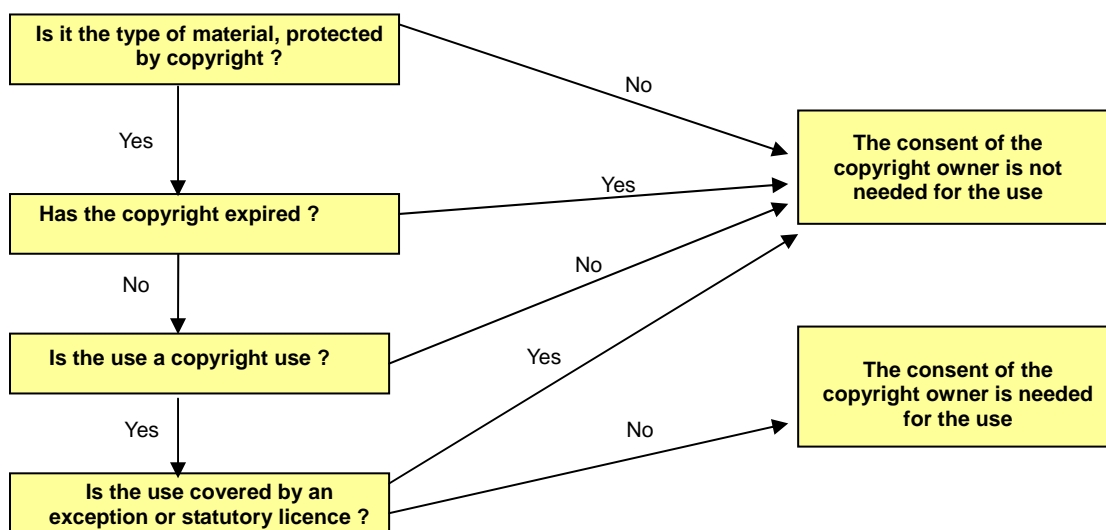
- The copyright owner’s permission or
- The use is permitted by an exception to copyright, or a statutory licence.

However, if the use being made of a work is not a copyright use or the copyright has expired the work can be used freely. Therefore it is important to be aware of the scope of copyright protection and its limits.

There are a number of steps to consider in deciding whether the use of a copyright work is permitted. The first step is to consider if the use is a copyright use at all. An example is if the copyright in the work has expired then the work is no longer protected by copyright. It is in the public domain.

If, however, the work is a copyright work and has copyright protection, the next step is to identify whether the use is permitted by an exception to copyright or by a statutory or compulsory licence. If the use is not permitted by an exception, or statutory licence the next step is to obtain the consent of the copyright owner to the use.

This series of steps can be illustrated as follows:



I will now consider each of these steps in more detail.

### 3. Scope of Copyright Protection

The monopoly that the Berne Convention grants copyright owners over the use of their works is limited in a number of ways. Limitations on copyright rights balance the public interest in promoting copyright protection against a number of other public interests.

Key limitations on the scope of copyright owners' rights include the following:

#### (a) Expression of Ideas

Copyright only protects the expression of ideas, not the underlying ideas themselves. A requirement for copyright protection is that the work be fixed in material form. This is to encourage the reuse, criticism or discussion of the ideas contained in copyright works.

Consequently, reading a copyright work and using the ideas it contains is not an act restricted or limited by copyright.

#### (b) Certain Rights

Secondly, copyright owners are only entitled to control some uses of their works. Copyright is often described as a bundle of rights. That is, the copyright owner is given the right to exploit some, not all, uses of their work. These rights vary from country to country and are often described differently in different countries.

However, copyright owners are generally granted rights to control the reproduction, publication, performance in public, broadcasting and adaptation (including translation and dramatisation) of the works they create.

Recently the right to communicate works to the public was added to the bundle of rights contained in copyright to take into account the development of digital technologies and uses of works – especially the development of the internet and e-mail. This right is contained in the WIPO Copyright Treaty.

Uses of copyright material that are different from these rights are not controlled by copyright owners. An example is, copyright owners of books and journals do not generally control the rental or lending of their works and consequently libraries can lend books for reading purposes<sup>1</sup>.

#### (c) Certain Works

The Berne Convention also allows national governments to decide whether or not to provide copyright protection for a number of categories of works.

These include, official texts of a legislative, administrative and legal nature and official translations of texts.

<sup>1</sup> Copyright owners in some other types of copyright material do have rights over the rental of their works. Article 11 of the TRIPS Agreement requires signatory countries to provide rental rights for copyright owners in computer software and cinematographic works.

Works which governments are not required to provide copyright protection for also include, political or legal speeches and lectures and addresses which are delivered in public.

*(d) Term of Protection*

Copyright protection is limited in time. That is, the Berne Convention provides that a creator has control over their works for a minimum of their life plus an additional 50 years.

However, increasingly the duration of copyright is being extended to the life of the author plus 70 years, particularly in Europe and in the USA.

Once the copyright term expires, the copyright material becomes part of the public domain and available to all to use without needing to seek the author's permission or to rely on an exception.

*(e) Substantial Part*

In order for copyright infringement to occur the proportion of the work used must be "substantial". Whether a proportion of the work is substantial or not depends on a number of factors, such as the significance of the part used, and the circumstances of the use. This means it is not possible to provide a general guideline as to the size or amount that would be appropriate to be used without requiring the permission of the copyright owner in all circumstances.

Even if none of the above limitations apply, the work is in copyright and the use you wish to make is a copyright use, there are some permitted exceptions to the rights the copyright owner controls. These exceptions enable the use of works in some specific circumstances. The second step is to identify if any of these exceptions apply to the use we want to make of the work.

#### 4. Exceptions to Copyright

Copyright exceptions are a means of balancing protection of copyright works and access to them. They allow copyright material to be used for certain purposes without the permission of the copyright owner if the use of that material meets certain public policy objectives.

These exceptions to copyright apply in different circumstances depending on the national context in the country concerned. However, exceptions to copyright contained in national laws are required to be consistent with the standards of protection set down in the Berne Convention. The Berne Convention also provides the test against which

any proposed exceptions to copyright owners rights are to be assessed. This test is called the three step test.

Exceptions to copyright recognise that in certain circumstances, the value of the community having access to copyright material outweighs the public interest in protecting the interests of the individual copyright owner.

#### 5. The Three Step Test – a Guide to Exceptions and Limitations

As mentioned above, the Berne Convention recognises that in certain circumstances, governments will want to legislate for exceptions to the exclusive rights of copyright owners.

The test for deciding in which circumstances exceptions to the reproduction right can be introduced into legislation is contained in Article 9(2) of the Berne Convention. Article 9(2) reads:

*It shall be a matter for legislation in the countries of the union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*

This test, which has become known as the three step test, was extended to apply to all uses of copyright material (rather than only to the reproduction right) by the TRIPS Agreement<sup>2</sup>.

Its application to works in digital form was confirmed by the WIPO Copyright Treaty<sup>3</sup>.

The three step test provides that exceptions to copyright can only be justified if they:

- **Apply only in certain special cases** – this implies that the exceptions to copyright must be clearly defined, narrow in scope and reach;
- **Not conflict with the normal exploitation of the work** - the uses permitted by the exceptions to copyright must not be of considerable or practical importance or economically compete with the author's interests; and
- **Not unreasonably prejudice the legitimate interests of the author** – the legitimate

<sup>2</sup> Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement).

<sup>3</sup> WIPO Copyright Treaty 1996.

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interests of the author include both moral and economic rights. It may be that if the exception to copyright provides for a payment to the copyright owner then permitting a use in legislation will not unreasonably prejudice the interests of the copyright owner.

Governments use the *three step test* in deciding how to frame the exceptions that they will adopt in their national copyright laws. Even though many of these are specific to individual natural circumstances, there are a number of exceptions to copyright that appear in the copyright law of most countries. I will now review some of these common exceptions.

### 6. Examples of Common Exceptions to Copyright

There are several exceptions to copyright that in many countries are considered to be consistent with the three step test. However, it is important to note that these are limited exceptions, not broad use rights. The scope of these exceptions must be construed narrowly so as to comply with the three step test.

It is also important to note that many of the commonly accepted exceptions were developed in the time before digital use of copyright works. As such they may not be appropriate for the digital environment. In fact one of the questions many national governments are struggling with is how to best shape their copyright laws to take account of the digital environment.

There is an ongoing debate at the international level as to how exceptions to copyright should apply in the digital world

The vast explosion of copying and musical works, by individuals in file sharing networks and the growth of licensed download services, such as i-tunes, has led to a rethinking of the scope of exceptions, such as those for private copying. As digital technology and digital rights management develops, the view that private copying exceptions should be replaced by direct licensing by the copyright owner is gaining acceptance.

Following is a table which sets out several common exceptions to copyright owner's rights:

Exception	Explanation	Comment
Use by disabled readers	Provides access to works by the visually impaired, as the works may not be in the format they require	Digital networks provide great opportunities for the visually impaired, however care must be taken to ensure that copies made for this purpose do not find their way into the general market for copyright goods
Fair dealing for research and study	Use by a student related to a course of study they are undertaking	The fairness requirement means that the scope of these exceptions cannot involve copying the whole or a substantial part of the book
News reporting	Only as much as is required to report the news	This is an important exception, but the scope of the term news is subject to debate – it generally means “the news of the day”
Criticism and review	For the purposes of reviewing or analysing another work	Requires acknowledgment of the original source. The amount used cannot be so much as to substitute for the original
Legal proceedings	For individuals to inform themselves of the law when they are involved in legal matters	Again, the scope is limited, and does not include all copying by lawyers for example.
Copying by libraries	To assist patrons exercising fair dealing exceptions and for preservation and archiving purposes.	The scope is limited to the equivalent of fair dealing uses, and does not extend to commercial document supply, or libraries in commercial undertakings

A common feature of each of these exceptions is that the uses of copyright permitted by them are limited. Such limited uses are considered not to prejudice the interests of the copyright owner, and consequently to be consistent with the *three step test*.

A variation on the 'exception' system of specifying particular uses that can be made of copyright works without infringement is the fair use system – developed in the USA.

In the fair use system, instead of a list like the one above, a general provision enabling the 'fair use' of copyright material is included in the Copyright Act. It is then left to the courts to decide if a particular use of a copyright work is fair in the particular circumstances. In order to do this the courts use a test similar to the *three step test*.

The key benefit of the fair use system is considered to be its flexibility – as it can apply to new uses of copyright works without requiring a change to legislation. However, it also means that there is uncertainty whether a particular use is fair, unless it has been litigated.

The key benefit of the fair dealing system is its certainty. Because the exceptions are specified in law, the users of copyright material know what uses will be considered fair.

In either system, the uses that are considered to be fair, and therefore permissible are very similar.

## 7. Collective Licensing

In some circumstances there are uses of copyright material for which a strong public policy objective exists but the copying impacts on the interests of individual copyright owners and their ability to exploit their works.

An example of such a situation is copying in the educational context. Many schools and universities make copies of copyright material and provide it to their students. The use is extensive and does impact on copyright owner's markets as very often the copies substitute for text books. However making and using the copies is essential for important social purposes such as education, development and training.

Also consider the use of copyright materials in the home – where time shifting of television or the making of a copy of a sound recording to use in the car are common. However obtaining a licence to undertake such activities from every copyright

owner would be time consuming and many would not seek to do so, although a legal liability exists.

Similarly, nightclubs and bars often play music, which is considered to be an essential component of the ambience of such establishments. For these venues to obtain the rights to play music from each composer individually would be impossible – particularly for those using the radio. Nevertheless, as a copyright use, the nightclubs and bars have a legal liability to pay the copyright owners concerned.

In such circumstances governments will consider mechanisms that will permit the copying to take place, but accompanied by a payment to the copyright owners whose works are being used. They may adopt mechanisms to encourage copyright owners to enter into collective management of their rights or they will introduce compulsory or statutory licensing.

### (a) Encourage Voluntary Arrangements

There are a number of legal techniques through which governments can support voluntary collective management.

In the UK, Canada and Hong Kong, statutory provisions encourage users and rightsholders to enter into voluntary agreements. Examples of these types of provisions include a presumption that if you have entered into a licence agreement with a collecting society, you are entitled to assume that all works of the same type are included in the licence unless specifically excluded.

An alternative approach is the 'extended collective licence' common in the Scandinavian countries. The elements of an extended collective licence are:

- The agreement between the collecting society and the user is negotiated;
- The collecting society is representative of national rightsholders;
- The legislation then makes the agreement binding on non-represented rights owners, so that:
  - The user may legally use all materials, whether the rightsholder is represented by the collecting society or not;
  - The non-represented right owners have a right to individual remuneration, and a right to prohibit the use of their works.

An extended collective licence does not give the collecting society rights to represent copyright owners for any other purposes.

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### *(b) Legal, statutory or compulsory licence*

In compulsory or statutory systems the government grants a right to copy in law accompanied by a right for copyright owners to receive payment. Non-voluntary systems are of two types - statute based licence schemes or levy systems.

As well as the right to copy being granted in law sometimes the royalty or remuneration payment is also determined by law. Sometimes the copyright owners can negotiate the remuneration with users (although they are not able to refuse authorisation). In many countries, if the parties fail to agree, then the payment can be determined by a government tribunal or board.

A feature of many non-voluntary licence systems is government appointment or approval of a specific copyright management organisation to manage the licence on behalf of all copyright owners.

For example, in Australia both the statutory licence schemes for copying in the education and government sectors are administered by CAL (Copyright Agency Limited) through government appointment. The licence fees charged by CAL are negotiated with the copyright users and if there is failure to agree, set by a government tribunal, the Copyright Tribunal.

In Singapore, Fiji and Samoa, although a compulsory licence is provided for in copyright legislation, there is no requirement that rightsholders be represented by a single government approved RRO (Reproduction Rights Organisation), as in Australia.

The Dutch RRO, *Stichting Reprorecht*, administers a non-voluntary system in the educational and government sectors. The remuneration is established by government regulation. Statistical surveys are used to determine the quantity of copying and which works are being copied. The split of fees between authors and publishers is also determined by government regulation.

### *(c) Levy system*

The equipment levy approach acknowledges the difficulty in tracking the making of single copies for private and personal use and also acknowledges the importance of making payment to copyright owners. This system makes payments to copyright owners by imposing a levy on copying equipment.

The first country to introduce a levy system on equipment used for photocopying was Germany in 1958 and it has recently been widely adopted by

countries in Eastern Europe such as Poland. The levy is paid by and collected from the manufacturers and importers of copying and fax machines, printers and scanners. In addition to the equipment levy, an operator levy is paid by large-scale users, such as schools, universities, research institutes and copy shops. The tariffs for both the equipment levy and the operator levy are determined by law. A collecting society distributes the fees to copyright owners.

Similar equipment levy systems have been adopted in Spain, Belgium, Greece and Nigeria.

However advances in digital technology are making the monitoring and tracking of the use of works for personal use a reality and there are moves in Europe to replace levy systems with licensing systems – either individual licensing or collective management systems.

## **8. Contracts for Copyright Works**

If you want to make use of a copyright work and it is not permitted by any of the exceptions or statutory licences mentioned above, then you will need to enter into a contract with the copyright owner.

The copyright owner has the right to negotiate the terms of the use, including payment and if agreement cannot be reached the use cannot take place.

Common examples of situations in which individual contract negotiations take place are when someone wants to translate a work, when someone wants to publish a work, or use an artistic work on a calendar or book cover.

One important thing to ensure is that you are negotiating with the right person – often the owner of the work (such as the owner of an artistic work) may not be the person with whom you need to negotiate.

Possibly one of the ownership rules I explained earlier applies and negotiations should be with the employer rather than the actual creator. Or, possibly the copyright owner has joined a collective management organisation and the use rights can be negotiated with that agency, acting on behalf of the copyright owner.

The next thing to consider is whether the contract needs to be in writing. In some countries there is a legal requirement that assignments of copyright need to be in writing. For example, Mongolian copyright law requires that transfers of ownership

must be writing and must contain specific terms – including the uses permitted and the amount of payment required.

Even if the contract is not required to be in writing, there are good reasons to do so anyway, as that avoids misunderstandings both at the time the contract is negotiated and later if there is a question about the scope of the contract.

Then the basic rules of contracts apply – you need an offer and acceptance, and some consideration or payment, even if it is just a token amount. Clear descriptions of who the parties to the contract are and what are the work and rights covered by the contract are also important.

When considering the rights needed, consider whether an assignment (a transfer of ownership) or a licence (permission to use the work) is necessary and if a licence is preferred whether that licence should be exclusive or non exclusive.

In another session we will look more closely at contracts in the publishing industry and the drafting of sample contracts.

## 9. Infringements of Copyright

If you use someone else's copyright work without permission and an exception does not apply to the use then you will have infringed another's copyright.

Infringement of copyright can be a civil infringement or a criminal infringement. The distinction is drawn as a result of the seriousness of the illegal use of someone's copyright work that has occurred.

If it is of a more minor nature – say a small number of copies made for personal use, it is usually defined as a civil infringement.

If the offending use of another's copyright works is on a broader, perhaps commercial scale, then it is usually considered a criminal offence. One reason for this distinction is the effect that the different infringements will have on the copyright owner's legitimate interests in their work. If I make one or two offending copies of a work, its effect on the author's market will be small, and the loss they have suffered will be small. If I make many copies of a work the detrimental impact on the copyright owner's market will be greater.

Naturally, where a criminal infringement is found to have been perpetrated, the punishment will be greater than where the infringement is civil.

Many countries have established specialist Courts or Tribunals to hear infringement cases. They have expertise in both copyright, to assess where copyright infringement has occurred, and what sort of infringement it is. Additionally, they have expertise in quantifying damages suffered as a result of infringement, and therefore in setting appropriate remedies to the copyright owner, and other punishments for the offender.

## 10. Copyright and the Digital World

The digital environment poses many challenges for copyright owners and disrupts the equilibrium between the various interest groups. This disruption occurs in a number of ways:

- Ease of copying and reproduction is greatly enhanced by digital technology;
- The copies made more easily are the same quality as the original; and
- The potential scale and organisation of the re-use of material is facilitated by the internet and the networked environment.

This ease of reproduction and dissemination threatens the traditional business models for the copyright industries. Digital technology means people can now distribute copyright content easily and cheaply when they have no right to do so. Further, that content, because of the quality of the reproduction, competes directly with legitimate content.

Copyright owners voice great concern at the potential for mass use of their works using digital technology and without payment. The possibility for infringement occurs at an early stage of the value chain – even before the point of first sale (which is usually guaranteed in the analogue world).

This lack of security in the digital environment diminishes copyright owners' confidence in providing materials and indeed the incentive to create them in the first place. Lack of incentive to create, means a reduction in the quantity of new material available to the whole community, which is contrary to the public interest.

Uses which once were private now have the potential to become public and impact significantly on copyright owners' markets.

The challenge for policy makers is to balance the use of technological measures by copyright owners to control and protect their copyright with the demands of consumers for access to those works.

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### 11. Open Access Movements

There are also a number of initiatives in which copyright owners participate to make their works more accessible. In these initiatives copyright owners either choose not to assert their copyright at all or waive their copyright for certain purposes or uses.

Creative Commons is an example of one such initiative. Creative Commons works by developing a set of easily identified licences to use content. The copyright owners then attach this licence to their works indicating the circumstances in which a copyright work can be used without requiring payment.

Another example is the *free for education* campaign in Australia, in which publishers and authors mark their works with the free for education logo. This lets teachers and educators know that the work can be copied in the educational context without payment.

The most important thing to note about these systems is that the copyright owner is still making decisions about the extent to which a particular work can be used for free, or under which circumstances use can take place. This is why these systems are often considered to be variations on copyright licensing – except on standard terms and conditions.



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## What is Copyright II Use of and Access to Copyright Works

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## Topics

- Using copyright works
  - Limitations
  - Exceptions
  - Statutory/compulsory licensing
  - Contracts for copyright works
  - The digital environment
  - Open access movements
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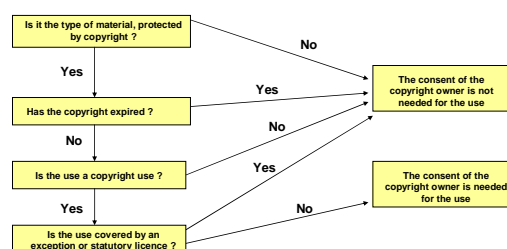
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## Using Copyright Works

- Is the work copyright protected ?
  - Does an exception or statutory license apply ?
  - Do I have the copyright owner's permission ?
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## Using Copyright Works




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## Using Copyright Works - Limitations

- Term of protection
  - Only certain rights
  - Expression of ideas, not the ideas themselves
  - Public domain
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## Using Copyright Material - Exceptions

- Even if a work is in copyright there may be circumstances in which you can use it without seeking permission
  - Substantial/insubstantial use
  - "Exceptions" to copyright – in copyright legislation – the three step test
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### Exceptions and Limitations

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- Three step test
    - Certain special cases
    - Not conflict with normal exploitation
    - Not unreasonably prejudice the legitimate interests of the author
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### Examples of Exceptions

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- Fair dealing – research and study; reporting the news; criticism and review
  - Fair use
  - Library copying
  - Disabled readers
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### Collective Licensing

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- Strong public policy objective, for example education
  - To permit the use for free would conflict with the three step test
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### Collective Licensing Mechanism

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- Encourage voluntary arrangements
  - Statutory or compulsory licences
  - Levy system
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### Contracting for Copyright Works

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- If a limitation, exception or statutory licence does not apply, will need the copyright owner's permission for the use
  - Negotiations with the copyright owner
  - Writing ?
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### Contract Basics

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- Offer
  - Acceptance
  - Consideration
  - Intention to be legally bound
  - Certainty
-

### **Contract Basics – Certainty**

- Parties
- Clear description of works
- Copyright owner
  - attribution and notice
- Rights granted

### **Contract Basics – Certainty** (Continued)

- Duration
- Territory
- Termination
- Signature and date

### **Assignment or Licence?**

- Assignment
  - transfer of ownership in a work
  - preferred by publishers
- Licence
  - grant of specified rights in a work
  - exclusive or non-exclusive
  - preferred by authors

### **Digital Rights**

- Existing contracts – presumption that communication right is not covered, unless explicit from contract terms
- New contracts – make sure the right of communication is dealt with and valued.

### **Infringement of Copyright**

- Owners of copyrights have exclusive rights to deal with their works in certain ways
- Require permission of copyright owner to deal with work in one of these ways, otherwise infringement of copyright

### **Infringement of Copyright**

- Civil
- Criminal/piracy

### **Copyright and the Digital World**

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- Ease of copying and communication
  - Quality of copies
  - Potential scale and organisation
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### **Open Access Movements**

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- Increased accessibility of copyright works
  - Licensing systems
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### **Questions?**

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