



Searching for Certainty in Implying a Copyright Licence

19th Annual Intellectual Property Scholars Conference

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DePaul University College of Law

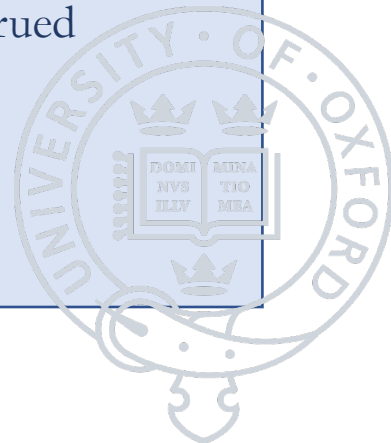
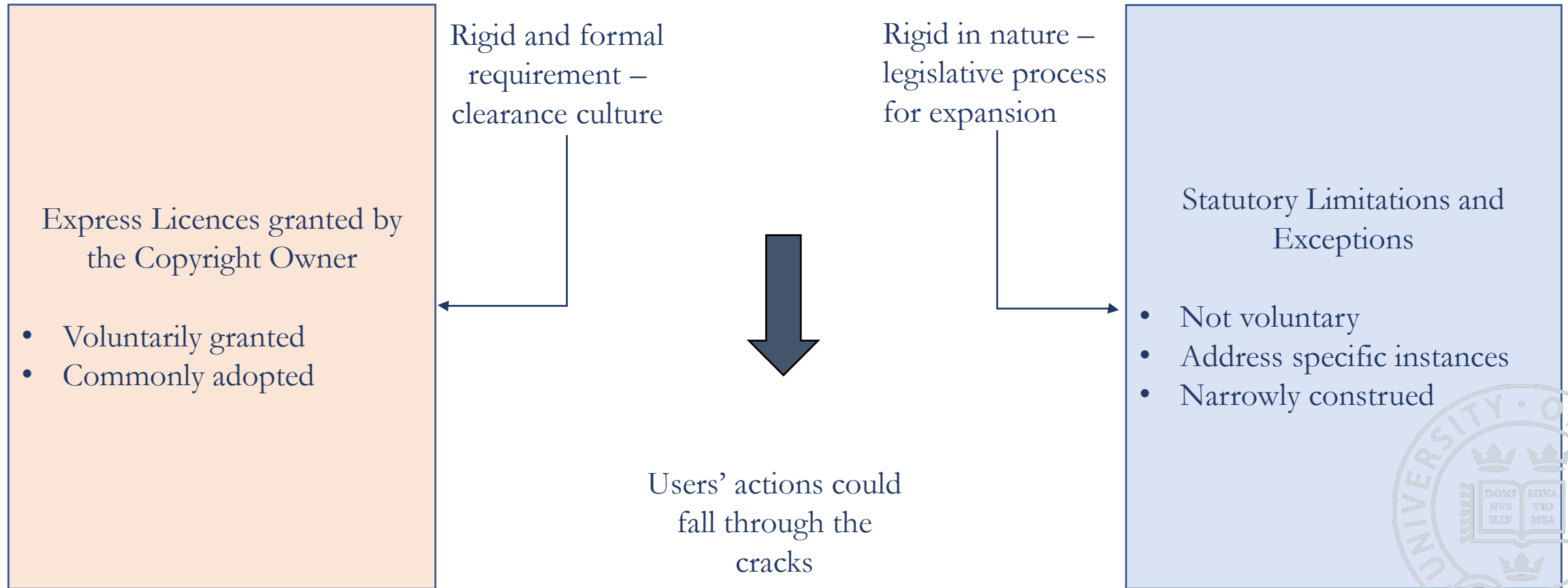
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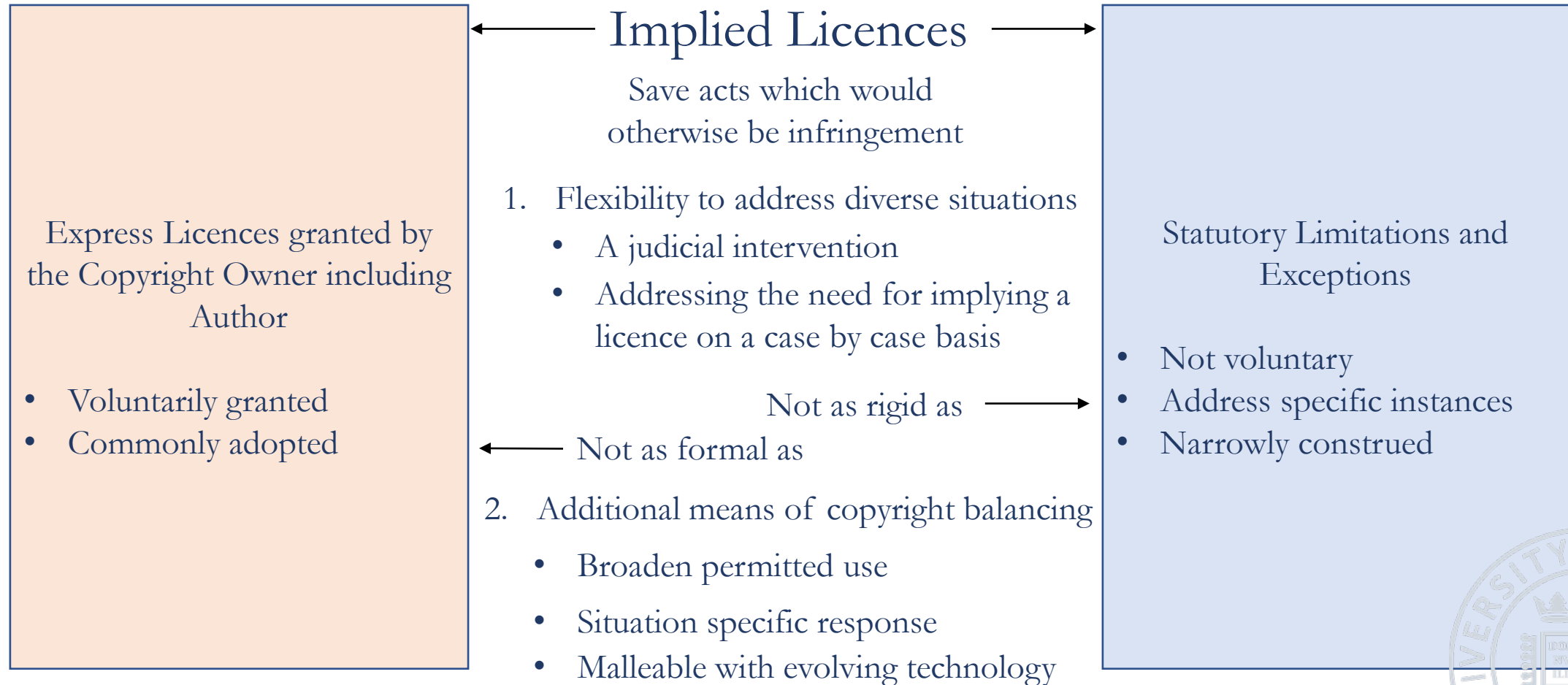
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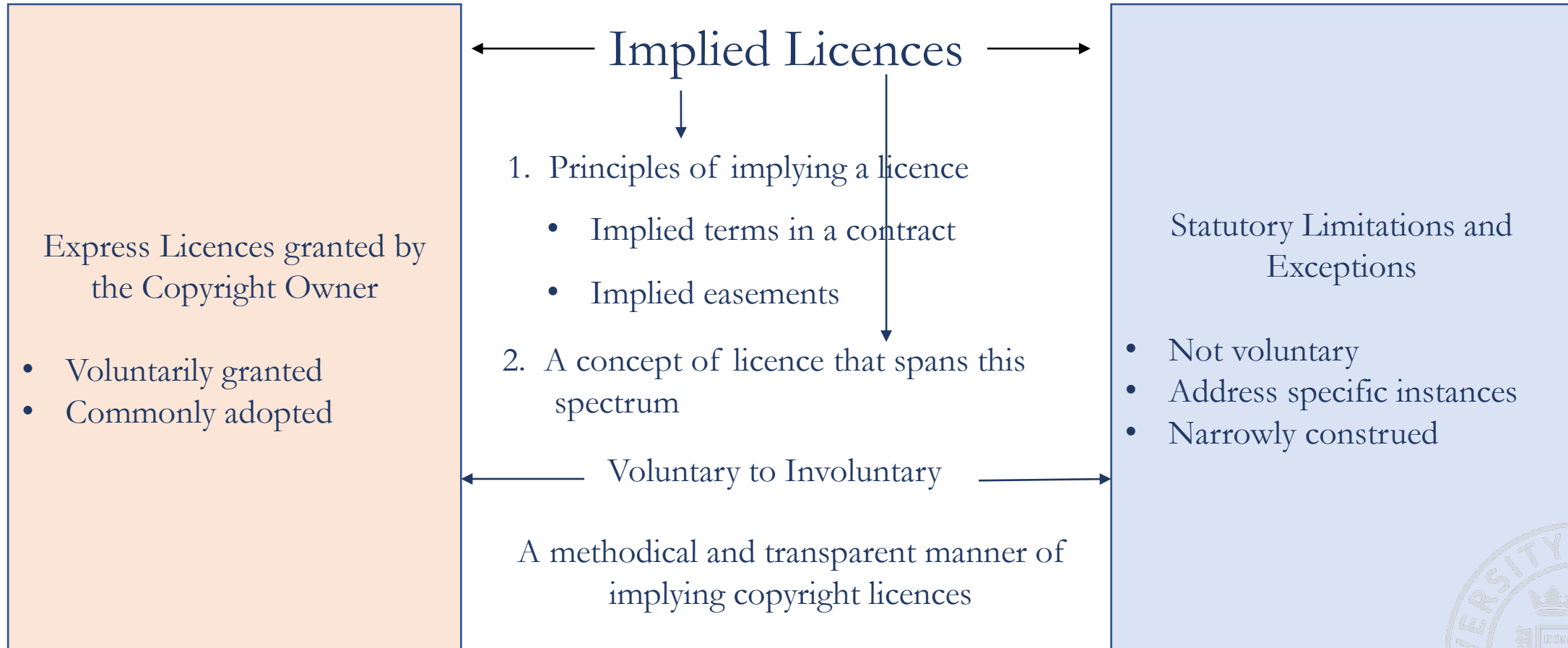
Landscape of permitted acts



Benefits of Implied Licence



Challenges of Implying a Copyright Licence



Concept of licence

- A licence is not a contract in itself, but can arise within a contractual context
 - A licence can be the consideration in a contract for reciprocal benefit
- A licence at its core is only a permission that can arise under different circumstances
 - Analytical jurisprudence – Hohfeldian notion of licence – a licence simply as a privilege
- Land law notion of licence – a residuary character after all other property interests are classified
 - Ubiquity of licences
- Just as different factors can drive implying a term in a contract, different factors drive implying a copyright licence



Contract Law Rules of Implication

Principles of implying terms geared towards ascertaining the unexpressed joint intention of the parties - **Implied in fact**

Necessary to achieve 'business efficacy' meaning the commercial objective of the contract – *Moorcock* (1889)

A term is so obvious that it goes without saying – officious bystander test – *Shirlaw v Southern Foundries* (1939)

Does the implication spell out in express words what the instrument, read as against the relevant background, would reasonably be understood to mean – *Attorney General v Belize* (2009)

Principles of implying terms geared towards giving effect to a usage in the industry or market - **Implied by usage**

The practice must be certain in the sense that it is clearly established, identifiable and uniform – *Cunliffe-Owen v Teacher* (1967)

The practice must be notorious in the sense that it must be well known in the market – *Cunliffe-Owen v Teacher* (1967)

The practice must not be reasonable and must not be against the law – *Robinson v Mallett* (1874)

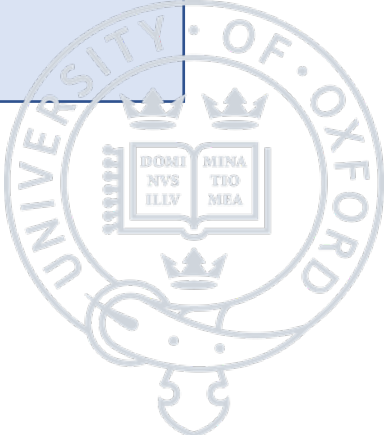
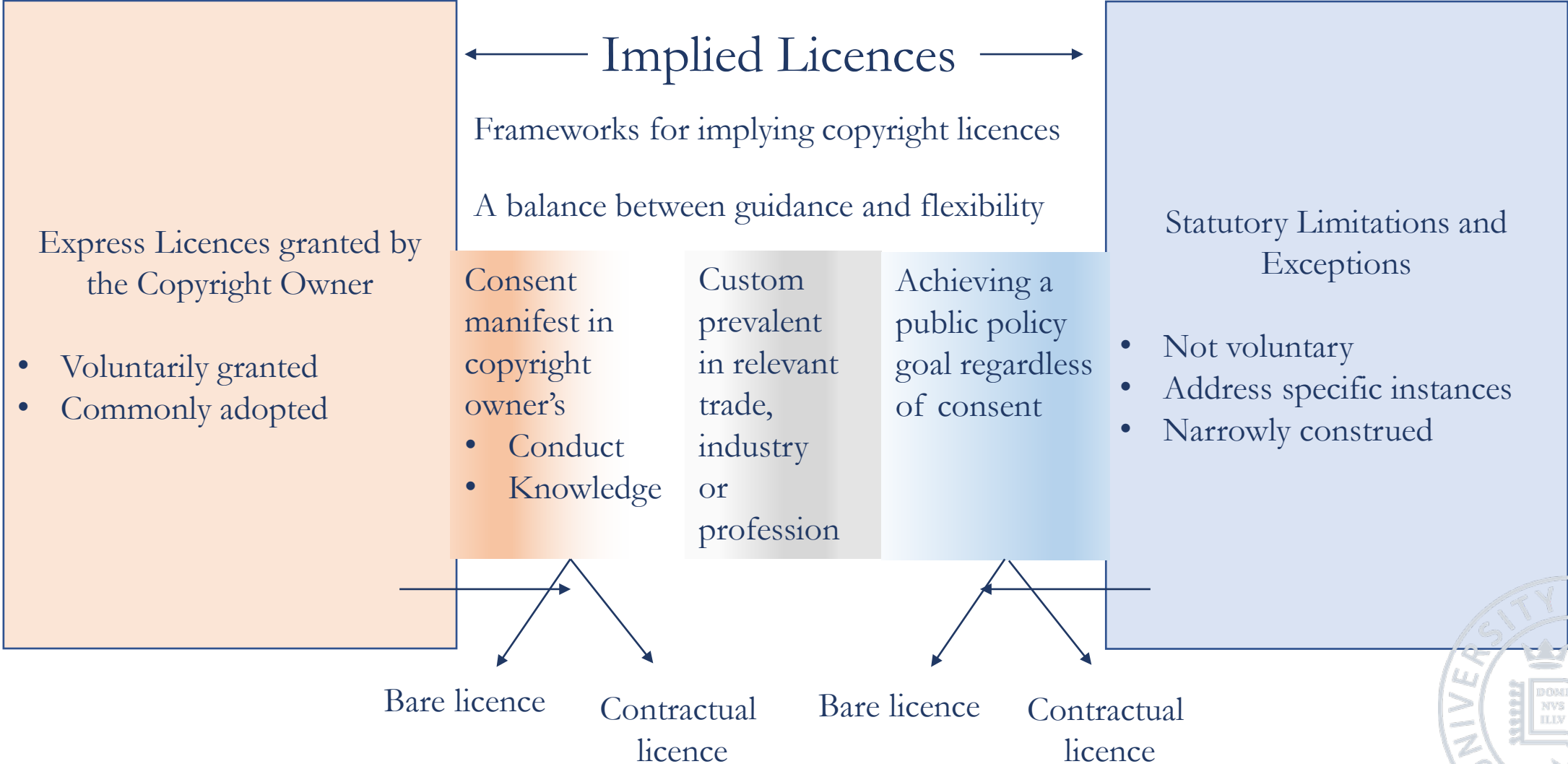
Principles of implying terms to bring about fairness, reasonableness, efficiency – **Implied in law**

Necessary in a particular type of contract – lease of council flats – *Liverpool City Council v Irwin* (1977)

Necessary in a particular type of contract – employment contract – *Scally v Southern Health* (1992)

'... reasonableness, fairness and the balancing of competing policy considerations.' *Crossley v Faithful Holdings Ltd* (2004)

Implying a Copyright Licence



Limitations of Implied Licence

- Express words can override implied licence
 - No matter how comprehensive a contract, there will always be a gap or a loophole
 - Courts can decide what kind of express words are required to override – can a general term that says all implied licences are overridden sufficient?
- Implied licences are expensive – need to litigate for a result
 - Intellectual Property Enterprise Courts – pecuniary jurisdiction of less than £500,000 go to this court (with an option of small claims track for very small amounts)
 - A robust doctrine of implied licence can bring the certainty that may avoid the need to approach the court





Thank you!!