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# **‘Inverted Supremacy’, ‘Weaker Precedent’ and other uncertainties brought about by the Retained EU Law (Revocation and Reform) Act 2023**

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*The Retained EU Law (Revocation and Reform) Act 2023 fundamentally changes the nature of retained EU law. It removes the ‘frozen supremacy’ introduced by the European Union (Withdrawal) Act 2018 and in some cases entirely inverts it so that domestic law trumps retained direct EU law. Thereby creating a degree of uncertainty. But greater uncertainty still comes from its abolition of the strained interpretation of domestic law (under the Marleasing Principle) to ensure compliance with retained EU law. Coupled with these changes, the Act endeavours to make it easier for judges to depart from retained EU law. This discussion looks at these changes and the difficulties they may present to the law generally, and intellectual property laws in particular, and it presents ways in which these difficulties may be mitigated by the courts.*

## **Introduction**

In 2022, one candidate to lead the Conservative party promised to have a “bonfire” of retained EU laws<sup>2</sup> and the other to “shred” those laws.<sup>3</sup> The proposal was simple.<sup>4</sup> All EU retained direct EU legislation<sup>5</sup> and all EU-derived subordinate legislation<sup>6</sup> would sunset (cease to have effect) at the end of 2023 and all other retained law would be ‘assimilated’.<sup>7</sup> While the sunsetting policy was substantially truncated during its passage<sup>8</sup> the Retained EU Law (Revocation and Reform) Act 2023 still includes measures which will profoundly shift the relationship between retained EU law and the rest of domestic law.<sup>9</sup> This discussion is divided into two parts: one dealing with the changes it makes to interpreting legislation; and the second looking at how the Act has tried to pry out the retained case law from the rest.

## **PART 1: LEGISLATION**

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<sup>1</sup> This paper was originally presented under a different title to the British Literary and Artistic Copyright Association on 13 July 2023.

<sup>2</sup> Peter Walker, “Truss vows to scrap remaining EU laws by end of 2023 risking ‘bonfire of rights’”, 22 July 2022 <<https://www.theguardian.com/politics/2022/jul/22/bonfire-of-rights-truss-vows-to-scrap-remaining-eu-laws-by-end-2023>>.

<sup>3</sup> “Rishi Suna vows to put EU laws ‘through shredder’ in now campaign video” <<https://www.youtube.com/watch?v=BsDWD7ayXhY>>. The instruments which might have been sunsetted are listed at:

<https://webarchive.nationalarchives.gov.uk/ukgwa/20230613221616/https://www.gov.uk/government/publications/intellectual-property-and-retained-european-union-law-the-facts/retained-eu-law-for-intellectual-property..>

<sup>4</sup> See Retained EU Law (Revocation and Reform) Bill (as introduced) (Bill No 156), cl 1.

<sup>5</sup> See definition in European Union (Withdrawal) Act 2018, s 20(1).

<sup>6</sup> See definition in Retained EU Law (Revocation and Reform) Bill (as introduced), cl 1(4) (in summary this meant all delegation made under or operating for the purpose mentioned in the (repealed) European Communities Act 1972, s 2(2)).

<sup>7</sup> The Retained EU Law (Revocation and Reform) Act 2023, s 5 changes “retained EU law” into “assimilated law” from the end of 2023. This is just a change of name. The text of the 2023 Act still uses the original nomenclature and so it will be used here.

<sup>8</sup> Kemi Badenoch, *Regulatory Reform Update*, 10 May 2023 Statement UIN HCWS764: <<https://questions-statements.parliament.uk/written-statements/detail/2023-05-10/hcws764>>. Instead, a schedule sets out the laws which are to be repealed (which includes six (spent) laws relating to intellectual property): Retained EU Law (Revocation and Reform) Act 2023, s 1(1) and Schedule 1.

<sup>9</sup> It also includes a range of legislative powers (Retained EU Law (Revocation and Reform) Act 2023, ss 11-16), but these will not be explored here.

The primary change brought about by the 2023 Act is it ends the supremacy of EU law in respect of any enactment or rule of law.<sup>10</sup> This brings about a different but no less real type of uncertainty than the abandoned sunseting of all EU laws. To understand this unpredictability the nature of EU supremacy as it applied to the United Kingdom will be briefly summarised before seeing how it changed when the UK was no longer bound by EU law, that is after IP completion day (31 December 2020).

### Supremacy under European Union Law

The rule that the laws of the European Union (and its predecessors, the European Community and European Economic Community) are supreme over the laws of Member States was firmly established by the time the United Kingdom joined in 1973.<sup>11</sup> The matter is so well known that it is enough to state the basic rule: all laws from the European Union, whatever their nature, take priority over all conflicting domestic law and international law, whether it came into effect before or after the EU law in question.<sup>12</sup>

There are two key principles which arose from supremacy which are germane for current purposes. The first is that domestic laws which conflict with EU laws (whenever passed) must not be applied if they contravene EU law (the disapplication rule)<sup>13</sup>. Indeed, it is not enough for a Member State to simply say that it will no longer apply a law – the State must actually take steps to remove the disappplied law from the statute book.<sup>14</sup> The second aspect of supremacy (commonly called, *indirect* effect or the *Marleasing* principle<sup>15</sup>) requires courts to interpret domestic enactments, and rules of law, in accordance with EU law “as far as is possible”, unless to do so would be *contra legum*.<sup>16</sup>

The outer limit of the rule was said by the domestic courts to be that an enactment cannot be “re-written” or amended<sup>17</sup> and when the rule is being applied it is presumed that Parliament intended to go no further than it was required to do so under EU law.<sup>18</sup> Parliamentary and EU supremacy was reconciled in *Factortame*<sup>19</sup> meaning, as Lord Sumption later explained

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<sup>10</sup> European Union (Withdrawal) Act 2018, s 5(A1) inserted by Retained EU Law (Revocation and Reform) Act 2023, s 3(1). All references to the European Union (Withdrawal) Act 2018 are to the Act as it was at the time of writing (July 2023) unless specifically stated.

<sup>11</sup> See Case 26/62 *Van Gen den Loos* [1963] ECR 3; Case 6/64 *Costa v ENEL* [1964] ECR 1141; later see Case 11/70 *Internationale Handelsgesellschaft mbH* [1970] ECR 1125; also see the attempt to get a declaration that the UK signing the EEC Treaty would undermine the Crown in Parliament: *Blackburn v Attorney General* [1971] 1 WLR 1037.

<sup>12</sup> The only exception is where a Member State had a prior-existing international obligation and departing from EU law is the only way to give effect to that agreement: see C-324/93 *The Queen v Secretary of State for the Home Department ex part Evans Medical* [1995] ECR I-563 and C-13/93 *Office national de l'emploi v Minne* [1994] ECR I-371, [19].

<sup>13</sup> C-213/89 *The Queen v Secretary of State for Transport ex parte Factortame* [1990] ECR I-2433 at [17]; also see Case 106/77 *Simmenthal v Commission* [1978] ECR 629; but the rule can continue to apply in other contexts where it does not effect EU law: C-10/97 *Ministero delle Finanze v IN.CO.GE.'90* [1998] ECR I-6307 at [25] – [29]; C-264/96 *Imperial Chemical Industries* [1998] ECR I-4695 at [35]; and, in the absence of a remedy, national courts must fashion one: C-432/05 *Unibet v Justitiekanslern* [2007] ECR I-2271.

<sup>14</sup> C-334/94 *Commission v France* [1996] ECR I-1307 at [28].

<sup>15</sup> C-106/89 *Marleasing* [1990] ECR I-4135; also so Case 14/83 *Van Colson* [1984] ECR 1891.

<sup>16</sup> C-441/14 *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2015:776 at [AG68]

<sup>17</sup> *Football Association Premier League Ltd v QC Leisure* [2012] EWCA Civ 1708, [2013] FSR 20; and in the post-Brexit context: *Revenue And Customs v Ampleward Ltd* [2021] EWCA Civ 1459 at [109].

<sup>18</sup> *The Claimants in the Royal Mail Group Litigation v Royal Mail Group Ltd* [2021] EWCA Civ 1173 at [76].

<sup>19</sup> [1991] 1 AC 603 at 659; also see *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [65] (the European Communities Act 1972 being seen as an “independent and overriding source of domestic law”); see European Union Act 2011, s 18.

succinctly in *Benkharbouche*,<sup>20</sup> that “a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied”. The usual resolution of the conflict is that proposed by Lord Bridge in *Factortame*:<sup>21</sup>

“By virtue of section 2(4) of the [European Communities Act 1972, any other enactment] is to be construed and take effect subject to directly enforceable Community rights ... This has precisely the same effect as if a section were incorporated in [every enactment] that the provisions ... were to be without prejudice to the directly enforceable Community rights...”

Notwithstanding, it remained the case that any statute which was found to be contrary to EU law needed to be amended or repealed to make it compliant. So when the Court of Appeal took the view in *Football Premier League v. QC Leisure*<sup>22</sup> that the exception in section 72 of the Copyright, Designs and Patents Act 1988 extending to films did not fit with EU law, the provision was subsequently amended to make it compliant.<sup>23</sup> There were of course instances of the government proactively changing the law to avoid a court making an adverse finding, such as the amendments to the Trade Marks Act 1994<sup>24</sup> to expand dilution protection to similar goods and services following C-292/00 *Davidoff v Gofkid Ltd*<sup>25</sup> and C-408/01 *Adidas-Salomon v Fitnessworld Trading Ltd*,<sup>26</sup> and the repeal of section 67 of the 1988 Act<sup>27</sup> to avoid a domestic *Francovich* claim<sup>28</sup> that the copyright exception, which allowed certain clubs and societies to play sound recordings, infringed the three step test.<sup>29</sup> However, Lord Bridge’s ‘without prejudice’ rule means that unlike unlawful statutory instruments which are always void<sup>30</sup> enactments which are disapplied are entirely valid until repealed.

The second half of supremacy is indirect effect and it has two strands. The first is it became a way for the courts to look behind the legislation (what is now be called EU-derived domestic legislation<sup>31</sup>) to the context and purpose of it being enacted. As it was put by Lord Walker in *R v Johnstone*<sup>32</sup>

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<sup>20</sup> *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 at [78] (he was referring to the distinction between the ECHR and the EU law.

<sup>21</sup> [1990] 2 AC 85 at 140.

<sup>22</sup> [2012] EWCA Civ 1708, [2013] FSR 20.

<sup>23</sup> Copyright (Free Public Showing or Playing) (Amendment) Regulations 2016 (SI 2016/565). The Explanatory Note makes the link directly. The repeal of s 73 was slightly different. It was questioned in *ITV Broadcasting Ltd v TVCatchup Ltd* [2015] EWCA Civ 204, [2015] FSR 28. The provision was repealed by the Digital Economy Act 2017, s 34. This Bill (including this provision) was introduced before the Court of Justice answered the question which would have put unbearable strain on s 73: C-275/15 *ITV Broadcasting*, EU:C:2017:144.

<sup>24</sup> Amendments to the Trade Marks Act 1994, s 5(3) were made by the Trade Marks (Proof of Use, etc.) Regulations 2004 (SI 2004/946), reg 7; this was criticised by Jacob LJ in the Preface to David Kitchin et al, *Kerly’s Law of Trade Marks and Trade Names* (14<sup>th</sup> Ed, Sweet and Maxwell 2005), p viii.

<sup>25</sup> [2003] ECR I-389.

<sup>26</sup> [2003] ECR I-12537.

<sup>27</sup> See Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010 (SI 2010/2694)

<sup>28</sup> That is a damages claim by an individual based on a Member State failing to implement or breaching EU law: see C-6/90 *Francovich v Italy* [1991] ECR I-5357. These claims were abolished on IP completion day: European Union (Withdrawal) Act 2018, Sch 1, para 4.

<sup>29</sup> See *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2004] 1 WLR 2893; the three step test in question is the one now found in Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, art 10(3).

<sup>30</sup> See pp ???.

<sup>31</sup> European Union (Withdrawal) Act 2018, s 1B(7).

<sup>32</sup> [2003] UKHL 28, [2003] 1 WLR 1736 at [63].

“In construing the [Trade Marks Act 1994] your Lordships have to approach it as a new statute, the main purpose of which is to implement the Directive. The Directive aims at the partial approximation (but not the complete harmonisation) of the trade mark laws of the Member States. The 1994 Act must be construed accordingly...’

But many courts took a much more robust approach, for instance, Pumfrey J in *Levi Strauss & Co v Tesco Stores Ltd.*<sup>33</sup>

“It has been observed that to the extent that the substantive provisions correctly implement the Directive, then they mean the same thing, and the Directive can be directly consulted. To the extent that they mean something different they represent a failure correctly to implement the Directive, and this is a conclusion against which the Court will strive, in order to comply with what is sometimes called the *Marleasing* doctrine...”

Thus, it became “customary in intellectual property litigation” for counsel to argue the case “by direct reference to the Directive.”<sup>34</sup>

The second strand of the *Marleasing* principle requires words in an enactment (or rule of law) to be given a meaning – a strained interpretation - they might not otherwise possess to ensure compliance with EU law. Instances of where this has happened will be considered below after looking to the ‘frozen’ supremacy rule which came into effect at 11pm on 31 December 2020.

### **2021-2023: ‘Frozen’ Supremacy**

When the United Kingdom left the European Union, or more precisely when the implementation period for the Withdrawal Agreement ended on 31 December 2020, the role of supremacy changed, but not that fundamentally. This is because when the European Union (Withdrawal) Act 2018 came into force it froze supremacy in aspic. Accordingly, Parliament became ‘sovereign’ in relation to any future legislation passed<sup>35</sup> but it was different for the existing law. The Act provided that the “principle of supremacy of EU law” does not apply to an enactment or rule of law made on or after IP completion day, but it does continue to apply to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before.<sup>36</sup> This was explained in the Explanatory Notes:

“Where ... a conflict arises between pre-exit domestic legislation and retained EU law...the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it.”<sup>37</sup>

In the *Open Rights Group* case,<sup>38</sup> the government accepted that this meant that the Court of Appeal could disapply a provision of the Data Protection Act 2018 if it considered that it was

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<sup>33</sup> [2002] EWHC 1625 (Ch), [2003] RPC 18 at [27].

<sup>34</sup> *Dyson Limited v Vax Limited* [2010] EWHC 1923 (Pat), [2010] FSR 39 at [9]; also see Daniel Greenberg, “The Copy-Out Debate in the Implementation of European Union Law in the United Kingdom” (2012) 6 *Legisprudence* 243.

<sup>35</sup> But it was possible to make a future enactment subject to supremacy: European Union (Withdrawal) Act 2018, s 5(3).

<sup>36</sup> European Union (Withdrawal) Act 2018, s 5(1) and (2).

<sup>37</sup> European Union (Withdrawal) Act 2018: Explanatory Notes, [103].

<sup>38</sup> *Open Rights Group, R (On the Application Of) v The Secretary of State for the Home Department* [2021] EWCA Civ 800, [2021] 1 WLR 3611 at [13] (the government acceptance), and [53-54] where it was disappplied.



contrary to EU law as it stood on 31 December 2020;<sup>39</sup> and subsequently the Act was amended.<sup>40</sup> Examples of incompatible intellectual property laws have been set out above. But there have been wide ranging arguments about incompatible domestic laws, particularly in the field of copyright.<sup>41</sup> One example makes the point, Elenora Rosati argues that section 116A<sup>42</sup> of the Copyright, Designs and Patents Act 1988<sup>43</sup> is incompatible with the Orphan Works Directive.<sup>44</sup> If this argument is correct<sup>45</sup> then any challenge to section 116A on the basis of supremacy would still lead to domestic law not applying to the extent it was contrary to EU law. This will change when the 2023 Act comes into effect.

Just like the disapplication rule, the *Marleasing* principle still applies, and it has continued to be relied upon (not always successfully) after the UK left the bounds of EU law.<sup>46</sup> So it remains possible to turn straight to the Directive for the purposes of interpreting EU-derived domestic legislation. And similarly, the strained interpretations of this legislation remain good law. The *Marleasing* principle could also continue to help a court when on IP completion day a Directive had not been expressly implemented. So, for example, art 3(2) of the Enforcement Directive requires remedies to be “effective proportionate and dissuasive”<sup>47</sup> and this has, amongst other things, led the court to consider proportionality when deciding whether to grant an injunction.<sup>48</sup> Likewise, the substantive provisions of the Trade Secret Directive<sup>49</sup> were not statutorily implemented.<sup>50</sup> So it remains unclear whether a breach of confidence action can extend to

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<sup>39</sup> Data Protection Act 2018, Sch 2, par 4 and (Retained) Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), art 23; for a criticism of the approach see Nicholas Kilford, ‘The Supremacy of Retained EU Law: ‘We’re Lost, But We’re Making Good Time’’, U.K. Const. L. Blog (27th July 2021) (available at <https://ukconstitutionallaw.org/>).

<sup>40</sup> The change was made to the provision to make it compliant by the Data Protection Act 2018 (Amendment of Schedule 2 Exemptions) Regulations (SI 2022/76).

<sup>41</sup> This has been a theme of Laddie since the Third Edition; in the most recent edition, the list is much diminished: *Laddie, Prescott and Vitoria: The Modern Law of Copyright* (5<sup>th</sup> Ed, Butterworths 2018), [2.8] (the current examples relate to the duration of films, the term of moral rights and the distribution right). The term of moral rights is discussed below.

<sup>42</sup> As the provision is an enabling power it is not clear how it could be contrary to EU law as it does not actually create any law (only a power). But the arguments made could apply to the regulations subsequently made under this power (and two ancillary powers in Copyright, Designs and Patents Act 1988, ss 116C and 116D): Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014/2863).

<sup>43</sup> Elenora Rosati “The Orphan Works Provisions of the ERR Act: Are They Compatible with UK and EU Laws?” [2013] EIPR 724.

<sup>44</sup> Directive 2012/28/EU on certain permitted uses of orphan works.

<sup>45</sup> The nature of orphan works means there is unlikely to be anyone to challenge the law: see Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property* (6<sup>th</sup> Ed, Oxford 2022), p 21,

<sup>46</sup> see *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC), [2022] FSR 25, [92-97]; *WaterRower (UK) Ltd v Liking Ltd (T/A Topiom)* [2022] EWHC 2084 (IPEC), [2023] FSR 6 at [58-79]. In most cases, these would have been covered by the transitional provisions applying to cases pending on 31 December 2020: European Union (Withdrawal) Act 2018, Sch 8, para 39

<sup>47</sup> Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property* (6<sup>th</sup> Ed, Oxford 2022), pp 21-2; the Court of Justice confirmed the requirement applies to remedies: C-324/09 *L’Oreal v eBay International* [2011] ECR I-6011, [139-144].

<sup>48</sup> *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch), [2012] RPC 28 at [116]–[147]; *EMI Records v British Sky Broadcasting* [2013] EWHC 379 (Ch), [2013] FSR 31 at [90]–[107]; *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2011] RPC 28 at [199]–[201].

<sup>49</sup> Directive (EU) 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, art 2-5.

<sup>50</sup> See Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018/597). Regulation 3 is intended to ensure there is protection of trade secrets where the law of confidence does not prohibit the conduct, but it is an unusual provision: *Shenzhen Senior Technology Material Co Ltd v Celgard, LLC* [2020] EWCA Civ 1293, [2021] FSR 1 at [29]

reverse engineering<sup>51</sup> or whether it extends to prohibiting the development of certain derivative products.<sup>52</sup> *Marleasing* enabled the courts to paper over any implementation cracks. This is taken much further in relation to the obligations set out in the UK-EU Trade and Cooperation Agreement.

### *The general implementation*

To ensure full effect was given to the UK-EU Trade and Cooperation Agreement,<sup>53</sup> including its intellectual property chapter,<sup>54</sup> there was a general implementation provided in section 29(1) of the European Union (Future Relationship) Act 2020:

“Existing domestic law has effect on and after the relevant day with such modifications as are required for the purposes of implementing in that law the Trade and Cooperation Agreement ... so far as the agreement concerned is not otherwise so implemented and so far as such implementation is necessary for the purposes of complying with the international obligations of the United Kingdom under the agreement.”

The provision applies to any domestic law<sup>55</sup> passed before the IP completion day. The TCA itself is neither directly effective nor does it create a form of supremacy in the strict sense,<sup>56</sup> but it does create “a blanket, generic, mechanism to achieve full implementation, without the need for any further Parliamentary or other Executive intervention”<sup>57</sup> and so domestic law on an issue is what it says in the TCA.<sup>58</sup> The rule only applies so far as it is required<sup>59</sup> and when it is so required then courts have to look to the TCA to interpret domestic law.<sup>60</sup> The TCA has an entire chapter setting out intellectual property rules many of which map directly onto Directives and Regulations. It therefore provides another back door for courts to take account of EU law.<sup>61</sup> Nothing about the general implementation is changing under the 2023 Act and so in the absence of *Marleasing* it might become much more significant as we move into 2024.

### *Isn't not supremacy but...*

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<sup>51</sup> *Mars v Teknowledge* [2000] FSR 138; *Volkswagen v Flavio D Garcia* [2013] EWHC 1832 (Ch), [2014] FSR 12; see Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property* (6<sup>th</sup> Ed, Oxford 2022), pp 1267-8.

<sup>52</sup> Directive (EU) 2016/943, art 4(5) and 2(4); see Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property* (6<sup>th</sup> Ed, Oxford 2022), p 22.

<sup>53</sup> The same rule applies to the Security of Classified Information Agreement, but this will not be explored here; and see *British Gas Trading Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [207].

<sup>54</sup> Trade and Cooperation Agreement between the United Kingdom and the European Union (2021 CP 426), Title V.

<sup>55</sup> For the definitions of existing domestic law and domestic law: see European Union (Future Relationship) Act 2020, s 29(4).

<sup>56</sup> *British Gas Trading Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [229](i).

<sup>57</sup> *R (Heathrow Airport Ltd) v HM Treasury* [2021] EWCA Civ 783 at [227]; also see *Lipton v BA City Flyer Ltd* [2021] EWCA Civ 454, [2021] 1 WLR 2545 at [78]; however direct effect and applicability in the traditional EU sense is given to anything included in the EU Withdrawal Agreement or the EEA/EFTA and Swiss Agreement: European Union (Withdrawal) Act 2018, s 7A and 7B as inserted by the European (Withdrawal Agreement) Act 2020, s 5 and 6.

<sup>58</sup> *R (Heathrow Airport Ltd) v HM Treasury* [2021] EWCA Civ 783 at [228].

<sup>59</sup> *British Gas Trading Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [229](iii).

<sup>60</sup> *British Gas Trading Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 737 (Admin) at [229](iv).

<sup>61</sup> For an extensive discussion see Phillip Johnson, *Intellectual Property, Free Trade Agreements and the United Kingdom: The Continuing Influence of European Union Law* (Edward Elgar 2021).

Section 2(1) of the European Union (Withdrawal) Act 2018 provides “that EU derived domestic law as it had effect in as it has effect in domestic law immediately before IP completion day, continues to have effect in domestic law on and after IP completion day”. This means that any delegated legislation made under the European Communities Act 1972<sup>62</sup> to implement Directives or further implement Regulations continues in force despite the repeal of the 1972 Act.<sup>63</sup> The wording of s 2(1) of the 2018 Act itself presents an interesting conundrum. What if the delegated legislation made under the 1972 Act went beyond the legislative powers granted by the Act (that is the making of the instrument was *ultra vires*).<sup>64</sup> This might be either because a Directive was “over implemented” or implemented in a way inconsistent with a Directive.<sup>65</sup> For instance, it is argued in *Laddie, Prescott and Vitoria: The Modern Law of Copyright*<sup>66</sup> that the Duration of Copyright and Rights in Performances Regulations 1995<sup>67</sup> are *ultra vires* to the extent they extended the term of moral rights at the same time as they extended economic rights.<sup>68</sup> If this argument were accepted by a court then the Regulations would be *ultra vires* and they would have been void (at least to the relevant extent).<sup>69</sup> Logically it follows that if the 1995 Regulations has been void since they were made then they must have been void immediately before IP completion day (and so had no effect). In turn, this means they remain void after IP completion day as only then would the Regulations continue to have the same effect they had before that date.<sup>70</sup> This suggests that arguments about the scope of the power to legislate under the European Communities Act 1972 remain live and the uncertainty it causes is therefore mixed up with that brought about by the 2023 Act.

### **From 2024: All up in the air...**

The relative stability under in the European Union (Withdrawal) Act 2018 was washed away by the Retained EU Law (Revocation and Reform) Act 2023. It amends the 2018 Act so that:<sup>71</sup>

“The principle of the supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever passed or made).”<sup>72</sup>

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<sup>62</sup> European Communities Act 1972, s 2(2) (and also paragraph 1A of Schedule 2).

<sup>63</sup> European Union (Withdrawal) Act 2018, s 1.

<sup>64</sup> While provision was made to preclude challenges to the validity of an EU instrument (European Union (Withdrawal) Act 2018, Sch 1, para 1) nothing was done to prevent challenges to domestic implementing legislation (as to the retention of delegated legislative powers see: Sch 8, paras 3 to 12).

<sup>65</sup> There were very broad powers to implement EU laws and this means ‘over implementation’ arguments face an uphill battle: see generally Phillip Johnson “Implementing Community Obligations in the Realms of Intellectual Property” (2006) 1 JIPLP 449.

<sup>66</sup> (5<sup>th</sup> Ed, Butterworths 2018) at [2.17].

<sup>67</sup> SI 1995/3297.

<sup>68</sup> More precisely their argument is that Duration of Copyright and Rights in Performances Regulations 1995, reg 5(1) which inserts a section 12 into the Copyright, Designs and Patents Act 1988 is *ultra vires*. If correct this would lead to the copyright in the United Kingdom returning to life plus 50 years; but the life plus 70 years term is required by TCA, art 230 and so even if reg 5(1) is *ultra vires* the longer term may be retained by reason of the general implementation (see ???). But there are reasonable grounds for suggesting the argument in Laddie, Prescott and Vitoria is wrong: see Phillip Johnson “Implementing Community Obligations in the Realms of Intellectual Property” (2006) 1 JIPLP 449, fn 45.

<sup>69</sup> *R. (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2020] AC 869 at [119]; *R. (on the application of Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [70].

<sup>70</sup> The counter argument that the instrument’s validity is judged as it was believed to be on that date is much less convincing, but there is some support for it based on the uncertain as to the legality of completed acts before an instrument is found void: see *Boddington v British Transport Police* [1999] 2 AC 143, 164, HL; also see Daniel Greenberg, *Craies on Legislation* (12<sup>th</sup> Ed Sweet and Maxwell 2020), [3.6.7].

<sup>71</sup> European Union (Withdrawal) Act 2018, s 5(A1) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 3(1).

<sup>72</sup> In this provision, ‘enactment’ has a particular meaning (see Retained EU Law (Revocation and Reform) Act 2023, s 21) and includes retained direct EU legislation.



This change in the law only applies prospectively to things occurring, and legal proceedings started, after the end of 2023.<sup>73</sup> But from that time neither the disapplication rule nor the *Marleasing* principle continue to apply. The end of supremacy is coupled with an express provision that direct EU legislation<sup>74</sup> is “subject to all domestic enactments so far as it is incompatible with them”<sup>75</sup> and in cases where incompatibility is identified the court must make an incompatibility order.<sup>76</sup> In other words, supremacy has been removed in some cases and expressly inverted in others. Had the *Open Rights* case been started in 2024 then the Data Protection Act 2018 would take precedence over the United Kingdom General Data Protection Regulation<sup>77</sup> and it would have been the latter that needed amending. It is important to note that provisions that have already been amended for being incompatible with EU law, such as section 72 of the Copyright, Designs and Patents Act 1988 and sections 5 and 10 of the Trade Marks Act 1994, are not changed back by reason of this provision.

But if Rossatti’s argument (that the orphan works regime set up under section 116A of 1988 Act is incompatible with EU law) was correct on 31 December 2023 then it would be wrong the following day. This is subject to the transnational provisions which means that a domestic statute could still be disapplied if the incompatible thing was created or vested before the end of 2023 even where the legal challenge is started in 2024. This is because the abolition of supremacy does “not apply in relation to anything occurring before the end of 2023.”<sup>78</sup> Nevertheless, as domestic enactments are only read to be “without prejudice” to EU law, any incompatibility discovered in old cases need not lead to the offending provision being repealed as it can still be applied to newer cases.

The abolition of supremacy also brings to an end the *Marleasing* principle. The courts will no longer be able to turn straight to the Directive when interpreting EU-derived domestic legislation. But it raises much more difficult questions as retained domestic case law will start to flap in a wind of uncertainty. So for instance, the evolution of EU law dissolved the edges of traditional “closed list” of copyright works<sup>79</sup> and enabled English courts<sup>80</sup> to move away from its strict boundary.<sup>81</sup> Once the *Marleasing* principle no longer applies does this mean that the lists are locked up once more? Or are they locked up for post-2023 works, but remain open

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<sup>73</sup> Retained EU Law (Revocation and Reform) Act 2023, s 22(5).

<sup>74</sup> The definition of “direct EU legislation” is in European Union (Withdrawal) Act 2018, s 3(2) this includes, in particular, any EU regulation, EU decision or EU tertiary legislation, as it has effect in EU law immediately before IP completion day.

<sup>75</sup> European Union (Withdrawal) Act 2018, s 5(A2)(b).

<sup>76</sup> European Union (Withdrawal) Act 2018, s 6D to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 8. The most significant aspect of this power is that it may delay the effect of the incompatibility in the individual case (see s 6D(3)(b) and (c)).

<sup>77</sup> (Retained) Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

<sup>78</sup> Retained EU Law (Revocation and Reform) Act 2023, s 22(5).

<sup>79</sup> *Northern Office Micro Computers v Rosenstein* [1982] FSR 124 (SA).

<sup>80</sup> *Response Clothing v The Edinburgh Woollen Mill* [2020] EWHC 148 (IPEC), [2020] FSR 25; *Shazam Productions Ltd v Only Fools The Dining Experience* [2022] EWHC 1379 (IPEC), [2022] FSR 25; *WaterRower (UK) Ltd v Liking Ltd (T/A Topiom)* [2022] EWHC 2084 (IPEC), [2023] FSR 6; *Wright v BTC Core* [2023] EWHC 222 (Ch), [2023] ECDR 9.

<sup>81</sup> See in particular, Nicholas Caddick, Gwilym Harbottle and Uma Suthersanen, *Copinger and Skone James on Copyright* (18<sup>th</sup> Ed, Sweet and Maxwell 2020), [3-04] to [3-09].

for older works?<sup>82</sup> Likewise, it was held that, if necessary, *Marleasing* would allow the copyright exception in section 28A of the Copyright, Designs and Patents Act 1988 to apply to broadcasts even though the Act specifically does not list this sort of work.<sup>83</sup> Without *Marleasing* does the exception narrow back to how it was drafted? Another example, the definition of literary works in the 1988 Act seems to create two works in computer programmes one in the programme itself and one in the preparatory material<sup>84</sup> whereas the Computer Software Directive<sup>85</sup> envisages only one.<sup>86</sup> With the end of *Marleasing* does one work divide into two? Yet another example is the view that only a “part” needs to be taken to infringe an entrepreneurial work (rather than a “substantial part” as set out in section 16(3) of the 1988 Act).<sup>87</sup> Has the substantiality requirement bounced back? A further, and the final example here, is the Enforcement Directive required the rationale for additional damages to change so that they are “effective, proportionate and dissuasive”.<sup>88</sup> Once *Marleasing* no longer applies does that rationale continue?<sup>89</sup>

### *Weakened precedent?*

Where an enactment (or rule of law) could be construed in the normal way to comply with EU law then the abolition of supremacy will make little difference. As will be discussed below, it may also be easier for domestic courts to depart from retained case law once the 2023 Act comes into force, but this is not a matter of supremacy. On the other hand, where the domestic legislation has already been given a conforming interpretation it is important to appreciate what happens once the *Marleasing* principle is eviscerated from the precedent. Strictly speaking a *new* statutory rule for reading all statutes had been adopted. This means that courts of any level should not apply *Marleasing* to a statutory provision even if a higher court had done so in the past. And cases where the courts have considered only the text of a Directive, and not the implementing law, may no longer be correct due to the differences in language. So the court will have to consider its meaning afresh. In simple terms, the binding nature of appellate decisions on lower courts has been expressly overturned by Parliament where the higher court was forced to give an enactment or rule of law a strained interpretation.

So, for instance, once *Marleasing* no longer applies, the 1988 Act should be read in the conventional sense and the list of copyright works becomes closed again<sup>90</sup> – at least in relation to new works.<sup>91</sup> The exception found in section 28A of that Act will not be read to include

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<sup>82</sup> As the “thing” - the work - was created before the end of 2023 so supremacy may continue to apply to it: Retained EU Law (Revocation and Reform) Act 2023, s 22(5) and Explanatory Notes at [247]; it is also worth noting that works which were original before 22 December 2002 might remain protected: Nicholas Caddick, Gwilym Harbottle and Uma Suthersanen, *Copinger and Skone James on Copyright* (18<sup>th</sup> Ed, Sweet and Maxwell 2020), [3-10] to [3-12].

<sup>83</sup> *ITV Broadcasting Ltd v TV Catchup Ltd* [2011] EWHC 1874 (Pat), [2011] FSR 40 at [121].

<sup>84</sup> Copyright, Designs and Patents Act 1988, s 3(1)(b) and (c).

<sup>85</sup> Directive 2009/24/EC on the legal protection of computer programs, art 1(1).

<sup>86</sup> See *Nova Productions Limited v Mazooma Games Limited* [2007] EWCA Civ 219, [2007] RPC 25 at [28].

<sup>87</sup> See *C-476/17 Pelham GmbH v Hütter*, EU:C:2019:624 at [29] and Nicholas Caddick, Gwilym Harbottle and Uma Suthersanen, *Copinger and Skone James on Copyright* (18<sup>th</sup> Ed, Sweet and Maxwell 2020), [7-49].

<sup>88</sup> See Directive 2004/48/EC on the enforcement of intellectual property rights, art 3; *Phonographic Performance Ltd v Hagan (t/a Lower Ground Bar and Brent Tavern)* [2016] EWHC 3076 (IPEC), [2017] FSR 24 at [24]; also see Phillip Johnson “Compounding uncertainty: the need for guidelines in the assessment of additional damages for copyright infringement” [2019] IPQ 136.

<sup>89</sup> See below pp ???.

<sup>90</sup> There is an argument that requirement to grant exclusive rights in relations to the author’s ‘work’ in TCA, art 225 retains the requirement in domestic law by reason of the general implementation (see pp ???).

<sup>91</sup> The transitional arrangements may save a work outside the closed list existing on 31 December 2023: see fn 68.

broadcasts. Takings will need to be substantial once more.<sup>92</sup> Additional damages need not be dissuasive or effective.<sup>93</sup> Computer programs can split into two works. The same applies to rules of law. So neither a reverse engineering defence nor protection for products derived from trade secrets can be moulded from the common law (at least not because of the Trade Secrets Directive). In other words, the end of *Marleasing* could put many otherwise binding decisions on shaky ground. And the after-shock might spread because precedent builds upon precedent. Judgment A may have relied upon *Marleasing*, and Judgment B relies upon Judgment A and so forth leading to an unravelling effect.

In relation to retained direct EU legislation the position is more complicated as it must, so far as possible, be read and given effect in a way which is compatible with all domestic enactment.<sup>94</sup> In other words, *Marleasing* is inverted. The question becomes therefore how will these previously non-complying provisions be interpreted when domestic case law which has already settled a matter is reopened?<sup>95</sup>

## **Statutory interpretation in the new world**

### *Context and purposive*

The normal approach to statutory interpretation<sup>96</sup> is contextual and purposive and as was explained by Lord Bingham in *R (Quintavalle) v Secretary of State for Health*:<sup>97</sup>

“The court’s task, within the permissible bounds of interpretation, is to give effect to Parliament’s purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

Thus, when reading a statute, its “legal, social and historical context” is considered<sup>98</sup> and as recently explained by the Supreme Court in *Uber BV v Aslam*:<sup>99</sup>

“The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.”<sup>100</sup>

There are many enactments, both primary and secondary, which were intended to implement EU law. Even if the *Marleasing* principle no longer applies, the courts are likely to consider the context of the legislation. If a measure was enacted to give effect to a Directive (or further implement a Regulation)<sup>101</sup> then surely the “context” and “purpose” must include the text of

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<sup>92</sup> The general implementation (see pp ???) might negate the effect of the word ‘substantial’ because the relevant provisions refer to in ‘whole or in part’ in TCA, arts 225, 226 and 227.

<sup>93</sup> Once more, there is a requirement in the TCA, art 256(2)(c) for remedies to be “effective, proportionate and dissuasive” and so, by reason of the general implement (see pp ??), this obligation might remain.

<sup>94</sup> European Union (Withdrawal) Act 2018, s 5(A2)(a) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 3(1).

<sup>95</sup> Written evidence submitted by the Bar Council on the Retained EU Law (Revocation and Reform) Bill (REULBO5), [9].

<sup>96</sup> See generally, Lord Burrows, *Sir Christopher Staughton Memorial Lecture 2022, Statutory Interpretation in the Courts Today*, 24 March 2022 <<https://www.supremecourt.uk/docs/sir-christopher-staughton-memorial-lecture-2022.pdf>>.

<sup>97</sup> [2003] UKHL 13, [2003] 2 AC 687, at [8].

<sup>98</sup> *Unger v Ul-Hassan* [2023] UKSC 22 at [37].

<sup>99</sup> [2021] UKSC 5 at [70]; also see *Kostal UK v Dunkley* [2021] UKSC 47, [2021] 3 WLR 697, at [109]

<sup>100</sup> [2021] UKSC 5 at [70].

<sup>101</sup> See Phillip Johnson “Implementing Community Obligations in the Realms of Intellectual Property” (2006) 1 *JIPLP* 449.

the relevant EU instrument.<sup>102</sup> This might be extended further. It was not uncommon for the government when implementing a Directive to conclude that domestic law was already “compliant” with EU law and so no changes were made.<sup>103</sup> In such cases, at a stretch, it might be said that the purpose of existing statutory provisions were “repurposed” once the Directive came along. In any event, the modern rules of statutory interpretation mean a court need not be so reliant on *Marleasing* as it would have been a generation ago.

On the other hand, the Supreme Court has made it clear that legislation should be treated as if it was “always speaking”<sup>104</sup> so that provisions are interpreted in light of “modern conditions”.<sup>105</sup> In the context of the current discussion, this can be taken two ways. There will be instances where the “modern conditions” mean the words no longer have their “natural” meaning because of the interpretation a court has given them relying on the *Marleasing* principle. So, for instance, “communication to the public” now has an embedded concept of a “new public”<sup>106</sup> which certainly is not clear from the text itself. On the other hand, once the 2023 Act has “spoken” it is difficult to see cases where “modern conditions” would include relying on retained domestic case law to give a strained interpretation to EU-derived domestic legislation.

### *International law*

It has long been the case that domestic law should, if possible, be interpreted in accordance with international law.<sup>107</sup> This rule, however, had to take a back seat to the *Marleasing* principle while the UK was a member of the EU.<sup>108</sup> But once *Marleasing* ceases to apply the courts can give full force to international obligations from treaties<sup>109</sup> – such as the Berne Convention and the WIPO Copyright Treaty – to aid interpretation.<sup>110</sup> Indeed, as the Court of Justice has regularly suggested it is actually interpreting these treaties, its decisions remain relevant<sup>111</sup> because domestic courts often look at the meaning given to treaty texts by “foreign courts”. Furthermore, as mentioned above, there are many trade agreements involving the UK where the wording of the agreement follows the text of Directives and Regulations and this might affect how the agreement is interpreted by the court.<sup>112</sup> So the rule requiring a consistent interpretation with a treaty might reach through to the underlying EU instrument. In other words,

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<sup>102</sup> And the alternative could not have foreseen at the time: Written evidence submitted by the Bar Council on the Retained EU Law (Revocation and Reform) Bill (REULBO5), [33].

<sup>103</sup> This is acknowledged in the meaning of EU-derived domestic legislation in European Union (Withdrawn) Act 2018, s 1B(7)(b): “passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of [the European Communities Act 1972]”; also see Explanatory Notes, [77].

<sup>104</sup> See *Owens v Owen* [2018] UKSC 41, [2018] AC 899; *TW Logistics v Essex CC* [2021] UKSC 4, [2021] 2 WLR 38 at [73]; *R v Ireland* [1998] AC 147 at 158-159.

<sup>105</sup> *TW Logistics Ltd v Essex County Council* [2021] UKSC 4, [2021] 2 WLR 38 at [73]; also see *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47, [2020] 3 WLR 1369 at [147].

<sup>106</sup> The concept was introduced in C-306/05 SGAE [2006] ECR I-11519.

<sup>107</sup> *The Jade* [1976] 1 WLR 430 at 436; *Fothergill v Monarch Airlines* [1981] AC 251; also see *SAS Institute v World Programming* [2010] EWHC 1829 (Ch), [2011] RPC 1, [150-154].

<sup>108</sup> “Berne cannot displace the express provisions of the InfoSoc Directive or override what was said by the ECJ. “: *Newspaper Licensing Agency v Meltwater Holding* [2011] EWCA Civ 890, [2012] RPC 1

<sup>109</sup> It is usually the case that the Treaty has to precede the legislation in question: *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219, [2007] RPC 25 at [37]; but Lord Hoffmann did consider TRIPS (a subsequent treaty) in *Designers Guild v Russell Williams* [2000] 1 WLR 2416 at [23].

<sup>110</sup> It might be argued similar principles can be applied to Directives, that is reading the Directive as if it were a treaty.

<sup>111</sup> See fn XX below.

<sup>112</sup> For a discussion of the domestic courts might interpret these agreements see Phillip Johnson, *Intellectual Property, Free Trade Agreements and the United Kingdom: The Continuing Influence of European Union Law* (Edward Elgar 2021), p- 46-53.

there is another reason for a *softer* strained interpretative obligation when construing EU-derived domestic legislation.<sup>113</sup> Where the obligation is found in the Trade and Cooperation Agreement then this interpretative obligation is buttressed in stone by the general implementation. For example, while the Enforcement Directive's requirement for "effective, proportionate and dissuasive" remedies<sup>114</sup> no longer applies the self-same obligation in the TCA is an expressly enforceable obligation in domestic law.<sup>115</sup>

#### *Conforming interpretation under the Human Rights Act 1998*

Where the scope of an intellectual property right is narrowed (or abolished) by the 2023 Act this may engage Article 1 of the First Protocol to the European Convention of Human Rights. This ensures that natural and legal people are entitled to the peaceful enjoyment of their possessions and it has long been the case that it extends to intellectual property rights.<sup>116</sup> If the abolition of *Marleasing* undermines an *existing* property right then it may be that the relevant provisions have to be read in much the same way under section 3 of the Human Rights Act 1998 as they did by *Marleasing*.<sup>117</sup> For instance, it has been suggested that when registered designs law was harmonised<sup>118</sup> it was necessary to retain the validity laws for pre-2001 registered designs<sup>119</sup> to avoid offending Article 1, Protocol 1.<sup>120</sup> This could mean, for instance, that an existing copyright work which would be protected in an "open list" approach, but which would get no protection under the closed list, might be saved from extinction by a strained construction under section 3 of the 1998 Act.<sup>121</sup>

#### *General Principles of EU law*

The Court of Justice has developed certain general principles of law. They can be used as an interpretative aid when construing the meaning of an EU instrument and, at the more extreme end, they could be used to challenge the validity of an instrument.<sup>122</sup> The development of these principles is outside the scope of this discussion,<sup>123</sup> but they include the respect for fundamental rights, proportionality, legal certainty, fair process and the protection of legitimate expectations. The initial approach in the European Union (Withdrawal) Act 2018 was to retain the general principles of law, but not to allow them to develop further beyond 31 December 2020,<sup>124</sup> and to end the possibility of using them to challenge the validity of any retained EU law.<sup>125</sup> In simple terms, the general principles could only be used to interpret EU law and provide any necessary safeguards.<sup>126</sup> This changed with the 2023 Act which provided that from the end of

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<sup>113</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [79], [184] and [198].

<sup>114</sup> Directive 2004/48/EC on the enforcement of intellectual property rights, art 3(2).

<sup>115</sup> Trade and Cooperation Agreement, art 256(2).

<sup>116</sup> *Ashby v France* (App 36769/08); *Neij v Sweden* (App 40397/12) [2013] ECDR 7; *Anheuser-Busch v Portugal* (App 73049/01) [2007] ECHR 72.

<sup>117</sup> *Revenue and Customs v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at [92].

<sup>118</sup> By the Registered Designs Regulations 2001 (SI 2001/3949).

<sup>119</sup> See Registered Designs Regulations 2001 (SI 2001/3949), reg 12 and 13.

<sup>120</sup> Martin Howe "Oakley Inc v Animal Ltd: designs create a constitutional mess" [2006] EIPR 192 at 193; a similar point is discussed in relation to design right under Part 3 of the Copyright, Designs and Patents Act 1988: see Martin Howe et al, *Russell-Clarke & Howe on Industrial Designs* (10<sup>th</sup> Ed, Sweet and Maxwell 2022), [4-012, fn 41].

<sup>121</sup> However, this is probably not necessary due to the transitional provision: Retained EU Law (Revocation and Reform) Act 2023, s 22(5).

<sup>122</sup> Eg. C-293/12 *Digital Rights Ireland*, EU:2014:238.

<sup>123</sup> See, for instance, Takis Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> Ed, Oxford 2007).

<sup>124</sup> European Union (Withdrawal) Act 2018, Sch 1, para 2.

<sup>125</sup> European Union (Withdrawal) Act 2018, Sch 1, para 1 (this is the general prohibition). as was the ability to bring an action based on the failure to comply with a general principle of EU law.: European Union (Withdrawal) Act 2018, Sch 1, para 3

<sup>126</sup> For a recent example see *re Allied Wallet* [2022] EWHC 402 (Ch) at [60]

2023,<sup>127</sup> the general principles of EU law will no longer have any effect whatsoever in domestic law.<sup>128</sup> It is not entirely clear what effect abolition might have to domestic intellectual property law. For instance, proportionality is relevant to enforcement and remedies, but this has largely been retained by the TCA<sup>129</sup> and in any event proportionality has seeped into all domestic law and not just that derived from the EU.<sup>130</sup>

*And another thing...latent free movement*

When the UK left the EU, the government decided to keep free movement law in place in a very limited regard. The rules of free movement meant that intellectual property rights could not be used to restrict the resale of goods in the United Kingdom once they have been put on the internal market with the consent of the right holder. In simple terms, goods bought from the right holder in Germany could be freely resold in the United Kingdom, but the right holder could prevent the resale of same goods bought from the United States. While the government has consulted on new exhaustion rules to adopt now the UK is no longer part of the EU,<sup>131</sup> it currently maintains a form of asymmetrical exhaustion so that from the British point of view the rules of exhaustion did not change on 31 December 2020.<sup>132</sup> But this asymmetrical regime is dependent on things being retained by section 4 of the European Union (Withdrawal) Act 2018.<sup>133</sup> From the end of 2023, any right, power & c retained by section 4 is revoked<sup>134</sup> and there is no express provision regarding exhaustion in the 2023 Act. So the current mechanism, will fold in upon itself.<sup>135</sup> If this asymmetrical regime is to be retained,<sup>136</sup> even temporarily, then another way to do so will need to be found.<sup>137</sup>

## PART 2: CASE LAW

The second major change brought about by the Retained EU Law (Revocation and Reform) Act 2023 is the precedential weight given to retained case law. Once more, to understand the change it is necessary to see how the rules have evolved. The initial approach to whether a court could depart from retained EU case law was straightforward. The European Union (Withdrawal) Act 2018 as enacted made Court of Justice decisions, including those of the

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<sup>127</sup> Retained EU Law (Revocation and Reform) Act 2023, s 22(5).

<sup>128</sup> European Union (Withdrawal) Act 2018, s 5(A4) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 4(2)(a) (this rest of the section makes other consequential changes).

<sup>129</sup> Trade and Cooperation Agreement, art 256, 260, 264, 266, 274. Across the whole agreement, proportionality in some form or other is mentioned 87 times.

<sup>130</sup> There is an extensive debate in public law whether proportionality can be a free standing ground of review (and whether it replaces unreasonableness): see for instance, Timothy Endicott, “Why Proportionality is not a General Ground of Judicial Review” (2020) 1 Keele LR 1.

<sup>131</sup> See *Consultation: UK's future exhaustion of intellectual property rights regime* (18 January 2022).

<sup>132</sup> Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019 (SI 2019/265).

<sup>133</sup> Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019 (SI 2019/265), reg 2; the instrument also made amendments to the Registered Designs Act 1949, s 24G(5); Copyright, Designs and Patents Act 1988, s 27(5) and 228(5); Trade Marks Act 1994, s 17.

<sup>134</sup> Retained EU Law (Revocation and Reform) Act 2023, s 2(1).

<sup>135</sup> The exhaustion regime will continue in relation to some aspects, for instance, direct infringement: Copyright, Designs and Patents Act 1988, s 18(2) and s 27.

<sup>136</sup> See Phillip Johnson, *Intellectual Property, Free Trade Agreements and the United Kingdom: The Continuing Influence of European Union Law* (Edward Elgar 2021), p 199-201 (and the issues with the most favoured nation principle).

<sup>137</sup> One possibility is a saving provision being made in regulations under section 22(4) of the Retained EU Law (Revocation and Reform) Act 2023 to save the effect of section 4 of the European Union (Withdrawal) Act 2018 for the purposes of the Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019.



General Court,<sup>138</sup> equivalent to Supreme Court<sup>139</sup> decisions. The same test for departing from European jurisprudence was to be applied by the Supreme Court as to its own decisions: that is a decision is normally binding, but the Court would depart from it when it appeared right to do so.<sup>140</sup> It is ‘right’ to do so where the current law is leading to unjust results or is contrary to public policy, or where it is impeding the development of the law.<sup>141</sup> This rule changed before the 2018 Act even came into force. The Act was amended<sup>142</sup> and regulations made so that certain appellate courts (including, the Court of Appeal and, in Scotland, the Inner House) could also depart from retained EU case law on the same basis as the Supreme Court.<sup>143</sup> The only difference being that if and when the Court of Appeal applied (or modified) EU case law<sup>144</sup> (whether before or after it was retained) it was converted into a domestic authority of that court.<sup>145</sup> Thus, in respect of applied (or modified) case law the Court of Appeal could no longer depart from its own decisions.<sup>146</sup>

The first time the Court of Appeal was asked to depart from retained EU case law was in *Tunein v Warner Music*.<sup>147</sup> This led the court to explain when it was appropriate for it to depart.<sup>148</sup> First, a majority of the court thought that the failure of Parliament to amend the relevant domestic implementing enactment (in that case, the Copyright, Designs and Patent Act 1988) was a reason to not depart from EU law.<sup>149</sup> This follows a longstanding view of the judiciary that where there is a general unhappiness with a court decision it should be reversed by Parliament<sup>150</sup> as it is not for the courts to fix.<sup>151</sup> Indeed, it is even more unlikely domestic courts will depart from retained EU case law if there is no general unhappiness.

Secondly, the Court of Appeal was united in believing that where the relevant rule comes from an international treaty domestic courts should strive to maintain a harmonious interpretation of

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<sup>138</sup> As to the binding nature of General Court decisions in the United Kingdom before leaving the EU: see *Jaguar Land Rover Ltd v Bombardier Recreational Products Inc* [2016] EWHC 3266 (Ch), [2017] FSR 20 at [38].

<sup>139</sup> European Union (Withdrawal) Act 2018, s. 6(4) (as enacted).

<sup>140</sup> European Union (Withdrawal) Act 2018, s. 6(5); the Supreme Court made clear in *Austin v Southwark LBC* [2010] UKSC 28, [2011] 1 AC 355 at [24]–[26] that it would continue to apply the House of Lords approach from the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

<sup>141</sup> *Knauer v Ministry of Justice* [2016] UKSC 9, [2016] AC 908, [22]–[23] partially relying upon *Horton v Sadler* [2006] UKHL 27, [2007] 1 AC 307 at [29].

<sup>142</sup> This was provided for by a power under European Union (Withdrawal) Act 2018, s. 6(5A) and 6(5B) and the courts were set out in European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525), reg. 3.

<sup>143</sup> European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg 5.

<sup>144</sup> European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg 4(2); this rule is maintained by European Union (Withdrawal) Act 2018, s 6(4)(ba) (to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(2)(b)).

<sup>145</sup> European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, reg 4(2).

<sup>146</sup> *Young v Bristol Aeroplane* [1944] KB 718, CA.

<sup>147</sup> [2021] EWCA Civ 441, [2021] RPC 11.

<sup>148</sup> Similar caution to depart from EU law was exercised by the Court of Appeal in a non-IP case: *Ms Kanaka Durga Chelluri v Air India Ltd* [2021] EWCA Civ 1953.

<sup>149</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [78]; Arnold LJ’s reasoning was not adopted by Vos MR who presented his own (at [196]) but it appears to have been accepted by Rose LJ [184]; also see [2021] EWCA Civ 1953 at [63].

<sup>150</sup> See Lady Rose, “1966 and All That: Changing Our Minds in a Post-Brexit World”, 23 May 2022 at [27]; <https://www.supremecourt.uk/docs/ukael-lady-rose-speech-23-May-2022.pdf> (and the ease by which it can be changed may also be a factor, [32]).

<sup>151</sup> But see *Knauer v Ministry of Justice* [2016] UKSC 9, [2016] AC 908 at [26]: “The current law on the issue we are being asked to resolve was made by judges, and, if it is shown to suffer from the defects identified above, then, unless there is a good reason to the contrary, it should be corrected or brought up to date by judges.”

its international obligation, that is follow EU law, and not adopt “individualist disharmony”.<sup>152</sup> This follows a long standing rule described above that domestic courts should try and give a treaty the same construction as it is given in different countries, particularly where there is a “prevailing harmony”.<sup>153</sup> As the Court of Justice has interpreted numerous provisions of international treaties<sup>154</sup> and its view becomes the view of its 27 member states each decision is one large step towards harmony.

Thirdly, where the Court of Justice has developed jurisprudence – even if not free from difficulty or criticism – it does not follow that a new (better) domestic approach can easily be created.<sup>155</sup> This suggests strongly against any embedded rules being amended unless there is a very clear way forward presented to the court. Fourthly, it may be academic criticism is a reason for a court to depart from retained EU case law,<sup>156</sup> but there would need to be a pretty consistent view in the literature for the courts to give it much weight and even then the question will become whether the circumstances in the UK are now such that the court should depart. Fifthly, where the EU case law has developed into a complete system it is unlikely that the court will depart from only one aspect of the system.<sup>157</sup> In intellectual property this is particularly pertinent as much of the system is a balance between right holders and competitors (or users) and pulling at one thread might lead to the system unravelling.

Finally, the Court of Appeal reiterated the importance of legal certainty.<sup>158</sup> The public have relied on the existing law and so the court should be slow to change it. A similar sentiment is commonly expressed by the Supreme Court, for instance, “A sudden change in the law is likely to destabilise it”<sup>159</sup> and there will be concern particularly where “contracts, settlements of property or fiscal arrangements have been entered into on the faith of a settled legal rule.”<sup>160</sup> It must be remembered that except in limited circumstances, Court of Appeal decisions are binding on all courts but the Supreme Court. In simple terms, the system is built on continuity and so it is hardly surprising retained EU case law is baked in.

The Retained EU Law (Revocation and Reform) Act 2023 keeps the basic approach of allowing the Court of Appeal to depart from retained EU case law, but it removes the ‘right to do so’ test and introduces non-exhaustive statutory factors. They ‘reflect some of the factors’ from *Tunein*,<sup>161</sup> but they are presented in a way which encourages a court to depart from retained

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<sup>152</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [79], [184] and [198].

<sup>153</sup> *Effort Shipping Co. v Linden Management SA* [1998] AC 605 at 615 and 623.

<sup>154</sup> The Court of Justice has referred to the Berne Convention for the Protection of Literary and Artistic Works in 46 judgments, the WIPO Copyright Treaty in 29 judgments; and the WIPO Performances and Phonograms Treaty, in 14 judgments; and Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations in 11 judgments (many times two treaties will be referred to in the same judgment so this involves double counting). The figures were obtained by a text search on [curia.europa.eu](http://curia.europa.eu).

<sup>155</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [80].

<sup>156</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [81].

<sup>157</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [87].

<sup>158</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [83].

<sup>159</sup> *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd (Northern Ireland)* [2020] UKSC 36, [49].

<sup>160</sup> *Horton v. Sadler* [2006] UKHL 27, [2007] 1 AC 307 at [31].

<sup>161</sup> Retained EU Law (Revocation and Reform) Act 2023: Explanatory Notes at [118].

EU case law.<sup>162</sup> Or as James Lee puts it, they are *Tunein* presented in a ‘passive aggressive way’.<sup>163</sup>

The first statutory factor is “the fact that decisions of a foreign court are not (unless otherwise provided) binding”.<sup>164</sup> This reiterates a point so banal in terms of precedent that it is not clear what it could add.<sup>165</sup> It is supposed that it is there to remind judges that the Court of Justice is a ‘foreign court’. But even this proposition could be qualified as that court was not a foreign court at the time, rather it was part of the wider legal framework. Even taking it at its height it adds little unless it is referring to the Court of Appeal in *TuneIn* rejecting the submission that it could look to the law in other (non-EU) countries for guidance rather than following retained case law.<sup>166</sup>

The second factor for the higher court to consider is “any changes of circumstances which are relevant to the retained EU case law”.<sup>167</sup> One clear change would be that the UK is not part of the internal market any more and many decisions of the Court of Justice were premised on preserving the integrity of that market.<sup>168</sup> But in most cases the circumstances of the legislation are based on their day-to-day application in the UK and only if the rule is causing injustice or is contrary to some wider or new policy would the decision be departed from. The final factor is a higher court should consider is “the extent to which the retained EU case law restricts the proper development of domestic law.” This is precisely the test that has been applied by the Supreme Court and by the court in *Tunein*.

These factors are not exhaustive and so other factors (whether from *Tunein* or elsewhere) can be taken into account when a court is asked to depart from retained EU case law. One factor that may dwarf all others is the desire to maintain legal certainty. As has been clear for decades higher courts do not depart from long established rules unless there is a good reason to do so. But at some point courts will depart from existing precedents as otherwise “the whole body of law would be ossified forever”.<sup>169</sup> Nothing in the 2023 Act will change any of this and it is likely that the Parliamentary attempt to chivvy the judges to reject more European jurisprudence will simply fail.

The 2023 Act also changes the approach to precedent in relation to retained domestic case law. These are decisions of domestic courts on any direct EU legislation, EU-derived domestic legislation or retained right which had been handed down before IP completion day.<sup>170</sup>

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<sup>162</sup> Written evidence submitted by the Bar Council on the Retained EU Law (Revocation and Reform) Bill (REULBO5), [43]; Written evidence submitted by the Professor James Lee on the Retained EU Law (Revocation and Reform) Bill (REULB23), [14].

<sup>163</sup> Written evidence submitted by the Professor James Lee on the Retained EU Law (Revocation and Reform) Bill (REULB23), [16].

<sup>164</sup> European Union (Withdrawal) Act 2018, s 6(5)(a) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(3).

<sup>165</sup> As to how courts consider foreign law see the comment of Lord Wilberforce documented in Lord Bingham, “The Break with the United Kingdom and the Internationalisation of the Common Law” in Peter Crane (ed.), *Centenary Essays for the High Court of Australia* (LexisNexis, Sydney 2004), 82 at 85

<sup>166</sup> *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441, [2021] RPC 11 at [82].

<sup>167</sup> European Union (Withdrawal) Act 2018, s 6(5)(b) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(3).

<sup>168</sup> See comment of Lord Neuberger, HL Deb, Vol 789, 7 March 2018, col 1094.

<sup>169</sup> See Lon L. Fuller, *The Morality of Law* (Rvdsd Ed. Yale 1969) at 60 (cited with approval *Axa General Insurance v Lord Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [120]).

<sup>170</sup> The definition is in s 6(7) and this is dependent on European Union (Withdrawal) Act 2018, s 1B(7) which defines “EU-derived domestic legislation”.

Accordingly, retained domestic case law covers many (even most) decisions on trade marks, copyright,<sup>171</sup> designs,<sup>172</sup> and supplementary protection certificates.<sup>173</sup> In simple terms, the 2023 Act changes the normal rule that the Court of Appeal cannot depart from its own case law<sup>174</sup> and allows it to do so where the earlier judgment is part of the retained domestic case law. When the Court of Appeal decides whether it is right to depart from the retained domestic case law it must have regard to the following factors (among others): (a) the extent to which the retained domestic case law is determined or influenced by retained EU case law from which the court has departed or would depart; (b) any changes of circumstances which are relevant to the retained domestic case law; (c) the extent to which the retained domestic case law restricts the proper development of domestic law. Thus, it is open for a party to invite the Court of Appeal not to follow an unhelpful pre-2021 judgment on trade marks for example. However, once retained case law has been followed the normal rules of precedent apply and the post-2020 judgment is binding. For the reasons outlined extensively above one can imagine departures from retained domestic case law are going to rare.

### References to higher courts

The Retained EU Law (Revocation and Reform) Act 2023 seems to have an underlying premise that once all the retained case law gets to the right level of appellate court then it will quickly get washed away. Leaving only pure domestic law behind. As has been made abundantly clear, this is almost certainly a false assumption. Nevertheless, the 2023 Act includes mechanisms to funnel the cases up to the higher courts as quickly as possible. It does this by creating new procedures to enable lower courts and tribunals, and the law officers, to refer questions to appellate courts so the higher court can consider overturning retained case law.<sup>175</sup>

The reference power given to court or tribunal is quite simple. Where a point of law arises on binding retained case law and resolving it is of general public importance, the court or tribunal can refer it to the relevant higher court<sup>176</sup> to consider whether to overturn the retained case law or not.<sup>177</sup> But it remains up to the higher court to decide whether to accept the reference.<sup>178</sup> It is doubtful that many (if any) references will be made in intellectual property cases due to the structure of courts and tribunals (and probably not many in other areas of law either). First, the ‘general public importance test’ is linked to that under section 12 of the Administration of Justice Act 1969 which enables a leapfrog appeal from the High Court to the Supreme Court.<sup>179</sup> This procedure is invoked very rarely having been used 19 times<sup>180</sup> since the creation of the Supreme Court in 2009. This suggests a reluctance to leapfrog the intermediate appeal except in the rarest of circumstances, and there is no reason to believe that the High Court will be more willing to use this power when it comes to retained case law. Indeed, the High Court could

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<sup>171</sup> The harmonisation of copyright has been much more recent, and there is a lot more older case law which is still relevant.

<sup>172</sup> Other than design right under Part 3 of the Copyright, Designs and Patents Act 1988.

<sup>173</sup> There is much less harmonised law relating to patents and very little domestic case law covering geographical indications.

<sup>174</sup> *Young v Bristol Aeroplane* [1944] KB 718, CA. It does not enable a lower court (such as the Court of Appeal) to depart from the retained domestic case law of a higher court (the Supreme Court).

<sup>175</sup> That is both retained EU case law and retained domestic case law.

<sup>176</sup> The definition of “higher court” is defined in European Union (Withdrawal) Act 2018, s 6(6B) and (7) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(6) and (7).

<sup>177</sup> European Union (Withdrawal) Act 2018, s 6A(1) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(8).

<sup>178</sup> European Union (Withdrawal) Act 2018, s 6A(4) to (6) to be inserted by Retained EU Law (Revocation and Reform) Act 2023, s 6(8).

<sup>179</sup> Retained EU Law (Revocation and Reform) Act 2023: Explanatory Notes at [126].

<sup>180</sup> This is based on a search of Westlaw using the phrase “Administration of Justice Act 1969”.

have used section 12 at any time since 2021 to leapfrog an appeal relating to retained case law had it thought it important enough, but it has chosen not to do so.

Secondly, appeals from the County Court are usually heard by a High Court judge (then the Court of Appeal and then the Supreme Court) and so a reference under the 2023 Act saves some time by skipping one, or two, levels of appeal.<sup>181</sup> But while the County Court can hear copyright and trade mark cases<sup>182</sup> it almost never does.<sup>183</sup> Intellectual property cases are heard in the High Court either in the Intellectual Property List or by the Intellectual Property Enterprise Court. Appeals from the High Court, including the IPEC,<sup>184</sup> go straight to the Court of Appeal and so the reference procedure adds little. Indeed, if an issue arising from retained case law needs to be resolved before the trial it could be decided as a preliminary issue and an appeal heard on that issue alone.

Thirdly, while the time it takes for an appeal to be heard by the Court of Appeal has gone down significantly over the last couple of years (the median time being 40 weeks) this is because the workload has reduced, but if the number of appeals goes back up to 2018 levels then the delay may double.<sup>185</sup> Few parties or judges will want to add a year (or two) to the proceedings to see if retained case law can be overturned before even moving on to the substantive issues in the trial itself.

Fourthly, the drafting of the provision means that references from the Appointed Person on hearing appeals in relation to trade marks or designs is very limited.<sup>186</sup> This is because only where the retained case law is a decision of the Supreme Court does the reference get made to that court otherwise it is the “appropriate appellate court.”<sup>187</sup> This means ‘the court...to which an appeal...on the point of law...would lie’<sup>188</sup> but no appeal ever lies from decisions of the Appointed Person so there is no “appropriate appellate court”. In any event, this may not matter as where an issue of general importance arises in a case before the Appointed Person it should be transferred to the High Court in any event.<sup>189</sup> Finally, and the overarching reason why references will be rare, is that the message from *Tunein* was that the higher courts are not looking to depart from broad swaths of retained case law as to do so would undermine legal certainty.

The other form of reference, that made by the law officers, is much broader and more sweeping.<sup>190</sup> It is possible for a law officer to make a reference to the higher court once the

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<sup>181</sup> CPR, PD 52A, par 3.5, Table 1.

<sup>182</sup> See Access to Justice Act 1999 (Destination of Appeals) Order 2016 (SI 2016/917).

<sup>183</sup> While the Copyright Tribunal could make a reference, there are very few cases where questions of interpretation of retained case law are likely to arise in matters before it.

<sup>184</sup> Small claims in the IPEC are appealed to an enterprise judge.

<sup>185</sup> <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2023>. Royal Courts of Justice: Annual Tables – 2022 (in 2018, the median was 93.8 weeks).

<sup>186</sup> It could however be referred to the Court of Appeal by the registrar as appeals from that tribunal do lie to the Court of Appeal (as appeals can either go to the High Court or Appointed Person: Trade Marks Act 1994, s 76(2) and Registered Designs Act 1949, s 27A(1)).

<sup>187</sup> European Union (Withdrawal) Act 2018, s 6A(3) to be inserted by the Retained EU Law (Revocation and Reform) Act 2023, s 6(8).

<sup>188</sup> European Union (Withdrawal) Act 2018, s 6A(9) to be inserted by the Retained EU Law (Revocation and Reform) Act 2023, s 6(8).

<sup>189</sup> Trade Marks Act 1994, s 76(3); Registered Designs Act 1949, s 27A(2).

<sup>190</sup> There is also a right to become a party in any case where a court is considering overthink retained law: European Union (Withdrawal) Act 2018, s 6C to be inserted by the Retained EU Law (Revocation and Reform) Act 2023, s 6(8). This is similar to that in the Human Rights Act 1998, s 5.

proceedings are concluded and no further appeal is possible.<sup>191</sup> The higher court must accept the reference and there are no prescribed rules on the circumstances in which a reference can be made. It does not need to be a point of general importance. The outcome of the reference will not affect the case just decided, but it will affect future cases.<sup>192</sup> Despite its breadth, the nature of this power means it is unlikely to be used very much and even less in relation to private law disputes, such as those involving intellectual property.

## Conclusion

The cliff edge of all retained direct EU legislation and all EU derived subordinate legislation suddenly ceasing to have effect was ultimately omitted from the final version of the Retained EU Law (Revocation and Reform) Act 2023. But in its wake another – albeit possibly less frightening – uncertainty remains. The end of the *Marleasing* Principle will undoubtedly reopen many debates about how legislation is to be construed and read. The courts “turning straight to the Directive” means that much domestic case law has not directly been mapped onto the phrasing and precise wording of the implementing legislation. But equally significant is the end of the strained interpretations given to comply with EU law. The case law built upon these interpretations are likely to be challenged; even if not ultimately upset. On the other hand, there are now rules of statutory interpretation which may mitigate the effect of supremacy being abolished. In the short term, however, there will be great uncertainty as to how enactments will be read and this will be coupled with how the courts will respond to the new statutory factors for departing from EU law. Everything will be up-in-the-air. The best that can be hoped is that when everything does come down-to-earth again it does suffer the fate of Humpty Dumpty.

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<sup>191</sup> European Union (Withdrawal) Act 2018, s 6B (excluding late appeals) to be inserted by the Retained EU Law (Revocation and Reform) Act 2023, s 6(8) while it is not mentioned it appears similar to the power to refer a case to the Court of Appeal following an acquittal in a trial by indictment: section 36 (1) Criminal Justice Act 1972 (now rarely used as it is possible for the prosecution to appeal points of law: Criminal Justice Act 2003, s 58).

<sup>192</sup> Retained EU Law (Revocation and Reform) Act 2023: Explanatory Notes at [141]. However, a party who would have obtained a more favourable outcome following such a reference might simply try to appeal out of time.