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What IP lawyers need to know about the Retained EU Law Act (REULA)

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Venue: Browne Jacobson LLP, 15th Floor, 6 Bevis Marks, London, EC3A 7BA

Speakers: Nick Zweck (Hogarth Chambers)

Chair: Giles Parsons (Browne Jacobson LLP)

Introduction

After a contentious legislative journey, the Retained EU Law (Revocation and Reform) Act 2023 (REULA) came into force on 1 January 2024. Although the act is far from the 'bonfire' of EU law once envisaged, REULA abolishes key principles of EU law and significantly expands the powers of the UK courts to depart from retained EU law.

The act brings with it uncertainty in several areas, including in relation to IP law, much of which derives from EU regulations, directives and CJEU jurisprudence.

In this presentation, Nick Zweck discussed the new statutory remit of the UK courts under REULA and gave his preliminary view on the likely impact this will have on UK IP law.

Where did we come from?

the EU Communities Act 1972¹ made EU law supreme. This Act gave EU regulations direct effect in UK law whilst EU Directives had indirect effect. Decisions of the CJEU on applicable law were binding on the UK courts.

The interim position

Post-Brexit, the European Withdrawal Act 2018 (EUWA) gave the UK an interim constitutional framework for the treatment and interpretation of EU law.

The EUWA repealed the EU Communities Act and provided a partial continuation of supremacy for EU-derived legislation made prior to IP completion day (31 December 2020). This created a new category of UK law; retained EU law. Retained EU law was to be interpreted in accordance with retained EU case law (principles laid down by decisions of EU courts prior to IP completion day), retained domestic case law (principles laid down by decisions of an EU court or tribunal prior to IP completion day) and the retained general principles of EU law.

In deciding both the meaning and effect of retained EU law, lower courts (the High Court and below) were bound by retained EU case law and UK case law. The Supreme Court and the Court of Appeal were only bound by retained domestic case law; they had the power to depart from previously binding EU law, as they chose to in *Industrial Cleaning*².

The new law

REULA now allows the courts greater room to depart from EU law. Along with familiar wording about the UK

¹ European Communities Act [1972], s.2(1), s.3(1).

² *Industrial Cleaning Equipment (Southampton) Ltd v Intelligent Cleaning Equipment Holdings Co Ltd & Anor* [2023] EWCA Civ 1451 (06 December 2023).

'seizing its future' and 'taking back control', the Act's explanatory note explains how REULA amends the EUWA to remove the special status of retained EU.

Primarily, the Act revokes the principle of EU supremacy in the UK by removing:

- the doctrine of direct effect³;
- the duty for UK courts to read domestic legislation in compatibility with EU law (indirect effect); and
- the influence of general principles of EU law i.e. proportionality, equal treatment and respect for fundamental rights⁴.

To reflect these changes, retained EU law has been renamed 'assimilated law'⁵.

REULA Section 6 – Removing EU Supremacy

The speaker drew particular attention to Section 6 of REULA, which at the time of writing, is not yet in force.

Section 6 amends the factors higher courts must consider when deciding whether or not to depart from retained EU case law. Instead of the court having regard to whether it is 'right' to depart, judges must now remind themselves that "the decisions of a foreign court are not binding"⁶. It is difficult to pinpoint exactly what substantive guidance or test this imparts, other than encouraging the courts to diverge from EU law.

For decades the courts have been guided by a desire to maintain legal certainty, so despite the changes in section 6, it is unlikely REULA will prompt mass departure from long established rules and precedents without specific cause or reason. Further, LJ Arnold has said that the courts will continue to pro-actively consider the legal position in each case, including considering EU law. By reference to the obiter in *E-accounting*⁷, Arnold noted that whilst EU law is no longer supreme, it is not redundant⁸. When domestic legislation has been enacted to implement an EU directive, a body of case law will have built up, and this will still play a role in interpreting legislation.

However, REULA may give the UK a welcome opportunity to abandon aspects of EU law that weren't working for domestic IP stakeholders. There are areas of tension between UK statute and approach and EU jurisprudence; the copyright protection of 3D objects is one example. The effect of REULA may be seen most clearly along these fault lines. Parties are unlikely to argue that REULA's enactment should alter the application of entrenched legal tests, e.g. the likelihood of confusion.

REULA Section 6 – Referrals

20 years ago, some UK IP practitioners felt that the trade mark law in the UK had been impaired by the introduction of the European reference procedure. Under section 6(A)⁹ of REULA the UK now has its own version of this reference procedure. The speaker believes is the biggest change enacted by REULA, and that the effects of it will be seen imminently.

The new referral procedure allows lower courts and tribunals to make references to a higher court, either at the request of the parties or on their own volition. A reference can be made where they consider a point (or points) of law to be of 'general public importance'. The Act provides no guidance on what constitutes 'general public importance' or when in the process the referral should be made (the Act currently allows the Attorney General to refer a point of law even after a case has been decided).

Notably for IP practitioners, the UKIPO is caught by section 6. With the Supreme Court sitting as an appellate court, the tribunals reference procedure has expanded significantly, and litigation strategy will change as a result. LJ Arnold envisages that the UKIPO will need to develop an internal strategy to thwart a potential influx of reference requests (especially from litigants in person)¹⁰.

³ Retained EU Law (Revocation and Reform) Act 2023, s.3.

⁴ *ibid*, s.4.

⁵ *ibid*, s.5.

⁶ European Union (Withdrawal) Act 2018 s.6(5)(a) inserted by Retained EU Law (Revocation and Reform) Act 2023 s.6(3).

⁷ *E-Accounting Solutions Limited t/a AdvanceTrack v Global Infosys Limited t/a GI Outsourcing* [2023] EWHC 2038 (Ch).

⁸ Arnold, LJ [2024]. *Are you Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law*. Available at: [Are you Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law \(youtube.com\)](https://www.youtube.com/watch?v=...)

⁹ Retained EU Law (Revocation and Reform) Act 2023, s.6(A)1.

¹⁰ Arnold, LJ [2024]. *Are you Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law*. Available at: [Are you Ready for REULA? The Conscious Uncoupling of UK and EU Intellectual Property Law \(youtube.com\)](https://www.youtube.com/watch?v=...)

Key takeaways

REULA is puzzle which will change and complicate UK IP law. REULA is puzzle which may prove difficult to solve. It is a short piece of legislation, accompanied by little to no guidance, which IP judges seem to be genuinely concerned about. It is difficult to see exactly where the removal of EU supremacy leaves the related body of domestic and EU case law. As courts can no longer turn directly to the wording of EU legislation and make conforming interpretations by reference to CJEU decisions, the way that UK legislation is interpreted could change. Precisely how it affects UK law will depend each time on the extent to which the courts wish to depart from EU law. This gives the Court of Appeal and Supreme Court considerable influence.

In summary, the three main takeaways were:

- 1) REULA introduces provisions intended to make it easier for UK courts to decouple from assimilated law.
- 2) In the short term, REULA will create real uncertainty. We will need to wait and see how the case law develops in this area.
- 3) Until a greater level of certainty is achieved (through precedent or further legislative guidance), REULA will make IP litigation more complex and expensive.

As we begin to detach from EU law, IP practitioners should be particularly mindful when advising clients on matters concerning assimilated EU law and assimilated EU case law to account for the potential divergence in terms of:

- Substantive advice on merits;
- Tactical litigation advice;
- Advice on costs and timeframes.