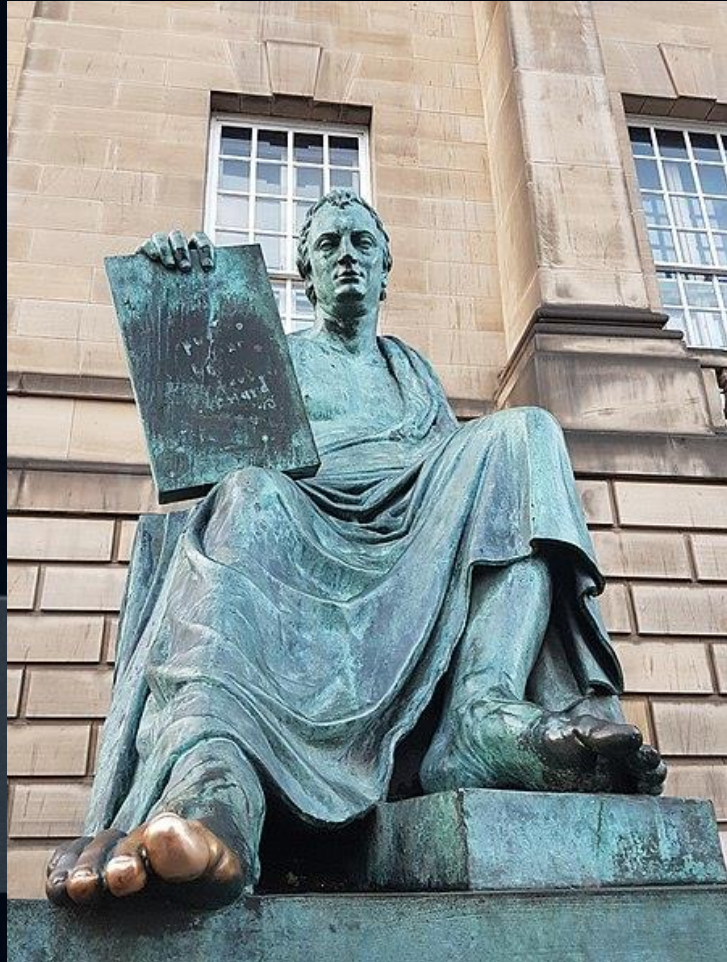


A New Dawn or A False Dawn

THE UK'S APPROACH TO IP POST BREXIT AND
WHAT IT COULD MEAN FOR YOU





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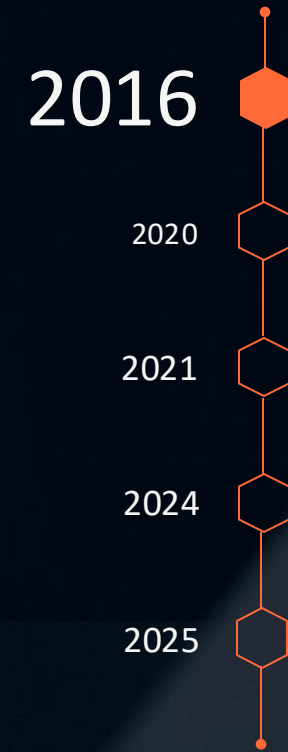
01

The UK's approach to BREXIT – the
story so far



Referendum

23 June 2016





'Exit Day'

31 January 2020







'IP Day'

31 December 2020





From 11pm on 31 December 2020:

- EU law ceased to apply *except as set out in the Withdrawal Act and Withdrawal Agreement*.
- In reality, all directly applicable EU legislation in operation was converted into UK domestic law = retained EU law.
- There was no substantive change to the law in effect in the UK.



Brexit Delivery
Department



Assimilation

1 January 2024





- *Retained EU Law (Revocation and Reform) Act 2023 (REULA)* comes into effect.
 - End of EU law supremacy
 - *Marleasing* principle – interpretation of national legislation in line with parent EU legislation
 - Abolition of general principles of EU law
 - Proportionality, legal certainty, equal treatment, etc.
 - Government departments given powers to review, revoke, restate
 - Start of UK law supremacy
 - Senior UK courts given greater freedoms to depart from retained EU case law



02

The impact on intellectual property



E-Accounting Solutions t/a Advancetrack v Global Infosys [2023]

- Tindal J (deciding the case pre-REULA) explored whether his findings of infringement would be the same post-REULA.
- He noted that post-REULA, Trade Marks Act 1994 must be interpreted **based on orthodox principles of statutory interpretation**.
- Domestic legislation enacted to implement an EU Directive may use the Directive as a relevant **“external aid”**.





Section 10(1), Trade Marks Act 1994

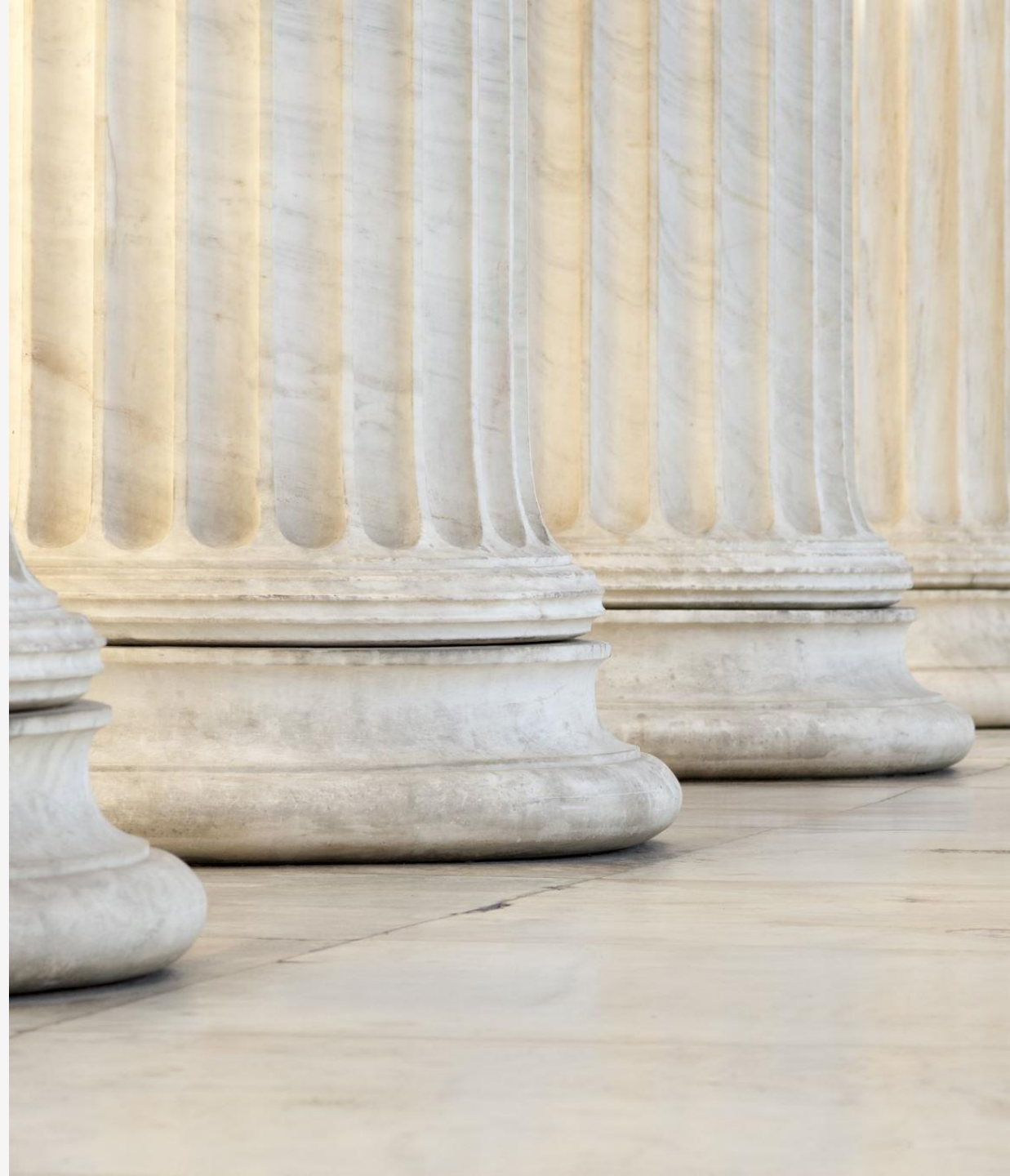
A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.





Reminder of the purpose of REULA

*“An Act to **revoke** certain retained EU law; to make provision relating to the **interpretation** of retained EU law and to its relationship with other law; to make provision relating to **powers to modify** retained EU law; to enable the **restatement, replacement or updating** of certain retained EU law; to enable the **updating of restatements and replacement** provision; to **abolish the business impact target**; and for connected purposes.”*





Industrial Cleaning Equipment v Intelligent Cleaning Equipment [2023]

- **Court of Appeal diverged** from the CJEU's interpretation in the EU's *Budvar* case. It ruled that the five-year period begins when the earlier mark or right owner becomes aware of the later registered trade mark's **use**, rather than its **registration**.
- Court of Appeal found the **CJEU's approach inconsistent** with the General Court and EUIPO's approach, and decided to apply the legislation in a manner that best served its objectives.
- Divergence is more likely when the position had not been consistently decided within the EU itself or there is lack of clarity.





Thatchers v Aldi [2025]

- Aldi invited the Court of Appeal to **depart** from *L’Oreal v Bellure*. Arnold LJ **rejected**.
- Departing from *L’Oreal v Bellure* would create **considerable legal uncertainty**.
- Arnold LJ was not persuaded by Aldi’s submission that the CJEU had restricted the development of law in this area or was heading in the wrong direction.





SkyKick v Sky [2024]

- Commenced pre-2020, so decided under EU law.
- UK Supreme Court emphasised that broad trade mark specifications are not inherently problematic, but **bad faith can be found if there is no intention to use the mark for specific categories.**
- The UK may, therefore, now have a position on bad faith which is more restrictive than that in the EU, where broad specifications may remain acceptable.
- The UK and the EU have started to diverge on this point and appear likely to continue to do so.





THJ v Sheridan [2023]

- The Defendants appealed against the declaration of **copyright subsistence in GUIs**.
- Arnold LJ agreed with Mr Sheridan that the High Court judge failed to use the **correct test** from the EU case law, choosing instead the **UK's obsolete "skill and labour" test**.
- The correct test was confirmed to be "*author's own intellectual creation*" (*Infopaq and Cofemel*).
- Originality in the UK is determined by case law, not statute.





WaterRower v Liking [2024]

- Issue: does copyright subsist in a rowing machine?
- The UK copyright statute contains a **closed list of works** that could attract copyright.
- *“Works of artistic craftsmanship”* in the UK.
- EU and UK copyright interpretations were **never in sync**.



03

Where will divergence come from?



Trade marks

- UK courts must interpret the statute based on domestic principles, without the (direct) influence of EU law.
- Recent case law demonstrates the possibility of divergence only in limited circumstances.
- As CJEU and UK courts continue to interpret trade mark law independently, **further divergence from EU law is inevitable.**





Copyright and design law

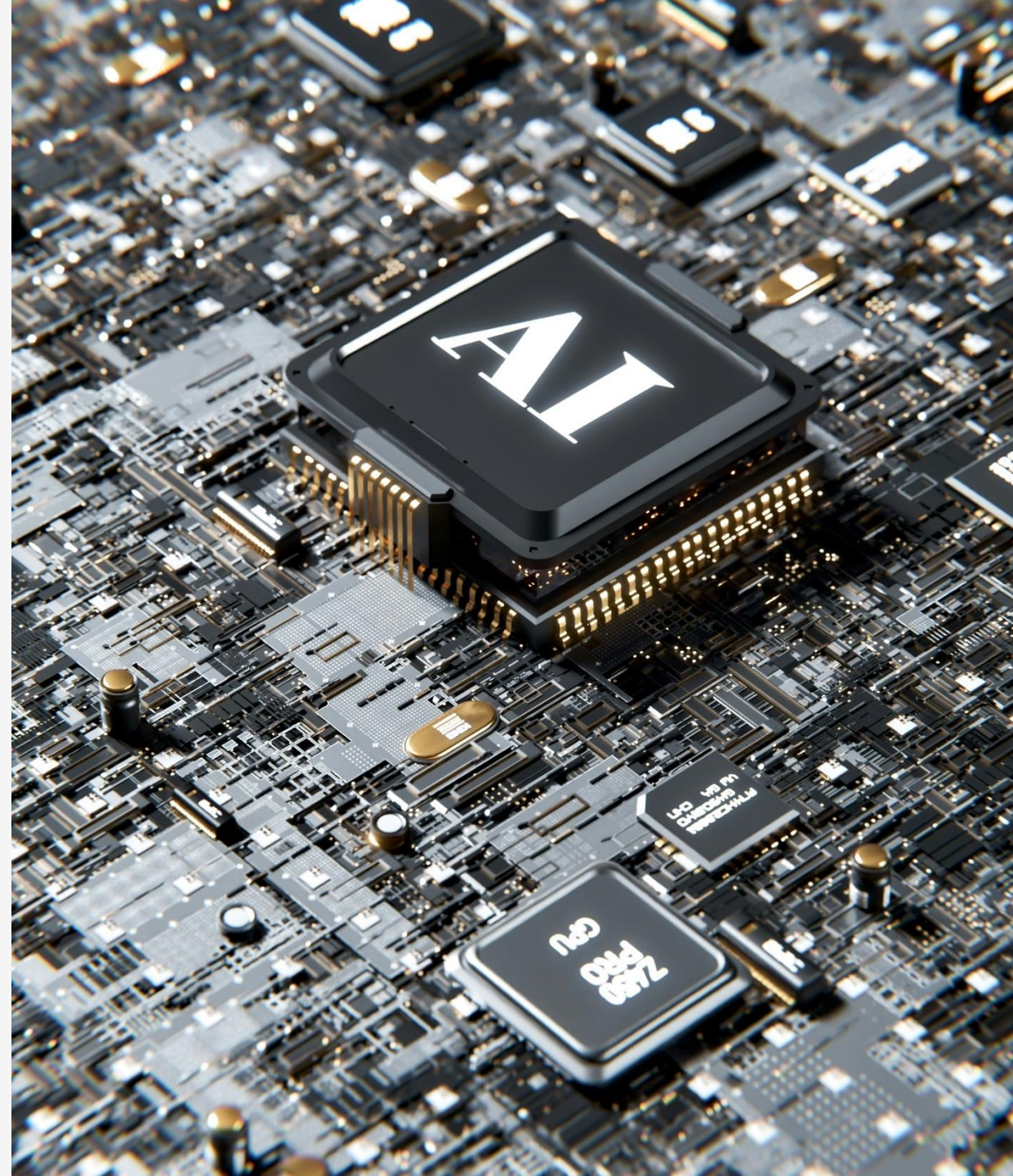
- UK copyright law, with its closed list of protected works, will diverge further from the EU's more open-ended approach.
- Tension regarding "*works of artistic craftsmanship*".
- Fundamental changes in the EU that the UK is not a part of, e.g.:
 - Directive on Copyright in the Digital Single Market 2019
 - EU Design Regulation 2024
 - EU Directive on the legal protection of designs 2024
- Design consultation in the UK.





Artificial Intelligence (AI) & tech

- The EU's AI Act is one of the tightest articles of global legislation around AI. It includes a requirement to comply with copyright law.
- The EU has enhanced obligations on online marketplaces and content sharing service providers (DSM Directive, DSA).
- The UK has not yet legislated meaningfully. It is attempting to take a tech-first approach.
- Certain judgments in the UK, notably *Lifestyle Equities v Amazon* and *Swatch v Samsung*, do indicate a judicial tightening around tech.



04

What it could mean for you?





Thank you

For more information, please reach out to:

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