



Intellectual
Property
Office

The Intellectual Property (Unjustified Threats) Act 2017 Business Guidance



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The purpose of this guidance

Intellectual Property (IP) law provides businesses and individuals with certain protections, so that they are not unfairly threatened with legal action for infringing someone's IP right, when those threats are actually groundless. This guidance covers changes to IP law in this area made by the Intellectual Property (Unjustified Threats) Act 2017 ("the Act" or "the 2017 Act"). It gives a general overview of the changes, almost all of which are expected to come into effect on 1 October 2017, but it is not a substitute for legal advice on specific issues.¹

The development of threats provisions in the UK

IP litigation has the potential to be expensive and commercially disruptive, and may involve specialist courts, judges, lawyers, advisers and experts. As a consequence, mere threats to sue for infringement of a patent, trade mark or design are taken seriously. The threats provisions were introduced over a hundred years ago; some businesses had taken to threatening to sue their competitors' customers, who then took their custom elsewhere as a result. The provisions gave a remedy to a person aggrieved by such threats. Over time, provisions for unjustified (or groundless) threats developed separately for patents, trade marks and designs with significant differences arising between the law as it related to each of these rights.

Background to reform of UK unjustified threats law

In 2012, the Law Commission was asked by the Government to review the law of unjustified threats. The provisions in place at the time were considered to be inconsistent across the different IP rights and were thought to be unclear. The law was accused of failing to achieve the necessary balance between allowing rights holders to protect highly valuable assets while preventing the misuse of threats to sue for infringement to distort competition. The Law Commission consulted with the public over proposals to tackle these issues and published a paper making recommendations for reform. Following positive responses to the Law Commission's proposals, the Government asked the Law Commission to draft a bill to make changes to the law. The full background to this can be found in the Law Commission publications to which links are provided in the Appendix.

The Intellectual Property (Unjustified Threats) Bill was introduced into Parliament in May 2016 and used the special Parliamentary procedure for uncontroversial bills arising from Law Commission recommendations. In April 2017, the Bill received Royal Assent and became an Act of Parliament.

1. The Intellectual Property Office provides a guide to [seeking IP related advice](#).

Aims of the Act

The Unjustified Threats Act aims to:

- Protect businesses and individuals against the misuse of threats to intimidate or gain an unfair commercial advantage where there has been no infringement.
- Make it easier for those involved in a dispute over IP infringement to negotiate a settlement and avoid litigation.
- Bring consistency across the law of unjustified threats as it applies to patents, trade marks and designs.

The main provisions of the Act:

- Extend the changes made to unjustified threats law for patents in 2004 to trade marks and designs. These allow a rights holder to challenge someone capable of causing the most damage, usually the trade source of the infringement, without fear of being sued for making unjustified threats.
- Strike an appropriate balance which allows rights holders to protect their valuable IP assets but not to misuse threats in order to distort competition or stifle innovation.
- Protect customers and those within the supply-chain, such as retailers and suppliers, against unjustified threats.
- Provide a clear framework within which disputing parties can exchange information to resolve the issues between them and avoid litigation.
- Protect professional advisers from personal liability for making threats when they act for their clients.
- Make changes to the law which are necessary so that the protection against unjustified threats applies to European patents that come within the jurisdiction of the forthcoming Unified Patent Court.

The test for a threat

A new statutory test sets out the principles the court will apply in order to decide whether a communication contains a threat to sue for the infringement of a patent, trade mark or design.

The test, which is the same for each of the rights, gives a clear indication to individuals, businesses and advisers of what a threat is for the purposes of the threats provisions.

What is the test?

The test has two parts; both parts are considered from the position of a reasonable person in receipt of a communication.

The first part is whether a reasonable person would understand from the communication that a patent, trade mark, or design (i.e. an IP right to which threats provisions apply) exists.

The second part is whether the reasonable person would understand that a person intends to bring proceedings against another person for infringement of the right by an act done in the UK.

Threats need not be made directly to an identified individual to satisfy the test. A threat can be made in a more general way but must be more than a general warning. A threat may be made by mass communication, and in such cases the reasonable person will be a recipient who is a member of the public, or a member of the section of the public to which the communication was directed.

An example of applying the test

A notice on P's webpage is read by potential purchasers of a particular product. The notice advises that products of that type, made by manufacturer M, infringe P's patent. It also states that P will take steps to prevent any further infringement of the patent.

The inference is that a purchaser of M's product might be infringing by buying it. The test would be whether a reasonable person in the position of a potential purchaser of that type of product would understand the webpage text to contain a threat to sue them. Recent case law suggests that the test would be satisfied in these circumstances.

The test brings into statute the test which was previously applied based on case law, but with one change. As the threats provisions are part of domestic law, in order for them to apply there must be some link between the threat to sue for an infringement, and the UK. Previously, a threat for the purposes of the threats provisions must have been understood to be to bring proceedings in a UK court. This is changed by the Act, so that the threat must be understood to be a threat to bring proceedings for an act done (or intended to be done) in the UK. This provides a better, clearer link to the UK² for EU-wide IP rights. It also allows the provisions to apply to European patents (effective in the UK) that come within the jurisdiction of the Unified Patent Court when that comes into existence.

If the test is satisfied, attention then turns to the rest of the threats provisions - these govern the circumstances under which a threats action may be brought. The provisions also outline exceptions which may be available such that they prevent a threats action being brought. The defences available to the person making the threat are also set out. These are discussed in the rest of this guide.

2. The problem of a lack of a clear link to an act done in the UK in determining what is meant by a threat to bring infringement proceedings was identified in *Best Buy Co Inc v Worldwide Sales Corp España SL* [2011] EWCA Civ 618 (a case about Community Trade Marks). The Court of Appeal in this case was concerned that there must be some link to the UK in order to avoid the effect of the threats provisions being exported abroad.



Actionable threats and exceptions

The Act aims to improve the balance between a rights holder's ability to protect their IP right while providing adequate protection to persons affected by unjustified threats. The changes to the law attempt to more effectively allow a rights holder to identify and approach the 'source' of infringement while directing threats away from, and maintaining protection for, customers and retailers.

This improved balance is achieved by defining a number of exceptions which may apply to a threat such that it is not actionable. The exceptions are outlined below.

The next step in assessing a threat

If a communication contains a threat (as determined by the [new test](#)) then the next step in applying the new law is to see if someone is entitled to bring a threats action in respect of that threat.

Who may bring a threats action?

Any person aggrieved by a threat may bring a threats action unless one of the below exceptions applies. (A "person aggrieved" means any person whose commercial interests have been or might be affected by the threat in a real rather than a fanciful way.)

Exceptions which make a threat not actionable

Primary act exception

Action for unjustified threats is not available where the threat is in respect of an allegedly infringing primary act. The primary acts for each right are set out in Table 1.

Table 1

Primary acts		
Patents	For a product	Making for disposal
		Importing for disposal
	For a process	Using a process
Trade marks		Applying a sign to goods or packaging
		Causing another person to apply a sign to goods or their packaging
		Importing for disposal, goods to which, or to the packaging of which a sign has been applied
		Supplying services under a sign
Designs		Making a product/article for disposal
		Importing a product/article for disposal

Actionable threats and exceptions

This 'primary act exception' is not new. The law has, however, been amended to extend the exception to threats that refer to *intended* primary acts.

A change to the law relating to trade marks has also been made: it has been made clear that "causing another person to apply" a sign to goods or their packaging is a primary act.

Primary actor exception

A person who has carried out, or intends to carry out, a primary act cannot bring an action for threats made against them which refer to related secondary acts.

This allows threats made to primary actors to also refer to secondary acts done by that primary actor. So, for example, it does not matter if threats to a manufacturer also extend to selling the product they have manufactured – despite referring to secondary acts, the threats will not be actionable.

Importantly, this only applies where the mentioned secondary act is in relation to the same product/article as the primary act. So if a person produces and sells a product, threats of infringement for both producing and selling will not be actionable. But, if the same person also sells an equivalent product produced by someone else, threats for selling the equivalent product will be actionable.

Primary acts and primary actors exceptions - example 1

Business M manufactures a patented product, and sells what it produces. M is also selling the same products manufactured by Z. Patent holder P writes to M claiming that M infringes P's patent by manufacturing the products. P also claims that M has infringed by retailing both the products it has made and those supplied by Z, that M merely sells.

- Only the retail of products manufactured by M fall under the primary actor exception.
- The threats in respect of M selling the products it manufactured are not actionable.
- Threats relating to the retail of products manufactured by Z do not fall within the primary actor exception and are actionable unless some other exception applies.

Primary acts and primary actors exceptions - example 2

Business U uses a patented process to produce a product which it then offers for sale. U is also selling products that are a direct result of Z using the process. Patent holder P writes to U claiming that the use of the process and the sale of the products that result from that use infringe P's patent. P also makes the same claims about the products that resulted from Z's use.

- Only the sale of products that directly result from business U using the process are covered by the primary actor exception.
- The threats in respect of the selling of products produced by Z are not covered by the exemption.
- As in example 1, unless some other exception applies, the threat is actionable.

Actionable threats and exceptions

This exception was introduced for patents in the 2004 reforms³ and has been newly extended to the other rights.

Preventing threats action being brought for threats made to primary actors avoids a situation such as that which arose in *Cavity Trays*⁴. In this case a manufacturer of a product threatened by a patent holder for infringement was able to bring a threats action against the patent holder because the threats also made allegations of infringement by selling the product. Under the new law, the threats regarding selling the product would not be actionable because they were made to the manufacturer of the product.

Permitted communication exception

An aggrieved person might also be prevented from bringing a threats action if the threat is contained within a 'permitted communication'. This is a communication satisfying certain requirements which are discussed in detail below.

3. The [Patents Act 2004](#)

4. *Cavity Trays Ltd v RMC Panel Products Ltd* [1996] RPC 361



Permitted Communications

What are permitted communications and why have they been introduced?

Communications relating to a potential IP dispute can become complex and difficult. In the past, even the most innocent communication, made with the best of intentions, could be interpreted as being an implied threat and trigger a threats action.

The Act introduces a 'safe harbour' of 'permitted communications' which allow parties to communicate and take some steps towards resolving disputes without running the risk of triggering litigation.

The provisions allow rights holders to attempt to identify the source of infringement by engaging with those further down the supply chain under a clear framework.

Clear boundaries are set such that rights holders and those acting on their behalf can approach those they suspect of being secondary infringers (such as retailers) with greater confidence. The provisions are underlined by the principle that rights holders should attempt to identify the source of the infringement (a person carrying out a primary act listed in Table 1) in order to resolve disputes.

Secondary actors maintain protection against unjustified threats and may bring a threats action if a communication does not satisfy the conditions required of a permitted communication.

How do permitted communications work?

The new provisions provide a framework which allows parties to exchange information to resolve disputes in situations where one of them may otherwise be entitled to bring a threats action. Certain conditions must be met, otherwise the threat is actionable. The conditions only apply to the part of the communication considered to amount to a threat (under the [new test](#)).

A communication containing a threat of infringement proceedings is a 'permitted communication' if:

- it does not contain an express threat; and
- the part of the communication which contains information that relates to the threat was made for a permitted purpose (see below); and
- all of the information that relates to the threat is information that:
 - is necessary for that purpose, and
 - the person making the communication reasonably believes is true.

Permitted purposes

The provisions give a list of examples of permitted purposes. The examples given are:

- giving notice that a patent exists;
- discovering the identity of a primary actor or whether primary acts of infringement have taken place;
- making a person aware of an IP right, where it is relevant to any proceedings (such as infringement proceedings) that the person is aware of the right.

The court is also given discretion to treat any other purpose as a permitted purpose in the interests of justice.

Permitted Communications

This is intended to give certainty over what will be considered a permitted purpose, while allowing flexibility for the court to take into account the surrounding circumstances and for the law to develop over time to reflect changes in those circumstances.

As further guidance, the provisions also give examples of information that will be regarded as necessary for a permitted purpose. This is generally information which allows the recipient of the communication to identify the right in question or an alleged infringing article.

As an example: a patent holder who believes that their patent is being infringed writes to a retailer of a product they believe is infringing their patent. They identify themselves as owner of a patent and ask the retailer to identify the manufacturer of the product. This would be considered to be an implied threat against the retailer (a secondary actor) under [the new test](#). However, providing that there is no **express** threat made, and all of the information given relating to the threat is necessary to identify the manufacturer, and is reasonably believed to be true by the patent holder, the communication will be a permitted communication. No unjustified threats action will then be able to be brought in respect of that threat.

Purposes which cannot be considered permitted purposes

The provisions rule out three purposes from being considered as permitted. These are where the person making the threat asks a person –

- to stop doing something
- to destroy or to hand over something, or
- to promise not to do something in respect of the IP right in question.

Permitted Communications

Example of how permitted communications work

P sends a communication to shop S, as that shop is retailing a product that P believes infringes its patent. The communication covers three issues. The first is an opening paragraph introducing the writer and asking the shop's owner if they would like to be added to P's Christmas catalogue list for a fantastic new range of products. The second notifies the shop of P's patent and asks the shop to give details about the manufacturer or importer of the particular product mentioned in the communication. The final piece of the communication is the transcript of a case brought by P for the infringement of an entirely different product. P states that it has been included "just so you know". The shop S takes legal action under the threats provisions.

- The first part of the communication would not satisfy the permitted communication conditions as it is not made for any of the permitted purposes and would, in any event, be unnecessary. However, this does not matter because it is not a threat within the meaning of the statutory test and the threats provisions are therefore not engaged by reason of its inclusion.
- The second part could be taken to mean that shop S might be retailing infringing products and therefore is at risk of being sued. However, whether P intended it or not, it is made for the permitted purpose of tracking down the primary actor and the information given is necessary for that purpose. Provided the communicator can show they reasonably believe the information relayed to be true, the threat is permitted.
- The final part of the communication provides information that is not necessary for that permitted purpose and does not come within any other permitted purpose. Applying the statutory test, it is an implied threat - unless some other exclusion applies, it is actionable.



Remedies

The remedies available in a threats action are:

- An injunction stopping more threats being made, which can be obtained as an interim or final remedy.
- Damages for loss caused by the threat that is a natural and reasonable consequence of the threat being made.
- A declaration that the threats were unjustified.

These remedies are not changed by the 2017 Act. They are the same as the existing remedies set out under patent, trade mark and designs law on threats.

Defences

The justification defence

If the act which is the subject of a threat is shown to be an infringing act, or an intended act that (if carried out) would be infringing, the threat is justified. Justified threats of infringement are, of course, allowed. A person having made a threat may defend themselves in an unjustified threats action by showing that the threat was justified because infringement actually occurred or was intended.

This defence was already a part of the law. Note that it is no longer expressly stated that if the person aggrieved can show that the IP right in question is invalid then the justification defence fails. This is because an invalid right cannot be infringed. The change has simply removed a superfluous reference to a specific way in which non-infringement may occur – namely, that the right is invalid.

This in no way changes the fact that the validity of the right concerned may be put in issue in proceedings under the unjustified threats provisions. If a person aggrieved by a threat shows that the IP right is invalid then there was never any infringement – the threat will be held to be unjustified.

Remedies and Defences

Defence where no primary actor can be found

A defence introduced by the 2004 reforms for patents has now been replicated across designs and trade marks. This makes the law consistent across the relevant rights.

The defence allows businesses and individuals to threaten to sue alleged secondary infringers of their IP, where a primary actor (a manufacturer or importer) cannot be found. This allows the rights holder to prevent further commercial damage where they believe that infringement is occurring, or would occur.

A person who has made a threat to a person who is not a primary actor has a defence if they can show:

- that they have taken reasonable steps to identify a primary actor but have not been able to identify anyone; and
- that they have notified the person to whom they made the threat of the steps taken to find a primary actor; and
- the notification was given either before or at the time of making the threat.

This defence applies the principle that a rights holder must try to direct any threats towards an alleged primary actor. Only where they have been unable to find an alleged primary actor despite taking reasonable steps to do so is the new defence available. The person being threatened must be informed of the steps taken to identify an alleged primary infringer.

For example, consider where a patent holder believes that a product sold by a shop infringes their patent. If the patent holder threatens the shop with infringement proceedings and the shop believes the threats to be unjustified then the shop may sue for damages (or another remedy listed above) from the patent holder for making these threats. If, before making the threat to the shop, the patent holder took reasonable steps to identify a manufacturer

or importer of the product but failed to do so, the patent holder has a defence against the threats action. For the defence to be available the patent holder must have informed the shop at the time or before making the threats of the steps taken to try and identify a manufacturer or importer.

It is important to note that, if the steps taken identify a primary actor, this defence is no longer available. This is the case even where it may appear likely that there is more than one primary actor, such as more than one importer or manufacturer of the product.

Reasonable steps

For the defence where no primary actor can be found to apply, the person making the threat must have taken 'reasonable steps' but failed to have found anyone who has carried out, or intends to carry out, a primary act.

What will satisfy the requirement of taking 'reasonable steps' will depend on the particular circumstances of a case. Where appropriate, a reasonable step is the use of the permitted communications exception to discover whether a primary act has been committed and by whom. There may be circumstances where it would be reasonable to pursue all possible lines of enquiry available, however there may also be circumstances where it is reasonable to do much less.

For example, where a rights holder is faced with on-line, high volume, low value infringements produced by an unknown overseas manufacturer, taking reasonable steps might simply be sending an email to the trader in those goods to ask who has supplied them. In this example, where no importer of the product can be identified after taking reasonable steps the supplier may be threatened.



Professional Advisers

An exemption for professional advisers

Under the previous law, professional advisers were at risk of incurring personal liability because *any person* could be sued for making a threat, even if it was made on behalf of a client.

The risk of facing a threats action was known to be used against professional advisers as a tactic to damage their relationship with their client. The consequent loss of professional advice could leave the client vulnerable and reluctant to enforce their IP right. The client could also incur significant expenses if they needed to instruct new counsel or to indemnify their adviser against a threats action. Disputes could also be prolonged because the adviser had to explain why they are at risk, increasing the costs to the client receiving legal advice.

It was considered that the law should be changed in this area to prevent the misuse of threats action in this way. Protection against threats action is now provided to regulated professional advisers acting on behalf of a client. No loophole has been created, however. The protection does not affect the principle that anyone (not just the rights holder) may be liable for making a threat. Where the adviser makes a threat to a third party any underlying liability for doing so remains intact, as does any liability that may accrue under the general law of agency. The instructing client also remains fully liable for any unjustified threat that is made. The protection works by preventing threats action being brought against the adviser.

Conditions for the exemption to apply

Under the new law, a threats action cannot be brought against a professional adviser providing that the adviser satisfies both of the following conditions:

- They are acting on the instructions of a client.
- They have identified that client to the person with whom they are communicating.

Legal advisers to whom the exemption is available

The protection applies to any adviser meeting the following conditions:

- They are acting in a professional capacity in providing legal or attorney services.
- They are regulated by a regulatory body in the provision of those services.

Often, advisers will be acting for a single client who gives specific instructions in respect of a dispute. However, the protection also applies to in-house advisers who may not be instructed on a case-by-case basis but under a general mandate to protect their employer's IP rights. In either case, the adviser is acting on the instructions of another and not of their own volition.

The requirement that an adviser is regulated in the provision of services by a regulatory body⁵ ensures that any misconduct by the adviser can be dealt with as a professional conduct matter. Some advisers may choose not to join a regulatory body, in which case the protection is not available. It is for the adviser claiming the protection to show that the necessary conditions are satisfied.

The protection is not restricted to UK or EU advisers and applies equally to foreign advisers provided they meet the above conditions.

5. Examples of such bodies are the [Intellectual Property Regulation Board \(IPReg\)](#) and the [Solicitor's Regulation Authority \(SRA\)](#)



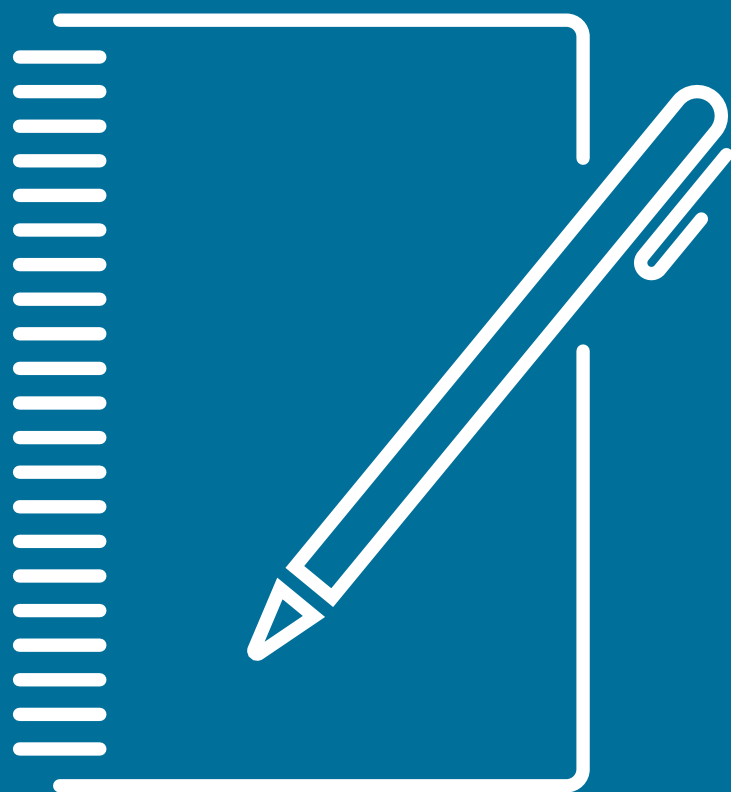
Pending IP applications

The law is now consistent between the registered rights in how threats made on the basis of pending rights are treated.

For patents, the position established through case law⁶ is that a threat to sue for an infringement made before a patent has been granted (i.e. while a patent application is being processed) is understood to mean that proceedings will be brought once the patent is granted. The provisions now set out this principle in statute. They also clarify that the same principle applies for trade marks and registered designs.

The provisions also make clear that, where a threat is issued on the basis of a pending right, the question of whether there has been an infringement will be determined on the basis of the granted or registered right.

6. For example *Brain v Ingledew Brown Bennison & Garrett* (No 1) [1996] FSR 341 at 347-348



Delivery up and orders for disposal

A rights holder may apply to the court for an order that infringing goods, products or articles which a person has in their possession are given (delivered) to them or that they are destroyed. A threat to apply to the court for one of these orders can be just as damaging as a threat to sue for infringement.

Protection against unjustified threats of infringement proceedings is extended to include threats to bring proceedings asking for delivery up and/or destruction of the infringing articles.

Threats to apply for proceedings asking for delivery up and destruction of an article in front of the Unified Patent Court will also be covered by these threats provisions, when the Unified Patent Court comes into force.



Amendments relating to unitary patents and to the Unified Patent Court

The Act is drafted so that the threats provisions will apply to threats made in respect of European patents with unitary effect ('unitary patents') and to threats of proceedings to be brought before the Unified Patent Court (UPC) when they come into effect.

Section 1(3) and (8) of the Act will make the necessary changes to the Patents Act 1977 and Schedule A3 thereto. These provisions will be commenced on the date of entry into force of the Agreement on a Unified Patent Court.

The UPC

Section 1(3) of the Act will ensure that threats to sue for delivery up or destruction in front of the UPC come within the threats provisions. It will amend section 70F of the Patents Act 1977 (inserted by the Act into the Patents Act 1977) when the Unified Patent Court comes into force.

The new [test for a threat](#) makes sure that threats to bring proceedings before the UPC in respect of patents falling within its jurisdiction will, where appropriate, fall within the scope of the threats provisions. As noted above, this is done by requiring that the threat of proceedings be in respect of an act done or to be done in the UK.

Unitary patents

Schedule A3 will be inserted into the Patents Act 1977 when the Unified Patent Court Agreement comes into force. This new Schedule will apply the relevant provisions of the Patents Act 1977 to unitary patents. Section 1(8) amends Schedule A3 upon its insertion, so that the new Schedule will correctly refer to the new sections 70 to 70F of the Patents Act 1977, rather than old section 70. This will ensure that the new threats provisions apply correctly to unitary patents.

7. [Agreement on a Unified Patent Court](#) signed at Brussels on 19th February 2013

8. By the Patents (European Patent with Unitary Effect and Unified Patent Court) Order 2016 (SI 2016/388)



Commencement and transitional provisions

Dates of commencement

The substantive provisions of the Act will come into force pursuant to regulations made by the Secretary of State.

The Government has considered the possible dates for commencement of the Act. It is considered best practice that the measures come into force on a common commencement date (CCD) so that disruption to business is minimised. Commencing on a CCD also allows awareness of the coming into force of the Act to be maximised effectively and efficiently. The Government sees no reason why the next available CCD – the 1 October 2017 – should not be used as the date of commencement for this Act.

However, commencement of the unitary patent and [UPC related measures](#) (section 1(3) and (8)) will be linked to the coming into force of the UPC Agreement as described on the previous page.

Transitional measures

Threats actions can take a significant period of time to get to court and may be brought on the basis of alleged threats which were made a long time prior to the action being brought. The regulations commencing the Act's provisions will include a transitional measure which will provide how the new provisions apply in relation to events which have occurred prior to the commencement of the Act in the interest of fairness and providing certainty.

An alleged threat should be determined under the law in force at the time the alleged threat was made. Therefore, the new law will apply to communications made on or after the commencement date of the Act. A threats action brought in respect of communications made before the commencement of the Act will be dealt with under the law as it stood prior to the changes introduced by the Act.

The principle underlying the transitional measure is that an alleged threat should be determined under the law in force at the time the alleged threat was made.

This allows senders and receivers of communications to know what is the relevant law governing those communications.

Determining when a threat is 'made'

A threat will be considered to be made when the communication containing the threat is sent, rather than when it is received, for example. This places the responsibility on the sender to be aware of the law of unjustified threats as it applies at the time of sending a communication.

This applies irrespective of whether a communication is part of a "string" of communications, a single event, or a person sending a communication in a string of communications starting before but continuing after the commencement date must be aware that each communication will be considered under the law as it was when the communication was sent. A communication may, therefore, not "retain" status to be treated under the old law by virtue of being part of a string of communications which started before the commencement of the Act.



Appendix – Background documents

The Intellectual Property (Unjustified Threats) Act 2017 –
<http://www.legislation.gov.uk/ukpga/2017/14/contents/enacted>

A collection of documents relating to the Law Commission's consultation and proposals, and the Government Response to those proposals –
<http://www.lawcom.gov.uk/project/patents-trade-marks-and-designs-unjustified-threats/>

A record of the Act's passage through Parliament, including transcripts of all debates –
<http://services.parliament.uk/bills/2016-17/intellectualpropertyunjustifiedthreats.html>

Concept House
Cardiff Road
Newport
NP10 8QQ

Tel: 0300 300 2000

Fax: 01633 817 777

Email: information@ipo.gov.uk

Web: www.gov.uk/ipo

Facebook: TheIPO.UK

Twitter: @The_IPO

YouTube: ipogovuk

LinkedIn: uk-ipo

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