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OFFICIAL REPORT

SPECIAL PUBLIC BILL COMMITTEE

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GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
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Special Public Bill Committee

Wednesday 9 November 2016

Intellectual Property (Unjustified Threats) Bill [HL] Committee

1.30 pm

The Senior Deputy Speaker (Lord McFall of Alcluith):

My Lords, before the start of today's proceedings on the Intellectual Property (Unjustified Threats) Bill, it may be helpful if I say a word about the procedure that we will follow. In nearly all respects, our proceedings will be identical to those of a Grand Committee. Any Member of the House may attend and speak, Members should stand when speaking and Members may speak more than once to each amendment or Motion. I will ask the Committee to agree to each clause standing part of the Bill.

The main difference from a Grand Committee is that the Committee may vote on amendments or on the question that clauses stand part of the Bill. If, when I collect the voices, it is clear that there is no agreement, I will call a Division, which will take place straightaway. Only Members of the Committee may vote; the Clerk will call out each name in alphabetical order and Members should reply, "Content", "Not Content", or "Abstain". I will then announce the result and call the next amendments or Motion. If there is a Division in the Chamber while we are sitting, the Committee will adjourn as soon as the Division Bell rings and resume 10 minutes thereafter. Do any Members wish to declare any interests that have not already been declared?

Lord Lucas (Con): Since this is a recorded proceeding, I think that I should declare that I own a trademark, which I defend from time to time with entirely justified threats.

The Senior Deputy Speaker: The noble Lord, Lord Lucas, has reminded the Committee that we are sitting in public and it is being recorded.

Lord Lucas: Before we begin, do I understand that we will follow the standard rules; that is, if we make an amendment here, the Government would not seek to reverse that amendment on Report—and that there is a full Report stage on the Floor of the House after this?

The Senior Deputy Speaker: Yes, there will be a full Report stage on the Floor of the House and I think that it needs a unanimous vote. Are there any other comments?

Lord Stevenson of Balmacara (Lab): Could you repeat that? Are you saying that even if there is a Division and an amendment is passed, it will not go forward to Report unless it is a unanimous vote?

The Senior Deputy Speaker: It will go forward to Report, but an amendment in this Committee will not be completely reversed unless there is unanimity.

Lord Stevenson of Balmacara: Sorry, I appreciate that this is new and uncharted territory, but we might as well get it right, otherwise we will tie ourselves up in knots. If it were an ordinary Bill and we were in Committee and passed an amendment by vote, the amendment would be inserted in the Bill and would be unlikely to be challenged by the Government on Report. But you have added that it would follow that arrangement only if it were a unanimous vote of this Committee, which does not seem to square with the idea that we stand in our places and provide—

The Senior Deputy Speaker: I will try to be as precise as possible—and so early on. I have the *Companion to the Standing Orders* and Section 8.133 says:

"An amendment agreed to on a vote in committee may not be reversed on report except with the unanimous agreement of the House".

Is that clear now?

Lord Stevenson of Balmacara: As mud. So it goes through to Report stage and would not be challenged, but it could be challenged if it were unanimous on Report. That is what you read out.

The Senior Deputy Speaker: There is a difference between changing something and reversing it. Is that clear?

Lord Stevenson of Balmacara: You put me on the spot. No, it is not, but I think that I will live with it for the moment and we can work it out later.

The Senior Deputy Speaker: We could maybe provide tutorials hereafter. I ask Members to speak sitting down, because the cameras are not coping.

Clause 1: Patents

Amendment 1

Moved by **Baroness Bowles of Berkhamsted**

1: Clause 1, page 2, line 9, at end insert—

"(c) commissioning a product for disposal."

Baroness Bowles of Berkhamsted (LD): Let me redeclare my interests, as this is a recorded and public hearing, that I am a retired chartered patent attorney, a former fellow of the Chartered Institute of Patent Attorneys, a member of the European Patent Institute and a representative before the European Patent Office and European trademark and design office. My husband still has residual income from the practice, which we have sold on, and I am a co-proprietor of a registered trademark. For the avoidance of doubt, I should also say that I took no part in any of the discussions that the Chartered Institute of Patent Attorneys had concerning its submissions to the Law Commission or indeed to this Committee.

[BARONESS BOWLES OF BERKHAMSTED]

I move amendment 1 and will speak to all the amendments in this group. All the amendments except Amendment 20 are the same content and are about commissioning, or causing another person to do something, and for the person doing the causing to be treated the same as a manufacturer that they commission to make a product according to the commissioner's specification. There are nine amendments in this set, because I had two goes at positioning the same point in Clause 1—so the same point appears in two different places, in Amendments 1 and 4, whereas in the three design clauses it is in the Amendment 1 position. Amendment 2 and its counterparts in the other clauses are just consequential numbering changes.

These amendments have been made in respect of patents and the three design types. They are not made in respect of trademarks, because such provision already exists. For trademarks, a person is a primary infringer if they cause the mark to be applied, which is what someone commissioning a product is doing. This point—that it only appears in trademarks—has been discussed in evidence sessions, for example with the representative from the IP Federation; there is a brief reference on page 4 of the transcript of our meeting with them. It is a well-known concept in the field of intellectual property and I would argue that, without this amendment, there is not the consistency on the different rights that is being sought by this Bill.

But it is not about neatness. The scenario that concerns me is that of the SME, especially the “S”—the small manufacturer who gets a new commission, possibly from a large company or even a large retailer, to make some products. They may be told that the specification is the large company's own particular design. It is possible that the manufacturer may manage to include indemnities for themselves in the contract, but it is often the case that small manufacturers get “take it or leave it” contracts. In the event that the product turns out to be an infringement of a patent or a design, the manufacturer is in the direct firing line. I am saying not that they should always get off but that the situation should be the same as it is for trademarks. Those causing—through their commissioning—should be in the same position as the manufacturer when it comes to being able to write to them freely, without fear of a threats action resulting. It is inequitable, if they are the commissioner, and quite probably the retailer and the person behind it all, that they cannot be approached.

The situation—and anomaly, without this amendment—can be explained with a hypothetical example. I could commission a small manufacturer to make me some interlocking plastic children's bricks and tell the manufacturer to make them so that the word “Lego” is embossed on them. Putting aside counterfeiting and passing off, which are not in this Bill, and assuming for the sake of argument that all the patent and design rights had not expired, what would be the situation? The brick might well infringe the patent. The manufacturer is a primary infringer in the sense they can be freely written to but I, as commissioner and prime mover, cannot be written to without fear of a threats action. The same is true for the registered design and/or design right. Again, the manufacturer can be written to but not the commissioner—the true perpetrator.

But, when it comes to the trademark, I have caused it to be applied, so you can write to me as a primary infringer. Indeed, you might do that and say nothing about the design or patent infringement, which might come as a nasty surprise later on—who knows?

There is an unfair situation that the manufacturer always gets dragged into it and any letter to the commissioning party concerning infringement is limited to trademarks. When it comes to litigation on the merits of the infringement, the commissioner—the causer—can be brought into it, but there is always the possibility that, by then, the threats trap has somehow been triggered and the rights holder has to contend with the additional problem of a threats action, potentially including the loss of right of initiative as the plaintiff in the action.

To close on the causing point, for better consistency with the existing placement of the wording in the section on trademarks—where it appears on page 5, line 24—the provision for patents sits best where I have put it in Amendment 1, rather than where I first put it in Amendment 4, which is the amendment that I think the noble Lord, Lord Stevenson of Balmacara, supports. If need be, the wording could also be adjusted to reflect more closely the “causing another” language that is used in the section on trademarks.

I will briefly move on to Amendment 20, but I will not say much other than that I support it in principle. This is not a new point to be drawn to our attention; it appears in the first consultation response to the Law Commission from the Chartered Institute of Patent Attorneys, on page 9 of its first submission, where it says:

“For example there is case law in relation to the criminal offence of trade mark infringement that ‘applying’ the mark means physically affixing it to the goods, and does not include selling the goods, for example on an Internet web site, by reference to the mark, even where the Internet ‘branding’ is the first time that the mark is used in relation to the goods”.

This goes against what we have been told by the Minister in response to the point about whether you need something to deal with electronic marking.

I further note that, in respect of registered designs, Clause 27 of the Digital Economy Bill—in Part 4, page 27—introduces the notion that an internet link constitutes marking of a product. Therefore, it seems eminently reasonable that the marking of a product electronically should be clarified in this Bill and not merely be a matter for an Explanatory Memorandum.

1.45 pm

Viscount Hanworth (Lab): I shall speak to Amendment 20, which has already been spoken to by the noble Baroness, Lady Bowles. This is a residue of an amendment to new Section 21A(2) proposed by CIPA, the Chartered Institute of Patent Attorneys. Its concern, shared by other witnesses, is that the Bill does not make adequate provision for infringements of rights that are common in e-commerce.

It was agreed that CIPA's amendment was opaque and misplaced within the text of the Bill. The witnesses from the BBC, which is involved in such commerce, have offered alternative amendments that I have undertaken to propose. The noble Baroness, Lady Bowles,

has proposed similar amendments, which I think we more or less agree are interchangeable. Those amendments are in the fourth group and I shall speak to them later.

Amendment 20 declares that a threat is not actionable if it relates to the kind of infringements that are common in e-commerce. It is a counterpart to later amendments that deal with permitted communications and provides a necessary link to them. That is why I have tabled Amendment 20.

Baroness Wilcox (Con): This is the point in the Bill where I think I can best make a contribution. The Intellectual Property (Unjustified Threats) Bill is legally satisfactory, but its difficulty lies in how it will operate in the real world. Specifically, for the many good changes that it contains to operate effectively, businesses must be fully aware of them and confident about their application. This is a problem particularly for SMEs, which often struggle to understand the complex law in the field of intellectual property. In the area of threats, it comes down to exactly what they can and cannot do and why.

The lack of engagement by SMEs with the Bill, especially an absence of written evidence, is a concerning indication of the difficulties that they face in the area. I have had my own SME and have personal experience of what it is like to receive an unexpected telephone call from a large company telling me that what I am doing is not quite right and that they would be happy to help me out and even to give me a payment for my trouble. So I understand the fact that most people running a small business are not reading all sorts of bits of paper to see what comes next for them. They cannot afford secretaries or legal fees while they are getting their businesses going. It is important for us to get small businesses going and up to that medium size where they are more secure and able to take the advice that they need.

I have one or two potential solutions that the Minister might like to think about. First, I would insert an amendment before Clause 7 reading: “Communication. The Intellectual Property Office shall take steps to ensure that the changes to the law relating to unjustified threats made by this Act are communicated to businesses in the United Kingdom, with a particular focus on communicating them to small and medium-sized enterprises in the United Kingdom”. This would be helpful, for example, in notifying businesses that professional advisers should no longer ask for indemnities to write to an alleged infringer or help them understand the permitted communication provisions of the Bill by setting out the examples listed.

A second solution might be the appointment of a champion for small businesses—we did this with the ombudsman for the grocery business. I am sure that the Minister does not want to find herself having to invent something, but if there is not good representation on the face of the Bill, the chances are that very little of it will feed down to small businesses. The appointment of a champion for small businesses in the field of intellectual property would be welcome. Such a champion could ensure that SMEs are fully aware of their rights and what they can and cannot do in the area of threats, and that big business could not exploit its

superior understanding of intellectual property law to gain unfair advantages over SMEs.

Thirdly, a designated lead in the IPO to offer advice to small businesses about approaching and dealing with the threats provisions, while stopping short of offering actual legal advice, would also be welcome. I worked with the Intellectual Property Office when I was a Minister for Intellectual Property. Prior to that, back when I was running a small business, it was one telephone call I made to the Intellectual Property Office when I was told, “Sign nothing. Say nothing. We’ll send someone”. That is exactly the sort of help I would hope for. A small business that is approached or attacked by a large business would find that they could make a phone call and somebody would be there to answer.

Lord Stevenson of Balmacara: My Lords, I support the amendments introduced so well by the noble Baroness, Lady Bowles of Berkhamsted. There is very little that I need to add in terms of the general case—she made it very well. In the context of the remarks that we have just heard, a broader concern about the role of SMEs should carry weight in these debates. The anomaly of the omission of those commissioned by others who perhaps should know better is a point strongly made—the Lego example is rather a good one, even though we perhaps should not put it around too much in case people get ideas. The fact that such provision already exists elsewhere in statute suggests that, if we are trying in this Bill to level things up, this amendment and those consequential on it are very important. The amendment in the name of my noble friend Lord Hanworth is also worthy of consideration, although we will need to hear him speak to the other amendments in later groups to get a full picture of where he is coming from.

The Minister of State, Department for Business, Energy and Industrial Strategy (Baroness Neville-Rolfe) (Con): My Lords, on interests, I am the Intellectual Property Minister, and I have the pleasure today of speaking on behalf of the Government.

I am very grateful to the noble Baroness, Lady Bowles, for her comprehensive introduction to this large group of amendments. I am also grateful to my noble friend Lady Wilcox for her support for the Bill as whole and for the good work done by the Law Commission.

It is common ground, I think, that Section 70A and its equivalents set out the definition of an actionable threat. The sections replicate the existing exception whereby a threats action cannot be brought if the threat refers to a primary act of infringement. The existing statutory definitions of what is an infringing act lie at the heart of the threats provisions.

The amendments in this group would mean that threats to someone “commissioning” another person to carry out a specified primary act cannot trigger a threats action. Commissioning infringing goods is not an infringing act within the meaning of any of the existing statutory definitions. This is a key point. Treating commissioning as if it were infringement, for the purposes of the threats provisions, would be a

[BARONESS NEVILLE-ROLFE]

highly significant change to the law. It would introduce a novel concept and create confusion in the law of threats and more generally.

Unjustified threats are those threats which are made in respect of invalid rights, or where there has been no infringement. Amendment 1 and its equivalents would remove any protection from unjustified threats for a particular class of people who are not actually infringers at all—that could easily include the SMEs we are concerned about, on which I will come back to my noble friend's comments at the end—and, to me, that cannot be right.

The amendment would also have other unwelcome consequences. For example, there is the defence which is available to the threatener, if they can show that the infringement did in fact occur. That defence is made unworkable in these circumstances.

I am concerned that, as with Amendment 3, there is a risk that the amendment would have unintended consequences on the interpretation of IP provisions more widely—specifically, the provisions which define infringement. Furthermore, the meaning of what amounts to “commissioning” a primary act would only become clear after a substantial body of case law had been built up. I do not think that that would be acceptable or welcome to business.

I shall now move on to Amendment 20—with many thanks to the noble Viscount, Lord Hanworth, for his explanation—which relates to use of trade marks in an online environment. I do not agree that there is an inconsistency in the threats regime. The noble Baroness, Lady Bowles, suggested that infringement law could be aligned better for the rights, but that is a wider question, as we discussed, that relates not just to threats or this particular Bill. If the amendment is intended to ensure that “applying” a trade mark in an online environment is covered more explicitly as a primary act, then in my view this is unnecessary when the threats provisions are read in the wider context of the parent Act.

This Bill will insert the individual threats provisions into the existing framework for the relevant rights. While the provisions appear in isolation in this Bill, they must be read—as I have just said—in their wider context.

The relevant sections of the Trade Marks Act 1994 do not expressly require a sign to be in physical form. It is accepted that services may be offered online under a sign in electronic form, and this applies whether the sign is included in a listing or as an AdWord. Nor do they require that the sign must be physically applied to physical goods or their physical packaging. Where goods themselves are electronic, then it follows that the sign applied must also be electronic.

That is a long way of saying that changing the provisions in the Bill to set out expressly that the online application of a sign is covered is unnecessary and, as we discussed in some of the hearings, could cast doubt on an already settled view.

I turn finally to the position of small businesses, which was so well expounded by my noble friend Lady Wilcox. I do not think that a champion is a matter for this Law Commission Bill, although she and I had a good discussion about it. I believe, as I have said

several times, that this will benefit smaller-sized businesses by helping them to gain access to justice at reasonable cost in order to enforce and make best use of their IP in the sort of circumstances that she was talking about.

I hope noble Lords will allow me to enlarge a little on the measures that government has taken to help SMEs, as I think that might help my noble friend. We heard in the evidence sessions from Mr Justice Birss about the benefits to SMEs of using the Intellectual Property Enterprise Court. Recent reforms made to the IPEC—in particular, the small claims track—help to level the IP playing field for SMEs that previously struggled with cost. The Government are fully supportive of the IP pro bono initiative, launched last month, which is designed to help small businesses and individuals who are involved in a dispute about IP. The IPO also undertakes a wide range of activities that are aimed at SMEs—partly as a legacy of the time when my noble friend was Minister—and geared to promote understanding, such as: the government-funded IP audit programme; the IP for business tools; and the IP finance toolkit. I make no apology for taking this opportunity to explain that.

Regarding the guidance on the Bill, the IPO has committed to publish business guidance 12 weeks before the new provisions come into effect. In addition, the IPO will implement a full communications plan, update the online tools, make presentations at outreach events—many of which are aimed at SMEs—update stakeholders who have signed up to receive updates and use social media channels to try and ensure that we take this opportunity to raise awareness of the changes. Actually, this is a good opportunity to expound the importance of IP. The IPO works tirelessly to increase awareness of IP and to provide guidance and education at every level. I am happy to commit the IPO to communicating to SMEs in a helpful way about the changes and benefits that will be brought by the Bill.

An important point is that we will ensure, as we did for the Consumer Rights Act, that the material is pitched at the right level. I have asked the IPO to road-test the guidance in draft with small business representatives. So we will have material suitably targeted for SMEs, but also communicate to the people who provide advice and support to these businesses, such as the patent library network, growth hubs and professional IP advisers. As IP Minister, I have tried to make sure that people understand IP a bit more and, with my noble friend's assistance, I think that this Bill is an opportunity to do a bit more of that.

Coming back to the amendments, I believe that they would in fact complicate what is currently, as drafted, a clear and consistent definition, developed by the Law Commission, of what is and is not an infringing act. I therefore ask the noble Baroness to withdraw the amendment.

Lord Lucas: My Lords, I apologise for being backward when it comes to IP law, but I am surprised that the “commissioner” is not committing anything actionable. In this internet world, if I commission a product that infringes a patent, it is easy to get it made somewhere

that is hard for the patent owner to get at and then arrange to sell it over the internet so that the importer is actually the final customer, rather than anyone who can be got at. That leaves the patent owner with no sensible place to go to enforce their patent. Is it really the case that “commissioning” a manufacturer to infringe a patent is not in itself actionable, or did I misunderstand the Minister?

Baroness Neville-Rolfe: These are quite fine points of law, but that is a fair question. Are there any other points, while we try to ensure that we answer your question accurately?

Lord Lucas: I thought that the Minister was saying to the noble Baroness, Lady Bowles, that she was seeking to introduce something new by saying that “commissioning” was not an infringement and, therefore, one could not make a justified threat to someone who was not doing anything that was actionable.

2 pm

Baroness Bowles of Berkhamsted: If I may, I think that in the kind of scenario where there is a commissioning person and a manufacturer and you can find them both, you would take action and the commissioner could be brought into it as a joint tortfeasor. If the commissioner was the big guy and the manufacturer was the small guy and you could take action just against the commissioner, as you could with a trademark, you might leave the small guy out of it. They become the prime person in the action, with the other person potentially joined in, but the issue is that you cannot write to the source of the problem.

It is true, as the Minister said, that there is a missing link in “causing” in everything except trademarks. When the Law Commission started its review in preparation for this Bill, it asked whether the law was working properly in various places and was told that it was not working as well as it could, including in relation to the amendments that had been made to Section 70 of the Patents Act following the Cavity Trays case. That has been rolled out with no change, not taking account of suggestions of areas where there could be improvement. Given that such suggestions have been made, it is appropriate that policy discussions and decisions take place. I can accept that the Law Commission does not have that power, but the legislature does. Therefore, I lay those points before the legislature.

I must quibble slightly with the suggestion that the point about unjustified threats is about getting at people who try to threaten you under an invalid patent or where there is obviously no infringement. Those are actions that, by and large, cannot be caught with a threats action; that is what the more blanket tort is needed for, or you have to go to different things, such as declarations of non-infringement or declarations of invalidity, because the threats action is not there. The law says that if you are the manufacturer or the importer anyway, you can threaten to your heart’s content.

If I may paraphrase Judge Pumfrey, as he then was, in the Quads 4 Kids case, he said that unjustified threats actions are about a rights holder who tries to keep enforcing their rights with the threat of going to

court but never intending to go to court. That is why you are not allowed to threaten the customers, because that would be a soft option for doing that. However, that does not mean that people who are selling things are not infringers; they are—you do infringe if you are selling, but one is supposed to go for the person at the core of it, the manufacturer.

What I am saying, and have been supported in, is that in this day and age the notion of causing is far more relevant. Historically, it was always relevant for trade marks, because you got somebody else to mark the carton—that is where it all started—but now that we are into remote access, commissioning in one country and selling over the internet, there is definitely a missing link that is being made use of, particularly in respect of designs as well as trade marks, and probably patents to some extent as well.

That is where I stand on this. I think that I would like to test the level of support in the Committee.

Baroness Neville-Rolfe: Before the noble Baroness sits down—I say that for the cameras—I should say to her that this is obviously a Law Commission Bill. The extent of that has been explained to us as a Committee from day one. We are getting here almost into a treatise on the general law of infringement. The threats Bill needs to match the existing law, which it does. I have explained why I think the amendments go beyond that and have potentially perverse consequences.

The noble Lord, Lord Lucas, was essentially right in what he said, so I thank him for that. I think that the right thing for us to do is to stick with this wording, which the Law Commission has spent a lot of time clarifying, rather than move into these new areas.

Baroness Bowles of Berkhamsted: I would still like to test the opinion of the Committee. We do not have to do it for all the amendments; we can test on Amendment 1.

2.07 pm

Division on Amendment 1

Contents 4; Not-Contents 6.

Amendment 1 disagreed.

Division No. 1

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2.09 pm

Amendment 2 not moved.

Amendment 3

Moved by Baroness Bowles of Berkhamsted

3: Clause 1, page 2, line 15, after “do,” insert “or claims to do,”

Baroness Bowles of Berkhamsted: My Lords, as well as moving Amendment 3, I shall speak to all the other amendments in the group. Although this group involves another load of 10 amendments, there are two basic amendments, which would be applied in the five relevant clauses.

The amendment in what I might call the Amendment 3 family of amendments is similar to suggestions made by CIPA in the form of “purports to do”, to which the Minister has already responded in writing. The Law Society, in its most recent evidence, supports the idea that one who holds themselves out as a primary infringer should not be able to rely on that misrepresentation. I can share a little of the concern expressed by the Minister in her written response on the CIPA suggestion that ambiguous statements should not lead to threats, but I am not so naive as to think that the retailers always overclaim their role by mistake; it can be done to gain commercial advantage over other retailers by making a product out to be special or exclusive.

However, “purports” is perhaps a word that carries with it suspicions that it is not necessarily true, rather than that you are being wholly taken in. But a clear “holding out”, a positive claim, should not lay traps. For that reason, I suggest the stronger, assertive wording of “claims to do”. I would be happy with the Law Society’s alternative wording of “holding out”, if that were felt to be better. So the relevant provision would then say that a threat is not actionable “if the threat is made to a person who has done, or intends to do, or claims to do, an act mentioned in subsection (2)(a)”, and so on.

In his oral evidence, Sir Robin Jacob thought that the “purports” amendment was acceptable, and in their subsequent written reply Sir Robin and Sir Colin Birss said that they did not consider satellite litigation a risk, which was another point that had been made in the Minister’s earlier written response. Sir Robin and Sir Colin did say that the amendment—here they were talking about the vaguer “purports” wording—could risk blurring the distinction between primary and secondary infringers. That line, if it is blurred, is less blurred, or blurred less often, using the stronger formulation of “claims”—or, if you prefer, “holding out”.

In the event that the claim is false, the true status of the retailer is soon revealed, because the letter that would be written on behalf of the rights holder would indicate the basis on which they thought the person was the manufacturer or importer. Including such a statement is desirable for the letter to make sense as well as for guarding your back. After saying who you are—and, if you are a professional adviser, who has instructed you—the letter would then say, “We understand that you are the manufacturer/importer of the product”, and it would quite probably cite the reason for making that assertion, which might be simply because it is what it says on the tin. The reply letter might then say, “Well, actually, we don’t really make it—we got it from

so and so”, and the line is then no longer blurred. In my view, a letter exchange like this is fairer than the innocent, misled rights holder also being on the receiving end of a threats action. Indeed, you can imagine circumstances—I have come across it once—in which some devious operatives might suggest to the retailers that they could say it was their own product.

It is important to recognise that the amendment does not change what happens to the retailer. The fact is that the first letter from the rights holder will be sent if there is a clear claim by a retailer that they are the manufacturer or the importer. It will be sent with the law as it is now and with the law as proposed in this Bill. The retailer, being a retailer, will still be concerned. They will still reply saying, “Oops, sorry, it’s not really like that”, or something stiffer if the letter in reply is from their lawyer. The difference that this amendment makes is not blurring; it is the false claim that makes the blurring.

2.15 pm

All that happens with this amendment is that it prevents a further step of unfairness—however infrequent that may be—of a rights holder then finding that, having been misled or even entrapped, they are on the receiving end of a threats action, which may well be used against them not by the retailer but by the true primary infringer when they are located, because they count as a person aggrieved who can bring the action. Again, you could find that the rights holder is in the unfortunate position of having the prerogative of being the plaintiff taken away from them. Surely stopping spurious and unfair actions is at the heart of this Bill.

The Bill has already added in, for primary infringement, the category of “intends to do” an act, which is something that is picked up possibly from advertising or from claims. So it is no greater a leap to accept advertising or claims “holding out” to manufacture a product to be any different from claims and advertising that you are “intending” to make a product. Possibly the Minister could tell me how she would distinguish one from the other?

I shall now speak to the second family of amendments—the family of Amendment 5—which would add clarifying wording to the end of the subsection that allows a letter to a primary infringer to reference secondary infringing acts by that same person. This section concerns text that was added for patents following the Cavity Trays case and which is being rolled out to the other intellectual property rights.

The problem revolves around one word—the word “that”, as it appears for the patents and designs clauses, and “those”, as it appears for trade marks—which seems to imply that you can mention only current acts, such as “that article” or “those goods”, and not future acts. This may be satisfactory, possibly, for a first letter, but in the subsequent exchanges, especially those about settlement and settlement out of court—any of which can constitute a threat if the wording is wrong—it is normal to seek undertakings to refrain from future infringement. After all, that is what you ask for from the court in the form of a restraining order. It is also quite normal to draft undertakings to cover infringing products or actions that are fundamentally similar to

the infringement that has been identified. Phrases such as “or colourable imitation thereof” spring to mind.

The fact is that you can say all that with regard to the manufacture, and you can now say, “Don’t sell the product”, but you cannot go on to say, “Don’t sell colourable imitations thereof”, or words to that effect. The fact that some future acts could not be referenced was brought to the attention of the Law Commission by the Chartered Institute of Patent Attorneys, and subsequently to us, together with amendment suggestions. This is another instance of where the amendment to the Patents Act made in 2004 has been discovered not to work as had been expected. It may stem, *inter alia*, from a 2009 FNM Corporation case where the fact of what you can and cannot say in such an undertaking was decided by, I think, Mr Justice Arnold.

So we have got the situation currently that, if you are trying to settle, you cannot write what you want to in order to settle the case. This leads you to precisely the problem that has previously existed where, in order to obtain the wording of the undertaking that you need from the infringer, you will file a case at the court, because then you cannot threaten and you can say, “In return for not continuing, or withdrawing, this case, I will have such-and-such an undertaking”—you can say whatever you like about that undertaking and you will get it signed. So the amendment to the law that was intended to make things simpler and reduce the need to rush to court—as Sir Robin Jacobs said, you can pull the knife out but you have got them at more of a disadvantage when you have the knife stuck in—does not work properly, and therefore the rollout to everything does not work.

One should always bear in mind that, although in this subsection we are talking about secondary infringement, it is secondary infringement being done by the person who is the primary infringer. So it is not a random secondary infringer from off the street.

In her response, the Minister also made the point that this could not be relevant to all kinds of IP. The answer to that is, well, yes it can. I challenge the underlying thought process that says that something having as much cost, worth and importance to research and industry as a patent should not be protected in a relevant way just because it does not transpose to, for example, a trade mark. That seems like a very bad start to an industrial strategy.

For patents, there are a myriad changes that can be made to a product that have no bearing on the fact that there is still infringement. I can give the simple example of changing the handedness of an article—that could equally well apply in a design case. The words used in the amendment are “having the same features so far as is material to the alleged infringement”, so it is tied back to the alleged infringement and it must still be material. Those are generic points that transpose across all IP.

It can also apply to trade marks. For example, you might try to change the typeface, the colour, the framing of the mark or sometimes the spelling—putting a double letter in or taking a double letter out—and so on. I am certain that the phrase “no colourable imitation thereof” will continue to be well used in threatening

letters concerning passing off and in the undertakings sought in settlement. In fact, it is normal to try to stop an infringer from using the trade mark in respect of any of the goods for which it is known or registered, even if the whole range had not been provided by the infringer.

I am sorry to have gone on at length, but this is yet another example of where, after asking in the consultation process whether there were any problems with the law that was intended to be rolled out, and after having been provided with example where it does not quite work, those seem to have got lost in the process. Therefore, I think that it is right that we consider them and consider the merit of them. I beg to move.

Lord Lucas: I want to ask a question, so that I understand things better. In the case of a box of Tesco own-brand cornflakes, is Tesco the primary infringer, or must the person who thinks that their patent is infringed write to Tesco to ask who the manufacturer is? In other words, must they ask who Tesco has commissioned to make the cornflakes for it?

Lord Stevenson of Balmacara: Luckily, I do not have to answer that, but we have expertise beyond parallel at the Minister’s end of the table.

I just want to support the points made by the noble Baroness, Lady Bowles of Berkhamsted. The question here is not so much whether this is an issue that we should take into account *ab initio*, which was slightly the case with the previous amendment, although I supported that as well; the support here comes because there was clear evidence from those whom we consulted that this issue needs further attention, and the noble Baroness has made that case very well. If we have gone to the trouble of taking evidence but then do not consider it and take it forward, that seems to be a slightly casual way of approaching things. I hope that we will take this point very seriously.

I also take the noble Baroness’s point that, if we were to amend the Act in the way that she suggests, this would reduce the impact on small and medium-sized enterprises and other organisations, because there would be fewer court actions and more such matters would be dealt with in the right way, which is directly between the participants. So I support these amendments.

Baroness Neville-Rolfe: My Lords, I am grateful to the noble Baroness, Lady Bowles, for her comments which, it is fair to say, were wide-ranging. I will explain how I see things and then address the various amendments, to use her words, on their merits—I should say her “family” of amendments, which is a good new collective term that she has invented today.

It is crucial that the threats provisions encourage rights holders to communicate with the trade source of an infringement—that is agreed—and provide much-needed protection for secondary actors, such as retailers and customers. To facilitate this, the Bill sets out a clear statement of primary acts. Threats in respect of these primary acts, namely the manufacture or import of a product, in the case of patents, will not give rise to a threats action. To answer the point made by my noble friend Lord Lucas, the manufacturer of the

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cornflakes—to use his example—is the primary actor. The point has been made by my advisers that this assumes that they are patented cornflakes; I am not sure how likely that is in reality, but it is a fair point. I think that there are people, as we discussed during the evidence session, who are in both the primary and secondary markets.

As we have discussed in this Committee, the provisions make a distinction between primary actor, such as the manufacturer, and secondary actor, such as the distributor and retailer, or the person with that hat. This provides protection for secondary actors from being exposed to threats. They are less likely to be able to make an informed decision on whether the threat is actually justified. Secondary actors are more vulnerable to threats because of the fear that they will become embroiled in an infringement action that they cannot afford. As a consequence, mere threats can—and do—persuade secondary actors to move their custom elsewhere.

This group of amendments would introduce circumstances where threats in relation to secondary acts would not give rise to a threats action. This clearly starts to undermine, to my mind, the protection for those who should rightly be protected by the provisions before us. The first set of amendments, concerning where a person presents themselves as doing a primary act when they are not, would mean that a threat sent to a person who claims to do a primary act could not be the subject of a threats action. The rationale for the proposed amendment is that the rights holder may not find out that the recipient is not a primary actor until after the letter has been sent, and then only if the recipient draws back from previous statements.

The amendment introduces an exception to secondary actor protection that is based on a new concept—as the noble Baroness explained—of “claiming” to be a primary infringer. This is an inherently vague concept not found elsewhere in the main Acts for the rights concerned. It would be complex and very difficult to bring evidence to prove in court. A significant body of case law would be required before businesses would have clarity about what amounts to “claiming” to be a primary actor. There may be different views to the one that I took on whether satellite litigation might result, but it certainly seems possible and unfairness could result in any case. Critically, the amendment would undermine protection for retailers who inadvertently use ambiguous language. If a secondary actor somehow implies, even accidentally, that their product was made by them, then under this amendment they lose all protection from unjustified threats, which also seems unfair. Under the current drafting, rights holders can make threats that refer only to primary acts. These are not actionable, so that is one solution. If a rights holder is uncertain about whether a retailer is also a primary actor, they can use a permitted communication to seek clarification of the identity of the primary infringer, without the risk of a committing an actionable threat.

I turn to the second group of amendments, which extend what is a primary act—for example, the manufacture of a hair dryer whose patent is owned by the threatener—to include any products or processes

having the same features. To continue the example of a hair dryer, it would be one which is not the same but is similar in all material respects. Where threats are made to a primary actor in respect of one product, it is correct to approach them. They are potentially the greatest risk to trade and the source of the alleged infringing. But if threats are made in relation to equivalent or similar products, where the same business is only a secondary actor, it should be possible—in my view—to bring a threats action. To remove this option would chip away at the principle of protection for the secondary actor, which is at the very heart of the threats provisions. Mark Bridgeway noted in his evidence session that asking secondary actors for undertakings to cease doing something for commercial purposes is expressly excluded from being a permitted purpose. Yet the effect of the amendment would be to allow this to happen.

The amendment would also make the provisions more, not less, complex. It would blur what is intended to be a clear line between what is and what is not actionable. In addition, the concept of “the same features” is very vague and I can foresee great uncertainty for business. The noble Lord, Lord Stevenson, rightly mentioned SMEs. For the reasons that I have stated, I believe that including the amendments would reduce clarity and, therefore, make the provisions more complex and advice potentially more expensive for SMEs. In reducing the protection for secondary actors, I fear that the amendment could open up SMEs to unjustified threats. I know that it is a very complex area but, for these reasons, I ask the noble Baroness to consider not pressing her amendments.

2.30 pm

Baroness Bowles of Berkhamsted: Thank you. I am sure that the Minister will not be surprised to learn that I do not quite agree with her summary. I think we have to go back again to what threats actions are all about, which is stopping the rights holder from being unfairly oppressive about their rights. They are not about protecting secondary infringers at all costs—in particular, they are not about protecting secondary infringing acts simultaneously performed by somebody who is a primary infringer.

The relevant section that we are talking about is not about a secondary infringer; it is about a primary infringer who makes something for disposal—previously, prior to Cavity Trays, you would be in this rather stupid position where you could say, “You can’t make that anymore”, but you could not tell them not to sell it. That is a rather difficult letter that you have to write when trying to sort out the case and make sure all the ends are tidied up. If somebody holds themselves out, or claims—“purports”—to be something, that is very strong; maybe it is accidental. Actually, retailers should have a certain amount of clarity about whether they are telling the truth about their product. If they claim that they are making it and they are not, that is probably wrong under trades descriptions. I do not see why they should mislead somebody and then avail themselves of an action that was really meant to stop the rights holder being unfair. You end up with the situation where a primary infringer is able to have a

bite back at the rights holder through the unfortunate accident of the relevant clause relating to the secondary acts done by the primary infringer. That is a situation that is no better than the situation prior to the Cavity Trays case.

If I talk about,

“having the same features so far as is material to the alleged infringement”,

you may think that it is vague but it will be in every undertaking that is ever agreed to and that has gone through the court, or that is done when agreeing not to go through the court but to withdraw the action. Therefore, to force things to go to the court in order to get a satisfactory undertaking will not make things any better. It will make things very bad for SMEs, in particular. I do not think the wording is vague at all. It talks about,

“so far as is material to the alleged infringement”—

that is very tight. But if you wanted it that, having pursued somebody, they could paint it blue instead of red and you have to go all the way round the loop again, it will not resolve the action. It is not saying a completely different product; it is essentially—as far as the court would perceive it—exactly the same infringement. I just think it is wrong that one cannot utilise again these sorts of letters.

Again, I would like to find out what level of support there is—there is perhaps a bit more support verbally than there might be in a vote. We only need to test on one amendment.

Lord Stevenson of Balmacara: The noble Baroness is making some very good points on this issue, but I am sure that she is aware of the situation—if we vote on this amendment and she is unfortunate enough to lose it, she will not be able to bring this back on Report. Might she reflect on that before she pushes the matter?

Baroness Bowles of Berkhamsted: I hear what the noble Lord says; if he is advising that it might be better to think about my wording a little more carefully, then I may be prepared to accept his advice.

Lord Stevenson of Balmacara: I think on this occasion that may not be sufficient. You will need to withdraw it, I think.

Baroness Bowles of Berkhamsted: Okay, I will withdraw the amendment.

Amendment 3 withdrawn.

Amendments 4 and 5 not moved.

Amendment 6

Moved by Baroness Bowles of Berkhamsted

6: Clause 1, page 2, line 29, leave out “contains information that”

Baroness Bowles of Berkhamsted: In moving Amendment 6, I will speak to all the amendments in this group, and will try to plot a careful course through

them. They interrelate with one another to some extent, so it makes sense to talk about them all at once. They all concern how permissively or not various parts of the wording in the sections on permitted communications should read. There are four places in each of the relevant clauses where minor adjustments to the language are proposed. In two of those places, there are alternative wordings.

I will start with the first position, which is new Section 70B(1)(a). It states that,

“the communication, so far as it contains information that relates to the threat, is made solely for a permitted purpose.”

Amendments 6 and 7, and their counterparts, can go together, although each makes sense standing alone. They suggest respectively the deletion of the words, “contains information that”, and the deletion of “solely”. The word “solely” was first brought to our attention in evidence by the Law Society and others, so I will start with that. I find myself in a slightly strange position because it was argued that “solely” brings in the state of mind of the writer of the communication, although in their written response the Government suggest that it does not.

I am somewhat in favour of the state of mind or intent being an issue, as it would be in a wider tort in order to limit abuse. I think that including the word “solely” has a ring of that. So, why am I suggesting deleting it? I also found myself so tied up in words in this whole subsection and the one following it, which seemed to repeat itself more than once, and that is confusing. Repetition leads to inventing reasons why something is said more than once—that it must mean something different or extra, but the main thing that we want in this whole threats actions arena is clarity.

Thus it seems to me that subsection (1)(a) should be left simply as saying,

“the communication, so far as it ... relates to the threat, is made ... for a permitted purpose”.

There is no need for “solely”, nor for the words, “contains information”. I am not sure in this context what a communication without information is, or whether a communication without information can be seen as a threat, although we did have a client who was threatened in Texas with six shots fired into the ceiling and the taunt, “That’s what we are going to do to you in Scotland”. I suppose that is a communication, and, I think, a threat, although I am not so sure about the information.

I am also quite partial to the engineer’s definition that information is initial ignorance minus final ignorance. Apart from giving counsel lots of potential entertainment opportunities in court, I concluded that there were a few too many words here that were confusing, so I sided with the IP Federation suggestion to go for maximum simplicity. I think it is best to have both deletions.

The Law Society and others have suggested or agreed with deleting “solely”. We did not put to them the deletion of the words, “contains information”, because that came in with the last batch of evidence as a late suggestion, but it seemed to me sensible.

I shall now speak to the Amendment 8 family. This refers to the subsection which reads,

“all of the information that relates to the threat is information that ... is necessary for that purpose (see subsection 5)”.

[BARONESS BOWLES OF BERKHAMSTED]

Rather as with “information”, I began to dislike the word “necessary” in this whole section because every time it came up I felt it needed some qualification. It comes up again in subsection (3) and again in subsection (5). In each instance I found the direction and reason for wanting qualification to be different.

As it is used in this first instance, it sets a high standard for what can be put in the communication, and I have no problem with it in that context. But here we are talking about letters to retailers which may be for a variety of reasons. If the purpose is to try and find the primary infringer is it right to send a communication to every single retailer, for example? That might be an effective deterrent to them continuing to sell and is just the sort of thing that threats actions are about preventing. Or should you deliberately select the weakest retailer and make an example of them? So I felt that the word, “necessary” here needed to have some qualification, and that the information should be both “necessary” and “proportionate”. There are other words that could have been used, such as “appropriate”, but proportionate and disproportionate are words well used in the context of legal actions.

If I am completely honest about the occurrence of “necessary”, I think it should also say “sufficient”. Those are the usual ways to define something mathematically; for example, the conditions that are necessary and sufficient to define a positive, real and rational function—we could do with a few more of them in some of this legislation. The word “necessary” does not mean you have said everything that is needed to be said but choosing to include “proportionate” helps out a little with saying the things that should be said.

In a way, the problem is similar to what comes later in subsection (3), where we had more discussion about the court being able to have flexibility. The wording of subsection (3) allows extra things to be treated as a “permitted purpose” and it might, possibly, allow them to be discounted as was suggested by Professor Sir Robin Jacob when he was before us. We get into that again in the context of the word “may” in subsection (5).

2.45 pm

Amendments 12 and 13 relate to subsection (3) that I have just referenced, which allows the court to treat “any other purpose” as a “permitted purpose” if it considers it in the interests of justice to do so. We had a discussion during the session with Professor Sir Robin Jacob, led by the noble Lord, Lord Stevenson, on whether the word “necessary” in this position was too strong. In that discussion and in follow-up written comments, Sir Robin and Sir Colin Birss put forward the wording,

“reasonable in all the circumstances”.

I am content that this is a good suggestion. As an alternative, just the word “necessary” could be deleted to leave it as saying,

“in the interests of justice”,

but I take the comments made by Sir Robin that it may not be clear at different stages what is meant by “the interests of justice”. So I prefer the language

of Amendment 13 and its corresponding family of amendments in the other clauses, but if the Minister is looking for something that looks smaller, there is the possibility of Amendment 12, which just deletes “necessary” as an alternative, because it still makes sense.

Finally in this group we come to the Amendment 14 family, which suggests that after “that”, the words, “prima facie” should be inserted. This concerns the use of the word “may” in subsection (5) which states:

“Examples of information that may be regarded as necessary for a permitted purpose”.

We have to recall that this also references back to “necessary” used in subsection (1), where I thought the word, “proportionate” should also go in.

The discussion that we got into during the evidence sessions was whether something in the list in subsection (5) might sometimes not be allowed, and that that went against the grain of seeking a safe harbour, as expressed, for example, in the last submission from the IP Federation. However, Sir Robin and Sir Colin thought that it did mean “may” and that sometimes everything might not be “necessary”, which is in keeping with the notion of flexibility that they expounded. Furthermore, if it is changed to “shall”, to give safe harbour, as the IP Federation suggested, it makes it look like you always have to say everything that is in the list, rather than there being options that you might wish to say but it is not always desirable or appropriate to say. For example, why go into details about the patent infringement if all you wanted to know was who the manufacturer was and where they were?

In trying to overcome this dilemma, I thought that if we inserted, “prima facie”, in front of “may”, it would have the sense of, “Well, in all normal circumstances, it is okay to say this, but if you find some extraordinary and egregious way to utilise it, then the court might decide that it takes a dim view of it, so it is best not to do it”. I apologise for using Latin, but I felt that it had the flavour that I wanted. I have to say, looking at it now, it might be better if the words, “may be” had been changed to “are”. I hope that that has cleared up the problems that we came across in looking at the language of that subsection. I beg to move.

Lord Stevenson of Balmacara: My Lords, I pay tribute to the noble Baroness, Lady Bowles of Berkhamsted, for her ability to expand such a wide range of interests within one group. The grouping has been necessary, but possibly not in the best interests of a focused series of discussions. It rebounds on the Minister to try to respond in like mind to whichever one of the very large number of points we could have picked up on. I am sure she is well prepared, but I will not trouble her too much because I will not range very widely on this. I do not need to repeat what has been said so eloquently.

I wanted to focus my remarks on Amendment 13, which, more by luck than good judgment, I managed to get my name down to. I support what was said here in the context of the evidence we had. If the Committee will recall, a lot of what we talked about with one or two colleagues who came and gave evidence was the question of whether the Bill could be seen as evolutionary

in any sense, leading to a broader understanding of the nature of the regulatory structure within which business in the UK should be conducted. I do not wish to put words into the Minister's mouth, but I think she is not unsympathetic to the idea that we should instil good ethics in the business community. I hope for her support later on, perhaps, on this point.

The narrow issue here is that the decision of the Law Commission after much discussion was to accept that, while there was a teleological approach to this area of law in the sense that, in time, a wider tort could be introduced because it would encompass this and other areas, and in the process allow us to engage more directly with the Paris convention—which is where we might have to seek a wider international relationship post Brexit—it was not the time to do that and it had not carried out the necessary consultations it would wish if that was indeed where Parliament wanted to go. If we are not going the whole way, was there a midpoint?

It was interesting to hear the evidence from Sir Robin Jacob in particular that new Section 70B(3), if he read and interpreted it correctly, provided a little bit of breadth of discretion to the courts when approaching the issues that the noble Baroness, Lady Bowles, mentioned. I am keen that that should be the case. I align myself entirely with the noble Baroness's remarks on this. It would be unfortunate if the wording as it currently stands, with the word "necessary", was seen by some as a barrier to the sort of thing we think is appropriate, which is that, on occasion, only in appropriate circumstances and only for good reason, the judges should have the right to take a wider view about some of the issues before them.

It would be helpful to get a sense from the Minister of whether she understands that. It may be that she cannot go as far as the proposal here, although the words "reasonable in all the circumstances" or "proportionate" that the noble Baroness would introduce, would be better than "necessary". Perhaps the Minister could reflect a little on what she takes from the current wording. If, on reflection, we look at that in *Hansard* and think it probably takes us as far as we need to go, it may be sufficient to leave this. It is probably one of the key points in this Bill where we could be doing something rather wonderful in trying to move the whole way this is taken forward from a rather tight set of constraints to a much more open approach. That would be for the benefit of small businesses in particular, which cannot always necessarily see the narrow point and come forward with ideas that would make it easier for people to move forward with their business. I support the amendment.

Baroness Neville-Rolfe: My Lords, new Section 70B introduces a framework of "permitted communications", which sets out clearly how a rights holder may communicate with a secondary actor without being at risk of a threats action. It is important to note that a request for this certainty came from businesses and legal professionals during the Law Commission's work. I have listened to the points that have been made with great interest. I am rather a fan of Latin, which is a very politically incorrect thing to say. I did Latin A-level and was probably one of the last to do so—people do not study it much nowadays.

Lord Stevenson of Balmacara: They are not allowed to.

Baroness Neville-Rolfe: You learn a lot from the mistakes of the Romans in terms of public policy.

I shall start with Amendment 6 and its equivalents. One of the requirements for a permitted communication is that the specific part of the communication which relates to a threat is made for a "permitted purpose". The phrase,

"so far as it contains information that relates to a threat",

is there to limit properly the scope of the provision about permitted purposes. We believe that deleting the words "contains information that" would risk the test being read as meaning that the entire communication had to be made for a permitted purpose—even the parts which were not a threat. The current drafting was inserted precisely because stakeholders—the Law Society and CIPA—expressed concern about that result. The amendment would mean that the permitted communications provisions might not apply if a communication happened to contain harmless, extraneous material. The hurdle would be so onerous that the protection offered by the permitted communications provisions would not, or might not, be used. Those less experienced would also easily be caught out by adding additional material.

I move on to Amendment 7. For a communication to be permitted, the part of the communication which relates to a threat must be made solely for a permitted purpose. The term "solely" ensures that the part in question cannot also be made for a non-permitted purpose. We heard that the Law Society and others have been concerned that the word "solely" somehow imports a need to look at the motives of the sender, but I do not really see how that would come about. The motives of the sender are not a consideration under either the current law or the new provisions. I think that the noble Baroness disagreed but my view is that that is right. As Professor Sir Robin Jacob said when he gave evidence, litigating over what someone believed,

"just leads to applications for discovery and claims for privilege". That is a bit of a red light to me because it could mean more costly litigation.

The "permitted purposes" in the Bill are based closely on the current patent exceptions. The law in this regard is unchanged—it remains an objective test—and, in legal terminology, making a threat will remain a strict liability tort. The requirements clearly relate to assessing the purpose of the communication itself, based on its wording alone. The amendment therefore seeks to resolve an issue which simply does not exist.

Turning to Amendment 8, to my mind the non-exclusive list of examples of information which are necessary for a permitted purpose provides valuable clarity. It gives stakeholders the certainty they desire, making it possible for disputing parties to know how and what they may communicate effectively without risking litigation. The amendment seeks to undermine that certainty by adding a requirement that not only must the information be necessary but it must also be "proportionate". The term casts doubt on whether a

[BARONESS NEVILLE-ROLFE]

business can rely on the examples listed. This decreases the value of the guidance that paragraph (5) is meant to provide and which stakeholders asked to be spelt out.

Amendment 14 has a similar effect by saying that the examples given are only “prima facie” to be regarded as necessary information. In other words, these examples can be regarded as necessary information, which it is safe to convey, only until it is proven otherwise. Noble Lords can see that this will introduce considerable doubt for business about whether the examples can be relied on.

Both amendments raise many possibilities for how to assess whether a particular communication can safely be made. They risk both confusion and even satellite litigation, and the resulting uncertainty about what information can be communicated risks encouraging a return to the “sue first, talk later” approach, which we are trying to avoid. That goes against the direction of the Bill as a whole.

Finally, I will address Amendments 12 and 13. The noble Lord, Lord Stevenson, spoke to the latter. As I said, the Bill provides a list of permitted purposes in order to give the much-needed clarity and certainty that stakeholders have asked for. However, consultees also warned against being too prescriptive. For this reason, the courts have discretion to treat other purposes as permitted, but only if necessary in the interests of justice.

The requirement for something to be necessary in the interests of justice is in fact intentionally high, and it is expected that the discretion will be used sparingly. “In the interests of justice” is a familiar and steady concept to shape how the law develops. A new test of “reasonable in all the circumstances” could make it difficult to ensure that the law provides the required level of guidance and certainty. These amendments could provide the courts with a wider discretion to treat other purposes as permitted, and that could create uncertainty for users over what communications can safely be made. That is undesirable both for those wishing to enforce their rights and for secondary actors in receipt of a threat. It would make legal advice more complex and perhaps more costly and it could risk the erosion, over time, of the valuable protection for secondary actors which is at the heart of the threats provisions.

The noble Lord, Lord Stevenson, was making a wider point, but I do not think that we can tackle business ethics in this Bill. However, I agree that being responsible in business leads to better business, not only in the long term but in the shorter term.

I have listened to the debates about “solely” and “necessary”—we have now debated this over five sessions—and I can see that noble Lords share the same objective that we have, which is to ensure that this key area of the law operates in the best possible way and that these permitted communications work well. I cannot promise anything today but I, along with perhaps other noble Lords, will look at the *Hansard* report of the debate and I will consider carefully the various detailed points that have been made today. On that basis, I hope that the noble Baroness will feel able to withdraw the amendment.

Baroness Bowles of Berkhamsted: I beg leave to withdraw.

Amendment 6 withdrawn.

Amendments 7 and 8 not moved.

3 pm

The Senior Deputy Speaker: I call Amendment 9 next.

Viscount Hanworth: I wish to speak not to Amendments 9 and 10, or to the other amendments of the same nature that are replicated for the series, but to my own amendments, which are more or less equivalent. They are Amendments 11, 28, 46, 64 and 80. They relate to permitted communications, namely—

The Senior Deputy Speaker: Somebody needs to move Amendment 9.

Amendment 9

Moved by Viscount Hanworth

9: Clause 1, page 2, line 42, at end insert—

“(d) take-down from a digital platform by a notice of an infringement sent to or by the platform.”

Viscount Hanworth: I shall move Amendment 9. To continue, Amendment 11 relates to permitted communications, namely,

“giving notice to or by an information society service provider of the infringement of a patent”.

The amendment has been provided by the BBC and by BBC Worldwide Ltd at the instance of the Committee. The problem that it addresses was also recognised by the Chartered Institute of Patent Attorneys. It provided an amendment to new Section 21A(2), which had the same purpose as the present amendment. However, it was agreed that the text of its amendment was tortuous and that amendments to the same end were required in other places in the Bill, which is why we find them in five places. To that end, the BBC has provided five amendments that are to be placed throughout the Bill. They concern, respectively, patents, trademarks, registered designs, design rights and community designs. The wording of these amendments is virtually identical and so it is appropriate for me to speak to all of them together. As we proceed through the list of amendments, it should be clear which ones these are.

I should briefly describe what the problem is. It arises when a rights holder contacts an internet service provider, such as eBay, to assert that there has been an infringement of its rights. Someone may be advertising goods for sale using its trademark or infringing its brand. An example that was provided by the BBC concerns the sale of bespoke “Doctor Who” birthday cards, but there are many other similar cases that one can imagine. The action of the brand owner or the rights holder would be to contact the internet company—eBay, for example—requesting that it takes down the offending advert. The internet company would do so, while contacting the party responsible with information

concerning the putative infringement and providing it with an opportunity to contest the action. In a contested case, it would encourage the parties in dispute to open negotiations.

A point that has to be stressed concerns the huge volume of such incidents. They have to be handled in a routine manner by dedicated teams within internet companies, which would be severely constrained if they were liable to the charge of making unjustifiable threats. Moreover, it is unclear in many cases whether the putative infringer would be regarded as a primary infringer, to whom it is legitimate to send a threatening letter, or a secondary infringer, to whom it would not be legitimate to send the letter. The Bill makes an allowance for this in cases where all reasonable steps have been taken by the claimant to determine whether the infringer is a primary infringer or a secondary infringer. However, in the cases that we are considering, which concern high volumes of low-value trades, the requirement to take all reasonable steps to determine the matter seems to be excessively onerous. We will come to this point on a later amendment.

The question of whether a notice issued by the complaining rights holder or by the internet company can constitute an unjustifiable threat is still undecided in law. These amendments attempt to clarify the matter. There has been some pushback from the Law Commission, which seems to be loath to allow any interference with its handiwork. Its comments have been addressed to the amendment of the Chartered Institute of Patent Attorneys rather than to the offerings of the BBC, which it may not have seen. It has made two arguments. First, it has suggested that the matter can be dealt with adequately in the Explanatory Notes that accompany the Bill. It has also proposed, more generally, that any outstanding matters can be settled by case law. I do not regard these as adequate responses to the genuine difficulties that are arising. I beg to move.

Lord Lucas: I am very sympathetic to these amendments. The internet is an international community, it has developed an international and agreed method of dealing with infringements and it would be daft of us to try to insist on a separate method of dealing with them just for the UK, even if we may be in that sort of mood as a country at the moment. This is a moment to try to swing behind an international system that works.

Baroness Bowles of Berkhamsted: This is the last long intervention I shall make, but I have some additional points that I would like to share on this. The idea of making a take-down notice into a permitted communication evolved during the course of our hearing with the BBC and eBay. The BBC suggested that one could utilise wider words than those I chose to use. I used “digital platform”, and it used wording from the electronic commerce directive, which refers to, “an information society service provider”.

It is quite useful to be reminded that the electronic commerce directive has an impact upon the way take-down notices have developed over time. As the noble Viscount, Lord Hanworth, said, there are two reported cases

where courts have declined to make an interim decision about whether a take-down notice constitutes a threat because it is an issue of substance that would need to go to full trial. In its last submission, the BBC referred to the Cassie Creations case. That case refers to the earlier case and, in particular, to the Quads 4 Kids case. I know we like to have judgments and case law in order to evolve law, but we have now got into an area where, even if we had a full trial decision interpreting the law as it stands, we would still be faced with having to look at the policy intent for the world we live in.

Relevant to that are also the bits of law that are being taken away by the Bill. It removes the right a rights holder has at the moment that mere notification of a trade mark or design registration or design right is not a threat. Of course, as soon as you put the word “infringement” into the notification, you bring in the notion that it might be a threat, although in the context of a take-down notice, it is not a threat of litigation because take-down avoids there being litigation most of the time. eBay told us that it happens some 97% of the time, and even the other 3% does not all go to court, as that figure includes when counterproposals are made.

I am trying hard not to get into arguing the case that has not gone to full trial, but the situation is that platforms are not liable for infringements until they are put on notice of an intellectual property right—that is the effect of the e-commerce directive. At the moment, you can put a platform on notice, at least for trade marks and designs, without using the word “infringement” using the safe harbour mere notification provision. That was the case for patents as well prior to the 2004 revisions.

When it comes to take-down notices as they are being used, to make the procedure sensible, the notices use infringement terminology, but in general platforms do not feel that they are being threatened. At least, that is what eBay said in evidence. It said that threats were more likely to arise in the few cases where there is further correspondence. However, as the BBC pointed out, threats and the suggestion that a take-down notice is a threat have been raised and have twice been considered to be a substantive point that would need a fair trial. In the Quads 4 Kids case, Judge Pumfrey, as he then was, said it was an arguable case needing full trial, and that precedent of leaving it for a full trial—which did not happen—was followed in the Cassie Creations case.

However, to stop being liable, once they have been put on notice, platforms take action and take down infringements without the matter going to litigation or even the threat of litigation—unless the take-down notice constitutes a threat, which has not been decided. You also need to consider which leg is a threat. Is it both legs, the first leg from the rights holder to the platform, the second leg from the platform to the vendor or a pass-through transmission from the rights holder to the vendor via the platform? All this is going to go on and be uncertain until there is a judgment in a yet-to-come case that makes it beyond the interim stage. Often there are other things that enable a decision to be made, so this point still does not get decided.

[BARONESS BOWLES OF BERKHAMSTED]

Meanwhile, the Bill is taking away the mere notification right, which is at least theoretically useful as a defence in such instances—and some say that it is more than that—and replacing it with the all reasonable steps defence and permitted communications, but permitted communications have new limitations as well as new possibilities. There is nothing quite so broad as the existing right under mere notification when all you are saying is, “This is the patent number”, “This is the design number” or “This is the trade mark number”—I should correct myself as it was taken away for patents, but some people have said it should come back. We have something here where a safe harbour right is being taken away and a less comprehensive defence is being put in its place. In the context of a digital platform, that may be a very significant change, so the basic suggestion in all these amendments is that a take-down notice should be a permitted communication.

3.15 pm

Of course, the other side of it is: what do you do if there is overaggressive use of notices? We had mention of bad-faith notices in the evidence from Chris Oldknow, the former chair of the Anti-Counterfeiting Group, although he said that is at a low level. What to do about overaggressive and covetous enforcement is still a sore point. It is not captured in threats action, and I do not think the Bill makes any difference to that unless its purpose is to hinder take-down notices in general. However, there is one safeguard in the permitted communications route, which is a requirement for the person making the communication to reasonably believe that it is true. That is a useful provision. So-called bad-faith notices would fall foul of that. They could not describe themselves as a permitted communication and would still constitute a threat, so I do not think we are opening the door to bad-faith notices.

We also heard evidence that in China there is now strong push-back against take-down notices from vendors. That will potentially come to haunt us even more. Aggressive action might be taken against vendors in this country if this take-down situation is not decided. That makes it all the more necessary to make the policy choice now.

My first amendment, Amendment 9, and its counterparts are quite simple. They just make a take-down notice to or from a digital platform a permitted communication. Amendment 11 proposed by the noble Viscount, Lord Hanworth, does the same thing with different language and covers more than digital platforms, which one might want think about.

After some thought, I tabled an alternative version of Amendment 9, Amendment 10, in which I import the language of the reasonable steps defence in an enabling provision to make it a permitted communication. In effect, it switches the burden of proof. I have suggested that the take-down notice is a permitted purpose only when it is impracticable to identify or communicate with anyone who is the primary infringer. I have made it into a right rather than a defence, and I have taken away “all”, so you have to find a mechanism to say, “We searched but didn’t find”.

We have to think about these things quite carefully. What would be the effect of my reversed burden of proof? If I advertise the sale of product X made by Y, the implication is that you have to communicate with Y. However, if Y is a hard-to-pin-down entity and communication is impractical, you can send the notice. That is exactly the situation envisaged in the defence in the Bill. There is some justification to say that if the mere notification right is being deleted, it should be replaced with a right, not a defence. There is also an interesting secondary effect in that it might encourage more vendors to say the source of their product, which is highly desirable for safety, supply-chain knowledge and all kinds of other things.

If something like this is not made into a permitted communication, it is not right that we should remove the mere notification right. That is something I would want to revisit by way of amendment at a later stage to reintroduce it. This is a serious point. Taking away a right and replacing it with a defence reduces the options of the rights holder.

Baroness Neville-Rolfe: I am grateful to the noble Viscount, Lord Hanworth, for his clear explanation of these amendments. I liked his example of the Doctor Who birthday cards, which I look forward to researching.

It is true that the internet is growing. It is increasingly international and it is very important, but I am not sure that that necessarily means that we should be changing the Bill. The amendments seek, in various ways, to include the sending of an online infringement notice in the list of permitted purposes, the result being that such notices can be used to communicate with an online secondary actor, without fear of a threats action being brought. Unfortunately, such amendments would completely undermine the protection for secondary actors provided by the Bill. Noble Lords will remember that Mr Justice Birss was clear in his oral evidence that these forms should not be made an automatic exception from the law of threats. He noted that he was aware of the notification process being used in exactly the way the threats provisions aim to prevent. Furthermore, the amendments would distort the policy behind permitted communications, which, of course, is to encourage a conversation to resolve a dispute. If an online form is used, rightly or wrongly, and the product listing is taken down, then the rights holder has prevented further trade in the item, so that closes the door to discussion.

Amendment 11 defines the new permitted purpose in relation to the e-commerce regulations 2002. These regulations do not specify how the notification must be made or what it should contain. There is no conflict, as we see it, between the Bill provisions as they stand and these regulations. It is possible to send a communication which fits within both the requirements of the regulation and the permitted purposes. Given the undefined nature of an e-commerce notice, the range of communications exempted by this amendment would potentially be large. That could create a gap in the protection for secondary actors.

Amendments 9 and 11 in particular would allow malicious and unjustified threats to be made to a secondary actor simply because a particular online

form is used. The parties damaged by that threat would have no form of redress. That cannot to my mind be the right outcome. A rights holder facing a threats action as a result of using such a form can take advantage of the defences set out in the Bill. One defence available is that “all reasonable steps” have been taken to find the primary infringer. What is reasonable in the case of high-volume online infringement, to which the noble Viscount referred, is very likely to be a lower hurdle than in other situations. If a step is reasonable, then I see no problem in expecting a rights holder to take it. In light of this, the permitted purpose set out in Amendment 10, with its explicit reference to the impracticality of finding a primary actor, is not necessary. A suitable defence already exists.

The other defence for a rights holder facing a threats action is that the right has in fact been infringed. As the BBC noted in its evidence, it is very well aware, before it makes contact, of who is permitted to use its brand, and therefore whether others are infringing. The provisions as drafted in no way prevent rights holders from legitimately enforcing their rights. Sir Colin Birss says about not including standardised/online letters in his evidence:

“I would not include them in the exemption. That kind of thing can cause real damage. ... I would be wary of a draft that went too far the other way and simply excluded that kind of thing altogether. That would be unfortunate. It is a place where SMEs can get damaged”.

Finally, I will try to pick up a couple of the points made by the noble Baroness, Lady Bowles. As I am sure she knows, the list of permitted purposes is based on the current threats provisions where it is permitted to notify a recipient of a right or, for patents only, to give factual information about the right or make inquiries to find out if a right is being infringed and by whom. That is not changing. Also, mere notification, to which she referred, is the first of the permitted purposes, and notification is not a threat to the platform.

These are complex matters. They have obviously been discussed at length with the Law Commission. I hope that, on reflection, the noble Viscount will feel able to withdraw his amendment.

Viscount Hanworth: I shall consider carefully what the Minister has said, as recorded in *Hansard*. Therefore, I beg leave to withdraw my amendment. I wish to give notice that I may bring it back on Report, in collaboration, I would expect, with the noble Baroness, Lady Bowles.

Amendment 9 withdrawn.

Amendments 10 to 14 not moved.

Amendment 15

Moved by Viscount Hanworth

15: Clause 1, page 3, line 29, leave out “person who made the threat (T)” and insert “person (T) who made the threat”

Viscount Hanworth: Amendment 15 is a trivial amendment. It says,

“leave out ‘person who made the threat (T)’ and insert ‘person (T) who made the threat’”.

I have observed that, in the subsequent text, T denotes a person rather than a threat. It occurs to me that it would have been better to denote the person in question by a capital P instead of a capital T. Even a capital C might be used to denote the complainant who makes the threat. This is a rather clumsy piece of illogic in the text, and I think it brings it somewhat into disrepute. These remarks apply also to Amendments 32, 50, 68 and 84, which are absolutely identical in their content. It is not the threat T that is instanced in the subsequent text; it is the person T that is instanced, and therefore there is a piece of illogic in the Bill. I think that should be expunged. I beg to move.

Baroness Bowles of Berkhamsted: I agree with the noble Viscount. I think it would have been less ambiguous if you had used P for person, but that might be used in another part. However, I observed that in the Digital Economy Bill, where there was the same kind of phrasing, they put the person, followed by a letter, who did something or other, so I think that the noble Viscount, Lord Hanworth, is right.

Viscount Hanworth: I have to say that mathematicians instantly spot this, so there are three of us who hold that opinion rather strongly. Others, who are of a different culture, cannot see what we are driving it.

The other amendment in the group is Amendment 16, which is replicated in Amendments 33, 51 and 85. We have already been over this ground, but I repeat that the amendment seeks to leave out “all”. This amendment relates to the requirement that the person T, who has made the threat, should take all reasonable steps to identify those who are ultimately responsible for the infringement, before they can claim that their threat is justifiable. It is argued that this places an onerous burden on a rights holder, who is subject to an infringement of e-commerce. Therefore, the word “all” should be deleted. We have been here before because it has been suggested that, instead of the phrase “all reasonable steps”, we should allow only steps that are practicable. I think the basic point is that the onus falls too heavily upon the claimant, in the case of e-commerce, of infringement.

Lord Saville of Newdigate (CB): I entirely agree that the word “all” sets too high a test and should be removed.

Baroness Bowles of Berkhamsted: I also agree that the word “all” should go. As regards new Section 70C and new Section 70C(3), a lot of technical people agree that it should be looked at again, so I ask the Minister to do so.

3.30 pm

Baroness Neville-Rolfe: New Section 70C and equivalents set out remedies in the case of a successful threats action and the defences available to those who have a threats action brought against them. Subsection (4) sets out a defence if it has not been possible for the threatener to identify the primary actor.

[BARONESS NEVILLE-ROLFE]

As has been said, the first amendment would amend the subsection to reflect a drafting preference by moving the location of the reference letter T. That may relate to the person who made the threat, which begins with T, but I will discuss the wording with parliamentary counsel in the light of the Digital Economy Bill to see whether we feel that it is right. I do not think that anybody thinks that it is a material point.

The second group of amendments under discussion relate to the defences available for someone who is faced with a threats action. The 2004 patents reform introduced a defence for a person making a threat to a retailer or the like. The defence applies if their efforts to find the trade source of the infringing patented goods were unsuccessful. The Bill extends this limited but useful defence to trade marks and designs. The provisions clarify that the person making the threat must have used “all reasonable steps” to find the importer or manufacturer of the product in question before they are safe to approach the retailer.

The phrase “all reasonable steps” was carefully chosen in response to stakeholder feedback, discussions with the Law Society and the Law Commission’s working group. Stakeholders thought that the previous phrasing used in the patents defence, “best endeavours”, carried too much legal baggage, as it has a special meaning in commercial contract law. In addition, it was felt that this could require disproportionate efforts by a rights holder attempting to identify a primary infringer. “All reasonable steps” therefore strikes the right level. It requires the person making the threat not just to do something which is reasonable but to do everything which is reasonable. The wording is fair; it does not require the person making the threat to go beyond what is reasonable.

Amendments 18 and 19 and equivalents seek to deal with pending rights. It is well established that threats to sue for infringement of an IP right, when an application for that right is still pending, are nevertheless subject to the threats provisions. New Section 70E for patents, and equivalents for other rights, ensure that there is no change to this principle—the threat will be interpreted as a threat to bring infringement proceedings once the right has been granted.

The effect of the amendment is to state explicitly that the issue of whether there has been an infringement will be determined on the basis of the granted right. It would add words in respect of the justification defence at new Section 70C(3) to state that a reference to the word “patent” means, in the case of an application, “patent as granted”. It would also make similar changes in relation to the other rights. The amendment is unnecessary. The threatener has a defence that the acts were in fact infringing ones. It is already the case in law that he must be able to show that the acts are infringing at the point of trial. If, at that time, there is not yet a granted IP right, there is no valid right to infringe and so the defence is not available to the threatener. That is the right outcome.

It is only where an IP right has been granted by the time of the trial that the defence is available. The new threats provisions do not change this legal principle. They fit into the relevant Acts, which themselves make

clear at what point and in what way infringement of an IP right can occur. Let us take patents as an example: to understand references to infringement of a pending patent, it is necessary to refer to Section 69 of the Patents Act 1977. This makes it clear that you will not infringe a patent until it is granted and explains how infringement works for pending patents.

I have tried to explain why the provisions are drafted in this way. I will look again at our friend T. I ask the noble Viscount to withdraw the amendment.

Lord Lucas: My Lords, I would be grateful if, between now and Report, the Minister could write to me with some examples of cases decided on the basis of “all reasonable efforts”, so that I can get a real grip on what that means. It is a very uncertain phrase in English. If I wrote to Tesco asking, “Who made the cornflakes?”, and it said, “It’s not our policy to divulge that information”, would that be “all reasonable efforts”, or should I ask five or six times? If I cannot find a way on the website to communicate with somebody who appears to be selling products off a platform, are no efforts “reasonable efforts”? Particularly in the context of being asked to give way on Amendment 11 or whatever comes back on Report, knowing that, for example, the things that we are asking the BBC to do in defence of “Doctor Who” are actually reasonable and are not a ridiculous burden in defence of a 20p commission on a Doctor Who birthday card is something that we as a House should do. I would be grateful for an opportunity to see the sort of evidence that a court will see, against which it will judge whether a particular course of action involves all reasonable actions rather than just reasonable actions.

Viscount Hanworth: Yes, indeed, in my perception, “all reasonable” goes far beyond reasonability. I think that is a substantial point, although we are talking about just one word. I beg the Minister to take this matter away and consider it. I shall withdraw the amendment, but assure her that I shall raise it on Report if we cannot find any better way of phrasing this onerous demand.

Amendment 15 withdrawn.

Amendment 16 not moved.

Amendment 17

Moved by Baroness Bowles of Berkhamsted

17: Clause 1, page 4, leave out lines 1 to 3 and insert “statutory regulatory bodies or entitled to legal professional privilege.”

Baroness Bowles of Berkhamsted: This is the last group to move, and I can be relatively brief. The amendment speaks for itself. I have harvested suggestions from the chartered institute and the Law Society with the intention of making this wording a bit less clunky but also international. During hearings we looked at what duties regulators had when people were behaving badly. I have not gone so far as to name just the club of advisers envisaged in the CIPA amendment, but I thought it would be good to say that they should be

regulatory bodies that were authorised by statute. I did not mention a statute because even one statute did not fit the whole of the United Kingdom. “Statute” is well understood in other jurisdictions. I thought the words “entitled to legal professional privilege” that the Law Society suggested was useful. I have done it in one line instead of three, so at least it is brief. I beg to move.

Baroness Neville-Rolfe: I am grateful to the noble Baroness, Lady Bowles, for her very brief introduction. We have debated this issue through the oral evidence. Not least for the benefit of people who feel strongly about this, I will set out why we are not inclined to accept these amendments.

The tactic of suing a professional adviser for making a threat has been used to disrupt negotiations and hamper the legitimate client-adviser relationship. We heard that convincingly from several people who gave evidence. Exempting professional advisers from the threats provisions has long been called for, because it stops game-playing.

The Bill delivers an exemption in a carefully limited way. The amendment seeks to restrict the protection available for professional advisers to just those who are regulated by statutory regulatory bodies or entitled to legal professional privilege. It is right that a professional adviser should not become personally embroiled in a threats action, when they were acting only on behalf of their client. I do not agree that this principle should apply to only a limited category of particular professional advisers. Neither should the law on threats be the place to define which regulatory bodies are considered appropriate to oversee exempted advisers. As we were discussing, it is an increasingly global market. The definition must capture the different types of foreign and domestic IP legal practitioner, who may risk facing a threats action under UK law. The current draft does that.

The first limb of the amendment would seek to restrict protection to those whose services are regulated by a “statutory” regulatory body. The term is unclear, leading to uncertainty about the exact scope. In addition, the requirement of statutory regulation would exclude international lawyers with a system of professional self-regulation, such as the American Bar.

The second limb provides that, as an alternative to being regulated by a statutory regulator, professional advisers might fall within the exemption only if they are entitled to legal professional privilege. We all know that the law on privilege is complicated and inconsistent in different jurisdictions. An adviser may not be able to be sure whether they can rely on legal professional privilege in particular circumstances. Again, that could restrict options available to business and advisers might therefore—this is always the problem—continue to seek the indemnities we heard about in our evidence sessions.

We have delivered a careful, limited exception that requires the legal adviser to be regulated but is not overly prescriptive or complicated. I therefore ask the noble Baroness and the noble Lord not to press their amendments, as I think we have found a way forward.

Baroness Bowles of Berkhamsted: I beg leave to withdraw the amendment.

Amendment 17 withdrawn.

Amendments 18 and 19 not moved.

Clause 1 agreed.

Clause 2: Trade marks

Amendments 20 to 36 not moved.

Clause 2 agreed.

Clause 3 agreed.

Clause 4: Registered designs

Amendments 37 to 54 not moved.

Clause 4 agreed.

Clause 5: Design right

Amendments 55 to 70 not moved.

Clause 5 agreed.

Clause 6: Community design

Amendments 71 to 88 not moved.

Clause 6 agreed.

Clauses 7 to 9 agreed.

Title agreed.

Lord Saville of Newdigate: My Lords, as the former Chairman of the Committee, I thank all Members of the Committee and the Law Commission, which put a lot of thought into this exercise.

The Senior Deputy Speaker: My Lords, that concludes proceedings on the Bill.

Committee adjourned at 3.46 pm.

