



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

Standing Committee on Industry, Science and Technology

INDU • NUMBER 004 • 2nd SESSION • 41st PARLIAMENT

EVIDENCE

Monday, November 18, 2013

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Chair

Mr. David Sweet

Standing Committee on Industry, Science and Technology

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• (1530)

[English]

The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)): Good afternoon, ladies and gentlemen. *Bonjour à tous.*

Welcome to the fourth meeting of the Standing Committee on Industry, Science and Technology.

Before us we have the following witnesses: from the Canadian Manufacturers & Exporters, Martin Lavoie, the director of manufacturing competitiveness and innovation policy; from Hockey Canada, Dale M. Ptycia, senior manager, licensing; from the International Trademark Association, David Lipkus, lawyer, and Peter Giddens, lawyer; and as an individual, Jeremy de Beer, associate professor, Faculty of Law, University of Ottawa.

I will follow the order of the agenda as I've introduced you.

From the International Trademark Association, is just one person giving opening remarks or both?

Mr. David Lipkus (Lawyer, International Trademark Association): Both, but we'll keep our comments to 10 minutes.

The Chair: Thank you very much.

We will go to Mr. Lavoie first.

Would you begin?

Mr. Martin Lavoie (Director, Manufacturing Competitiveness and Innovation Policy, Canadian Manufacturers and Exporters): Thank you, Mr. Chair.

Thank you for inviting me to discuss Bill C-8, the Combating Counterfeit Products Act.

I represent the Canadian Manufacturers & Exporters. We are Canada's largest trade association. We represent about 10,000 manufacturers and exporters across the country. Our sector represents more than 75% of all R and D expenditure by the Canadian private sector, so you can understand that protecting intellectual rights is central to our industry.

We applaud the government for introducing this important legislation and the committee members for keeping a close eye on the details of this bill. We strongly support the objective of the bill. Canada needs strong legislation to prevent counterfeit goods crossing our borders. However, I would like to raise a number of concerns that we and our members have with the bill in its current form.

One of them is about the responsibility of the right holder—or in other words, the victim of counterfeiting—to pay the fees associated with the detention and destruction of goods. We do not understand the rationale for this.

We believe that the importers should be responsible for these costs, since they are the ones introducing these goods into our country in the first place. They should not be given a free ride. Where is the disincentive in that? Moreover, these costs, which will largely be incurred in court proceedings, are likely to be onerous and difficult to support for smaller companies that are the victims of counterfeiting. I know that you've heard this from other witnesses. We share this concern.

Our second concern is the provision that the detention of goods requires that a court action be undertaken by the IP owner. Court actions are expensive and time-consuming, and they take a long time to get results. We believe that if there is enough evidence to show that the goods in question are counterfeit, they should be destroyed, regardless of whether or not the IP owner undertakes a court action.

You have heard the stories. Not only have you seen many examples of goods that are counterfeit, but you have seen cases where even the Canadian standards association logo is being copied. Do we really need a long court process to destroy those items? I think there are many examples of where we could proceed with the destruction of goods without requiring prior legal action on the part of the victim.

As the witness from the Intellectual Property Institute of Canada said when she appeared here on November 6:

Other countries such as the United Kingdom and Australia, as well as the European Union have already introduced a summary procedure whereby goods that are truly counterfeit, where there's incontrovertible evidence that they are, and the importer of the goods does not respond to an inquiry, will be permanently detained or destroyed.

That should apply to Canada as well.

We believe that when legal proceedings do take place, the onus should be placed on the importer, or whoever is responsible for bringing the goods in question into the country, to provide evidence that the goods are not counterfeit. Has the importer undertaken sufficient due diligence to ensure that the foreign supplier is not producing counterfeit products? What steps have been taken to make sure that counterfeit goods are not harming our economy? In its current form, the bill makes it too easy for the importer to claim ignorance.

Another issue I'd like to raise, which is not necessarily within the scope of this bill but is essential if you want to succeed in combating counterfeiting, is the need for better international coordination. This may be another area in which Canada can do more.

As you know, the "Special 301" priority watch-list of the United States Trade Representative, or USTR, has included Canada for the past several years because of our failure to implement our international obligations or to take effective enforcement action against counterfeit and pirated goods, especially at the border. This priority watch-list is an annual review of the global state of intellectual property rights protection and enforcement.

In 2011, the USTR's report stated:

The United States encourages Canada to provide for deterrent-level sentences to be imposed for IPR violations as well as to strengthen enforcement efforts, including at the border. Canada should provide its Custom officials with *ex officio* authority to effectively stop the transit of counterfeit and pirated products through its territory.

This bill will fix some of these issues. That's why in 2013 the same report was better. It recognizes the importance of Bill C-8. As a result, the USTR is moving Canada from its priority watch-list to its watch-list. The report says that the United States "urges Canada to expand the legislation to also provide authority for its customs officials to take action against goods-in-transit". We agree with that. I know this has been raised by some other witnesses who were here before.

Finally, we applaud the Canadian government's leadership in the negotiation of the anti-counterfeiting trade agreement, the ACTA. While most countries have not yet implemented the agreement, it is a step in the right direction. The ACTA signatories are Australia, Canada, Japan, South Korea, Mexico, Morocco, New Zealand, Singapore, and the United States. The European Union and the 22 EU member states signed the agreement in January 2012, but it has not yet been approved by the European Parliament.

You will notice that none of the countries included in the U.S. watch-list is a signatory of the agreement, so we still believe that a lot of work remains to be done to bring more countries to the table.

Thank you again for your time and for inviting me. I look forward to questions.

• (1535)

The Chair: Thank you very much, Mr. Lavoie.

Let me note for those who are giving testimony that there is translation. If your pace is a little bit slower, it's easier for those interpreting to deal with it.

Mr. Petycia, please go ahead.

Mr. Dale Petycia (Senior Manager, Licensing, Hockey Canada): Mr. Chairman, honourable members, ladies and gentlemen, thank you very much for inviting Hockey Canada to participate in the committee's study of Bill C-8.

Hockey Canada is the country's national sport organization. Our association is responsible for the creation and implementation of hockey-specific programming for more than 650,000 young Canadians, from entry-level beginners through to high-performance

athletes competing at world championships and such multi-nation games as the Paralympic and Olympic games.

More than 1.2 million Canadians are involved in minor hockey as players, participants, officials, and administrators, from coast to coast to coast. Over the last 20 years, the retail licensing of Hockey Canada brands—Team Canada, *Équipe Canada*—and our logos and trade dress all have been diligently cultivated to provide a substantial revenue stream for the association. In our particular case, counterfeiting means lost royalty revenue. Lost revenue for Hockey Canada equates to lost opportunities to support wholesome, athletic hockey opportunities for Canadians of all ages and of all abilities. Every dollar lost to counterfeits has a direct negative impact on our programs and services.

A very specific example that I'd like to bring to your attention today occurred in early February of 2010. In a time span of less than two weeks during the 2010 Vancouver Olympics, the RCMP and the Canadian Border Services Agency at the Vancouver mail facility intercepted and detained more than 16,000 counterfeit Team Canada jerseys, with a retail value of more than \$2.3 million. At the request of the RCMP, Hockey Canada arranged for additional personnel to assist with the processing of these counterfeit jerseys. More than 1,500 individual shipments in those two weeks were processed, and all at substantial cost to Hockey Canada. Together, we estimated that less than 10% to 20% was intercepted of the actual number of counterfeit jerseys imported into Canada leading up to and during the games. This translates into more than 250,000 jerseys that were imported into Canada, with a retail value of over \$32.5 million—all lost revenue, which negatively impacts Hockey Canada.

I understand that Bill C-8 may afford brand owners such as us the ability to work directly with the CBSA through a request for assistance process, with costs to be borne by the brand owner. At a bare minimum, the estimated cost per request to proceed with a court action is in the neighbourhood of \$500 for legal fees and disbursements, and likely substantially more than that in many cases.

Using a real-life example from 2010 from a single mail facility, Hockey Canada would be asked to spend in excess of \$750,000 just to action the very first step in the proceedings. This takes away from resources that are earned to reinvest into Canada's youth and from the programming involved with delivering minor hockey across the country. There are substantial costs and inherent difficulties in enforcing IP rights in Canada currently through the civil avenues afforded brand owners such as us. We are dealing with criminals who do not adhere to any laws and don't keep records for anyone to estimate what profits have been made or what revenues they generate.

As a double whammy, many counterfeiters simply view any exposure to civil remedies as a small and insignificant cost of doing business. Monetary penalties or awards are generally small and much less than the actual costs associated with enforcement in any civil action, even assuming that we can collect on those civil actions. Without statutory damage awards or appropriate border seizure capabilities, Canada's civil remedy toolbox will continue to be severely limited, with additional costs required of the brand owner just to prove what our actual damages were or what profit the counterfeiter might have made or has made.

The current supply chain for counterfeit jerseys is dominated by manufacturers based overseas. Counterfeit commerce is conducted primarily and increasingly over the Internet. This channel makes it virtually fool-proof for any individual with a credit card and a mailing address to participate as an importer of counterfeit goods.

Hockey Canada officially released the 2010 Sochi Winter Olympic Games hockey jersey on October 8. Within three weeks we have seen counterfeit jerseys enter the country and be offered from unauthorized sources from overseas factories, with minimum quantities as low as single units and with prices in the \$30 neighbourhood. A bona fide retailer would pay in excess of \$65 at wholesale, with a retail value of \$140 per jersey. These are already being resold here in Canada by unauthorized sources for less than \$100 to unsuspecting Canadians and consumers.

• (1540)

We currently have several covert purchases under way to validate the counterfeits, which are clearly identifiable by our brand experts. One major variable to understand is that all bona fide Team Canada jerseys have been produced elsewhere from where they're originating as counterfeits, and all by one source—our single and only official licensee—and not by multiple factories offering the counterfeits over the Internet.

The entire production of our 2014 jerseys was shipped only in container quantities by our exclusive licensee and landed in Canada earlier this summer for distribution to bona fide Canadian retailers. Please note that to date neither our office nor our investigators have been notified of a single interception by authorities of these readily identifiable and individual small-quantity shipments of counterfeit jerseys.

Ease of access via the Internet has exponentially added to counterfeit Team Canada product in the country. Importing or exporting counterfeit product should be treated with strong measures. The current model utilized by the European Union, which aims to strengthen the protection of intellectual property in the EU and reduce the administrative burden on customs authorities, is perhaps an exemplary model. The model allows for the destruction of counterfeit goods without requiring lengthy and burdensome legal proceedings on the merits to establish whether an intellectual property right actually has been infringed upon in circumstances where there is no dispute by the importer when confronted with evidence that the goods being imported are counterfeit.

With virtually no deterrent currently for importing or possessing counterfeit goods in Canada, this channel will continue to be utilized by counterfeiters to ply their unauthorized goods.

As a registered brand owner with the Canadian Intellectual Property Office, Hockey Canada has a responsibility to monitor and police our intellectual properties and brands. The tools afforded to brand owners such as us through the Trade-marks Act and the Copyright Act realistically are limited, but with reasonable and future progress being made through this bill.

The proposed changes are a very strong step forward; however, still more can and should be accomplished.

Hockey Canada regularly engages the services of anti-counterfeiting experts, dedicated legal counsel, and trained investigators to

assist with the ever-elusive task of counterfeit enforcement, consuming valuable financial resources. We have been and continue to be prepared to do this task, but within realistic parameters. Adding significant costs to such not-for-profit entities as Hockey Canada may not be the most effective manner to deal with counterfeit goods at our borders.

Hockey Canada continues to support and participate in actively engaging the efforts of the Canadian Anti-Counterfeiting Network and the Canadian Intellectual Property Council, just to name two. We support the need to strengthen Canadian legislation to empower front line officers to target and seize counterfeit goods. Greater deterrents and resources are also necessary for the officers to process seized goods and effectively deal with them as counterfeit items.

As the honourable members of the committee continue to study how to combat counterfeit goods, you are urged to include appropriate measures for the protection and enforcement of rights associated with the intellectual property of Canadian brand owners, ultimately for all of us as Canadians. We should not and cannot continue to lose sales to these criminals, who very often deal in cash-only transactions, keep no records, and contribute nothing positive, really, to our economy.

With that, I'd like to close and say thank you very much for your attention this afternoon.

• (1545)

The Chair: Thank you very much, Mr. Ptycia.

Now I will go on to the International Trademark Association. Who's going to begin?

Mr. Lipkus.

Mr. David Lipkus: Yes, I'll begin. Thank you.

Good afternoon. My name is David Lipkus, and I am a lawyer at Kestenberg Siegal Lipkus LLP.

I am appearing today on behalf of the International Trademark Association as chairman of the Canada subcommittee of INTA's anti-counterfeiting committee.

I am joined by Peter Giddens, partner at McMillan LLP, chair of the Canada subcommittee of INTA's trademark office practices committee.

We are honoured to appear today before this committee to share INTA's views on the Combating Counterfeit Products Act.

INTA supports the bill as a major step in improving protection against counterfeiting in Canada, but our members believe that Bill C-8 can better protect the Canadian public by including tougher deterrents against counterfeiting and developing stronger measures at the border to keep counterfeits out of our country.

INTA is a not-for-profit membership association, with 6,300 member organizations in over 190 countries. We have 179 member organizations across Canada. INTA's membership spans all industry lines and sectors and is united in the support of trademarks and related intellectual property in order to protect consumers and promote fair and effective commerce.

Our message is simple, and as you have heard from other witnesses, counterfeiting is a crime. Counterfeiting endangers the public health. Counterfeiting steals from Canadian businesses. Counterfeiting drains revenue from our government. And counterfeiting and the counterfeiting problem are growing in our country.

We believe that including our suggestions to Bill C-8 could make a huge and significant impact on this growing problem

INTA members have seen counterfeits in product categories such as food, medicines, automotive parts, electronics, appliances, cosmetics, and luxury goods. These counterfeits can be bought anywhere, from basements to shopping malls, and increasingly on the Internet. These products are bought and used by Canadians and found in Canadian homes, Canadian schools, Canadian businesses, and Canadian hospitals. We need effective laws to address this crime that harms the public and steals from our businesses.

Also, because counterfeiting is a global issue, Canada's actions on this issue will have international consequences. Canada must address counterfeit products with the same high bar as its trading partners. Bill C-8 is an essential step towards this objective. As we express support for Bill C-8, we recommend priority amendments that are important improvements to the bill.

With respect to statutory damages, INTA is recommending additional provisions to the Trade-marks Act, giving courts the power to award significant statutory or pre-established damages against counterfeiters in recognition of situations where it is difficult, or even impossible, for the trademark owners to prove the measurable monetary loss or damage. Often counterfeiters don't keep any records of the business they do and transact only in cash. The minimal compensatory damage awards currently ordered by our courts make breaking the law and selling counterfeit in our country simply the small and insignificant cost of doing business in our country.

While the bill does allow for punitive damages, they are discretionary and therefore rarely awarded by our courts. Thus, there is a need to deter the sale of counterfeits in our country against businesses, both large and small business, in order to protect the public from this crime. Statutory damages can help to accomplish this.

INTA applauds the addition of sale and distribution of counterfeits as a criminal offence in Bill C-8. These provisions align with the criminalization of counterfeiting globally, including places like the EU, United States, and China. However, after a counterfeiter is charged, the government must prove several elements of the counterfeiter's knowledge, which will make it very difficult for the government to prosecute criminal cases. More importantly, it misses the fundamental nature of *mens rea*, which makes these offences criminal.

As the bill is drafted today, a counterfeiter could easily deny knowing that the trademark was registered, that the mark on the goods is identical to or indistinguishable from a registered mark, and that the sale or distribution is an infringement as defined in the relevant sections of the Trade-marks Act. I'm not sure how many counterfeiters go to the CIPO database or review the Trade-marks Act on a regular basis, as I do in my practice.

The criminal offences should be written in a manner that they will be enforceable to truly act as a deterrent to counterfeiters and keep these criminals from hurting the public.

With regard to goods in transit, INTA recommends that the section of the Trade-marks Act that explicitly prohibits the Canada Border Services Agency from intercepting and seizing counterfeit goods in transit be removed from Bill C-8. Counterfeits must be stopped at any point in transit or destination. Allowing counterfeit goods in transit to pass through Canada encourages the use of our country as a convenient transit destination by organized crime. Counterfeiters rely on transit through third countries as a covert way of getting their illegal products to designated markets. Countries must therefore be vigilant about stopping counterfeits in transit, even when the products are destined for a third country.

- (1550)

Ensuring that national laws allow customs inspectors to seize counterfeit goods in transit is an important tool in the global fight against counterfeiting. For example, counterfeit car parts shipped to the United States could easily be installed into cars that travel to our border in Canada. Given the integration in North American manufacturing, it makes sense to intercept counterfeit goods when and where they are discovered. It is not in any country's best interest to support counterfeiting. Allowing counterfeits in transit to pass through Canada has the unfortunate effect of supporting the global trade of counterfeit goods.

An administrative regime at Canada's border to efficiently destroy counterfeits can significantly reduce the costs and resources devoted to counterfeit goods seized at the border. The alternative is litigation, which, as you know, is time-consuming. The costs associated with the request for assistance and the storage of counterfeit merchandise will undoubtedly be onerous on the rights holder and taxpayers because court actions will be issued after every seizure done by customs. Many INTA member organizations will not have the budgets to participate in this request for assistance program.

An administrative regime will eliminate many unnecessary costs, especially in cases where the importer does not even respond to a seizure notice and the goods are confirmed to be counterfeit. Many countries already have an administrative regime in place to quickly destroy counterfeit goods seized at the border. That is working. The customs officials in the European Union, Australia, and the U.K. dispose a large percentage of counterfeits seized at the border by some form of administrative regime. The inclusion of an administrative regime in Bill C-8 would be beneficial for not only brand owners but also the government.

Peter Giddens is now going to address the additional important trademark issues.

The Chair: You have about two and a half minutes.

Mr. Peter Giddens (Lawyer, International Trademark Association): Thank you.

INTA believes that the Canadian Intellectual Property Office should not destroy trademark application or registration records unless and until electronic copies are made and perpetually maintained. Although INTA is mindful of the practical difficulties and costs associated with warehousing original documents, in our view the downside risk of losing public access to these documents outweighs the hardships to the Canadian Intellectual Property Office associated with maintaining those records.

Neither the United States Patent and Trademark Office nor OHIM destroys the electronic versions of the documents upon the destruction of the paper version, and paper versions are kept without limitation. If Bill C-8 does not provide for electronic copies prior to destruction, the Canadian Intellectual Property Office will be significantly out of step with both the U.S. and European intellectual property offices when it comes to trademark files record retention. In any event, INTA believes that the proposed six-year clock as a countdown to destruction of documents is at odds with many established private sector file retention policies. INTA recommends that Bill C-8 be amended to require that electronic copies be made and retained by the Canadian Intellectual Property Office before destruction is permitted.

Finally, INTA also urges you to expand clause 21 of the bill to provide for a cause of action against not only counterfeit goods that are identical to those appearing in the trademark owners' registration but also those goods that are reasonably ancillary, incidental, or connected to the goods that appear in the trademark owners' registration. Also, we urge that clause 21 of the bill be expanded to prohibit the unauthorized use or display of a trade name that is identical to or confusing with a registered trademark. Such changes, in keeping with the law concerning confusing trademarks in Canada, will assist trademark owners in combatting counterfeiters who ride on the trademark owner's product line expansions before a Canadian trademark is issued or who try to avoid the reach of these new provisions on the basis of an argument that the impugned sign was a trade name rather than a trademark.

In conclusion, INTA appreciates the efforts of the Standing Committee on Industry, Science and Technology and its consideration of our testimony. INTA supports Bill C-8, but our members would like to see amendments to make it more effective in protecting the Canadian public, including adding tougher and effective deterrent factors against counterfeiters to protect consumers from harmful counterfeits; developing stronger measures and an operational administrative regime at the border to keep counterfeits out of Canada; and making a number of practical technical amendments regarding trademark practice.

Thank you again for this opportunity to participate in these committee hearings.

•(1555)

The Chair: Thank you very much, Mr. Giddens.

Now to Mr. de Beer.

Professor Jeremy de Beer (Associate Professor, Faculty of Law, University of Ottawa, As an Individual): Thank you very much for the opportunity to testify before you on the important matters in Bill C-8, Combating Counterfeit Products Act.

I would like to focus my comments to the committee today on only one issue in particular and that's the issue of parallel imports. The term "parallel imports" is one that you may or may not have heard before. I would like to help the committee understand what parallel imports are, and why they are important to Canadian families, and how Bill C-8 might help to fight price discrimination against Canadians.

What are parallel imports? Parallel imports are not pirated goods nor counterfeit products. Counterfeit products mislead consumers about the origins, quality, or other valuable aspects of goods. Assuring quality, especially in respect of health or safety standards, is among the most important functions of a trademark. It's essential that consumers not be misled by inauthentic marks, especially when it comes to compliance with health and safety standards. Bill C-8 is correctly aimed at prohibiting pirated goods and counterfeit products bearing inauthentic trademarks from entering into Canada.

Parallel imports typically pose no such problems. Parallel imports are genuine articles sold with the authority of the intellectual property rights owner outside of Canada. Manufacturers may want to segment geographic markets, so that they can keep prices higher in some jurisdictions than in others. They do this by giving certain distributors exclusive licenses or assignments of their intellectual property rights. Often those rights are to packaging, labels, logos, or other incidental aspects of the goods.

Exclusive licensees or assignees often then use these intellectual property rights to fully control their territorial markets, including pricing. Legitimate competitors who would otherwise import genuine articles from abroad and offer them to consumers at lower, fairer prices, are called "parallel importers". Parallel importers are not exempt from Canadian health and safety standards, or from complying with all relevant regulations regarding duties, taxes, and other legal requirements. Parallel importers do, however, sell the same goods at lower prices.

Why are parallel imports important? Parallel imports help to prevent geographic price discrimination against Canadians. They are one way of encouraging pricing parity across borders, such as the one between Canada and the United States. Permitting parallel imports is also an essential aspect of free trade. For example, we want Canadians to have access to goods from the European Union on the fairest terms possible. That is among the reasons for concluding the comprehensive economic and trade agreement with the EU. Fair access is facilitated when multiple legitimate suppliers of genuine articles are able to compete to offer Canadians access to goods produced with the authority of intellectual property rights owners in other countries.

I note that the principle of eliminating price discrimination against Canadians is rightly identified in the most recent Speech from the Throne as a priority to protect Canadian families, but I worry that the bill creates the risk of inadvertently undermining these aims.

I also note that Bill C-8 might undermine certain provisions recently enacted into Canadian law through the Copyright Modernization Act, which gives copyright owners the right to control the distribution of goods only if distribution has not previously been authorized inside or outside of Canada. Certain intellectual property rights, lawyers say, are “exhausted” by the first sale of goods anywhere, but Bill C-8 seems to restore some of these rights to permit detention of such goods at the border.

Finally, I note that this aspect of Bill C-8 appears to make Canadian law inconsistent with the law concerning parallel imports in the United States, particularly following a decision of the United States Supreme Court, which I can speak to more in questions if you're interested.

• (1600)

I admit that it was not easy for me, or a number of other IP experts whom I consulted, to understand the intricacies of this bill's provisions affecting parallel imports. The provisions are technical and complex, and they interact with the provisions of the existing legislation with effects that may not be immediately apparent. So my recommendation is that the committee carefully review all of the provisions to ensure that parallel imports of genuine articles from abroad are allowed so that the government can live up to its promise to protect Canadians from geographic price discrimination.

If I had more time, I might also explain why I believe that Bill C-8 strikes an appropriate balance in providing effective procedural remedies and anti-counterfeiting support to rights holders without unduly burdening taxpayers with the full costs and complexities of enforcing private rights. I believe it would be impractical and excessively costly for taxpayers to impose further obligations on customs and border services officers than already provided for in the bill—certainly without increased budgetary support. Extending the act's application to in-transit shipments, for example, would increase the administrative burden on officials and the financial burden on taxpayers. So might be the imposition of an obligation upon public officials to destroy or indefinitely detain suspected, but not confirmed or of interest to the rights holder, infringing goods. I think statutory damages may also skew the balance in the bill too far away from parallel importers or other small businesses that offer

choices to consumers but are not trading in truly pirated or counterfeit goods.

Thank you.

The Chair: Thank you very much, Mr. de Beer.

That's all the testimony from the witnesses, so we'll go on to our first round of questioning of seven minutes.

Over to Mr. Lake.

Hon. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Thank you, Mr. Chair.

Thank you to all of the witnesses for taking the time to come here today.

I'm going to start with anybody who wants to weigh in here, but particularly the first two witnesses, Martin and Dale.

Obviously when witnesses come before committee oftentimes they're looking at things they'd like to see changed in legislation, but what I'd like you to focus on with this question is what you see as the most important parts or aspects of the legislation.

Martin, could you respond for your members and then, Dale, for your organization.

Mr. Martin Lavoie: On our side definitely giving more powers to the customs officers is the most important part. That's also the part, as I said very quickly in my remarks, that the USTR has pointed out in its 2011 report as well. So I think that is the most important one.

Mr. Dale Ptycia: I would think as a brand owner that we would participate in a fair and equitable amount of investment in the protection of that, but we'd like to see front-line officers given the authority and the power to seize and detain those goods. We'd then like to see a meaningful and cost-effective way of dealing with those goods without releasing them back into the chain of commerce, if you will, by returning the shipment and putting the onus back on the counterfeiter or importer to prove that those goods are actually legitimate. It seems like the onus now is on us as brand owners to take that and ensure that we're, first of all, showing that it's a counterfeit or unauthorized through the legal recourse measures made available to us, but the counterfeiters don't have any onus to show that they have legitimate goods, or legitimate rights to the products.

Hon. Mike Lake: Martin, what's the scope of the problem with counterfeiting for your organization or your members? Maybe you could give some examples of some of your members who have been impacted.

Mr. Martin Lavoie: It's definitely across sectors, as you've heard here before. In general, I think there's the broader category of goods that are dangerous for health, right? So you've heard from health products—or even if you look at automotive parts and stuff like that.... It's difficult to put a price on it. I know you've had some witnesses trying to say how much was seized at the border and stuff like that. It's in the hundreds of millions for sure, most of it being about manufacturing.

For a lot of manufacturers the IP has a lot of value. If you look at a typical start-up in our industry, after 10 years of existence, most of the time the whole value of the business is the value of its IP, right? So it's a huge problem and something that we've been hearing about for many years among our membership.

We've got a lot of positive comments so far about the bill, I have to say.

• (1605)

Hon. Mike Lake: Jeremy, a couple of times through your presentation you said “if I had more time”, and you then went on to say something. One of those things was the balance basically of who pays for what. I think that we heard from other witnesses here who were saying that maybe there isn't quite the balance they'd like to see struck. You seem to think that a good balance has been struck in this. Maybe you could explain that in light of the comments made by the other witnesses.

Prof. Jeremy de Beer: I'm very sympathetic to the plight of trademark owners, but the fact is that any time you oppose any additional administrative obligations, there's going to be a cost. Somebody's going to pay for that—absolutely it should be the counterfeiter or the importer. In my reading of the bill, it actually provides for the ability of the IP owner to recover those costs from the counterfeiter. Admittedly, that presumes that they'll be able to succeed eventually in an action, but in the absence of the counterfeiter's paying for this, it's either the taxpayer or the private rights holder. I think the bill strikes a reasonable compromise between those two potential payers of the financial costs in the administrative burden.

Hon. Mike Lake: I'm going to come back to you, and then I'll come to Peter and David on the same question I asked the first time.

What are the most important aspects of this from your point of view, which is a little bit different, say, from the first two?

Prof. Jeremy de Beer: I think it's essential that we do all that we can to discourage counterfeit and pirated goods from crossing our border. It's a good thing that border services agents are going to have the power to enlist rights holders in the fight against counterfeiting. That's a well-intentioned principle. It should be retained. I think the bill strikes the right balance in that regard.

Hon. Mike Lake: David.

Mr. David Lipkus: I'd just like to give an example of the scope of the problem in our country, because you asked that question before. There are two projects I want to talk to you about regarding police and criminal enforcement efforts done in our country.

The first is project consumer safety. This was undertaken by the Toronto Police Service. It targeted retailers and wholesalers selling counterfeit goods in our country, in Ontario. During this project there

was a business that was selling luxury brand merchandise, purses and wallets and those things, at a retail level. When the rights holders took action against these counterfeiters, there was a judgment of the court, and the court ordered them to stop selling counterfeit. This counterfeiter decided to continue, and what we believed was a problem with respect to luxury-brand merchandise was not so. When the police went in and conducted their criminal raid, at the back portion of the store, which obviously the rights holder would have no access to, this retailer was selling counterfeit drugs. That's just one example where we would have no idea as a rights holder what we were up against, because these civil remedies do not provide for this. Obviously, we want our border officials to ensure that these criminals are stopped.

The second is with respect to project O-Scorpion. I applaud the efforts of the RCMP here. There was a six-month period between the fall of 2011 and the spring of 2012 when containers of counterfeit merchandise were targeted and seized by the RCMP. During that six-month period the value of merchandise that was seized in our country was \$78 million, but that's not the number that should shock you. What about the six-month period following the project's end? What was the value of merchandise seized? Zero. That's the number that should shock you.

Right now, rights holders are dealing with this problem on a retail and wholesale level across the board. We need to provide resources to customs to deal with this problem, and the administrative regime will help do that, will help save costs for everybody involved.

The Chair: Thank you, Mr. Lipkus. That's all the time we have.

Now on to Madam Charlton, for seven minutes.

Ms. Chris Charlton (Hamilton Mountain, NDP): Thank you very much, Chair, and thank you very much to all of the witnesses. I wish we had more than seven minutes to spend together here.

In particular I note, David and Martin, that you have quite different views on the exclusion of goods in transit. I'd love to see the two of you debate that a bit further. I'm going to move on to something else, but if either of you want to send the committee further details on your perspectives on that, I'd sure welcome them. Because it's the same disagreement we heard about earlier, when we had testimony from the Intellectual Property Institute of Canada and from Michael Geist. They took quite opposite positions as well.

Martin, you represent manufacturers, small, medium, and large. If a shipment is held up at the border on the suspicion that goods may be counterfeit, when your manufacturers are all dealing with just-in-time delivery for parts, if those goods aren't counterfeit, how will they recover from the lost time of the goods being held up? Are you concerned about the fact that whereas there's no liability for the government in any of this, and the bill's quite explicit about that, there's no way for your members to actually be compensated for their potential losses?

• (1610)

Mr. Martin Lavoie: Our membership is about 85% SMEs.

You're quite right about just-in-time delivery, especially in the automotive sector. If I understand this well, if legitimate components come to the border, they wouldn't be under detention if the IP owner doesn't notify the customs agents.

Ms. Chris Charlton: It's not always clear when items at the border are counterfeit or not. Is that right?

Mr. Martin Lavoie: That's right.

Ms. Chris Charlton: In fact, there may be a period of detention where something turns out not to be, ultimately.

Mr. Martin Lavoie: Ultimately, that's right. At that point, the customs officer will contact the IP owner and will clarify that. Right?

There might be some losses associated with it if it's legitimate. But to go back to the balance, is that more costly than being the victim of counterfeiting?

Ms. Chris Charlton: So you're comfortable with the clauses the way they are written now in the bill?

Mr. Martin Lavoie: That's right.

Ms. Chris Charlton: Okay. That's super. Thanks.

Dale, I want to go back to your examples with respect to hockey sweaters and others. I came back from China late last night. In Shanghai, there's a place actually called the "Fake Market". That's the name. All you buy there are fake goods. I looked at the hockey sweaters they had, and I looked at the label. I wanted to see what it actually said. Here in Canada, most things we buy say "Made in China", so I was quite surprised that on the counterfeit hockey sweaters, it said "Made in Canada".

I want to ask you about the balance that this bill tries to strike between items for personal use and those used for the sale, manufacture, or possession of counterfeit goods for people engaged in commercial activities.

First, are you satisfied that the distinction can be made reasonably well about what's for personal use and what's for resale? Second, if items are brought over for personal use, is that okay? Currently, those are exempt under the bill.

Mr. Dale Ptycia: First of all, to answer your question about the market, if it said "Made in Canada", that's one of the signs we look for, because those jerseys are made in Indonesia through our licensing partner.

To clarify that, our on-ice, authentic jerseys that Team Canada will be wearing are made in Granby, Quebec, and only in Granby, Quebec. The price for those authentic jerseys is closer to \$460, rather than the replica jerseys. We do have a made-in-Canada component for part of our program.

The distinguishing elements of personal use and commercial use or commercial redistribution is probably a moving line. To give a real-life example, the one element we came across here last week was a counterfeiter or importer openly advertising that he brought in 100 jerseys to resell in Canada. Is it one jersey for personal consumption or five jerseys, if you've got four or five nieces and nephews that you want to perhaps gift out? However, the real point here is that the supply chain coming that way is all counterfeit goods for us.

We have only one bona-fide licensing partner who deals with bona-fide retailers. It doesn't come through the Internet. We're not offering consumers the ability to buy individual jerseys from a manufacturer. These counterfeit manufacturers overseas openly say

that they've got a manufacturing capacity from one unit to 500,000 units per week. They're not in our regular supply chain or bona-fide chain. Those are easy elements in the chain to say are not authorized supply.

We've got to be able to continue to educate our consumers and all Canadians that only bona-fide products can be bought at bona-fide retailers.

The ability of our customs officers and our border officials to work together—and I think they're all aware that this supply chain is a real, direct route of counterfeit goods.... But they don't currently have the power to stop and detain those. As in my earlier example, the RCMP officer at border integrity said, "I'm one person here. I can't deal with this. We need some help." So we enlisted help. We hired people to help process those goods.

All those packages were detained under the Canada Post Corporation Act, not through the Customs Act, not through the Trade-marks Act, but by the Canada Post Corporation Act. That way, we were successful in using that vehicle to detain those 1,600-plus shipments from two dozen to 24 dozen to 50-dozen pieces at a time.

• (1615)

Ms. Chris Charlton: I only have one more minute.

My question is for anyone. Are you comfortable that the CBSA has, first, the resources and, second, the training to take on the new responsibilities under this bill?

We're asking them to add a lot more responsibility. There have been significant budget cuts to the CBSA. If we want this to work, the enforcement piece has to be there.

Would any of you like to comment on that?

Mr. David Lipkus: I'll just comment briefly, as we are short of time.

I can tell you that clients of our firm provide free training to law enforcement on how to identify the difference between authentic and counterfeit goods—and that will certainly include the CBSA once they have the authority to seize those products.

Am I worried about the resources? Of course I'm worried about the resources. Our firm last year opened 600 files related to businesses in Canada selling counterfeit merchandise. The problem is huge and the impact on our market is huge, and I think that we should dedicate as many resources as possible to dealing with this issue.

The Chair: Thank you, Mr. Lipkus.

Now we go to Madam Gallant for seven minutes.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman, and through you to our witnesses.

Mr. Lavoie, you mentioned that the actual victims of this crime must pay the overhead. Are you suggesting that the Canada Border Service agents be the decision-makers on whether or not a shipment is authentic?

Mr. Martin Lavoie: They certainly must have a say. There have been witnesses who have said that in some other countries, when there's strong evidence that goods are counterfeit, they should just be destroyed without necessarily waiting for court action.

My point was more to say that it seems that the importer of these goods, the one responsible for contacting a manufacturer in China and bringing the goods over to Canada in a container, should be the one to do the due diligence, to explain what has been done to make sure that the goods were legit, for example. The way the bill is drafted now, I'm just wondering, if the importer says that he didn't know or is not aware, what is going to happen. Do we just let those items go onto the market?

Mrs. Cheryl Gallant: So for the witnesses who do not agree with the present proposal to go through the courts in determining whether or not a shipment is authentic and what the damages are, if any, what process would you recommend instead?

I'd like to hear from each witness.

Mr. David Lipkus: Sure, I'm happy to discuss that. Thank you. I think that's an excellent question.

In the hypothetical example, which accounts for 70% of the cases in Europe, the importer, after receiving a notice of seizure, does not respond to customs. When there's confirmation from the rights holder that the good is counterfeit, that's where you get the administrative regime. After there is confirmation, for what purpose do we require the rights holder to go to court to get a judge to say the item is counterfeit when the rights holders confirm it's counterfeit? That system works in those jurisdictions. Certainly, if there is an issue between an importer and a rights holder on whether the goods are counterfeit, okay, then that's a battle to be decided between the two. But this bill does not include parallel imports or "grey market goods", the trademark term for that issue. We're talking about counterfeits and the counterfeits in Canada can be really good. It can be hard to distinguish between the real and the fake, but there are covert and overt technologies built into these items by the rights holders to determine whether the items are real or not.

When we're getting calls now from RCMP officials seizing counterfeit goods, we provide one or two reasons why the items are counterfeit, why they weren't manufactured by the rights holder. That's what this is about, not about articles that went from one country to another country and into Canada at a lower price. That's legitimate. That's the grey market. That's real. That's not what is encompassed in this bill. We're talking about counterfeits and that's what needs to be stopped at the border.

Mrs. Cheryl Gallant: Mr. Lipkus, what stronger measures at the border do you suggest, aside from changing the punitive damages to statutory damages? What are other examples of measures?

• (1620)

Mr. David Lipkus: That's an excellent question. I believe that statutory damages are an excellent deterrent.

There was a great question before about whether we should be exempting items for personal use. We should be excluding all counterfeits in our country. Take just a simple example of a counterfeit battery that's being brought into our country. That battery, when you look at it side by side with a non-counterfeit battery, looks

identical on the outside: the weight is the same, the name of the brand is the same. But when you remove the plastic shell from that battery, it doesn't have any protective fan or circuitry built into it to protect the consumer. So when that counterfeit battery gets put into a digital camera or any other electronic device, it can explode. That's the harm of counterfeiting that we're dealing with in Canada and that's what should be stopped, all counterfeits on all levels, and I think statutory damages will help address that. I think the administrative regime, which is not currently in the bill, will greatly assist and alleviate a lot of the burden on the government and the CBSA.

Mrs. Cheryl Gallant: Let's switch over now to counterfeits in transit. How often do Canada Border Service agents actually encounter counterfeit goods in transit? Is this a normal occurrence?

Mr. David Lipkus: I don't have the numbers on that to tell you today, but I can tell you that there was a very recent shipment of counterfeits found in the United States. Thankfully, in the context of that investigation, the records of that business were identified and reviewed by the Department of Homeland Security. There were more than ten business customers related to that U.S. entity with respect to counterfeit car parts that were destined for Canada.

That's the issue we're up against.

Mrs. Cheryl Gallant: You mentioned how the Europeans had this administrative process. But they have the Schengen agreement. We don't have that sort of agreement in place between Canada and the United States.

Are you suggesting a common border?

Mr. David Lipkus: I'm not familiar—

Mrs. Cheryl Gallant: In Europe, when you first go into Europe, if they're part of this agreement, you don't have to show your passport afterwards. So they have these border agreements in place.

Are you suggesting that sort of border agreement between Canada and the United States and other countries so that we have this common agreement?

Mr. David Lipkus: Absolutely I believe there should be agreements between border officials. If a good's in transit, and customs sees it, and it's destined for another jurisdiction, I absolutely think they should be contacted. The counterfeits at that level should be removed from the marketplace.

Mrs. Cheryl Gallant: Does anyone on the panel see a risk in authentic goods—alleged counterfeit goods, but perhaps authentic—being stopped unnecessarily and subsequently preventing Canadian manufacturing from continuing?

You gave the example of auto parts. There are shipments to come into Canada, but they're held. This can even be a non-tariff trade barrier. We've seen examples of this sort of thing where the parts are held at the other side of a border so that our manufacturing can't occur over here.

What measures would you suggest would counter that kind of activity?

The Chair: Hold that thought, witnesses. If you're able to answer it in some other time segment, that would be great. We're over time in this segment. Keep that question in mind; it may be one that you wish to answer later.

Madam Sgro, you have seven minutes.

Hon. Judy Sgro (York West, Lib.): Thank you very much, Mr. Chair.

Welcome to our guests. This issue just gets more and more interesting each time we have a meeting.

I've completely decided that I agree on the personal use. I can't understand why we're going to bring in a bill that would allow people to just a little bit be buying things that they shouldn't be buying. I think either we allow it or we don't. Clearly there's a huge issue of what's coming through the border. Certainly the whole issue of personal use is one that I hope we'll get to discuss further.

It seems like the rights holder, even with this bill, isn't getting the level of respect they should as the rights holder, as I see this going forward. At any rate, we'll have lots of work to do here as a committee, I think, on this issue.

The IP protections are very important, knowing how long it takes and the money and the investment it takes to get there. Can you tell me what the U.S. and Europe have done in the last year to try to deal with this issue? Clearly it's not just an issue for Canada.

That's for anyone on the panel who would happen to know that information.

• (1625)

Mr. David Lipkus: I don't have the numbers on what the Department of Homeland Security has done, but it's astounding the number of shipments seized at the borders in the United States—and certainly through the administrative regime in the European Union. I'm not going to speculate, but I would say that Canada is here—very little—and they seize a larger majority of counterfeit merchandise.

Let's be honest: Toronto, Vancouver, and Montreal are some of the biggest cities in North America, so anybody who thinks that counterfeiting isn't a huge issue in our country is sadly mistaken. I would like them to spend a day in my shoes and deal with the counterfeiters I deal with on a daily basis.

This legislation isn't about me. I've been trained by the rights holder how to identify counterfeit products. I know what to purchase. But my family, my wife, my son—they don't know. They do not see what we're up against, and it is dangerous. You're dealing with criminals who don't pay taxes, who do not participate in society as it's supposed to be done. That's what this is about.

I can't plead with you any more that the bill needs to do a little bit more to protect our Canadian citizens. That's what this is about.

Mr. Martin Lavoie: I made reference to the USTR watch-list. There are two countries in the G-8 on that list. They are Canada and Italy. There are two lists: there's the bad guys list, and the really bad guys list. Canada and Italy are on the bad guys list.

Hon. Judy Sgro: That's great. We're on the bad list.

Back to the issue, the impact this could have on small business has to concern all of us. Mr. Lipkus, you know what's counterfeit and what isn't, but it's going to take years for our CBSA or RCMP officers to get up to that level of knowing. The impact this could have on small businesses could be considerable. It puts the onus back on them rather than on the EU. They know it's counterfeit. They just destroy it right away.

Why do we have to put the onus on the rights holders to pay for storage? Wouldn't our officers have the confidence to recognize counterfeit and simply secure and destroy it?

Mr. David Lipkus: It's an excellent question, and I would say no. The rights holders are able to identify whether an item is counterfeit. That's why, after an item is seized, the rights holder will be contacted and receive confirmation, whether it be by some form of affidavit, as it's currently done, or with a will-say statement, containing one to two reasons why the item is counterfeit.

With respect to small businesses, the way the legislation is drafted right now, when actions are issued in Canada, there's a federal court database of the legal proceedings that are taken by rights holders against counterfeiters selling counterfeit in our country. They're not after small businesses. The actions issued in our country are against recidivist infringers, and right now the penalties on these businesses are a slap on the wrist. The judgment and damage awards are very low. Oftentimes the costs, the legal fees of proceeding with litigation, outweigh the monetary amount of the judgment. That's what's happening. So I'm not worried.

Right now there's no element of knowledge. The fact that a counterfeiter, big or small business, didn't know the item was counterfeit is not an element that needs to be proven by the trademark owner.

Hon. Judy Sgro: In the brief you sent to us, you raised some concerns about terminology, the word “distinctive” being one. Could you elaborate a bit on your concerns about the word “distinctive” and the implications of that in Bill C-8?

• (1630)

Mr. David Lipkus: Yes, I'm just going to review briefly.

Hon. Judy Sgro: I don't have time for you to review it. I'm going on a brief that you submitted in August 2013.

Let me move on to something else. On the in-transit issue, what's your suggestion to deal with it? Have you suggested any amendments? You've talked about the administrative regime. That was definitely one change. The other was the cost factor.

Mr. David Lipkus: I believe the language that's been expressed in the bill should be removed completely. At that point the bill would be silent on goods in transit. This way, if an item is seized that is counterfeit and dangerous, like electrical cords or a liquid with toxins in it, we wouldn't just release it from our country and possibly have it re-enter the market.

Hon. Judy Sgro: Exactly.

Mr. de Beer, you had a comment earlier on something I had asked.

Prof. Jeremy de Beer: I was just going to respond to your question about the capacity of the CBSA to deal with this. I am deeply worried about their capacity in terms of skills, human resources training, and cost.

The bill, particularly in respect of the copyright-related amendments, involves a lot of grey areas. There's a provision that prohibitions don't apply where there's a limitation or an exception.

These are very difficult judgments to make. I'm quite worried about putting the responsibility on our front-line border service agents to make these difficult decisions. If they're going to be expected to do this, there are going to be costs associated with it that I'm very worried about.

I see carving out the—

The Chair: Thank you, Mr. de Beer. I'm sorry, but we're way over. I gave you a bit of latitude there, but we're quite over on the time.

We're going to the second round now.

Mr. McColeman.

Mr. Phil McColeman (Brant, CPC): Thank you, Mr. Chair, and thank you to our witnesses.

Mr. de Beer, I want to pick up there and have you continue along the line of questioning you were on because I know you were cut off there. What are the alternatives, in your opinion—you used the words “I'm quite worried”—to not empowering border officials?

Prof. Jeremy de Beer: No, I think border officials should be empowered in the way that they are in this bill. But the personal use exception and in-transit exception are important exceptions to make the whole system workable, manageable, and cost-effective. It's not possible to do everything within the resource allocations in the training parameters that our agents are provided with. So the system in the bill as it is creates a very pragmatic, workable starting point, and I would encourage us just to leave it there.

In response to the Hon. Mike Lake's question earlier, I actually think those exceptions are some of the most important parts in the bill.

Mr. Phil McColeman: Okay.

We've had the minister here. You've probably maybe even reviewed some of the prior testimony. He has assured us before we go ahead with this bill that the resources exist within the current budgets to be able to handle those things. Of course, the opposition is going to criticize us by saying that we don't have those resources in place. He assures us that we do. If they're properly trained, if they have the skills.... Obviously, there are industry associations here who also lend resources to make sure they are properly trained because it's in their best interests to do that. Then it is proper to move forward in the way the bill contemplates.

Prof. Jeremy de Beer: I think that's right, but if you start changing the scope of the bill and adding additional responsibilities, like searching personal luggage or dealing with in-transit shipments, that's going to have cost implications and administrative implications, which I don't think have been fully explored.

Mr. Phil McColeman: Okay. I want to stick with you and some further questioning here.

You mentioned parallel imports and you spent quite a bit of time, actually, explaining those to us. Thank you for that.

Now, I believe we had an example from Hockey Canada of what parallel exports are, which is a territorial licensing agreement between the trademark holder and someone in an area that can't be serviced by that trademark holder for whatever reason, or decides.... And the goods are, as you said, sold at a lower cost, maybe in this case, in that market that was mentioned by one of the opposition members in their question. Is that an example? I'm trying to draw that parallel. Did you connect those?

Prof. Jeremy de Beer: I'm not sure about the particular territorial licensing arrangements in that example, but I do know it's very common for Canadian businesses, particularly small and medium-sized enterprises and large businesses like Costco, to engage in parallel importation to offer consumers more choices, to promote pricing parity with other jurisdictions. I think the trademark aspects of this bill deal with that fairly well, but I'm very worried about the copyright language in the copyright section. I couldn't understand that this bill will assure us that parallel imports will be permitted, in respect to the copyright provisions, in particular.

• (1635)

Mr. Phil McColeman: In terms of the actual protection of parallel imports, that being the case, you brought up some concerns. Is there a simple administrative way to make sure that when goods arrive and they're in this category of parallel imports, border officials and the people who are screening these goods can quickly identify that a licensing agreement is in place, or, through the supply chain, whoever the retailer is, can confirm that these are parallel imports and that a genuine relationship exists?

Prof. Jeremy de Beer: Yes, there may be. I can undertake to provide some further analysis of that issue. I didn't have time to look at that before my testimony today, but I'd gladly undertake that. I notice there's an exception in proposed subsection 51.03(2) for the trademarks provisions. The trademarks provisions don't apply if the trademark was affixed with the trademark owner's permission outside of Canada. But there's a lack of a parallel or similar provision for the copyright sections.

Mr. Phil McColeman: I'd like that information from you because I think it's important. I agree with you that we need to protect that category of goods, if they are legitimate, so that they can continue to come into the market, and for the protection of consumers, as you explained.

Prof. Jeremy de Beer: And to be clear...not to avoid health and safety standards, or to avoid duties or taxes, all of those must be complied with.

Mr. Phil McColeman: I understand.

The Chair: You have about 10 seconds.

Mr. Phil McColeman: Well, I'll end it there, then, won't I, Mr. Chair?

The Chair: Thank you very much, Mr. McColeman. As always, you're profoundly reasonable.

Voices: Oh, oh!

The Chair: Now we'll go on to Mr. Thibeault for five minutes.

Mr. Glenn Thibeault (Sudbury, NDP): Thank you, Mr. Chair.

Thank you, witnesses, for being here. I'm going to continue with what Mr. McColeman was talking about.

Mr. de Beer, specifically on parallel imports, as written, is it possible that this legislation could lean to the detainment of goods that are being legitimately imported, using, for example, parallel importation? And if so, at whose expense would that be?

Prof. Jeremy de Beer: It is my understanding that it is possible to detain goods that are being imported in parallel, particularly copyrighted goods that are made with the consent of the rights holder in another jurisdiction but are being imported into Canada to offer Canadians pricing parity—better, fairer prices.

I think the issue there again goes to one of the live matters before the committee, that is, statutory damages. I have no sympathy whatsoever for pirates or counterfeiters, but in cases of legitimate disputes the threat of statutory damages can dramatically shift the balance of power. A trademark owner or a copyright owner can actually bully the other party away from even taking an issue because the consequences of losing with statutory damages are so serious, whereas the status quo of proving trademark infringement damages seems to work reasonably well and, in cases of legitimate disputes, allow the parties to make their arguments in court.

Mr. Glenn Thibeault: In your opinion, do you believe that the government or the border officials have an accurate picture of the extent to which businesses in Canada are using parallel importation? If so, how will those businesses be protected from detainments that are not legitimate? If not, how would border guards know that imports like these would be lawful?

Prof. Jeremy de Beer: I don't know that anybody really has a handle on the scope of this problem or, frankly, the problem of counterfeiting and pirated goods crossing borders in general, so I applaud the efforts of the organizations that my fellow witnesses represent to gather better data. To me, that's something that has to be done on an ongoing basis to really understand the scope of this problem, rather than having only anecdotal examples such as we mostly have at present.

Mr. Glenn Thibeault: Mr. Lipkus, I went onto your website earlier today to try to get a little bit of a handle on parallel importation, because I thought the word "grey" really focuses in on this, particularly because it's such a complex issue and very hard to get a handle on.

Would you have anything you wanted to add on that?

Mr. David Lipkus: Right now, the grey market is legal, so this bill does not include grey market goods. This should be of no concern to the committee because this bill addresses counterfeit

goods. There is a big difference. A grey market good is legitimate and was authorized to be manufactured by the rights holder.

I can tell you on a personal level that every counterfeiter who calls me says, "This stuff is real; it's grey market", and in the end it is determined as being counterfeit. That's the reality of what the counterfeit world is like out there. But this bill addresses counterfeit goods, goods that were not manufactured by the rights holder. That's what is going to be stopped by this bill, so I don't think it's an issue that requires further concern, because grey market goods are legal in Canada, and I would say this bill addresses that issue as I previously stated.

•(1640)

The Chair: You have one-and-a-half minutes left.

Mr. Glenn Thibeault: Right back to you, Mr. Lipkus. We often hear of the health and safety risks posed by counterfeit goods. You eloquently mentioned those before, I think.

Do you think we should specify in this bill which counterfeit goods pose a health and safety risk, and should they be prioritized for enforcement, especially given the limited resources we are seeing?

Mr. David Lipkus: It's a very good question. I'll give you two very quick examples, as I have under a minute, I believe.

We don't know what we're up against. That's the reality. You take something you might not think is harmful to you, and it ends up being of great harm. People buy counterfeit sunglasses. People sell counterfeit sunglasses in Canada all the time. The legitimates have a sticker that says 100% UV protection, and the counterfeits have a sticker that says 100% UV protection, but the counterfeits do not provide any UV protection. Instead, they only shade the eyes and increases the size of the cornea. As a result, you are letting additional UV rays into your eyes.

So are sunglasses harmful? You might not think so, but based on the story I've told you, wouldn't you want to move them to the top of the list, considering that you can increase the damage to your eyes?

At the end of the day I think all counterfeits need to be stopped. I gave a quick example of the luxury goods that many people don't have a problem with. People in New York go to Canal Street and seek them out, but the same people selling luxury goods are selling drugs, and counterfeits are the issue on a global scale in every industry. We need to stop this crime.

The Chair: Thank you, Mr. Lipkus.

Now to Mr. Holder, for five minutes.

Mr. Ed Holder (London West, CPC): Thank you, Chair.

I'd like to thank our guests for being here today as well. The sense I have from all of your opening comments is that you're all in support of the bill and you think it's going in the right direction. We appreciate your testimony, which has given us some ideas to look at to potentially improve the bill.

Mr. Ptycia, as I was going to approach you, I was thinking that I would start with the hockey song, until I realized it was breaking a trademark, so I will not do that. You mentioned in your testimony that back in 2010, some 16,000 jerseys were confiscated, which worked out to \$32.5 million in counterfeit jerseys. When you spoke in front of our committee back in 2012, you brought to our attention in a very real way the issue of these jerseys and the gravity of the circumstance surrounding the Vancouver Olympics. It was rather interesting, because our minister brought in a fake, a counterfeit jersey, at the last meeting, and it's obviously hard for the untrained eye to tell the difference.

Do you think since that time, as it relates to your specific business, the problem of counterfeit jerseys coming into our country has gotten better or worse? Do you have any sense of that?

Mr. Dale Ptycia: Do you mean are there more counterfeits coming in?

Mr. Ed Holder: That's exactly what I mean.

Mr. Dale Ptycia: I think we're probably on the same track as we were back in 2009-2010, at least at this early stage. I think it will continue to be magnified and to become of even greater concern. As a real-life example, I recently spoke to a small business operator who deals expressly in licensed-product goods. He is based in Winnipeg and has upwards of 12 additional stores. He told me last week, as we spoke about my coming here this week, that his Internet business, his bona fide e-commerce business in Canada, has dropped by over tenfold since the introduction of the counterfeit jersey supply chain coming out of China with our Team Canada product in addition to his NHL-branded and NFL-branded product and so on.

It continues to impact bona fide small businesses across the country. Unless we can put the onus back on the counterfeiter or the importer of record if you will...they're the ones who really need to step up and say why they are authentic products.

Mr. Ed Holder: Do you not also want your retailers to ensure that they're buying quality product from the right source as directed by you?

Mr. Dale Ptycia: That's correct. I think, sir, that this is going on currently in our economy and in our commerce supply chain here in Canada. I suspect, dealing with my other fellow brand owners with the NHL and the other major leagues such as NFL and MLB, that they all have the same sort of approach to the business with bona fide retailers connected with bona fide licensing partners or the supply chain. We always share that common concern about counterfeit goods entering into the stream of regular commerce.

•(1645)

Mr. Ed Holder: This may be directed to Mr. Lipkus. I was noting your comment that all counterfeit goods should be stopped, not just broad shipments as it were. It makes me think about when my wife went with two dozen other friends to China for a five-day shopping spree. That's all I can call it. Most of the women went to those markets where you could buy what we call "knock-offs". You'll be

pleased to know my wife doesn't believe in knock-offs. I'm not sure I have the same energy that she shows with these things.

Does it become an issue that it's probably easier to handle broader shipments than it is to handle one-off knock-offs? I'm just trying to think of what it would take to try to adjudicate or police it. How do you get to the point where you find somebody on the street who happens to have a Versace knock-off purse, and then somehow the purse police come in and say that's a knock-off? Where does it start or stop? Is it all at border points? Do you have any sense of that?

Mr. David Lipkus: I can tell you that counterfeiters today are getting very sophisticated. The current business model that's being used by these counterfeiters is to enter into a retail store and put very few items per brand out on display. They do that because the rights holders have an interest too. They don't want to spend large amounts of legal fees on cases that handle, for example, five units.

Mr. Ed Holder: Do you not think that often the rights holders know those items are counterfeit?

Mr. David Lipkus: Sorry—say that again.

Mr. Ed Holder: Let's go right to that retail store example we just used with Mr. Ptycia. In that store, if I have a choice and I can spend \$500 at my cost as a business owner for a Versace purse that costs \$900 or I can buy a dozen for \$50 each, as a retailer I know the difference. I know what I'm buying.

Mr. David Lipkus: Certainly people do seek out counterfeit goods. I believe that.

Having said that, how would it make you feel if you found out the person you're paying for that item doesn't pay taxes?

The Chair: Mr. Lipkus, I'm sorry, we're way over time. I was giving you some latitude to try to get you to answer.

Now we'll move on to Mr. Stewart, for five minutes.

Mr. Kennedy Stewart (Burnaby—Douglas, NDP): Thanks very much to the witnesses for coming today. It's quite an exciting debate, which I welcome.

I was walking down my high street in Burnaby and walked into a store and bought a can of Coke. I noticed it was a little squishy, and I realized it was packaged in the U.S. Then I went to another store along the street and I noticed the same can was there.

This goes to the question of parallel goods. The confusion I have is that it's a can of Coke produced in the U.S., and because of the change in border allowances, the small retailers can now drive their truck across the border, stay for 48 hours, bring \$800 worth of Coke back, and then either distribute it down the street or keep it in their own stores. I'm wondering if the CBSA is now empowered to stop these goods and hold them. I'm a bit confused about how that all works.

Mr. de Beer or Mr. Lipkus, could you perhaps give me some thoughts on that? I am thinking it might be worth adding this into the bill. I'm not suggesting that, but I'd like some more information.

Prof. Jeremy de Beer: I think that's excellent.

I'm glad to hear the committee and my fellow witnesses' interest in making sure that the bill doesn't deal with parallel imports and grey market goods. My fear is that particular provisions, such as clauses 44.01, 44.11, and 44.12, don't actually make that clear enough.

I think an exception that specifies that this does not apply to parallel imports, if drafted carefully, would be fantastic. I would strongly advise the committee to encourage your analysts and legislative drafters to put that provision in—I'd be happy to suggest some particular language, if you like—because that would deal with the issue you're talking about.

It's a very common situation for a wholesaler to find lower prices in the United States for particular products, and even with their paying duties and fees and complying with all the taxation and regulatory obligations, they could still offer Canadians a lower price. I think Canadians and Canadian families are entitled to pricing parity, and I worry that this bill could inadvertently jeopardize that.

Mr. Kennedy Stewart: Before I get to Mr. Lipkus, if this new act goes into force, the CBSA officer could actually detain those goods and hold them, whereas in the past that wasn't the case.

• (1650)

Prof. Jeremy de Beer: Yes.

What would happen is that a copyright owner in this case—not a trademark owner but a copyright owner—of the artistic work, which is the logo on the Coke can or the label on the chocolate bar, whatever it happens to be, would file notice with the Canada Border Services Agency and enlist their support in stopping these goods or detaining them at the border. That can cause a 10-day delay, which we heard can be problematic. Particularly if there are statutory damages, that can cause significant problems.

Mr. Kennedy Stewart: Mr. Lipkus, through the chair...

Mr. David Lipkus: Mr. de Beer has referenced copyright actions, and I will remind everyone today that I am here on behalf of the International Trademark Association. I'll repeat that this issue is not being addressed under the current bill. Grey market goods are currently legal in Canada and this bill addresses counterfeit goods.

With the greatest of respect to Mr. de Beer, I don't believe there is an issue with current draft language of the bill or these items being detained by customs. This bill addresses counterfeit goods.

Prof. Jeremy de Beer: You should have a look at the technical language.

Mr. Kennedy Stewart: Thanks for that.

Thank you for the range of opinions there. That's why I'm enjoying this today.

I also had a question about the following. We know there have been overall cuts to the CBSA in terms of funding, and looking at Treasury Board numbers it looks like we've had 500 staff laid off from the border services.

We had the CBSA in here last session, and they assured us that no front-line staff had been cut. But as we've been discussing today, there will be a lot of extra additional training, probably for the staff and those kind of things. If the current pattern continues and we keep cutting and removing staff—500 last year—do you think that's going in the right direction?

Do you think it's possible for us to make this work, or do you have any suggestions about what we might do there?

Mr. David Lipkus: I can tell you very briefly that the rights holders have also amended the way they deal with things as a result of these budget cuts. There are several rights holders, including Mr. Ptycia, who have chosen to train customs officials and RCMP officers via the web. It's a one-hour session, and there might be six or seven brands per hour. The RCMP officers or the customs officers don't even have to leave their desks. From a resources standpoint, they're going to get on-hands training on how to identify counterfeit goods—again, at no cost to the government, and with very little time expended from their day-to-day activities. Oftentimes these training sessions are done during their lunch hours.

The Chair: Thank you very much, Mr. Lipkus.

Now on to Mr. Warawa, for five minutes.

Mr. Mark Warawa (Langley, CPC): Thank you.

Thank you to the witnesses.

Mr. de Beer, you mentioned that you thought there's a balance that Bill C-8 has reached regarding personal exemption and the exclusion of in-transit goods. Mr. Kennedy, I think, touched on the fact that there's no reduction of front-line staff. Do you feel that with the education that's available to front-line officers there will be a balance in being able to deal properly with counterfeit goods under Bill C-8?

Prof. Jeremy de Beer: I don't know, to be honest with you. What I do know is that if we expand the scope of the bill, as some witnesses today and during other meetings have suggested, it's going to make it increasingly difficult. It's going to put additional administrative burdens on our border services agency. It's going to put additional financial burdens on taxpayers. Ultimately what we're looking for is a pragmatic and workable system, and I think the bill has created that with the exception to scope.

Mr. Mark Warawa: Very good.

I think there was general consensus with the other witnesses with regard to goods that are in transit that there's some form of inspection.

I'm thinking of the hundreds of thousands of containers that come to the Vancouver and Prince Rupert ports, goods that are on rail and going to the United States that come into Canada. What percentage of the containers that enter our west coast ports actually ends up going to the U.S. and what percentage stays in Canada? If we are inspecting these in-transit goods, these containers, what do you envision? If the vast majority are going to the States, are we doing their job for them? Are Canadians absorbing that cost to do those inspections, in light of what Mr. de Beer said?

•(1655)

Mr. David Lipkus: Very briefly, I would argue that right now the U.S. government is doing our job for us, and the reason I say that is because I received several seizure notices with respect to U.S. seizures of items that are destined for Canada. The reason I get the notice is because they want follow-up to be done. Because if the counterfeiter is attempting to import counterfeit at one time, what about the shipments that end up getting through that the U.S. customs doesn't catch? That's the reality of the marketplace that we're up against, and the problems with respect to how close our borders are between the U.S. and Canada.

I believe that even if one per cent to three per cent of container shipments are observed, we're going to find a lot of counterfeit product. I don't know the numbers for exactly how much is destined between marketplaces, but you heard of the car parts example, where there's an item destined for the U.S. that's installed in a car in the U.S., then driven to the border into Canada. If something goes wrong with that car part—that air bag, those spark plugs, the brakes—it becomes a Canadian issue. And we have an opportunity to prevent it.

Mr. Mark Warawa: With respect, can anybody answer my question? What percentage of containers entering Canadian ports actually go to the U.S.? Do we know?

Prof. Jeremy de Beer: I have no idea.

Mr. Mark Warawa: Could you discuss the EU model? I think a number of you suggested that would be a model that we could follow. What parts of the EU model could we consider in Bill C-8?

Mr. David Lipkus: I'm happy to address it once again.

What I can tell you is that once there are counterfeit goods that have been identified, a seizure notice goes out to the importer—whether it's anonymous information or real information—and to the rights holder, that there is suspected counterfeit. The rights holder then confirms whether or not that's the case by providing one or two reasons why the item is counterfeit, and provides for the importer to respond either yes, that's the case, or no, that's not the case. In over 70% of the cases, the importer doesn't respond. If the importer comes to the table, then they're opening themselves up to dealing with the rights holder, and to them this is just one shipment that's being seized. It's better for them not to respond, have the goods destroyed, and hopefully stop counterfeiting, or unfortunately, in many cases, attempt another way to import their counterfeit merchandise.

I've heard comments earlier that there are significant resources being expended on the CBSA. An administrative regime eliminates and alleviates the resource issue.

Mr. Mark Warawa: Sorry to cut you off—

Prof. Jeremy de Beer: I think the statistics are very interesting. I don't know the basis for them, but they suggest to me that if they're correct, then in 30% of the cases there is some kind of dispute, which to me is an extremely high number.

The Chair: Mr. de Beer.

Prof. Jeremy de Beer: I'm sorry. My apologies.

The Chair: Mr. Toone, for five minutes, please.

[Translation]

Mr. Philip Toone (Gaspésie—Îles-de-la-Madeleine, NDP): I want to thank the witnesses. This is a really interesting debate.

The bill we are studying today will affect imports from the United States. Mr. Stewart mentioned that he went shopping in the U.S. and bought a can of Coke, which was produced there of course. Even if a retailer had the right to import some into Canada, the cans produced in the United States would not necessarily have the French information required by Canadian law. Does this bill go far enough to protect the rights of francophones in Canada? Mr. Stewart gave a good example.

According to what I have seen of this bill, I think that it will be prejudicial to francophones. Could someone comment that aspect?

[English]

Prof. Jeremy de Beer: Please forgive me for responding in English.

I think that's an excellent point. A parallel importer would not be absolved of any responsibilities whatsoever to ensure they comply with all applicable laws, including the labelling of packaging in both official languages.

[Translation]

Mr. Philip Toone: In that case, would it not be advisable to amend the bill?

[English]

Prof. Jeremy de Beer: I believe it would, to clarify the consensus that this should not apply to parallel imports.

[Translation]

Mr. Philip Toone: Thank you.

I want to go back to another point that was raised. Treasury Board had announced cuts, and the result is that there are now 500 fewer border agents than there were last year. There were 14,710 agents last year, and this year there are 14,218. This bill is asking them to do more. I have been told that we should not worry, because they are going to be trained. There were also some deep cuts to the budget. Since there are going to be fewer agents and less money, the remaining ones are going to have to do more.

Mr. Lipkus, you said that we need not worry, and that all the agents will have to do will be to work over their noon hour to go and get the training that is already available on websites. Is this a good way to protect our border, to ask these agents to work harder with fewer resources? Moreover, they are going to have to do their work in a state of exhaustion, after having worked during their breaks. They will not be able to stop, they are going to have to work harder. Is this any way to protect the Canadian border?

•(1700)

[English]

Mr. David Lipkus: I apologize again that I have to answer in English, but perhaps my comments were misinterpreted.

Just to be clear, I advised that the rights holders offer the web training program to RCMP officers, customs officials, and any other local police at times that are convenient to them. It's not necessarily that they're losing their lunch break. It might have been during the lunch hour.

I believe every day I'm asked to do more for less on a regular basis and, unfortunately, with today's economy, that is what is expected of our society, given how things are going.

Having said that, I think that everybody at this committee and certainly the drafters of this legislation have now realized that counterfeiting is a serious issue that is harming our Canadian economy. We were involved in a raid a couple of weeks ago and when we walked into the store the first thing we saw was a huge sign that said "Cash only". When we observed some of the business records we were able to identify business that was being done by one small counterfeit retailer in Ontario, with over \$700,000 of revenue.

Do you think this retailer was paying taxes?

[Translation]

Mr. Philip Toone: I understand, thank you.

The agents are going to have to work harder with fewer resources. You are telling us that you are also being asked to work harder with fewer resources. I congratulate you for working as hard as you do today. Keep up the good work.

However, you said that there were dangerous products, for instance glasses, or products that can explode. Should we be depending on people who must work harder with fewer resources to ensure the public's safety? From what I can see, we are heading in the wrong direction.

[English]

The Chair: I'm sorry, we'll have to leave that as a statement rather than a question. We're way over time there.

Now we'll move on to Mr. Jean for five minutes.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): Thank you, Mr. Chair. And thank you to all the witnesses who appeared today.

I have two questions, and then I'm going to open it to the floor to add anything that you feel is important to the committee and may have been missed.

The first is in relation to the European Union and their model. It was suggested that it's an exemplary model, and I'm wondering if that's just has to do with the seizure sections or other sections particular to that model, which Canada doesn't have.

Was it Mr. de Beer who actually mentioned it? Or was it Mr. Lipkus? I'm not sure who mentioned it.

Mr. Dale Ptycia: I'll start by saying that from our perspective the detainment and seizure and destruction of the goods exemplified in that model seem to work for us as a brand owner. I think it effectively puts the right amount of resources, whether it's invested by us in conjunction with the CBSA agents and the communication components, into action and actually takes the product off the street.

Mr. Brian Jean: Are there any other points to the EU model that you think are exemplary?

Mr. David Lipkus: I'm satisfied. The review that I did was with respect to the administrative regime. I believe that's the section that's missing from our bill and would help alleviate the demand on CBSA and the rights holder, making it possible to destroy the goods on an expedited basis.

Mr. Brian Jean: My question in relation to this generally is this. My understanding is that the border guards see these goods already. They see them. They don't have the power necessarily to deal with them, but my understanding is that under the plain view doctrine of general criminal law, if you see something that is illegal—bear with me—you could pull it out. Now is this the regime or the doctrine that you're suggesting be put into the CBSA's powers so that they would have the ability under the plain view doctrine to then deter and possibly destroy those goods?

• (1705)

Mr. David Lipkus: No. It's my understanding that right now if the CBSA observes counterfeits, they open the shipment and will then contact the RCMP or other local law enforcement in order to detain the goods pursuant to their legislation. Often, given the resources you have, the other RCMP or local police might not be able to participate, or might be able to assist the rights holder in seizing that counterfeit merchandise. The legislation as drafted will provide customs with the authority to seize and detain that counterfeit—

Mr. Brian Jean: So in essence we're actually taking a step out right now that they have to do. So there might actually be less work involved, because they don't have to coordinate with the RCMP and the other stakeholders. They can actually do what's necessary themselves at that time. So in essence it might alleviate some of the administrative burden on them currently.

Mr. David Lipkus: It certainly would on other law enforcement, absolutely, and we're hoping that if an administrative regime is included, it would then take even more resources because they don't have to worry about bonded storage warehousing of the items and the court actions, which end up costing taxpayers significant resources.

Mr. Brian Jean: Exactly. In fact it seems like it might be a cost savings generally to taxpayers and the CBSA.

Mr. David Lipkus: I can't....

Mr. Brian Jean: I'm not asking you to crystal ball it, but from my perspective, they're already doing most of the work. The truth is—and I see Mr. de Beers agreeing with me—they seem to be doing most of the work already. They just don't have the tools necessary to skip those other steps that seem to take so much time. I appreciate that.

The thing I like about lawyers is that if you ask 10 lawyers for an opinion, they'll give you 30 opinions. I'm also a lawyer, so I can suggest that.

Voices: Oh, oh!

Mr. Brian Jean: Now my question is that if you took the other side, the importers' position, how would you argue the case for them? What do you see as the downfalls to this particular piece of legislation? The idea of destruction of goods, for instance, from my perspective, is quite permanent and can lead to more legislation.

Mr. de Beers, could you comment on that?

Prof. Jeremy de Beer: Well, the risk is if you make a mistake. So in cases where the importer doesn't respond, or the importer either expressly or implicitly acknowledges liability, I don't have a problem with the destruction of the goods. In fact, I think it's great to get them out of the chain of commerce. But we just heard this anecdotal figure of 30% where there is a response—not the cases where there's no response. What happens then? I think we need to preserve the measures for due process in those circumstances and allow the parties to fight their legitimate disputes on an even balance. And I'm not talking here about counterfeiters or pirates, but about parties with legitimate receipts.

Mr. Brian Jean: And that's what you're talking about, proper balance. You suggested at the start of your submission that Bill C-8 does find the proper balance.

Prof. Jeremy de Beer: And I believe it's a workable solution. If we had infinite resources, administratively and financially, maybe we could do something different.

Mr. Brian Jean: Thank you very much.

The Chair: Thank you very much. We actually have enough time, if I'm a little bit more vociferous regarding timing than I have been up until now, to get another round in. That I will do.

So now on to Madam Gallant for five minutes.

Mrs. Cheryl Gallant: How often do we have cases where Canada Border Services actually finds an in-transit shipment that's counterfeit and then just lets it go? Does anybody have an answer to that?

Prof. Jeremy de Beer: As far as I know, we have no empirical data on that question.

Mrs. Cheryl Gallant: Does the United States ever stop shipments that it sees are counterfeit and are bound for Canada? Does it do that on our behalf?

Mr. David Lipkus: Yes, absolutely, they do.

Mrs. Cheryl Gallant: On the parallel imports, that's really a dispute between different business owners who have their territory purchased. If these parallel imports are genuine, why would you think they would be encompassed or captured in this anti-counterfeit legislation?

Prof. Jeremy de Beer: It's in particular respect of provisions amending the Copyright Act—more so than in respect of the provisions amending the Trade-marks Act. When I read through the technical language in this bill and I look at the Copyright Act as it's presently worded—and I've consulted with a number of my expert colleagues, other intellectual property experts—we don't understand how this doesn't apply to parallel imports. If it's inadvertent, then it's an easy fix. If everybody agrees this shouldn't apply to parallel imports, then we just add an exception for parallel imports and the matter's closed.

Otherwise, I'd encourage the committee to look through the provisions very carefully to get a better understanding of the scope of their application.

• (1710)

Mrs. Cheryl Gallant: When we have a situation where there are batteries that cause a laptop or phone to explode and cause personal injury, are you aware of whether or not criminal charges are involved in any of these cases?

Mr. David Lipkus: Of any personal use...?

Mrs. Cheryl Gallant: Let's say a counterfeit light bulb or electronic device is brought into the country and somebody suffers a physical injury as a consequence of it not being certified to Canadian standards. In your experience, has anyone been charged under the Criminal Code for knowingly bringing in these defective devices?

Mr. David Lipkus: I'm not aware of any current charges with respect to those issues. What I can tell you is that we're not doing enough testing of the harmful effects of counterfeiting. If there's a house fire and an electrical cord caused that fire, for example, the fire department and the officials don't test to see that it was due to a counterfeit electrical cord. They don't say, had the homeowner used the real thing, there wouldn't have been this house fire. How many house fires have there been or how many car accidents because counterfeit parts were involved? We don't know how big the problem is because not enough testing is being done.

I'm not saying let's amend the bill and include more testing; I'm saying the problem is so much bigger than what we think.

Mrs. Cheryl Gallant: Then for a victim who has suffered an injury as a consequence of unknowingly using a counterfeit electrical product, there is no recourse other than the civil courts? There are no criminal charges inflicted upon the importer or the manufacturer, if they can trace it?

Mr. David Lipkus: Unfortunately, I don't have an answer for you right now. I don't want to speculate on anything.

Mrs. Cheryl Gallant: For Hockey Canada, do you feel this bill will help combat the counterfeiting of your goods?

Mr. Dale Ptycia: It's a start, but more needs to be done. More teeth need to be implemented in the Trade-marks Act than suggested here in the bill, to allow perhaps, as a summation, the exchange of information between the CBSA agents and property rights holders like ourselves.

I'll mention, as Mr. Lipkus did, the training. We do that on a regular basis. We offer our resources. As I mentioned in my earlier comments, we financially invest in our brand protection. I could probably say that many of my rights holder partners would do the same too, if we could find more effective ways of stopping the product from entering into the country and having some very definitive means of dealing with it at the border.

The Chair: Thank you very much, Mr. Ptycia.

Now we will go to Ms. Charlton for five minutes.

Ms. Chris Charlton: Thank you very much.

I think for us the big challenge will be to make sure we achieve the right balance. To some extent, the bill has tried to do that in its present form. It's up to us to make sure that we actually live up to that intent in the final draft.

I have a couple of quick questions.

First, we talk a lot about people who are commercially selling counterfeit goods. What about retailers who unknowingly end up with counterfeit goods on their shelves? Do you have any suggestions about what we need to do there, if anything?

Perhaps to you, Mr. de Beer...

Prof. Jeremy de Beer: That's a very good question. I don't understand why such a retailer wouldn't have recourse under the ordinary law of contracts against their suppliers for supplying them with counterfeit goods. So I'm not sure this is a matter that should be dealt with in a bill of this nature. I think there are civil remedies that the retailer can take against the wholesalers or the counterfeiters for that kind of fraud.

Ms. Chris Charlton: The reason I raise it is that I'm concerned that, if you're actually selling counterfeit goods, you become liable under this bill, and yet it may happen unwittingly. Yes, I understand that you can go through the courts and that there are remedies. But for a mom and pop shop in which there are two people in the store, that kind of costly remedy isn't an easy one to pursue, and I wonder how we protect people on that retail side as well.

Mr. Petycia, you talked about more teeth and have made strong suggestions about how we get more teeth into the legislation. Do those teeth matter, if we don't have adequate enforcement?

Mr. Dale Petycia: I would say that in my experience of dealing with our law enforcement officials at the front lines, those who are empowered to take action have an effect. We've seen instances, coming out of either national training sessions or online sessions, in which we'll be contacted by on-the-street officers informing us that a suspected counterfeit product is being offered in either a smaller store or through other means. We take action with that. If they're given the ability and the empowerment to at least seize and detain and then communicate with the rights holder or the property holder, that's a big step.

I think we have to continue to focus on putting the onus back on the counterfeiter. Counterfeiters are not going to have large amounts of formal records to help in going back to pursue civil remedies. We may get judgments in Federal Court against them, but collecting on those damages is virtually impossible. We'll spend hundreds of thousands of dollars with our investigators on a yearly basis and with our legal counsel making claims. We get judgments against counterfeiters across the country on a regular basis, but we can't collect on those.

•(1715)

Ms. Chris Charlton: Thank you.

Mr. de Beer, here is one last question to you.

We've had Mr. Lipkus say that goods in transit should not be excluded; Mr. Lavoie has said that they should be excluded. Do you want to weigh in on that to say whether you think they ought to be or not, and why?

Prof. Jeremy de Beer: I believe they should be excluded from the scope of this bill for two reasons. One is feasibility, including administrative and financial feasibility. The other is the unintended consequences that can arise by virtue of the detention of in-transit shipments when there are legitimate disputes about the validity of the copyright or trademark claim.

Ms. Chris Charlton: How is that different from other shipments, for which those disputes may also occur?

Prof. Jeremy de Beer: I think it's a problem in both situations, but applying the act's provisions to in-transit shipments exacerbates it by expanding the scope of the application of the act and therefore the scope of the problem.

Ms. Chris Charlton: Let me go at that again.

I think all of us in this room agree that we don't want any counterfeit products in our country, period. That would be the goal for all of us. But why is it okay to facilitate the export, essentially through us—the import and then export—of in-transit goods? I understand what you're saying about enforcement, for sure. But aside from that, I'm not understanding what your issue is.

Prof. Jeremy de Beer: It's not a matter of facilitating the cross-border flow of counterfeit goods, but simply doing what's practical and feasible to stop it. We can start here by stopping what comes into our own country.

Ms. Chris Charlton: Okay, thank you.

The Chair: Thank you very much.

Now we go on to Mr. Lake for five minutes.

Hon. Mike Lake: No, I think Cheryl would like...or no, I'm sorry, Ed...

The Chair: Oh, I'm sorry.

We'll have Mr. Holder, for five minutes.

Mr. Ed Holder: Thank you, Chair, and to our guests.

Mr. Giddens, you've been awfully quiet. I'd like to bring you into the conversation, if we can.

In your combined presentation a reference was made to organized crime and the connection with counterfeit or pirated goods. I think it was mostly along the line of counterfeit goods.

Would you have any comments? Is that anecdotal? We all have the sense that there could be some connection to organized crime. We've talked about that respecting various types of products and industries. But I'm curious: is this anecdotal, or do you have any real specifics whereby you can confirm, either as a result of charges or filings or litigation or something, or whereby you somehow can attribute to organized crime a counterfeit product that has been brought in?

Mr. Peter Giddens: Let me address the preface to your question. The reason I've been mostly silent is that—

Mr. Ed Holder: —you didn't get a chance.

Mr. Peter Giddens: —the questions have largely been addressed to what I call the hardcore, anti-counterfeiting provisions of the bill. I'm here speaking on behalf of INTA with respect to the almost half of the trademark part of the bill that deals with other aspects.

I don't want not to answer your question, but if I could let me suggest that Mr. Lipkus answer that question.

Mr. Ed Holder: Would you prefer someone else to answer that?

He likes to answer.

Voices: Oh, oh!

Mr. David Lipkus: I can tell you that there have been confirmed cases of moneys that have been used with respect to the sale of counterfeit merchandise being sent back to Hezbollah and other organized crime.

I can also tell you that I've been personally involved in seizures of counterfeit merchandise where, instead of being allowed to go into the premises, I have been told I had to wait outside because of the guns and other weapons that have been involved, which weren't anticipated by the police at the store that was selling counterfeit but for obvious reasons ended up being found.

Mr. Ed Holder: Can you be specific?

Mr. David Lipkus: I can't right now because I wasn't anticipating that question, but I'm happy to provide you that information.

• (1720)

Mr. Ed Holder: It may be useful to the committee—perhaps from you to the committee, through the clerk—just to give us a better sense of specifics as to how deep that issue is. Obviously organized crime is something that concerns all of us around this table, including yourselves, so we all have an interest nationally to do that. So if you would, I would appreciate that, please. So you think you do have some specific things.

Here's what is interesting. When I heard your testimony, Mr. Lipkus—and again, please, I'm not picking on you—you said there is not enough testing, and you're looking for zero tolerance. I can't quite live in your perfect world and I don't mean that as a negative at all, because I think the comment Ms. Charlton made a few moments ago, which we all agree with, is that we should have zero tolerance of counterfeiting.

But do you think the bill strikes the balance you're looking for, that it's trying to go in the direction your clients are looking for while at the same time recognizing that, frankly, if people want to do bad things there are bad people out there who will find ways to do that?

Mr. David Lipkus: Thank you for that question.

Here is my issue and here is the reality, another working example. We received a telephone call from the police that there was a seizure of a shipment that contained 39 different brands. With the value of each brand in each unit—there might have been 12 or 13 items per brand—it would have been less expensive for our firm's clients to purchase the counterfeit items from the importer than to deal with the seizure of that counterfeit in any other way, whether it were assisting the police or through some form of request for assistance.

Right now, the way the bill is drafted, the right's holder essentially has to write a blank cheque to the Canadian government to participate in this program, without any idea of how much money it's going to cost to participate. Brands require certainty and this bill doesn't provide it.

I can tell you that if the pendulum is swinging, it's way more in favour of the importer than it is of the rights holder. That's what we're trying to have swing back to the rights holder, to say that we, as a government, want to eliminate counterfeit goods. We all agree that they're harmful. Let's do it and let's do it the right way. That's why I'm here today.

Mr. Ed Holder: But you would agree that responsibility falls among all the parties, including the rights holder, to know what they've acquired.

Mr. David Lipkus: Absolutely, right now with the administrative regimes in the U.S. government and in the EU, there is a small cost to that rights holder in order to participate, and not a blank cheque.

The Chair: That's fine, Mr. Holder. Thank you very much.

Now, Madam Sgro, you have the last word.

Hon. Judy Sgro: We could have kept right on because of fact that the EU and the United States have a way of dealing with it that seems much faster, much more capable, and we're just trying to do catch-up with Bill C-8. I'm glad it's here but we just seem to be doing catch-up more than anything else.

I do appreciate the amendments that you have suggested we put forward. I would hope that in discussions with departmental staff they would view those as a real positive.

But I want to ask you a couple of questions about the “distinctive” issue. Maybe I'd ask Mr. Giddens.

In your brief there were concerns about the word “distinctive” under the act. You had suggested that the word “distinctive” be changed to the phrase “inherently capable of distinguishing” to replace the word “distinctive”. What were your concerns with allowing the word “distinctive” to go forward?

Mr. Peter Giddens: This issue comes up with respect to the registration of trademarks rather than the issues that we've been speaking about thus far.

Because the bill has been amended to provide for distinctiveness to be examined during the trademark registration process—right now that is not the case—the bill does use the phrase “inherently capable of distinguishing”. Again, because the examiners will, for the first time, now be asked to examine whether the trademark is inherently distinctive or not, we would like some clarification about what exactly is meant by that phraseology.

Hon. Judy Sgro: You're suggesting “inherently capable of distinguishing”. It might reduce a whole lot of lawyers' fees—even though you're lawyers—and arguments that go on in court about what “distinctive” means.

Mr. Peter Giddens: We think it would be greatly beneficial to stakeholders, absolutely, to have clarity about that issue from the outset.

Hon. Judy Sgro: And there's the word “utilitarian”. You're suggesting in your proposed amendments that it be dictated primarily by “utilitarian function”, again for the same reason of clearly defining what that word is supposed to mean.

• (1725)

Mr. Peter Giddens: Exactly. Because the bill now speaks about those terms in ways the current Trade-marks Act does not, we feel that it would be very beneficial to stakeholders if it were clearly enunciated from the outset what is meant by those terms.

Hon. Judy Sgro: The proposed amendments in your brief were very helpful, as has been all of the information today.

I'll go back and ask, is it better laws that we need or better enforcement? We have 124 staffed border crossings and 37 unstaffed, as an example—all kinds of crossings and so on. Is it better laws, or is it better enforcement of what we currently have? We're certainly not doing a very good job right now if we have a 400% increase in counterfeiting going on. It's a new problem, I guess, that we are all trying to deal with as parliamentarians.

Mr. David Lipkus: I would argue it's both better laws and better enforcement that we need. Right now, the way the request for assistance is drafted in this bill, there is a positive obligation on the rights holder to institute legal action against the importer. I can tell you, in my own personal experience, that many times it's fake and anonymous information that's provided on the importer documentation. So what happens is that the goods are destined for Canada, they pass through customs, and the consignee calls up the company that's shipping the items and they end up being shipped to their actual destination. So the information that's located on the importer records is not that of the actual importer. It's being done because the people

we're dealing with are criminals who find ways to avoid being found and caught. It's especially true in our request for assistance program. But in that request for assistance, if brands don't participate and don't sign up for the request for assistance, what good is that law? That's where the administrative regime comes in. The only advantage Canada has is that we've never had an administrative regime. We're drafting our legislation now, so we get to look at other countries to see what's working there.

Hon. Judy Sgro: Why isn't it in Bill C-8? Why did the drafters of the bill not think it was necessary?

Mr. David Lipkus: I can't tell you that. I do not know, because I didn't draft it. I would have included it.

Hon. Judy Sgro: You would have included it in there.

As to the in-transit issue, why wouldn't we be checking everything going through?

Mr. David Lipkus: I think we should.

Hon. Judy Sgro: Thank you.

The Chair: Thank you very much.

Thank you very much, colleagues and witnesses, for your time and expert advice.

We're adjourned.

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