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Chair

Mr. James Rajotte

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• (1530)

[English]

The Chair (Mr. James Rajotte (Edmonton—Leduc, CPC)): We'll call the 58th meeting of the Standing Committee on Industry, Science and Technology to order. We are here pursuant to Standing Order 108(2), continuing a study on counterfeiting and piracy of intellectual property.

We have with us three witnesses today. First of all, we have Mr. Daniel Drapeau, a lawyer with Ogilvy Renault. We have Professor Michael Geist, a professor of Internet law at the University of Ottawa. And third, from the Intellectual Property Institute of Canada, we have Mr. Michael Erdle, the president.

Gentlemen, you were originally scheduled to be part of a five-person panel, and we had you for five-minute opening statements. But because there are three of you, I can be a little liberal—small *l* liberal—with your opening statements. We've added five minutes, but if you go a little over, I'll certainly accommodate you in terms of time. Then we'll get right into questions from members.

I think we'll start with Mr. Drapeau.

[Translation]

Mr. Daniel Drapeau (Lawyer-Partner, Ogilvy Renault): To begin, I would like to thank the committee for the invitation to appear and to give me the opportunity to contribute to its work.

I distributed a one-page summary of my presentation. Should there not be enough time to finish my presentation, you will at least have the essence of the various points I will make. Of course, I submitted the document in both official languages.

[English]

I am a partner with the law firm Ogilvy Renault. I have been doing anti-counterfeiting work for the last 10 years. I coordinate the anti-counterfeiting efforts worldwide and in Canada of Canadian clothier, Parasuco. I also do the work in Canada of anti-counterfeiting for a number of famous marks, including Chanel and Lacoste. This is my day-to-day work, whether I'm pleading before the court, conducting seizures, drafting proceedings, or negotiating with adversaries—infringers.

I'm also the author of a number of publications, but more precisely, my main topic of interest is Anton Piller orders. These are orders for seizures that are granted by Canadian courts, and in particular by the Federal Court of Canada, which we often use in the fight against counterfeits.

I have one article in English and I have one article in French, which I've given copies of to Mr. Latimer, should any members of the committee wish to consult them.

[Translation]

In conclusion, I am also the chair of the Anti-counterfeiting Committee of the Intellectual Property Institute of Canada. So I don't think anyone will be surprised at my position on this issue.

[English]

I am here in my capacity as a private legal practitioner. You will hear later on from the Intellectual Property Institute of Canada. You will also hear, at another time, from the Canadian Anti-Counterfeiting Network. While I belong to these organizations, what I can bring to you is the view of a practitioner, a coordinator of anti-counterfeiting efforts, and an observer of decisions rendered in this field by the Federal Court over the last 25 years.

When I was preparing my testimony two weeks ago, my main point to make in front of you was to show you the deficiencies in Canadian laws as they pertain to anti-counterfeiting. I may have been a bit ahead of my time, because when I was reading the minutes of the security committee meetings, I realized that before going on to that topic, which is summarized in the written document I provided, I probably needed to address other, more fundamental, issues.

You may hear from some that counterfeiting is not a big deal—that counterfeiting does not affect Canadian businesses, or does not seriously affect Canadian businesses. I've also read in some minutes that no one is duped, because counterfeits are sold at such a low price that a purchaser knows what he's getting is fake. I need to address these points before I can tell you how our laws are deficient.

This country has adopted laws to protect intellectual property, the underpinnings of which are the respect for property and the encouragement to innovate. Counterfeiting is a particular breed of offence that the current laws are not well equipped to deal with. Should counterfeiting be considered any less important than other types of intellectual property infringement? Bearing in mind that counterfeiting seeks to reproduce exactly what is protected—so it's not an inadvertent violation, because you have somebody who is taking a trademark and reproducing it identically on a product that has not been manufactured by the trademark owner—I propose to you that counterfeiting should be afforded an even higher level of importance by the legislator.

In terms of counterfeiting affecting Canadian businesses, one of our firm's clients is Parasuco, a company that has been designing, manufacturing, and selling cutting-edge clothing in Canada since 1975. Salvatore Parasuco has 250 employees scattered across Canada, but mostly in Ontario, Quebec, and British Columbia. He is the first Canadian designer who has been showcased at the Milan fashion week in Italy, and I think he's truly a source of national pride.

Parasuco is affected by counterfeiting. The brand is becoming hot; more and more people want it, and we are noticing instances of counterfeiting on the Canadian market. I will not even mention to you here instances of people in other countries attempting to register the mark Parasuco; that, of course, is not something over which this committee has jurisdiction.

The harm that's suffered here by Parasuco is lost sales, but not just lost sales; there is also a loss of goodwill to the trademark. A loss of goodwill occurs when people who buy the real thing stop buying the real thing because the brand has lost cachet or lost appeal because it's been too massively distributed. On the government side, of course, there is a loss of tax revenue.

There's another loss I'd like to raise to your attention, and this is in my capacity as a practitioner, a guy who works in trademarks all day long. There's a loss of distinctiveness of the Parasuco trademark when counterfeits are sold.

Here's how it works. Our Trade-marks Act provides that a trademark is there to identify the source of a product. In a way, the Trade-marks Act was probably the first piece of consumer protection legislation. A trademark is meant to identify to the consumer that you can rely on this trademark as indicating that the product comes from a given source. Well, if a whole bunch of people start using that very same trademark, the trademark no longer performs its distinctive function. It doesn't distinguish the product as coming from a source.

• (1535)

[Translation]

Let me give you an example. For Montrealers or for people in the room who know Montreal, there is a Montreal car dealership called Decarie Motors. Yet the Decarie Motors brand was removed from the trademark register in 2000 under a federal court of appeal order because too many people were using the brand name Decarie. Therefore, the brand had lost its original distinctiveness. Therefore, as far as counterfeiting is concerned, when a person copies the trademark of someone else, it negatively affects the holder of the trademark.

• (1540)

[English]

I'm talking right now of harm that is caused to a Canadian manufacturer. There may be people who say a lot of these famous trademarks are also held by foreigners, so why is it so important and why should we be concerned by it? Well, a foreign right-holder also often employs Canadians, whether as independent distributors or as direct employees, and counterfeiting also impacts at this level.

I have one last point before I go on to the substantive changes that can be made. When I hear somebody say nobody is duped because

counterfeits are sold at such a low price that the purchaser knows that what he's buying is a fake, my response is that anybody who practises in my field will tell you that the number of counterfeits on the markets goes up drastically just before Christmas. Why is that? Because people are busy buying Christmas presents for their loved ones.

I propose to you that if the buyer isn't duped—and by the way, I don't subscribe to that position; I think that some people genuinely are duped. But let's assume for argument's sake that the buyer isn't duped. I can assure you that when the buyer gives these counterfeits as presents on Christmas morning, he doesn't say, "Honey, don't you love the knock-off Lacoste polo shirt that I've bought for you?" I should add that last December I conducted a seizure of over 700 items of counterfeit Lacoste clothing in Montreal 10 days before Christmas.

In terms of being duped, it's not only the person receiving the product that's being duped, it's the whole public being duped. Anybody who sees sub-quality garments bearing a trademark will think that trademark is no longer indicative of a quality product. In the end, this goes to the depreciation of the market.

As I have limited time, my suggestions for legislative reform are set out in my written representations. The highlights of them are as follows.

In terms of criminal prosecution, the RCMP and crown prosecutors will only act pursuant to the Copyright Act, and not pursuant to the Trade-marks Act, because there is no criminal dispositions in the Trade-marks Act. That needs to be changed. Counterfeiting needs to be criminalized. Why? Because counterfeits are not regular litigants. They have covert operations, they make their assets disappear, and they make evidence disappear. They are not habitual participants in the litigation process, which presumes good faith.

From a cooperation point of view, we need a greater exchange of information between the RCMP and Customs. We need stronger border measures. The current system, under which you need to identify a shipment and obtain a court order to block goods, doesn't work.

Finally, from a deterrence point of view, we need stronger penalties. If I have time later on, I can talk about the damages that are awarded by the Federal Court, which are very restricted.

Thank you very much.

The Chair: Thank you, Mr. Drapeau.

I'm sure there will be questions about the specific measures during the question session from the members themselves.

We'll go now to Mr. Geist for your opening statement.

Prof. Michael Geist (Professor, Internet Law, Ottawa University, As an Individual): Thank you, Mr. Chair.

Good afternoon. My name is Michael Geist. I'm a law professor at the University of Ottawa, where I hold the Canada research chair in Internet and e-commerce law. I'm also a syndicated weekly columnist on law and technology for the *Toronto Star* and the *Ottawa Citizen*.

As I prefaced when I last came before you during your review of telecommunications reform, I appear before the committee today strictly in my personal capacity, representing my own views.

I actually appeared last week before the Standing Committee on Public Safety and National Security on the counterfeiting issue as well, and rather than simply repeat those remarks, I've provided the committee with a copy of my prepared comments, and I believe a full transcript will be available shortly.

I do, however, want to briefly reiterate four points that I made last week and then expand on two other issues.

The first of the four points—and this is in a sense stating the obvious—is that counterfeiting is not a practice that anybody with any credibility supports. When Mr. Drapeau talks about being on one side of the fence, there are only people on one side of the fence on this issue. Counterfeiting is not a good or a bad issue; I think it's broadly recognized as a bad issue. At its worst, it may pose a public safety issue. Even when viewed in the best possible light, when some activities may be relatively harmless, it's not a practice to be condoned.

The issue, though, is not whether counterfeiting is bad or good, but whether or not it merits a strong legislative response, and I believe that depends on two things: one, the state of counterfeiting in Canada; and two, the state of Canadian anti-counterfeiting law. On these issues I would submit that the situation is far less certain. Indeed, once we get past the attention-getting props and dig into the details, I believe it becomes clear that there is an awful lot we don't know.

Second, I think that public safety and security concerns should be accorded the highest priority with the counterfeit file. As a parent of three young children, I too find stories of exploding batteries and counterfeit pharmaceuticals deeply concerning. That said, I note that according to the RCMP, significant physical harm from counterfeiting is extremely rare. In fact, a recent B.C. case that involved fake pharmaceuticals that may have led to the death of a woman is the first such case in Canada on record.

Third, while I appreciate the impatience with perceived inaction, I think it's important to reiterate that Canadian law has not left law enforcement powerless. Canada is compliant with its international copyright obligations. Moreover, claims of police inaction do a great disservice to law enforcement across the country who are active in pursuing IP crime.

Indeed, the RCMP notes that from 2001 to 2004 it conducted more than 1,800 investigations and laid charges against 2,200 individuals and more than 100 companies, and just last week, before this committee, those numbers were updated, with the RCMP indicating that in 2005 there were 700 charges laid. With roughly two charges per day, this is a country that has laws to address counterfeiting and a law enforcement community that is committed to doing so.

Fourth, while advocates for reform argue that there is an obvious blueprint for addressing counterfeiting, we know that there is no silver bullet. Indeed, the experience elsewhere illustrates that most anti-counterfeiting measures have been exceptionally unsuccessful. The proof is in the data. Counterfeiting is widely viewed as a

growing international phenomenon, even in those countries that have adopted tougher border measures or criminal penalties. Despite U.S. action, for example, it is easier to obtain counterfeit products in Manhattan than it is in Markham, home to the much-discussed Pacific Mall.

If we know anything, we know that many legal reforms will do no more than provide the illusion of dealing with the counterfeiting issue.

With this background, let me spend my last couple of minutes focusing on two additional issues.

First is the issue of inconsistent data. I believe this committee could make an enormous contribution in addressing counterfeiting by calling for the collection of better independent data. As I'm sure you know, the RCMP has acknowledged that there has been no comprehensive independent study on counterfeiting.

While we know that only a fraction of counterfeit goods are actually manufactured in Canada, that organized crime is involved in some, though certainly not all, counterfeiting, and that counterfeit and genuine products are not perfect substitutes, I would disagree with my fellow panellists. I think it is rather obvious that a person who purchases a \$10 fake Rolex watch knows they're not getting the \$5,000 genuine article and has no expectation that that is so.

Consider, for example, the issue of camcording in Canadian movie theatres and allegations that Canada is a leader in contributing to DVD piracy. Earlier this year there were reports that Canada was responsible for 50% of camcordered movies that later appeared on pirated DVDs worldwide. Over the weeks that followed, industry sources began to alter that number with suggestions that the figure was actually 20%, then 23%, then 30% or 40%. In fact, just this morning there was a report out of New York that indicated that New York City is home to 40% of all global camcordered movies that are used for pirated purposes.

The reality, I would submit to you, is that we simply do not know. In fact, some of the data I've seen from the industry suggest that the number is closer to 3% of all motion picture released movies, as opposed to the 50% that we've heard.

● (1545)

When combined with the fact that few, if any, Canadian movies are said to be affected, and that Canadian copyright law already addresses the issue—it's an infringement to camcorder movies, and camcording a movie for the purpose of distribution brings with it the prospect of huge fines and jail time—the issue highlights the need to avoid knee-jerk legislative proposals by instead focusing on obtaining independent, reliable data.

Secondly, I want to talk for a moment about the absence of a connection between the World Intellectual Property Organization's Internet treaties and counterfeiting. I must say that I think there's been a surprising link made between counterfeiting and the fact that Canada has yet to ratify the WIPO Internet treaties. I believe it's important to understand that there is simply no connection between the two. Indeed, I believe that the inclusion of the WIPO Internet treaties within this debate has actually slowed progress on the counterfeiting front. I say this for two reasons.

First, the heart of the WIPO Internet treaties is anti-circumvention provisions that provide legal protection for technological protection measures. These provisions do nothing to address counterfeit pharmaceuticals, counterfeit clothing, counterfeit handbags, counterfeit watches, or dozens of other counterfeit targets. Moreover, they do nothing to address counterfeit DVDs and CDs since the act of commercial counterfeiting is simply not addressed in the treaties.

Second, the WIPO Internet treaties are extremely controversial. In recent months there has been public opposition from Canadian security companies. Four Canadian privacy commissioners have voiced misgivings. Consumers are deeply troubled by the potential impact, and many artists' groups have themselves come out against ratification of these treaties. Indeed, even the U.S. architect of the treaties has admitted that they have been a failure.

With the inclusion of the treaties within the counterfeiting issue, I believe that addressing counterfeiting becomes unnecessarily controversial. As I said, everybody is on the same side of the fence here. The committee would do well to bifurcate this issue by clearly stating that the counterfeiting file should proceed independently from the WIPO Internet treaties and the broader issues of copyright reform.

In conclusion, once again, no one supports counterfeiting, but I believe we should all support a reasoned, effective approach based on hard data and realistic goals. I fear that some of the possible Canadian reforms would do little to advance the battle against the real problems associated with counterfeiting in Canada.

Thank you.

• (1550)

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

We'll now go to Mr. Erdle, please.

Mr. Michael Erdle (President, Intellectual Property Institute of Canada): Thank you very much, and good afternoon, ladies and gentlemen.

My name is Michael Erdle. I'm the managing partner of Deeth Williams Wall, a law firm in Toronto, and I'm the president of the Intellectual Property Institute of Canada.

[*Translation*]

I am very pleased to be here before the committee today. I would have preferred to speak in French and English before the committee, but my daughters, who are at ease in French, heard me speak French and suggested that I give my presentation in English. I am sure you will all agree.

[*English*]

I'm here today to tell you why our institute believes that counterfeiting and piracy of intellectual property is a very serious problem. We believe that the Government of Canada should take action to address it for the benefit of all Canadians.

With me here today is Michel Gérin, who is the executive director of the institute.

I'd like to make three key points to you today.

First, there is a fundamental difference between infringement of intellectual property and counterfeiting. As Professor Geist has said, we are all on the same side of the fence when it comes to counterfeiting, but I want to explain a little bit more about that.

Second, we believe Canada's laws are generally adequate to deal with ordinary infringement, but not counterfeiting.

Third, we need stronger border enforcement, effective criminal penalties, and more effective legal remedies to deal with counterfeiting and piracy.

Before I explain these further, I'll give you a brief background about the Intellectual Property Institute of Canada, which is also known as IPIC. IPIC is the national association of IP professionals. We have about 1,700 members. Monsieur Drapeau and Professor Geist both are members of the institute. We represent the vast majority of IP lawyers, patent agents, and trademark agents. Our members work in private practice, from sole practice to the largest law firms in the country. They also work for private industry, government, universities, and hospitals, a wide variety of organizations. In my own case, I've practised exclusively in the field of technology and intellectual property law for almost 20 years.

Our members help IP owners obtain patents and trademarks and other IP rights. We represent plaintiffs in court—those are usually the IP owners—and defendants, the alleged infringers. In almost every IP case in the country, we have members on both sides. So I'm not here to speak for a special interest group of IP owners. I'm here to speak in favour of a strong IP framework for Canada as a whole.

Now, going to my main points, first I'd like to explain the difference between infringement and counterfeiting. I think this sometimes gets lost in the debate over piracy and counterfeiting.

Infringement is really a normal part of business competition, to a certain degree. In the patent field, inventors seek a patent for their inventions. If it's successful, others will try to imitate it. They'll also try to improve it. If they can do this without infringing the patent, they will. Sometimes competitors cross the line, and then they're sued for infringement. This could be a long and expensive process, but generally the system works when you're dealing with legitimate competitors.

Similarly with trademarks, a company will register their mark to indicate the source of a product or service, as Monsieur Drapeau has explained. If it's successful, others will try to imitate it or try to come close. The trademark owner will sue if they think this causes confusion in the marketplace. There's a constant kind of cat-and-mouse game, and this is normal competition.

With copyright also, rights owners and users are constantly testing the boundaries. Copyright tries to strike a balance between the rights of owners and the rights of users, the rights of the public, and there are always questions relating to new technologies, new uses of works. These questions can be resolved through the normal court process.

But counterfeiting and piracy are entirely different. They are a form of theft; it's as simple as that. In many cases, it involves organized crime; at least, the criminals are very organized in how they do the counterfeiting and piracy.

Despite what you may have heard, it's not just a problem of luxury goods. It's not fake watches and handbags. Our members have been involved in all kinds of cases of counterfeit goods. I'm sure you've already heard about the drugs—and Professor Geist mentioned one case in B.C.—where they have a harmful ingredient or maybe simply no active ingredients. There are fake automotive parts, aircraft parts, other industrial goods, electrical products. Virtually every kind of product will be knocked off if somebody can make a profit doing it, and the profits in doing it are huge.

● (1555)

We're not talking about so-called grey market goods, which are legitimate products that are purchased abroad and then resold in Canada. We're talking about absolute fakes.

Parallel imports are a different topic. The wholesalers and retailers who sell these products may actually be deceived into thinking they're the real thing—I would say they should be suspicious when it sells for a fraction of the price—but consumers are certainly deceived. People are deceived by these products all the time.

In some cases it's a health and safety issue. No one really knows what's in these products. But in all cases, there's a consumer protection issue. It's an issue that directly affects innovation in Canada.

As this committee itself noted in the recent report on the manufacturing sector, a strong IP system is essential to our economy. Counterfeiting and piracy hurt Canadian companies. They cost jobs in Canada—jobs in manufacturing, in research and development, and even in the retail sector. Counterfeiting is a serious problem and it hurts Canada.

My second point is that our existing private enforcement of IP rights isn't enough to deal with counterfeiting.

Owners of IP have four big problems when it comes to private enforcement. First, they have to find the counterfeiters. Second, they have to get injunctions to stop the activity. Third, they have to seize the counterfeit products and get them off the market. Fourth, they have to enforce a court judgment and collect an award of damages at the end of the day.

Counterfeiters don't put their names and addresses on the products. They can operate anywhere. Products come across the border by the container load. They're sold very quickly. Pirated software, movies, music CDs, and the like can be made in large volumes with equipment that anyone can buy at virtually any electronics store.

When IP owners find out about the counterfeits, the first step is to go to court to get an injunction to stop the activity before trial. But it's very difficult to do that. The court may decide a payment of money damages is good enough. Then the case has to go to a full trial. The IP owner never recovers all of the expenses and damages.

Owners also need to get court orders to seize infringing goods. They need to know where they are, but they can't get a court order until they know where the goods are and can prove they're fakes. They can't prove they're fakes without getting a court order. It's a catch-22.

Finally, even if the IP owner is successful in court and wins damages, after sometimes months or years of effort, it's virtually impossible to collect. The defendant is likely a shell company with no assets. The counterfeiter can set up a new shell company and be back in business within 24 hours.

Let me give you a typical example from my own experience. My firm represents a large Canadian automotive manufacturer. Last year they discovered someone selling counterfeit products, aftermarket products, online. It took more than six months to track down the counterfeiter. The address on the website and the Ontario corporate records were false. We then had to serve a statement of claim. We finally had to hire a private detective to stake out the owner's home. We had to get a default judgment because no defence was ever filed.

In the end, we managed to shut down the website. But there was no financial compensation for the goods that had been sold, only a couple of thousand dollars in legal costs, which didn't cover their legal costs. The individual now says the company has no assets and he can't pay.

Asking private parties to do all of this by themselves is like asking a homeowner to sue a burglar to recover stolen jewellery or a stereo or a car owner to track down the stolen car and get a court order to get it back. We all accept some degree of personal responsibility to protect our property. We buy locks to prevent theft and insurance to replace stolen goods. But we also expect the criminal laws against theft and the police to enforce the law, especially when it involves organized crime.

What do we need to have? We need to have three things. We need stronger border enforcement. We need effective criminal penalties in the law. We need more effective civil remedies.

I'd be happy to explain those further. I think I've used up my time, but I'd be happy to explain those further if there are any questions.

Thank you.

• (1600)

The Chair: Thank you, Mr. Erdle.

We'll now go to questions from members.

We'll start with Mr. Thibault, for six minutes.

[*Translation*]

Hon. Robert Thibault (West Nova, Lib.): Thank you for your presentation and for being here.

[*English*]

Mr. Geist, I was a bit surprised by your comment on the pharmaceuticals, that maybe the problem isn't huge—although you're not supporting counterfeiting in any way—because we only know of one death. What we don't know is how many people might have had the loss of expected outcomes. People who might have been buying counterfeit pharmaceuticals who were not having the outcomes they thought, thinking they're getting treatment and taking care of their health and not doing it. I think that's another area where we're fearful. We had people talking to us last time about the electrical equipment out there, safety electrical equipment that you buy thinking you're protecting yourself, and then it is counterfeit and substandard. If we're not looking for it, we wouldn't know.

But the question I want to put to you is on the enforcement side. I find it difficult. I agree with strengthening laws and strengthening the fines and these things. But one element that wasn't suggested in the areas that we should attack is the resellers, because a lot of these goods, especially the large amounts of imports, are being sold through our large chain stores or through those things, probably inadvertently. But I would think that the responsibility would be to the person who is selling it to the consumer, that there is a level of responsibility there. Somebody in the chain made too much profit. Somebody in the chain at one point made a lot more money on the goods than they would have if they had sourced a legitimate good.

So I think that might be an area we should perhaps include. I put the question to you. Is that an area you would recommend we include in recommendations for legislation or adding to the Criminal Code.

Mr. Daniel Drapeau: Is the question directed to me or to Mr. Geist?

Hon. Robert Thibault: Either/or, as you wish. You probably just have two minutes. Four minutes—

Prof. Michael Geist: I'd at least like to respond to your first comment about fake pharmaceuticals, just to make sure my comments are clear.

I first noted that I felt health and safety issues were the top priority on this particular file. When I suggest there was only one such incident, I'm quoting the RCMP. It is our law enforcement authorities themselves who have indicated that we don't have that other information. And while I would agree with you that there is the prospect or at least the possibility that other people may have been harmed, we should put this in context as well. According to some research I was doing based on Canadian Medical Association data, more than 10,000 Canadians a year die due to bad drug interactions when the drugs they've been prescribed are not the right ones interacting with other drugs. So that's obviously an enormous problem as well.

But the point is that, yes, it's possible other people are being affected, and this issue—the health and safety issue—ought to be, from my perspective, the top priority on the counterfeit file. But in the broader scheme of the consequences of pharmaceutical use, at least for the moment, the data we do have suggest it's a relatively minor problem.

Mr. Daniel Drapeau: I will speak from what I know. I will not address pharmaceutical issues.

As you've seen from my presentation, my view is that all counterfeiting is bad. Of course, pharmaceuticals that injure or kill are even worse, but the fact that it's worse doesn't diminish the fact that counterfeiting itself is bad.

Why is it bad? I think we have the obligation, but also the chance, to reflect on what kind of society we want Canada to be. Our founding fathers gave us peace, order, and good government, and I think respect for the rule of law is an integral part of our culture. Do we want to send the message that it's okay to counterfeit some things and we'll just give the counterfeiters a slap on the wrist, and that for other things it's much more serious? I think when you lie, when you sell a counterfeit, it's wrong, no matter what the product is.

To answer your specific question, in terms of retailers, you are right, a number of retailers are selling counterfeits. In my line of work, we call that “brick and mortar” stores.

I thought your comment about the profits made by those retailers very interesting, because that is indeed an argument I use when I'm up against retailers. Here's how it works. We were saying earlier that when you have a consumer who buys a product at a low price, he probably knows he's buying a fake. I don't agree, because consumers are a special breed of people. They're people who need protection sometimes.

•(1605)

Hon. Robert Thibault: The consumer might be paying the full price.

Mr. Daniel Drapeau: Of course.

But just for the price argument, that's why we have consumer protection legislation, because a legislator has deemed that consumers merit a special protection.

However, when you look at a retailer, he knows what's going on in the market. He's got a pretty good idea, when he's buying something grossly underpriced, that something's going on. You're right, that is one of the places where a very substantial amount of profit is made, especially if the counterfeit product is being sold at a price that is in keeping with the prices at which legitimate goods are sold.

The Chair: You have 30 seconds, if you have a quick question.

Hon. Robert Thibault: I find it difficult to see how our border people, without the help of the industry, even if we put more in place, would know whether a trailerload of extension cords or a trailerload of sweaters is authentic or not. You still need that interaction with the industry itself, the people who are being infringed upon, to trigger it.

Mr. Daniel Drapeau: Sir, I'm here in my personal capacity. I'm not here representing an industry, although I have a number of clients who are part of the industry.

I don't think anybody in the industry is saying that they don't want to participate, that they don't want to help. Indeed, industry has shouldered much of the responsibility in the fight against counterfeits. Industry, from what I see, is more than prepared to interact with the borders.

I have prepared products for Canadian customs, for various clients I handle, which clearly show how to recognize a counterfeit item through indicators: these are the places through which authentic merchandise usually transits, and this is the manner in which authentic merchandise is presented. Really, what that does is give border authorities, first, an alert signal. When they see something that's not in conformity with this, they can say that maybe we have a counterfeit, and the border authority can then liaise with the rights holder, or the Canadian representative of the rights holder, to ask if we have a counterfeit shipment here. This is being done to some extent today, but it could be done much more frequently and with a greater exchange of communication, namely, the identification of who the importer is, which we cannot get at present.

The Chair: Thank you.

We'll go now to Monsieur Vincent.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Thank you, Mr. Chairman.

I was pleasantly surprised—perhaps the word pleasantly is not quite accurate, but yes, I was surprised—by what Mr. Geist said a little earlier, namely that there is no international remedy for intellectual property infringement.

That is a huge problem. I don't know how we will solve it. I listened to all three witnesses. We may have legislative frame-

works, emergency measures, stronger border enforcement, patents, etc.

You also referred to a “minimum mandatory threshold with judicial discretion to increase the amount of pre-established damages”.

What can really be done to help these people? In your opinion, what is the total amount of losses each year in Canada due to intellectual property infringement? How much money do Canadian companies lose?

Next, how can we best protect these businesses? Do we have to go to the source? Should we turn to the businesses or to the stores which sell these products? Where does the solution lie?

Based on my understanding of what you said, there is no silver bullet, but where should we begin to address the problem? We may not get rid of it entirely, because I gather that it is fairly frustrating because there is no single guilty party. I wonder where we could start to help businesses protect their intellectual property rights.

I would like to hear all three witnesses on this point. What is the best solution? What is the best approach to put an end to the problem or, at the very least, lessen its impact?

•(1610)

[*English*]

Mr. Daniel Drapeau: Was there an order in which you wish us to address you?

The Chair: No, it's whoever would like to go first.

We'll go to Mr. Erdle.

Mr. Michael Erdle: I think the best thing we could do is improve the tools that customs has to intercept and seize products and give police more resources. They are taking action now. But I have spoken with a number of police officers over the last few years, and they say that their biggest problem is the lack of resources and manpower. They have to focus solely on the health and safety issues. They don't have the time and resources to deal with any of the other problems. They're simply unable to respond, even when there is a complaint, when IP owners say that they know this is going on and here's where to find the people. They will take action if they can, but they're stretched too thin.

So I think the number one thing we could do is provide those resources. The second most important thing is to have more serious penalties, because right now, if the penalty is a few thousand dollars fine, or maybe not even that, there's no deterrent for somebody who wants to sell counterfeit goods. The goods may be seized, but there will be another shipment very soon, and they'll make that money back very quickly. So there has to be enough of a penalty to be a deterrent.

The Chair: Mr. Geist.

Prof. Michael Geist: Chair, I have just a few things. You started by asking a question about how big a problem this is, and as I mentioned in my opening remarks, we don't know. So you will hear of many stock horror stories about the problems associated with counterfeiting, but there has not been in this country any independent data from someone who is truly reliable in this area to give us a sense of how much it actually does affect us.

That said, we do know that even if it's only one incident, let's say from fake pharmaceuticals, it's an issue that we ought to find some way to address. I believe before your committee you had someone from Health Canada talk about regulations that are 50 years out of date. Surely that's an ideal place to start in terms of trying to address this issue, dealing with that health and safety side, because from my perspective that is certainly an enormous problem.

With regard to stronger penalties, it's as if it's this magic elixir, that if only we had stronger penalties, suddenly people would stop because of the deterrent. Yet from Mr. Erdle's own remarks, it's pretty clear that that's ineffective as well, because his story indicated that after you've gone through the whole process with someone, they end up by saying they have a shell company with no assets whatsoever.

So I'm less convinced that strong penalties are effective. Indeed, in other countries where they have penalties that in some instances may be stronger than we're seeing, their counterfeiting problems are greater than ours.

The Chair: Thank you.

Finally, Mr. Drapeau.

Mr. Daniel Drapeau: Thanks very much.

I will not address the portion of the question dealing with how big a problem it is. The portion of the chain with which I deal is that I've a problem and I have to deal with it. I work on a full-time basis doing almost exclusively anti-counterfeiting work. Simply by my level of occupation, I think I can show you what kind of a problem this is. Beyond that, I cannot advance and give you figures.

However, in terms of

[*Translation*]

what needs to be done to tackle the problem or, at the very least, to control it, I have a few suggestions.

The first concerns border measures. Generally speaking, these products are not manufactured in Canada, but abroad. Therefore, customs play a crucial role. In that context, as I already said, there needs to be greater communication between rights holders and customs officials.

Second, concerning the legislative framework,

•(1615)

[*English*]

in Canada we have a very bizarre system. We have trademarks on one hand and copyright on the other. When they are each in their own domain, I can see why the two systems are not identical. But when you're dealing with counterfeits, they both should equally apply.

Here are some disparities between trademarks and copyrights. So everybody knows what we're talking about, a trademark is Lacoste, Chanel. Those are trademarks. A copyright is a work of art, a work of creation that is protected by copyright. For example, the alligator that you see on a Lacoste polo shirt is protected by copyright. It also happens to be a trademark.

The ideal situation, of course, is when you can cumulate both protections. However, if you only have one of the two protections, under copyright there's a good faith defence, so somebody can say he had no way of knowing and actually get out of it. Under trademarks there are no pre-set damages. Pre-set damages means that if somebody is proven to have violated the Copyright Act, the Copyright Act provides for damages that can be awarded by the court without proof of actual damage sustained by the right owner. You don't have that in trademarks. That's a very important limitation.

Furthermore, as I mentioned earlier, the RCMP and the Crown will not act on trademark matters, but they will on copyright matters. That disparity between the two laws, I think, is a major problem.

The Chair: Okay.

Mr. Daniel Drapeau: Can I add two points very briefly?

In terms of deterrents, there is civil deterrence. Increase the penalties. In terms of criminal deterrents, criminalize the process or criminalize the act. One point about camcorders is that if somebody is in a movie cinema and camcords, there may be a copyright law that's against it, but until you can get that guy's name, you can't institute an action against him. But if you criminalize that action of camcording, you can get a policeman to arrest that person and you can get an identification, which you cannot get civilly. Even under an Anton Piller order, somebody can refuse to identify himself.

Finally, in terms of effectiveness, when you do get a remedy and there's a shell company, as Monsieur Geist has mentioned, that's also part of increasing penalties. It's not only increasing the amount of penalties; it's increasing who pays the penalties, the personal liability of directors and officers of companies, and piercing the corporate veil in instances of counterfeiting.

Thank you very much.

The Chair: Thank you.

We'll go to Mr. Carrie, please.

Mr. Colin Carrie (Oshawa, CPC): Thank you very much, Mr. Chair.

Thank you very much, witnesses, for being here.

We've just completed a manufacturing study. We had the opportunity and privilege to travel across Canada. We didn't hear a lot of talk about Rolexes, but when we went to Quebec, we did talk to those in the textile industry. When we went to Windsor, we had a very good meeting with the auto manufacturers and auto parts manufacturers; in Oshawa, same thing.

I've been at trade shows where associations of plumbers and electricians have said, "My gosh, you've got to do something. These copies are so good, even we don't know the difference."

My concern is, okay, these parts are out there. These counterfeits are out there. Where is the money going from the profits, but also, where are these parts? Where are these electrical circuit breakers that are faulty? Are they in hospitals? Are they in schools? I'm very concerned about this.

Mr. Geist brought up a good point, that other countries out there have stronger copyright and IP protection than Canada has. I want to play devil's advocate here, because it seems the Canadian government currently meets its international standards and works with the international enforcement community. Other than getting taken off the American list of bad guys, why should we do anything?

Mr. Drapeau, why should we go ahead? And what should we do?

Mr. Daniel Drapeau: You've raised a number of points here.

I don't know where all the counterfeit items are. I can tell you that I have a fairly substantial amount of them in my office; they're on the marketplace.

Why should we have stronger protection? Let's talk about other jurisdictions. For those of you who have been to Charles de Gaulle airport in Paris, there are actually signs in Charles de Gaulle saying that if you come in with a counterfeit handbag—never mind for importation or resale, for personal use—the customs officers are authorized to seize it.

I am not of the view that the problem is just as bad in other countries. First of all, one has to look at each country on its own. There are countries that have more population. There are countries that have a bigger marketplace. There are countries in which certain products are more in demand. I think it's very difficult to compare country by country. What I know is that in Canada we have a counterfeiting problem.

You've asked me, why should we be doing something on this? Is it only to get ourselves off the U.S. list? And for those who are not familiar with this, the United States has a list of countries that it considers to be not proactive enough on intellectual property. We are on the list.

My testimony has not mentioned this for the specific reason that I think we need to be strong on anti-counterfeiting not because some other country is telling us to; we need to be strong for our own values. We don't want to live in a society where it's okay to cheat, it's okay to lie, it's okay to sell things that are fake. That's not the way I was raised, and I'm sure that's not the way the majority of the people around this table were raised.

It is your job, as legislators, to make sure that you preserve the integrity of that culture. I don't know how you develop a culture in a country, but that is probably one aspect of it.

• (1620)

Mr. Colin Carrie: For the benefit of the committee, could each of you give us your definition of counterfeit and its impact on the Canadian economy? I know that might be a long answer, but if you could keep it really short, we could get all of you in.

So give us your definition of counterfeit and its impact on the Canadian economy, as briefly as possible.

The Chair: Why don't we start with Mr. Erdle.

Mr. Michael Erdle: Certainly.

From our perspective, a counterfeit is a product that intentionally deceives, that intentionally has trademarks and other markings of another product, that is a copy, an out-and-out copy. That's our definition of counterfeit.

There are some grey areas. There are the Sony electronic products where Sony is spelled "Sonny". Is that a counterfeit or not? I think it is. I mean, it's still intended to deceive.

Mr. Colin Carrie: What would you say the impact is to the Canadian economy?

Mr. Michael Erdle: It's impossible to say in dollar terms, but the impact is on the integrity of the marketplace. There are laws enforced against false advertising, deceptive trade practices, and the like. This is simply one element of that, and the laws need to deal with it. People are deceived.

Mr. Colin Carrie: I hate to cut you off, but I was hoping we could get to everyone on that.

The Chair: Mr. Geist.

Prof. Michael Geist: I too would focus on unauthorized copies that involve clear deception, particularly where we're talking about public health and safety. I'd note that while you may have seen, as you toured the country, fake auto parts and the like, the RCMP's own data suggests that the top sources for counterfeiting are actually watches, handbags, and items of that nature. According to our own law enforcement, that's where the largest source is. Of course, we've heard about Lacoste and others.

In terms of the impact—and I'm sounding a bit like a broken record—the reality is that we don't know. We hear a lot of stock horror stories. I think most people can appreciate that a great deal of that kind of copying is not a perfect substitute. The person who buys the fake in a flea market knows full well that they're buying the fake in the flea market, and don't think they're getting a \$2,000 handbag for ten bucks.

Mr. Colin Carrie: It's actually putting Canadian businesses out of business.

The Chair: Do you want to get the entire panel?

Mr. Colin Carrie: I would if I could, quickly.

Mr. Daniel Drapeau: Counterfeiting, pursuant to our acts as they are currently drafted for trademarks, is the reproduction of a trademark on wares that are covered by a trademark registration. I would extend that to wares in the same category. If I have a registration for a shirt and somebody reproduces my trademark on a baseball cap, I would consider that counterfeit. For copyright, it is the reproduction of the work that is protected by copyright.

Incidentally, Mr. Geist mentions unauthorized copies, and there is a very important distinction to make regarding the issue of grey goods. There will be a decision coming down from the Supreme Court some time this year on the Euro-Excellence case. This is a case dealing with Toblerone chocolate and based on which we will know whether grey goods, which are legitimate but are imported into Canada in violation of the rights of the local distributor, constitute a violation of copyright or not.

When you're dealing with something that is unauthorized, you have to be careful, because some unauthorized can be counterfeit and some unauthorized can just be grey goods. My definition of counterfeit excludes grey goods.

What's the impact on the Canadian economy? Somebody may very well be right in saying we don't know the full impact. The reason for that is that it's illegal. People who operate in illegalities don't keep detailed records. I know; that's what I'm confronted with on a daily basis. That's my first answer.

Instead of asking what the impact of counterfeiting is on the Canadian economy, why don't we ask what the social benefit of counterfeiting is?

Contrary to what I've read in some minutes of the security committee, I can assure you that counterfeiting does not promote innovation. It is not fair competition; it's unfair competition. You should not link counterfeiting with two innovative products that are going head to head in the marketplace or two companies that are really trying to outdo each other to come up with a new idea. That's not it. You have one innovator who is coming up with something new, and you have somebody else riding on his coattails.

•(1625)

The Chair: I'm sorry, we're really going over time with everyone here.

We'll go to Mr. Masse.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

Thank you for appearing here today.

I apologize in advance as I have to leave after this, but I might come back again. I'll get the blues later on and follow up.

I have a couple of questions to all three of you.

Mr. Geist mentioned accumulating data. I think that's a good suggestion, because we have seen a lot of this come across before without knowing specifics. We have examples and a whole series of things. In your opinion, how would we go about collecting and building that good strong database and then a model for that, not only for the short term but also for the long term, with regards to this issue?

Prof. Michael Geist: I think it's important to distinguish between different types of issues, because depending on the type of product, there may be different ways to try to obtain the data. For example, in the camcording area there are these wild numbers that, if true, mean the total's going to amount to about 500% of all global camcording being attributed to a series of places. The numbers just don't add up.

One independent study on camcording that was conducted by AT&T Labs Inc. several years ago found that 80% of all pirated DVDs are actually sourced internally. They're in screener jobs that the industry itself has somehow lost; someone inside has released it out, and then it gets released onto the Internet and elsewhere, so in fact camcording was a tiny fraction of the overall sources. They did that by going online and actually taking a look, because you can tell the difference between a screener copy and a camcorded version.

In some areas I think there is the prospect of doing some fairly good data if we get some independent researchers on the job. In other areas—say, counterfeit pharmaceuticals and the like—I'd suggest we could engage in some pretty good sampling, both for some of the online pharmaceutical industries as well as even some offline pharmaceutical companies. We could try to obtain a sample. Presumably some forms of pharmaceuticals are more likely to be counterfeited than others, so we can probably get a pretty good sense and on that basis look at overall pay and the like.

But none of that has happened to date. All we deal with are these horror stories that unquestionably attract our attention.

In many respects it's not about whether there's a social benefit to counterfeiting. Let's be clear: I don't think there is a social benefit to counterfeiting here, but when you have people coming before you to say we ought to throw lots more resources into law enforcement or into border enforcement, it means taking resources away from something else. I think we need to be pretty darn sure we have a serious enough problem to merit the allocation of those public resources for essentially the private benefit, in many instances, of the companies that are being affected by having their clothes knocked off.

•(1630)

Mr. Brian Masse: Is there anybody else?

Mr. Michael Erdle: I think one of the benefits of devoting more resources to this is in collecting the information Professor Geist says we need. I agree that more information would be good; I don't agree that we should just sit on our hands because we don't have absolutely definitive data.

On the camcording front, I understand that all films released today now have watermarks. The source of the copies can be identified, so I think that data ought to be readily available. Probably the Canadian Motion Picture Distributors Association already has some of it. They're not independent and have a vested interest, but I'm sure they have the data, and if they can back it up, that's where we should look.

Other industries have data as well. The automotive industry certainly has data. The aerospace industry has information, and it would be very useful to have it.

But I don't think that should be a reason for taking no other action. We need to go ahead and take action.

Mr. Daniel Drapeau: I will give you a very simple way. Go to the Federal Court of Canada and get the registrar to pull out for you all the John Doe orders that have been rendered by the Federal Court. A John Doe order is an order that's rendered by the Federal Court of Canada. It orders infringers to deliver up counterfeit goods.

Incidentally, it's a uniquely Canadian remedy, one for which we're known. It originated in the U.K. in a decision rendered by the House of Lords, but it was imported into Canada. Our uniqueness is that John Doe orders are applicable across the country. In no other common law jurisdictions do you have one order that can be applicable in a whole country; usually it's limited territorially.

You go to the Federal Court and you get a list of all the John Doe orders that have been granted by the Federal Court. The first one was granted in 1982. That's quite some time ago. Then, under each of those orders, you look at how many counterfeit items were seized every year. I'm telling you already that it's a very daunting task. I've been in charge of John Doe orders in my firm, Ogilvy Renault, since 1997, and I keep that sort of record. In 1982 I wasn't even in law school yet.

That would be a way for you to know the extent of the counterfeits that were caught—caught—on the market for a given period.

It will be a very lengthy process. You are only going to get the tip of the iceberg. When you seize a counterfeiter, usually he hides the bulk of his stock; you only get a fraction of it. So whatever amount you get, multiply it by a factor that I cannot quantify, but which I can say would be substantial.

Mr. Brian Masse: I have one other quick question.

We had testimony in Windsor about auto parts being replicated. In fact, the tool-and-die mould industry was actually losing some of its mould designs through the big three and others—actually the big five—taking those designs and shopping them in China and other places. That's a real problem. It's a loss of jobs. We're losing a lot of jobs as it is right now, and this is significant.

There are also issues such as, for example, the electrical cord one that we had, and a number of other examples. Speaking as a young parent myself, if you have somebody actually hurt or injured from that....

I'm curious to know your position. Who do you believe is responsible for that? Do you believe it's the retailers? Do they have some element of responsibility to make sure the product they have on their shelf was done through proper accounting procedures and

that they've not bought it knowing...? Second to that, would you follow it back towards the manufacturer as well?

In your opinion, who is responsible if there's death or injury from a product? Where does the buck stop?

The Chair: Let's go very quickly.

Mr. Michael Erdle: I think everybody in the chain bears some responsibility. The retailer has to be responsible for knowing who they're buying stuff from and what they're buying. I think the distributors and importers have to be responsible for knowing. The manufacturers, if they're sourcing goods, or distributors, if they're sourcing product from outside Canada, have to know who's making it and how they're making it and where it's being made. They're all responsible.

The Chair: Mr. Geist.

Prof. Michael Geist: I think I'd agree with that, and I'd even go further, in a sense. If you buy a high-value item in a dollar store, let's say, or in a discount store, surely as a consumer you have some recognition that there is perhaps some risk associated with it.

That's not to say it's a good thing when we see these incidents happen. They're very scary. But I think consumers as well often know when a good deal appears to be too good a deal. In many instances there is some level of awareness that perhaps it's not quite what they...that they're getting something they didn't quite know they were getting.

• (1635)

The Chair: Okay.

Mr. Drapeau.

Mr. Daniel Drapeau: Everybody bears a responsibility, but the primary responsibility is with the retailer. Why? It's not necessarily because the retailer knows, but because the retailer is the only one against whom the consumer can have recourse. The source is probably not even in Canada.

As to whether the consumer knows he's getting a good deal, in a dollar store you're dealing with somebody who might only be able to afford a dollar store. Do you think that person has enough sophistication to know that the authentic product is much more expensive, so this must be a counterfeit? Maybe that person isn't even aware of the notion of counterfeit. All that person thinks is, "I'm getting a good deal." That person is relying on the store owner.

Incidentally, your question is one of product liability, and if I'm not mistaken—I'm not a product liability lawyer—the retailer is liable under product liability law.

The Chair: Thank you.

We'll go to Mr. St. Denis, please.

Mr. Brent St. Denis (Algoma—Manitoulin—Kapusksing, Lib.): Thank you, Mr. Chair.

Thank you very much. It's a very interesting discussion.

When you consider the crime around issues of counterfeiting, philosophically how do we look at this crime? Is it theft? One of you mentioned somebody breaking into somebody's house, and we have a way of dealing with people caught in the act of selling hot goods. Is it like a drug crime? Is it like fraud? How do we generally treat this kind of crime philosophically? Is it like something else? I'd be very interested in seeing how we categorize this as a country. Then I'll go to part B of my questioning.

It's for any one of you, or all of you.

Mr. Michael Erdle: I think the important thing is to start to draw those analogies. Right now it really isn't treated like a crime; it's really treated with a slap on the wrist or as somehow being okay. The important thing is to realize that it has a criminal element to it, and for the same reasons—that people make a lot of money doing it. And maybe in some cases the same people who import and sell drugs because they can make a lot of money will import and sell fake products. In fact, there's more incentive to sell counterfeits, because the chances of having to pay a fine or, worse yet, go to jail are practically nil. If you get caught trafficking drugs, you'll probably go to jail. If you get caught trafficking knock-off handbags or watches or even electrical parts—batteries that blow up—it's very unlikely that you'll be punished.

Prof. Michael Geist: I sat on the Minister of Industry's national task force on spam, and we spent a lot of time in that year, as part of that task force, working with law enforcement at the Department of Justice, as well as the RCMP, trying to address the issue. I came to appreciate during that time just how hard it is to get the resources from the RCMP and Justice and law enforcement officials generally to turn their attention to some of these issues. The RCMP has put IP crime among its top five priorities and has escalated the number of charges they've laid over the last number of years, so that we're now in the thousands over a period of time—and this is just the RCMP, not local law enforcement—and it does, in my view, an enormous disservice to our law enforcement across the country to suggest somehow that this isn't prioritized. It quite clearly is prioritized.

The issue here, and let's be frank, is that law enforcement has made clear that their priority in this area is health and safety. That's not the priority of the person who is selling the little alligator on their shirt. But I think we ought to recognize that law enforcement has prioritized this issue and, indeed, has been very active, taking resources away—in our case we couldn't get them to deal with spam, and spyware, and identity theft—because they were focusing on some of those other issues.

Mr. Daniel Drapeau: The question that was put was philosophically how do you characterize this? I find that very interesting, because that's the reflection process we're involved in. I would characterize it as three different types of violation.

First, it is a theft on the right owner. There's the reproduction of the trademark or reproduction of the copyrighted work. That's stealing intellectual property.

Secondly, and my apologies, I do not have the English term, but I would use the French term, *une voie de fait*. The translation services will probably reflect that on the transcript. If I were to translate that loosely into English, I would call it an attack on the distinctiveness

of a trademark, which is separate from the theft of the trademark itself. You're diminishing the value of that trademark.

Thirdly, it is a deception and a fraud on the consumer and on the general public.

While it was not an answer to your question, the issue of law enforcement being proactive on health and safety, thank God. For things that are not health and safety, create more communications with law enforcement. Give rights owners better tools to fight this problem. But by the same token, be aware that rights owners are not there to police the values that we, as a society, hold dear.

• (1640)

The Chair: Mr. St. Denis.

Mr. Brent St. Denis: So very quickly, it would seem that generally we don't give it the status of being a crime, if that's what you're saying, so we have counterfeit drugs being treated the same as counterfeit purses. The damage potential for the two is quite different. So if you had \$100 to spend on the front end—and I call the front end the border—or the back end, which is the street or the store or the Internet, where do you spend your \$100? A hundred dollars at one end, or 50-50?

The Chair: Mr. Erdle, quickly.

Mr. Michael Erdle: I would spend the money two ways. I would spend it on better border enforcement and I would also spend it on seizing and prosecuting the people who do it. For want of any better

Mr. Brent St. Denis: I just want a quick answer.

Mr. Michael Erdle: Sure. I would certainly focus on the health and safety, but I wouldn't ignore the rest.

The Chair: A quick answer, Professor Geist.

Prof. Michael Geist: Given that our copyright laws provide for statutory damages of \$20,000 per infringement, that \$100 isn't going to get us very far. I'd be spending more of the money on the back end in terms of trying to educate law enforcement, particularly on the health and safety side of things. To me, that's where the primary concern lies.

The Chair: Mr. Drapeau.

Mr. Daniel Drapeau: About the statutory damages of \$20,000, they've only been awarded once, and that was last December by the Federal Court in a Microsoft decision, so I don't think that is run-of-the-mill.

How to spread it? Spread it however you want—50-50, 75-25. I'd probably do 50-50, but add a plus value by amending your laws so that, aside from your \$100, you'll have money spent by others.

The Chair: I'm sorry, I should have explained this at the beginning of the meeting. Members are given very limited time to ask questions, and the members want to go through the panel because it's a very interesting discussion, but everyone is going way over their time, and I want to make sure all members get a chance to ask their questions. That's my role as the chair. I'm a glorified timekeeper.

So we need a brief question and a brief statement; otherwise members will not get a chance to ask questions.

So there, I've said that, and those are the rules.

We'll go now to Mr. Shipley for five minutes.

Mr. Bev Shipley (Lambton—Kent—Middlesex, CPC): I want you to know that somebody just took a lot of my time.

The Chair: No, no, not one second.

Mr. Bev Shipley: I appreciate it.

We understand the whole issue. I don't want to talk about Gucci watches. I want to talk about, for example, the breakers we had sitting in front of us the other day that were installed in hospitals, in intensive care units. They're electrical cords your family and my family would buy that melted away. They had CSA stamped on them, and they had the company trademark stamped on them. These are cords that burn down your house when you go away, and burn it down with your kids inside. Those are the things that concern me.

Does everyone agree that we're dealing with organized crime?

Prof. Michael Geist: Well, according to the RCMP data, obviously, organized crime is involved in counterfeiting, but they are not the exclusive purveyor of counterfeiting. Actually, Project Sham, which is their most recent study on this issue, says that depending on which part of the country you're in, it's sometimes mom and pop who are involved in this stuff, and in other instances it is indeed organized crime.

I want to point out that you're exactly right, the kinds of instances you've pointed to are exactly the problem, which is why I think we need to take certain issues right off the table.

It's not about stronger copyright laws. It's not about camcorders. It's about safety in our hospitals and in our homes, and that's not a copyright issue.

• (1645)

The Chair: Mr. Drapeau.

Mr. Daniel Drapeau: Whether or not it's organized crime is not a part of my testimony. The question may be directed to the RCMP.

The Chair: Mr. Erdle.

Mr. Michael Erdle: I agree. The RCMP has a much better sense of who is involved in this.

I disagree with Professor Geist to the extent that this is purely a health and safety matter and it's not a copyright or trademark law matter. It's both.

In order to be effective in stopping it, we need to have all the tools. The police need to have stronger tools, and they don't have them now in the Trade-marks Act and the Copyright Act. Individual companies and industry groups need to have those tools as well.

Mr. Bev Shipley: I think one of the things we've read, we've seen, and we've heard time and again is how lucrative this business is, and in fact, it's lucrative without many consequences. I'd like to know whether or not you think that's true.

The other part is this. Do you think legislation should be or could be amended to provide the Canada Border Services Agency officials with clear authority to target, detain, seize, and destroy counterfeit and pirated goods, either on its own initiative or at the request of an

IP owner? If you don't think it should be amended, why not? I'd like your response to that.

I'll start with Mr. Drapeau.

Mr. Daniel Drapeau: Is it lucrative? It most certainly is—when I look at the difference between the cost of these wares and the price at which they're offered for sale, when I am able to get my hands on that information.

What are the consequences? They're absolutely minimal. In my written document, there's what is called the compensatory conventional damages that are set by the Federal Court. It's really an assessment by the court of an amount that's awarded by the court when no amount can be figured out. Those amounts are \$3,000 for a street vendor, \$6,000 for a retailer, and \$24,000 for a manufacturer. It's nothing, and the consequences are very minimal.

Should a border be allowed to deal with counterfeits on its own initiative? Of course, with confirmation that the wares are indeed counterfeit, it absolutely should. Should it be able to be done at the request of a rights owner if the owner proves the wares are counterfeit? Yes, absolutely.

Prof. Michael Geist: I think we have every indication that people are generating some income out of this, but we also have to take a look at our statutes and note there are strong penalties. I think \$20,000 per infringement, which can be used to force a settlement, is strong. On the criminal side, within the Copyright Act, there's the prospect of jail time and penalties in the hundreds of thousands of dollars. We are talking about serious penalties.

Of course, you can increase the penalties, but it doesn't mean a judge is going to necessarily follow that. We oftentimes see legislation increase the penalties, but the judges look at the people in front of them and still decide whatever they decide. There's no guarantee that stronger punishments will be meted out, even if you increase the penalties associated with it.

In terms of the border issue, I think there's the prospect of some legislation, but we have to be careful because of the issue of grey markets and parallel imports. There is the prospect of seizing perfectly legitimate goods, simply because a party in Canada doesn't want those legitimate goods entering the country, because it provides some real competition for them.

The Chair: Briefly, Mr. Erdle.

Mr. Michael Erdle: I agree that border enforcement has to be there, and the Border Services Agency needs to have the power to seize. There has to be a mechanism in place to ensure that they really are seizing counterfeit goods and not legitimate goods, but that can be done.

As far as other penalties go, I think maybe more needs to be done in applying the penalties that exist, but at the same time, there are a lot of activities for which there are no penalties at all now, and that should be changed.

The Chair: Thank you.

We'll go to Monsieur Cardin.

[Translation]

Mr. Serge Cardin (Sherbrooke, BQ): Thank you, Mr. Chairman.

Good afternoon, gentlemen.

A little earlier, there was a question about the financial impact of counterfeiting. The Canadian Association of Importers and Exporters believes that the financial impact of counterfeiting and the identity theft of intellectual products is between \$20 and \$30 billion per year.

You also said that all counterfeit goods come mainly from abroad and that not many are manufactured in Canada. Can you confirm this?

• (1650)

Mr. Daniel Drapeau: I am speaking from experience. When I was involved in the seizure of goods or when I used other means to stop counterfeiting, I only very rarely found that products were manufactured in Canada. Generally speaking, the manufacturers are located outside the country. I'm not telling you that there never has been any counterfeiting activity in Canada, I'm just saying that it is fairly rare.

Mr. Serge Cardin: I imagine that when Canadians and Quebecers order products, regardless of what they may be, they deal with providers who normally certify those products, or there is a relationship of trust.

As you mentioned earlier, it is theft. If these products come mainly from abroad, the border is indeed the ideal place to tackle the problem.

A few moments ago, we talked about drugs. God knows that huge quantities of drugs cross the border. In that regard, there is obviously a lack of resources. I do not want to denigrate anyone, but if we were only dealing with Lacoste clothing, there would be no real danger in the area of security.

Furthermore, the public is an indirect accomplice because it is familiar with the products and buys them. Do recognized and known providers, whom people believe to be honest, sell these products? There are a lot of flea markets. That is possibly where a lot of these products are sold.

Mr. Daniel Drapeau: I found counterfeit products not only at flea markets, or at private parties, but also in department stores, chain stores and specialized boutiques. You can find counterfeit products anywhere. Of course, they are often found in places where the sellers can quickly disappear, such as flea markets. Many sellers are also street vendors.

What concerns me about your question is the idea that you can trust the supplier. Perhaps the buyer trusts the supplier, but that does not mean that the supplier is trustworthy.

Mr. Serge Cardin: As far as security is concerned, for example, have buyers for large organizations ever bought counterfeit products from elsewhere? The same holds true for the area of medicine. The odds of that happening there are, I imagine, not as great, because there is a better control of the procurement system by specialized buyers.

Mr. Daniel Drapeau: I have not looked into counterfeiting activity in the field of medicine. So I cannot answer your question. However, I can say that in that area, as everywhere else, there are bad fake products just as there are good fake products.

I would not be surprised if an expert were taken in, unless this expert is aware of secret indicators which would reveal whether a product is fake or real.

Mr. Serge Cardin: It's basically something that happens in every area, be it Lacoste clothing or the medical field, including drugs.

There was a wave of offers on the Internet recently. I'm referring to prescription drugs that people could order from abroad and which also probably came from abroad.

The Chair: That is your last question, sir.

Mr. Serge Cardin: These pharmaceuticals may also be counterfeit. So there's basically no end to it. You can find counterfeits across every sector, and because it's criminal, obviously, the means are also very limited.

[English]

Mr. Daniel Drapeau: But they are saying that the means are limited. By strengthening the laws, you can enlist the assistance of the private sector. And what Mr. Cardin has said, that counterfeiting is far-reaching and touches every segment, is one of the reasons we should be acting.

• (1655)

Prof. Michael Geist: But it also highlights why we have to prioritize. So the extent to which this is such a broad issue that it has infiltrated so many things means that we have to pick and choose. I mean, we have to ensure, first and foremost, that the real problems, the health and safety issues, the ones where Canadian manufacturers may find themselves directly affected, are the ones that we prioritize, because if this is that big an issue and that global an issue, then clearly we're not going to solve it sitting around this table. Let's ensure that the kinds of solutions that are proposed are the ones where the greatest amount of harm is taking place.

The Chair: Okay. Thank you.

We'll go to Mr. Van Kesteren.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Thank you, Mr. Chair.

Listening to this discussion and the previous discussions, too—I don't know, man. If you want a quick trip to the slammer, go rob a bank. And if we take the argument that it's really not hurting people, no big deal, so you take a few bucks, you take a thousand dollars, it's not killing anybody—This society has recognized that our banking institutions are fundamental to our market system staying intact, and to my way of thinking, I would think that when people labour and they have good ideas and they go about things the right way—Part of our whole market system is the advertising. There is advertising, and trademark is involved. To me, this is as serious as going to a bank and sticking a gun at the teller and stealing something.

I disagree that we should prioritize. This has to be stopped.

My question to Mr. Drapeau is, should we make it a criminal offence to manufacture, reproduce, import, or distribute—make it a serious criminal offence if we counterfeit or pirate products for commercial uses?

Mr. Daniel Drapeau: I am absolutely in support of that proposition.

And I'll tell you what my problem with the two tiers is. It's that if you're doing a two-tier approach—let's prioritize that these ones affect safety and those ones don't—that means there's some theft, some assault, some deception that's okay, and then there is other theft, other deception, that's not okay. So where do you draw the line?

I absolutely agree with your position, sir.

Mr. Dave Van Kesteren: I know, Mr. Geist, you have your position. I want to ask Mr. Erdle first.

Mr. Michael Erdle: Yes, I agree as well, absolutely. I see the same problem with the two-tier approach, if you will, or trying to say that this type of counterfeiting is harmful and this counterfeiting is not. It's all harmful.

And you're right that it's similar to robbing a bank and saying that if you rob a bank it's a crime, but if you rob a corner store and no one gets hurt, well, that's okay. It's not okay. And counterfeiting, I think, falls in the same category.

So yes, it should be a criminal offence.

Mr. Dave Van Kesteren: I want to ask another question too. When we talk about criminal offences, to me it's evident and obvious that organized crime is really involved. To what extent do you think countries are participating? Do we have blood on our hands too? I've heard some reports that the Americans are saying that this is rampant in this country too. Organized crime is involved, but are countries turning a blind eye to this whole situation and having this thing just grow without anybody stopping it?

Prof. Michael Geist: We just heard that the RCMP itself has found that upwards of 90% of counterfeiting comes from outside the country.

The U.S., which even just this week released its "Special 301" report, where it identifies various countries, chose not to elevate Canada, and has identified at least a dozen other countries that are seen as being more problematic, in its perspective, despite a lot of pressure that said Canada is, as you say, a real source of the problem. The USTR chose not to recognize that and kept us with dozens of other countries where it's more of a trade irritant than anything else.

Mr. Dave Van Kesteren: So we're not in the same vein as the others. None of them are here, but we took a trip to China, and they say that's a real problem in China too. They're starting to combat this. It's starting to affect theirs, as well.

Can we get some consensus with countries and ask for some agreement that, when this happens, we're going to have help on all sides of the border so we can stamp this out? Is that something we should be striving for as well—international agreement?

All three can answer.

•(1700)

The Chair: Mr. Erdle.

Mr. Michael Erdle: I think international agreements are important.

When you look at China, I find it very interesting—A lot of our patent work now is work dealing with inventions that come from China. They are starting to become innovators. And now they're

starting to get interested in enforcing intellectual property. They realize they now have something they need to protect as well. So they're not going to turn a blind eye any more to the counterfeits that come from China.

I think the same thing applies here. We have to take action to deal with counterfeiters. We rely so much on innovation; we have to protect it and we have to be seen around the world as protecting it.

The Chair: Okay.

Quickly, Mr. Geist.

Prof. Michael Geist: Canada did. The most obvious forum internationally is the World Trade Organization. And Canada has joined as a third party, as I'm sure you're aware. The U.S. complained against China. The U.S. itself identifies China and Russia as its top priorities and almost a dozen other countries. So Canada has played a role internationally, most recently in the last couple of weeks, in trying to pursue that line.

The Chair: Mr. Drapeau.

Mr. Daniel Drapeau: I was at the third world anti-counterfeiting summit in Geneva in January, and there definitely is a will internationally to see that treaty. But don't wait for an international treaty to do something. In the fight against counterfeits, you can't act against the source of supply, which is outside the jurisdiction. So we can't do anything about that. But you can act at the border. You can act against the people selling it in Canada. But also, by strengthening legislation, you can act on the Canadian culture. Sending a message that buying counterfeits is not good, you can make it not interesting for people to buy counterfeits and associate a social stigma with it.

The Chair: Thank you.

Thank you, Mr. Van Kesteren.

Mr. Byrne, please.

Hon. Gerry Byrne (Humber—St. Barbe—Baie Verte, Lib.): Thank you very much, Mr. Chair.

Very quickly, Mr. Drapeau—I want to question Mr. Geist on some other things—you brought up the U.S. 301 list.

Mr. Daniel Drapeau: I did not bring it up. What I mentioned is that I specifically did not refer the U.S. 301 list.

Hon. Gerry Byrne: Fair enough.

Mr. Daniel Drapeau: I don't want stronger laws because the U.S. says we should have them.

Hon. Gerry Byrne: Might I ask you a question? Based on the criteria that have been established, should the U.S. be on the U.S. list? Are they—

•(1705)

Prof. Michael Geist: I'm a Canadian lawyer, not a U.S. lawyer. I'm not able to answer your question.

Hon. Gerry Byrne: Okay, fair enough.

I do want to ask Mr. Geist this. On the whole issue of values—and I can appreciate very sincerely that health and safety does form a particular priority—am I wrong in thinking the following? I often buy my son Spider-Man pyjamas, not because he really likes Spider-Man. It actually makes it more difficult to get him to bed because he's wearing Spider-Man pyjamas now that he's a little more active. But I buy Spider-Man pyjamas because I go with an assumption that in order to get that licence the company that manufactures them and receives the licence from the Spider-Man company, whoever that is, Walt Disney or whoever, has to manufacture them under a certain standard—fire retardant, and so on and so forth. In other words, the quality of the goods I buy is actually elevated based on adherence to an intellectual property standard that is imposed by the holder of the licence, of the copyright and the trademark. Under the infringement of trademark and/or copyright, by buying a counterfeit good, I'm actually putting my son at risk in a health and safety issue because I'm not confident anymore that it's a flame-retardant product.

The second thing is that I also make decisions as a consumer based not on pills or hospital equipment, but on raw, ugly consumer goods, because I like to make sure that the companies I buy from have good labour standards and do not manufacture utilizing child labour. Copyright infringement, trademark infringement, actually lowers that standard for me as a consumer because I don't know where my products are coming from.

Finally, you say 90% of all products that come into Canada that are probable trademark and copyright infringements come from the outside. We regulate Canadian industry nearly to death. They voluntarily comply with various certification standards. How can I, even on those raw consumer goods as the lowest of the low on the totem pole, so to speak, judge what should be prioritized?

I've listed three examples of health and safety being a potential issue, my societal values of raising a norm or standard of behaviour that has been infringed, and I'm also undermining those within my own country who would seek to elevate certain standards, and I'm actually creating a circumstance where those standards are being eroded.

Mr. Geist, how would you respond to those three things I've raised?

Prof. Michael Geist: You raise a lot there.

I'd note, with respect to your question about the special 301 list, that it is a good point. The reality is that the U.S. itself is not fully compliant with its international copyright obligations, and so were there to be a list, you could easily put the U.S. on it, although I would argue that it has as much credibility as the U.S. reviewing our gun laws and saying that our gun laws are overly strict and we should make it easier for people to have access to guns. Or that our environmental laws aren't good enough. It is just one country's opinion on a set of laws when we are truly internationally compliant.

With respect to the specific issues you pointed out, we ought to be hesitant to create a clear link between something that has a logo attached to it with trademark protection and the issue of quality. It is true that in some instances a party who licenses out a product will want to ensure that the product itself bears a certain level of quality, but by no means in every instance. There are lots of trademark

products that are of shoddy quality and the like. This isn't a quality issue.

The concern is where someone fails to meet basic Canadian safety standards and the like. From my perspective, that ought to be fraud, if it isn't already fraud, and there's no question that in those kinds of instances there is a role to play for law enforcement to try to stop that activity from occurring. I think it would be a mistake to suggest that simply because something is trademarked or, indeed, copyrighted—everybody gets copyright on anything they write—that it is effectively an assurance of quality.

Indeed, the Canadian Standards Association is where the mark really comes in, in terms of indicia of quality, and where there is counterfeiting of a CSA logo, that is unquestionably a problem, I would agree, and one against which action ought to be taken.

Hon. Gerry Byrne: Then if we apply the CSA standard and prosecute on a CSA standard basis, you'd support stiffer penalties for trademark infringement and for copyright infringement.

Prof. Michael Geist: What I suggested is that where someone is deceiving the public by affixing as CSA logo, they are trying to tell the public that it is of a certain quality when it is not. Again, that is not a trademark issue, and once you move into the realm of stronger protection for trademark and copyright, there are other consequences, because once that legislation gets established, the impact is not so narrowly tailored to your son's pyjamas but has an impact on a broad range of activities, some of which may be seen as negative.

The Chair: Mr. Drapeau.

Mr. Daniel Drapeau: A trademark can be linked to quality. A trademark can be linked to absence of quality. It depends what the underlying product is.

The issue here is that you have certain trademarks that have been built over the years as being indicia of a quality product, a product that everybody wants, a product that's designed, a product that's in demand. There can be other trademarks that have not benefited from the same investment, that don't have the same underlying quality product. Those trademarks aren't counterfeited. The trademarks that are counterfeited are the trademarks that are indicative of a product that's hot, a product that's quality, a product that people want. Counterfeiting only exists if the authentic is in demand.

The Chair: Thank you.

Thank you, Mr. Byrne.

One of the reasons I try to be tough with time is that then I actually get a chance to ask some questions myself as the chair. I'll take the next Conservative spot. I have three issues that I want to raise.

On the first one, Mr. Geist, you mentioned in your presentation about inconsistent data. I think that is certainly real, but my concern there is that I don't know if we'll ever actually have certain, or real, or valid data, just because of the nature of what we're dealing with—counterfeiting and piracy. Do you suggest a method, or is there a way for us to actually get data that we could call certain, reliable data that we could then base public policy on?

Prof. Michael Geist: I don't agree. In the example I provided in my opening remarks, focusing specifically on camcording, I believe there is the prospect of obtaining very specific data. We haven't seen it to date. We've seen numbers, as I say, that are all over the place. On that kind of issue, I think there is the prospect for identifying to what extent Canada is a player in this or is a source of the problem, and use that as a determinant as to whether or not we ought to move forward with potential new legislative reforms. But we ought not put the cart before the horse. We don't need legislative reforms before we actually have a sense of what the particular issue is.

In other areas, I'm inclined to agree. I don't know that we'll ever get a full sense of the problem, but if we're going to get into the business of prioritizing, both from a legislative perspective and a resource perspective, I think we have to know more than we know right now.

• (1710)

The Chair: The second issue I want to raise was on your comment, Mr. Erdle, that "The Copyright Act has criminal provisions but they have not been applied effectively." Can you expand on that?

Mr. Michael Erdle: Yes. We've mentioned already the penalties of \$20,000. The reality is that when cases are brought to court, those penalties are never applied.

Now, I agree that raising the penalties won't necessarily mean that those would be applied either, but I think it is a matter of perception that this is a serious offence, or not a serious offence, and I think we need to change the perception. This is serious, and I think courts need to apply those penalties.

The Chair: The third issue I want to raise with Mr. Drapeau. Under your solutions, you have "Provide for statutory damages," and then you have "No proof of actual damage required." Can you expand on that?

Mr. Daniel Drapeau: Yes. Under the Copyright Act, this is the figure of \$20,000 that has been mentioned previously—and this is the difference between trademarks and copyright.

Under the Copyright Act, you have what is called statutory damages. Statutory damages means that if the court finds that there is infringement, it has the discretion to award an amount of damages that is independent from any damage suffered by the rights owner. The reason statutory damages exist is that sometimes it's very difficult for a rights owner to prove the actual damage he sustained, so there is this creation of statutory damages. The legislator says, okay, for a violation of copyright, per work infringed we will give you between \$200 and \$20,000, without your having to prove that you've actually sustained the damages.

On the issue of statutory damages, be aware of the fact that it is only provided in the Copyright Act. The Trade-marks Act contains no such provision. So the \$20,000 figure is only applicable in copyright, and in Canadian jurisprudence it has only been granted once, last December. Before that, the awards were always \$10,000.

If I can talk about the stiffer penalties, in terms of imprisonment, even in cases of recidivism, the Federal Court has declined to order imprisonment. Recidivism is passable of contempt of court, and one of the punishments for that is imprisonment. The Federal Court has

mentioned, on a first recidivism, we won't imprison. The idea behind changing the laws is also raising the bar in terms of the penalties that are awarded by the court.

One thing you have to bear in mind is that most of the anti-counterfeiting jurisprudence that is rendered right now is rendered under the aegis of Anton Piller orders and John Doe orders, which means orders for seizures. Those orders are so intrusive that the court is very careful in the way it approaches these orders. There is actually a restrictive trend on these, and that, I think, has extended to the realm of anti-counterfeiting and the punishment of anti-counterfeiting.

The Chair: Okay. The clerk's actually giving me my time, but Mr. Geist, you wanted to respond briefly?

Prof. Michael Geist: Yes, very quickly on the issue of statutory damages, because it shows how there can be negative consequences from something when you're trying to do a good thing. When we read, for example, in the United States of grandmothers or teenagers being sued for file sharing with liability in the millions of dollars, that's because if someone has 1,000 songs on their hard drive, they face the prospect of statutory damage for every song, literally the prospect of millions of dollars.

So how does this work? It's not that courts are awarding \$20,000 per infringement; it's that settlements are forced on people because they have no choice but to settle because the prospect of liability is so high. So the potential for misuse of these kinds of provisions is something we're seeing in play right now in countries such as ours and the United States.

The Chair: Do you really want to respond, Mr. Drapeau? Can you do it in 10 seconds?

Mr. Daniel Drapeau: We're not talking about file sharing; we're talking about products on which a trademark or a copyrighted logo is placed. That's the definition we set for counterfeiting at the beginning. That's number one.

Number two, on these humongous settlements, if the infringer just doesn't have money and she's a poor grandmother, she's not going to be able to pay one or another, so I doubt there's going to be a humongous settlement.

The Chair: I suspect we could keep this going, but my time is up.

We'll go to Mr. Scott.

Hon. Andy Scott (Fredericton, Lib.): Thank you very much.

Mr. Chair, you mentioned the job of the chair is the scorekeeper. We obviously have a very ambitious clerk. Get yourself elected.

I think we're creating artificial distinctions between the question of whether there's a broad problem or whether it should be only health and safety or those kinds of things. It occurs to me that these are compounding offences.

Consequently, if you steal somebody's idea, then that's a line of a defence. It's not unusual, I don't think, in law that then there would be other impacts of that act and then it becomes a greater offence. If you steal somebody's intellectual property, if it's theft of somebody else's creation, then that's an offence against whoever created it. If there's damage done by that, then there's an additional victim. Is it unfair to imagine that there's less of a victim if the thing you've stolen has less impact on the purchaser—other than the fraud, which I think has been articulated—than with a health and safety issue, where there's an additional damage?

Conceptually, I'm just trying to figure that out. Isn't that the way it would work—whatever the sanction, forget about what it is—or could work?

• (1715)

Mr. Michael Erdle: It certainly could work that way. In the area of regulated products, electrical, pharmaceuticals, there are violations of the law. Health Canada enforces other regulations. There are certainly avenues there.

But what we're trying to focus on, from the perspective of the Intellectual Property Institute, is that we want to make sure that Canada has good intellectual property laws. So it's the damage to the intellectual property itself, quite apart from any health and safety issues, quite apart from any other consumer fraud, false advertising, whatever, which may also be offences, it's the damage to the intellectual property, the damage to the good will of the company that produces *Spider-Man*, when the pyjamas are defective or any other product; that, from a trademark perspective, is what we care about.

From a copyright perspective, similarly, the rights of the owner are being infringed, quite apart from any other damage to the retailers who can't sell the DVDs because the pirated ones sell for half the price.

Hon. Andy Scott: Those aren't inconsistent. That's what I was trying to get at.

Mr. Michael Erdle: They're not inconsistent, no.

Prof. Michael Geist: But the goal of intellectual property law is not the enforcement of intellectual property law. The goal of intellectual property law is that it serves the broader public interest in saying that copyright at our Supreme Court has articulated a view that it's about both user rights and creator rights and the balance.

What we're really trying to serve here is the public interest. So I don't think our end goal is to say that our intellectual property laws are enforced in the maximum fashion possible. Our goal is to say that the public benefits, our societal benefits, are maximized to the greatest extent possible.

I think we do need to ask ourselves whether or not every infringement is equal in terms of its impact on the public interest in society. My view is that it is not, that there are some kinds of infringements—whether in scope or in a particular area—where that public interest is more deeply affected. Of course, it's in those instances that I think we would quite rightly say that that's where law enforcement, where public resources have to play a role, because the public interest is being deeply affected.

Where it's more private interest and the impact on society or the public interest is less, well, then sure, it's still an infringement, but the gain here isn't saying we're pure enforcement, it's about society and the public interest as a whole.

Hon. Andy Scott: I can see that enforcement would prioritize, but I'm simply saying these aren't inconsistent. Simply, one is a greater offence.

Are we doing enough research? Most of this is new. I think part of the reason we seem slow in dealing with a lot of these things is that we're applying a historical approach to coming up with rules and laws and so on, and the reality is that it's moving faster than our historical approach to dealing with these things allows. Are we doing enough research independently?

There's an e-commerce centre in Fredericton, in my riding. Are we doing enough research there? In the way of recognizing the commercial activity that this really speaks to, it's in Canada's interest to get it right, to understand it, to put these things in place. Are we doing enough of that to aid us, aid the government, aid the country in coming to terms with this?

• (1720)

The Chair: Mr. Erdle.

Mr. Michael Erdle: I don't think it really is new. I think this has been going on since there's been copyright and since there have been trademarks. What is new is some of the technology, the digital technology, that allows people to reproduce vast numbers of products overnight. So a movie can be released on Friday, and thousands of DVDs can be on the street on Saturday morning. That's new. What's also new is globalization and international trade, which allow products to be made very cheaply in other countries and sold here.

Some of those things are new. Those have increased the problem and increased the awareness of the problem. But the problem itself is not new. Ever since the first trademark and first copyright, there has been infringement and some degree of counterfeiting.

The Chair: Thank you.

Do you want to add briefly, Mr. Geist?

Prof. Michael Geist: I would say that I agree with you. I don't think the NRC is focused very heavily on counterfeiting. I would say Canadian academia has been very focused on copyright. So you can find a large number of academics doing independent research on the optimal system of copyright for Canada, and I would say the majority of Canadian academics right now would reject the special 301-type recommendations. On counterfeiting per se, not so much. That's one of the main reasons I started by saying I think this is an area we need to turn our attention to.

The Chair: Thank you.

Mr. Drapeau, briefly.

Mr. Daniel Drapeau: I'm not qualified to speak on the issue of research, but I do want to mention one thing. If the goal of IP is not enforcement, what is IP if one does not enforce it?

The Chair: Thank you.

I have two members left. I have Mr. Carrie and then I have Monsieur Vincent.

Mr. Colin Carrie: Thank you very much, Mr. Chair.

I want to thank you all for a very interesting discussion this afternoon.

As I'm putting this all forward in my mind, I'm thinking about the principles. As my Liberal colleague stated, it's principles in our society. I know that one of the things Canadians believe in, and I believe in, is property rights, which include of course intellectual property rights.

I'm concerned that if we're not doing anything, to what extent are we encouraging illegal behaviour, not only here at home but also overseas. Again, my colleague brought up these sweat shops, that people could be taking advantage of young children, that there could be crime—well, there certainly is crime around this. What should we be doing?

Mr. Drapeau, you hinted at this, but what would you describe as the purpose of IP law?

Mr. Daniel Drapeau: I think there are numerous purposes to IP law. First and foremost, I think the purpose of IP law is to protect and stimulate innovation. It's to grant someone a just reward for having been creative, and thereby encouraging others to be creative also. When I think of what I'm doing on a day-to-day basis and my social value, that's the social value I think I have. I help protect innovations. I think that's IP law.

On another component, it flows from the respect for property.

Mr. Colin Carrie: One of the things we've been arguing about a little bit is where you draw the line. We've heard this is more harmful to society, less harmful to society. How would you suggest the Canadian government handle this? Should we have minimal penalties for this type of crime? Would that serve as a deterrent, in your opinion?

Mr. Daniel Drapeau: The problem I have with the current legislation is that the Copyright Act, for example, is the only act—between the Copyright and the Trade-marks Acts that are applicable in this case—where statutory damages are provided. There's a discretion provided to the court, and the discretion can go as low as \$200 or as high as \$20,000. Because counterfeiting is not seen as the problem it is, the maximum has only been applied once. My suggestion that there be a minimal penalty that is attached to counterfeiting, and that there then be a discretion granted to the court to increase that penalty—depending on the circumstances—I think would be a way of sending a message.

Now, in terms of how one assesses that penalty, there are a number of ways. Currently in the Copyright Act, the statutory damage is between \$200 to \$20,000 per work that is infringed. There could also be a component of an infringer who has a minimal quantity or an infringer who has a much bigger quantity. Another measure, like the

compensatory conventional damages that have been set by the Federal Court, would be at what level of the chain the infringer is located. Is he a street vendor, a retailer, or a manufacturer? Those are options that can be explored.

I don't think we'll have the time today to determine the best option, but there are numerous ways in which this could be done.

● (1725)

The Chair: Mr. Geist has indicated he wants to respond. Then, unfortunately, Mr. Carrie, we're going to have to move on. Is that okay?

Mr. Colin Carrie: Okay.

The Chair: Mr. Geist.

Prof. Michael Geist: Thank you, Mr. Chair.

The issue of minimum penalties for counterfeiting perhaps makes sense in theory, but the problem is that the Copyright Act doesn't distinguish between counterfeiting and pure copyright infringement. The prospect of elevating the minimum penalties could apply equally to the grandmother who had someone use her Wi-Fi to engage in file sharing as it would to a clear case of counterfeiting.

I'd also note that if we're talking about respect for property, that's a two-way street. Consumers are concerned about a lack of respect for the property they've purchased: the DVD that won't play because it's locked down, and the prospect of copyright laws that might further take away their rights to use that; the song they download from an authorized music store like iTunes, or Napster that won't play on their iPod.

So when we're talking about property rights, I think it's important to emphasize that it's a two-way street. In many instances I don't think the industry—in combination with copyright—has shown enough respect for the property that individual Canadians are purchasing.

The Chair: I'm sorry, we're going to have to move on to Monsieur Vincent.

[*Translation*]

Mr. Robert Vincent: My final question is about a topic that still has not been broached, even in previous meetings. Witnesses have told us that defending their counterfeited patents can be extremely costly. They often end up dropping any legal action because of the astronomical costs.

Do you think the legal system could be simplified when there are lawsuits of this type? The timeframes could be shortened and the evidence procedure simplified. Would this be a potential solution, in your opinion?

I understand that there may be legal action and that there are people out there copying our pharmaceuticals, however the legal process, as you are aware, is very lengthy. Maybe a way could be found of shortening the time required for lawsuits in this field. What do you think?

Mr. Daniel Drapeau: You're entirely right. In English, you call that a rocket docket, which basically means a simplified procedure.

You have to understand that we're talking about counterfeit pharmaceuticals here. It is relatively easy to demonstrate whether or not a pharmaceutical is a counterfeit. Sometimes, the indicators are not so much for public consumption, but it is not really that hard to demonstrate that a pharmaceutical product is a fake. So this may be a potential solution in order to simplify the process when it comes to counterfeits. We're not talking about full-blown violations here, but about something that is similar, without being identical.

I'm a little bit concerned about today's testimony. You have before you two gentlemen arguing different points of view, but the problem is that we're not necessarily talking about the same things.

I'm talking about counterfeit pharmaceuticals that are trade-marked; I'm not referring to a grand-mother using Wi-Fi, etc. When you consider the testimony, you should perhaps bear this difference in mind.

Furthermore, if dealing with counterfeiting involves amending legislation, not only the Copyright Act would need to be amended. It would have to be a different piece of legislation which dealt specifically with counterfeiting. This would ensure other areas wouldn't be encroached upon.

Mr. Robert Vincent: Even if you're talking about a brand name counterfeit, these are still products which have been copied. For example, if a bag carries the brand name Cartier, or some other name, you may be dealing with a copycat product which carries the same trademark.

• (1730)

Mr. Daniel Drapeau: That's right.

Mr. Robert Vincent: In those cases, there could be another legal process to verify and confirm that you're dealing with a counterfeit. The case would be examined and quickly settled.

How much do you think it costs to defend a patent?

A company representative from my riding, in Granby, testified before us and told us that his insulating foam had been copied here, in Canada. He dropped the lawsuit because it would have cost him almost \$100,000 to get something concrete. So if we were able to, in a sense, shrink the legal process, it may lead to costs savings.

How much would it cost a company to file a lawsuit these days?

Mr. Daniel Drapeau: Mr. Vincent, you have raised something that is probably the infringement lawyer's dream—the establishment of an infringement tribunal. I think that is an idea we should pursue. The costs of filing a lawsuit, particularly in the area of patents, is very high.

We should not confuse trademarks, copyright and patents. The patent is probably an instrument which does not fall within our discussions today. Infringement applies primarily to trademarks and copyright.

When we come to patents, there could be an identical copy of a patent, but that happens rather rarely. Generally, the copies are similar, and that is where litigation becomes expensive. One has to demonstrate that the idea has truly been copied. I think the figures you put forward are quite accurate. A patent-related lawsuit is very expensive.

[English]

The Chair: Mr. Geist and Mr. Erdle want to respond.

Mr. Michael Erdle: In response to your question, one of the things the Intellectual Property Institute is doing right now is working with the Federal Court to try to streamline some of the processes to make them more effective, to reduce the costs, and to allow people to enforce the patents, in particular. It costs a lot of money and takes a lot of time. We're working with the Federal Court now. One of our former presidents is a judge of the Federal Court and has asked for a group to work with him to streamline the process and make it more effective.

The Chair: We'll go to Mr. Geist, briefly.

Prof. Michael Geist: That's all true, but again, we ought to have some context here. Canadian litigation costs pale in comparison to what our counterparts south of the border, in the United States, would pay for all sorts of litigation, whether counterfeit, patent, or copyright litigation. In fact, it's a cost of doing business there that far exceeds what our companies typically expect. That's not to say we can't do better here, but regarding the extent to which this is a problem, when we compare it to some of our counterparts in other jurisdictions, we're not even close. When you do start talking about costs, that's why cases drive towards settlement in so many instances, because it's too expensive to litigate. So when you have high thresholds, that really does push people in the direction of settlements, sometimes settlements they can ill afford to make.

The Chair: Thank you.

Merci, monsieur Vincent.

We have votes here in about 10 minutes, including on one important bill—mine.

Mr. Thibault asked if I could clarify Anton Piller orders. Mr. Drapeau, I don't know if you can clarify that briefly or if you want to perhaps send a statement to the clerk.

Mr. Daniel Drapeau: I can do both.

Briefly, an Anton Piller order is an order from a court—it can be the Federal Court or a provincial court—ordering someone to let a lawyer go onto the premises and seize evidence to preserve the evidence, pending litigation. It's an evidence preservation mechanism. As you can imagine, it's used a lot in anti-counterfeiting, because you can preserve the counterfeit goods.

The Chair: Monsieur Vincent.

[Translation]

Mr. Robert Vincent: Earlier, you said that since 1987 you had data from the Federal Court indicating how much money had been lost. Could we have those data?

Mr. Daniel Drapeau: That is not quite accurate. In fact, I said that Anton Piller orders had existed in Canada since 1982. Personally, I have been executing seizures since 1997. There are no financial data.

I know that if we look up every order granted by the federal court—orders obliging counterfeiters to have their counterfeit goods seized—we might have all the counterfeit products seized on the Canadian market during a given number of years. That said, finding that information would not be easy.

[*English*]

The Chair: *Merci.*

I want to thank you very much. I'm sorry to rush out like this, but we do have votes. I thought it was an absolutely fascinating session we had today. Thank you very much for your presentations.

If there's anything further you want to pass on to the committee members, please do so through the clerk, and we'd be happy to pass it on. Thank you.

The meeting is adjourned.

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