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Chair

Mr. David Sweet

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• (1535)

[English]

The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)): Ladies and gentlemen, *bonjour à tous*. Welcome to the third meeting of the Standing Committee on Industry, Science and Technology.

Today we have before us Mr. Wayne Edwards, from the Canadian Anti-Counterfeiting Network. From the Canadian Standards Association we have before us Katalin Molnar, manager, global intellectual property protection. From the Intellectual Property Institute of Canada we have Cynthia Rowden, chair, subcommittee on Bill C-8, and past president. We have as a returning guest Dr. Michael Geist, Canada research chair in Internet and e-commerce law, University of Ottawa, and he is representing himself as an individual.

I have some premonition that we may be short of time. I know you've probably prepared remarks that are up to 10 minutes, but if you're able to cut them down a bit so we can get a maximum amount of profitability out of the meeting, that would be great.

We'll begin with Mr. Edwards.

Mr. Wayne Edwards (Chair, Canadian Anti-Counterfeiting Network): Thank you very much, Mr. Sweet.

Thank you, members of the committee, for this opportunity to be here as a witness. I've done this once before. I'm no expert, but I'm not as intimidated as I was the first time. It's good fun.

I represent the Canadian Anti-Counterfeiting Network, and I also made some comments to an association that really pays my salary, and that is EFC, Electro-Federation Canada. We do a lot of work with the CACN and some of the other members around the table.

The Canadian Anti-Counterfeiting Network, CACN, applauds the introduction of Bill C-8 and looks forward to combatting counterfeit products with the help of the act as we go forward.

Our organization represents a coalition of individuals, companies, and associations that have gotten together to fight against product counterfeiting and copyright piracy in Canada and internationally. I'd also add that we do a lot of work through CACN on safety as it relates to counterfeit products that don't make the mark or have not been tested by the Standards Association.

The bill recognizes the need to address the widespread issue of intellectual property theft and it is certainly a good step forward. While CACN supports the legislation, we ask that you consider the following issues raised by our members in consideration of the

content of the proposed bill. We would like to make some recommendations in that area. Again, I think you'd be surprised if we didn't have any comments. Some of you may have seen these.

Enforcement at the border is the first concern. Are there enough officers available to actually carry out the activities that are proposed in the bill?

We are concerned that the proposed border provisions will not provide an effective means for stopping counterfeit products at the border. While the provisions provide for ex officio detention and the means to confirm the counterfeit nature of suspected goods to CBSA, no provisions are provided for ex officio seizure or forfeiture of the counterfeit goods. Further, the provisions dealing with requests for assistance by rights holders provide for seizure and forfeiture only through civil court proceedings commenced by the rights holders, and we see some issues with that.

It appears that what is contemplated by the provisions is that, to the extent that a request for assistance has been made and the rights holder does not commence proceedings within a short period of time, the goods will be released to the importer or owner. To the extent that no request for assistance has been made in respect of goods, it appears that, by the workings of the Customs Act, importers will be given the option of exporting or abandoning goods confirmed to be counterfeit.

This raises the spectre that confirmed counterfeit goods are being released, or would be released into the Canadian market for export or for use in the Canadian marketplace. This is a clear breach of the prohibitions and of the criminal provisions.

The problem could be alleviated to some extent by providing a mechanism for ex officio seizure and forfeiture by providing alternate procedures contemplating forfeiture if the counterfeit nature of detained goods is not contested, such as those contemplated in article 11 of the World Customs Organization model provisions. This is to say, there is an awful lot of work that would have to be done by the rights holder if he needed to get involved. If his product is being imported into Canada and happens to be suspect, it seems the rights holder would have to do an inordinate amount of work, and he's the one being injured by this.

Some work would need to be done in that area to alleviate or at least help the rights holders achieve their goal, to stop the importation of counterfeit goods.

Increased enforcement is the next item that we would like to draw your attention to. While the bill empowers Canadian customs officers more than before, we are concerned that resources may be insufficient to allow for effective enforcement at the border.

As it currently stands, only a small percentage of the imports are inspected. Without training, the border officers are on their own to identify what might be an inappropriate product coming into the country.

At CACN, we spend some time training border officers and we work with the RCMP to train them as well. We work with our manufacturing members to try to identify authentic goods, what they should look like and what a suspect product may look like.

We draw particular attention to safety. I have some examples that we can deal with during the question period. Safety is a big concern. We want to make sure that the consumers in Canada receive goods that are not going to harm them or injure their children or burn their homes down. We spend a lot of time in that area.

Liability for charges would be the next item. Under proposed subsection 44.07 (1), the rights holder is responsible for costs associated with the storage, handling, and destruction of detained goods. This is a bit of an imposition placed on the rights holders who are being injured. We would ask, where are the perpetrators? They seem to be getting off scot-free in that kind of an assessment.

Often there are a lot of costs associated with the destruction of product, particularly if they are deemed to be hazardous goods, like mercury-containing lamps, for example. If they happen to be off-spec, or batteries. There's a fair amount of work that has to be done to handle those products effectively and make sure they don't get into the marketplace.

We suggest amending the provisions dealing with costs of detention and destruction to put primary responsibility on the perpetrators of the crime, instead of on the rights holders.

Offences and punishment would be the next item. Proposed subsection 51.01 (1) deals with situations where they know not only that the goods are counterfeit, but also that the acts of sale or distribution they are undertaking would be contrary to section 19 or 20.

One would have to ask whether counterfeiters would care, or even know. They certainly wouldn't go out of their way to find out and would probably use that to their own advantage. If they were questioned, they would say they didn't know it was illegal. That's an area that would need to be looked at well.

I'm sure some others in the group will speak more closely to the Trade-marks Act. That will be discussed at the table here.

A broader spectrum of options would be required. Under the legislation, in order for the rights holders to ensure that goods are detained for more than 10 days (or five days if the goods are perishable), they are required to prove that they've commenced a court proceeding to obtain a remedy under the act. We recommend that a broader spectrum of options be available to those rights holders who either cannot file in time or may not have adequate funds to immediately begin litigation. We would need to have a look at that.

Simplified procedures would be welcomed. That leads back to the rights holders commencing action. This needs to be considered. Too much is asked of the rights holders in order to take action on counterfeit goods.

I'd be pleased to answer questions later and give you some examples.

● (1540)

The Chair: Thank you very much, Mr. Edwards. Now on to Ms. Molnar, whom I'll ask to be brief as possible.

Ms. Katalin Molnar (Manager, Global Intellectual Property Protection, Canadian Standards Association): Honourable committee members, Mr. Chairman, thank you for this opportunity to appear before you today on behalf of the Canadian Standards Association, now operating as CSA Group. I have been employed in IP protection now for over eight years. Prior to my work with CSA Group, I was the national anti-piracy coordinator for the Canadian Recording Industry Association, now known as Music Canada.

I am here to present on behalf of CSA Group to give you a picture of how counterfeiting affects our organization.

CSA Group is a not-for-profit association dedicated to safety and social good. As a certification body, CSA Group tests and certifies products in fields such as hazardous and industrial locations, plumbing, construction, medical devices, safety, appliances, and gas. The CSA Group certification mark appears on billions of products worldwide, and 88,000 clients use us for our certification services.

Intellectual property law and enforcement is very important to CSA Group. Its proprietary trademarks and certification marks are among the most valuable assets to our company. When products bearing counterfeit CSA Group marks appear in the marketplace, it puts public safety at risk and poses a very real threat to the acceptance of legitimate marks.

Numerous Canadian regulations require certain electrical, gas, and plumbing products to be certified by a certification body, much like CSA. These regulations have been put in place to protect the public. Products bearing counterfeit certification marks have not been put through the certification process. This means that no samples have been tested to meet the minimum requirements, and no audits have been performed on the manufacturer. Regulators rely on the CSA Group certification mark. As a result, products bearing counterfeit certification marks undermine the entire Canadian system of standards, testing, certification, and regulation.

I have provided some examples here if you have any of the handouts, but I thought I would cover some of CSA Group's most recent experiences involving products that bear counterfeit CSA marks. We find they're most often imported into Canada rather than manufactured here, and so as a result we recommend that the government provide customs officials with the express authority to target, detain, seize, and destroy counterfeit goods.

Like most private industry, CSA Group does not report its anti-counterfeiting statistics to any third parties. Our efforts are managed internally, and there is no reporting requirement mandate. The counterfeiting problem reflected in RCMP statistics, let's say, provides only a glimpse into the counterfeit problem here in Canada. Accordingly, we recommend the government adopt a recordation system whereby IP rights holders may record their rights with the CBSA.

Covered in the handout of photos I've included a wide range of potentially hazardous products that have been found recently bearing counterfeit CSA certification marks.

The first one is circuit breakers bearing counterfeit certification marks and brand names that were found in a hospital in Quebec supplying power to life support equipment. You can find this in your information package under photograph one.

• (1545)

Mr. Mark Warawa (Langley, CPC): I have a point of order. Maybe the presenter can pause for a moment so we can find that handout. It would be nice to follow along.

The Chair: Are there just pictures or are there captions under it?

Ms. Katalin Molnar: Just pictures, but the pictures are self-evident. There are words on only one photo.

Mr. Brian Jean (Fort McMurray—Athabasca, CPC): They're only in English.

The Chair: I'm sorry we won't be able to distribute them. They need to be in both official languages, so we'll have to go without these.

Mr. Warawa.

Mr. Mark Warawa: I believe if you sought unanimous consent the pictures could be passed out.

The Chair: I don't think there's consent, Mr. Warawa. I think we've been very stringent in this regard.

Yes, Madam Gallant.

Mrs. Cheryl Gallant (Renfrew—Nipissing—Pembroke, CPC): Thank you, Mr. Chairman.

I understand that under the routine proceedings they cannot be distributed, but that members can pick one up from the witness if we wish to. Would you mind if we did that?

Ms. Chris Charlton (Hamilton Mountain, NDP): There's only one copy.

The Chair: Perhaps you can take a look on our way out. That way it might be good and we'll listen to the text of the opening remarks.

I want to make sure that both official languages are respected to the utmost degree. Any kind of passing them around is akin to distribution.

Yes, Mr. Jean.

Mr. Brian Jean: I was only going to say my French is not very good but I think I could translate photograph into "photograph" if they like, because my understanding, from what I saw, is that's the only word that's not in French. That word is "photograph".

Ms. Chris Charlton: I wonder whether we could continue with the presentation because I'm cognizant of us losing time.

• (1550)

Ms. Katalin Molnar: My apologies. I had made five copies but I didn't realize I needed to send them ahead of time.

The Chair: Go ahead.

Ms. Katalin Molnar: The second photo details counterfeit CSA Group certification marks that have been found on thousands of medicine vials that were being passed off as child resistant with no testing whatsoever.

The third photo details hundreds of industrial welders bearing counterfeit CSA certification marks. They were built using substandard materials and exhibiting compromised electrical spacing, both of which are potential shock and fire hazards.

The fourth picture indicates thousands of Christmas lights that were removed from the shelves of a national retailer. This product was imported with counterfeit components as well as counterfeit CSA Group certification labels that could have resulted in endangerment to the public.

The fifth picture is counterfeit CSA Group certification marks that were found on electric fireplaces at a medium-sized retailer in Manitoba, Saskatchewan and in Ontario. The fireplaces were not manufactured to the appropriate standards, failed testing in our laboratories, and put Canadian consumers at risk.

The sixth picture shows safety footwear bearing counterfeit certification marks that have been found to offer substandard toe protection. These shoes were also deficient in dielectric protection, creating a potential shock hazard.

I have come to the end of the photographs.

Some statistics on counterfeiting: in 2012, CSA Group investigated 214 incidents of CSA Group's intellectual property being infringed.

In 2012, U.S. border protection services seized approximately \$156 million worth of counterfeit product. Electrical equipment alone accounted for over \$23 million worth and CSA Group was notified that electrical equipment from those seizures did bear counterfeit CSA certification marks. These numbers are based on statistics from the United States Department of Homeland Security.

In 2011, U.S. border protection services seized approximately \$10 million worth of consumer electronic products bearing counterfeit CSA Group certification marks in merely a three-month period.

CSA has been contacted by the Canada Border Services Agency for suspected counterfeit CSA marks on only one occasion in the past four years.

The government can play a role in improving the system to combat counterfeiting. As I have explained, the proliferation of products bearing counterfeit CSA certification marks can enable unsafe or otherwise deficient products to gain widespread access to the Canadian market. This reality places the public at direct risk of exposure to unsafe products that may result in serious injury or death.

I thank you for your attention today.

The Chair: Thank you very much, Madam Molnar.

Now on to Ms. Rowden.

Ms. Cynthia Rowden (Chair, Sub-committee on Bill C-8, Past President, Intellectual Property Institute of Canada): Good afternoon.

[*Translation*]

Good afternoon. I am pleased to be here today on behalf of the Intellectual Property Institute of Canada, the IPIC. Thank you for having invited us.

[*English*]

We are honoured to appear here today to give comments on Bill C-8.

IPIC is the association of intellectual property law professionals in Canada. We have over 1,700 members across the country in law firms and agencies and in business, government, and educational institutions. Our members' clients include virtually all Canadian businesses, universities, and other institutions with an interest in intellectual property, and foreign companies that hold IP rights in Canada.

IPIC is very pleased to see proposed amendments to the Copyright Act and Trade-marks Act to both improve counterfeiting and infringement remedies and make other updates to the Trade-marks Act. However, we are concerned that the bill will not greatly simplify procedures for IP owners, and it also includes many new provisions that may take years of judicial interpretation to clearly understand. I'm here today to make some suggestions for changes that we believe will improve the bill.

Since my time is very limited I thought I would list the eight changes that IPIC feels are key to amendments.

First, amend the request for assistance from customs authorities to provide for a more simplified procedure when there is little doubt that the goods being seized are actual counterfeits.

Second, do not exclude goods in transit through Canada from border controls.

Third, change the trademark criminal sanction language to focus on knowingly using another person's mark.

Fourth, add statutory damages for trademark infringement.

The other changes do not deal with counterfeiting, but instead deal with other amendments to the Trade-marks Act, which are very important for those who deal with applications and registrations of marks. Those four changes are as follows.

Fifth, for the new signs that are proposed, clarify how they will be used as well as the meaning of terms that will impact the registration of those new signs as trademarks.

Sixth, add filing grounds to the list of information required to get a trademark filing date. I'll explain that filing dates are very important.

Seventh, delay destruction of trademark registration records and trademark application records in the trademarks office until there are electronic copies.

And eighth, give the trademarks office more discretion to correct its own mistakes.

A key function of the bill is to set up a system whereby IP owners, owners of copyright and registered trademarks, may request assistance from customs authorities by recording their copyright and registered trademarks. It applies only to registered trademark owners. Many counterfeited marks that are found by border control agencies are not already registered. Registration takes a long time. We'd like to see the bill amended to cover trademarks per se.

The bill also provides for detention of goods following an initial notification to the IP owner, but only if the IP owner starts a court action. As anybody who's ever been involved in litigation knows, it's time-consuming and expensive, and it can take a long time to get to a final resolution. Meanwhile, as my friend Mr. Edwards mentioned, the IP owner is paying for goods to remain in detention.

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

The bill excludes goods that are in transit from another country through Canada to another country. IPIC members see no reason to permit known or likely counterfeit goods that are passing through to be excluded. To do so damages Canada's image and can lead to goods being reintroduced through less-controlled ports of entry.

The bill creates criminal sanctions for trademark infringement. IPIC welcomes these provisions but is concerned that the language of the bill will both discourage the crown from proceeding and deter successful convictions.

If you will permit me, I'd like to refer you to the language in the bill, which states that a person commits an offence—I'll just paraphrase—if that person knows that a trademark is registered for certain goods and that the sale or distribution of the goods in association with the trademark would be contrary to sections 19 or 20 of the Trade-marks Act.

• (1555)

I can pretty well assure you that most criminals don't know or care whether trademarks are already registered, nor do they know what sections 19 and 20 of the Trade-marks Act mean. Instead, we would like to see a company or a person who knowingly uses a trademark improperly to find themselves liable to criminal sanctions.

The Trade-marks Act does not now include provisions permitting a court to order damages based on a statutory range. Any successful plaintiff in a trademark infringement action must either wait for the court to award damages or prove it has lost profits.

Proving lost profits is time-consuming and expensive. The Copyright Act has a provision for statutory damages and provides a predictable range of damages. We feel that system would greatly benefit trademark owners and other applicants to court systems.

The next set of comments do not apply to the counterfeiting or infringement provisions of the bill. They actually apply to what I do in my day-to-day practice—that is, help Canadian and other companies select a trademark, figure out how they're going to use the trademark, determine whether or not they can get a registration for their trademark, and enforce their trademark rights.

Currently the Trade-marks Act permits words, designs, symbols, and some shapes to be registered. For example, McCain is a Canadian company. The McCain trademark is well known. One of their brands is Smiles. The shape of these little smiley potatoes is protected as a “distinguishing guise” trademark. For the record, it took seven years to get that trademark registered.

The bill will add to the possibility of registrations for such new signs as smells, taste, and texture. However, to register trademarks right now, an owner has to use them.

The bill doesn't give any guidelines on how purchasers will use a smell when they decide how to purchase a product. Usually trademarks have to be displayed to consumers at the time they purchase their goods and services.

How is a taste going to be used? Certainly we don't want everybody tasting something before they make a selection on whether or not to buy a product. Yet the bill doesn't provide any examples of what will be “use” for those particular types of trademarks. Those terms are really important.

In addition, the bill prevents registration of trademarks that are not “inherently distinctive” or have “utilitarian function”. Those terms are really important, because they determine whether or not a trademark could be registered.

Registration is really important, because it gives the owner exclusive rights to use that trademark for those particular goods and services across the country. If we don't know what “utilitarian function” means, or what “inherently distinctive” means, we will not be able to advise our clients carefully, and that will be difficult. It will lead to uncertainty. I'm sure it will lead to lots of litigation, which is great for lawyers like me but not so good for my clients.

The bill adds a new section clarifying when an applicant for trademark registration will get a filing date. Dates are really important in the Trade-marks Act. It's a really picky act, and priority between various parties is determined by a variety of different dates. To get a filing date right now, an application has to be filed that sets out certain information, including the grounds on which the applicant is filing: use, proposed use, or use and registration somewhere else.

The bill provides for a filing date to be set by certain defined information. It does not include whether or not the filing grounds have been included in the application.

Someone else looking at that who doesn't see the filing grounds will not be able to determine if that mark will block their mark. That's important to know. When I'm advising my clients, I need to know that as soon as possible. The longer I wait, the less my client knows about whether or not they can select a mark. Delay can often mean changes in business. Having that information as part of the filing grounds is important.

I have two final points.

First, the bill permits the trademarks office to destroy certain documents and files after six years. As a trademark practitioner, I use those documents to advise my clients on whether or not their marks will be registered, what position the trademarks office has taken in the past, and what position other companies may have taken in the past. Having access to that information is very important. There is an electronic option for storing those documents. IPIC would like to see no destruction until electronic options are available.

Finally, the bill permits the registrar to correct certain errors in its registration. Occasionally the trademarks office makes a mistake. They will leave things out of a registration.

● (1600)

As I mentioned, the registration sets the rights of the party and it's therefore important for it to be right. We would like to see more discretion to permit the registrar to correct those mistakes for a longer period of time.

Thank you. I hope that if you have any questions you'll direct them to me later.

The Chair: Thank you very much, Ms. Rowden.

Now on to Dr. Geist.

Dr. Michael Geist (Canada Research Chair, Internet and E-commerce Law, University of Ottawa, As an Individual): Thank you, Mr. Chair.

Good afternoon. I am a law professor at the University of Ottawa, where I hold the Canada Research Chair in Internet and E-commerce Law. I have appeared before this committee on a number of occasions and as in past occasions I appear here in a personal capacity representing only my own views.

I appreciate the opportunity to speak to you about Bill C-8. While the panel may disagree on certain elements of the legislation, I am sure that all agree that where harmful counterfeiting occurs—particularly involving health and safety—the law should provide all concerned with the legal tools necessary to address the problem. Indeed, we should not forget that the existing law in Canada is regularly used to conduct anti-counterfeiting raids and seizures, that border officials—as you heard on Monday—work with the RCMP and Health Canada on health and safety issues through their MOUs, and that the courts in Canada have awarded increasingly significant penalties in counterfeiting cases.

That said, context within a discussion on counterfeiting is important. It's easy, and rather scary as we just saw, to point to the obvious health and safety issues and, based on that, conclude that any available legal remedy should be adopted in response. Yet I'd argue that it's important to recognize that the scope of the problem remains subject to considerable debate, but even more, some proposed solutions may have unintended consequences that are themselves harmful and should be avoided. Moreover, given Minister Moore's insistence on Monday that the bill is about protecting intellectual property on an international scale, the international context, including the Anti-Counterfeiting Trade Agreement and the proposed trade agreement between Canada and the EU, merits some discussion as well.

Given that need for context, I'll actually shorten my remarks a bit by focusing on two main issues, first highlighting some of those unintended consequences, particularly those that could arise from some of the proposals for amendment that you just heard, and secondly, briefly discuss the international context of ACTA and CETA.

I should add that I won't be discussing the myriad of trademark reforms in the bill, some of which we just heard about, but I frankly think those are out of place in a counterfeiting bill. If the intent was to introduce an omnibus-style intellectual property bill, it should also deal with other live issues, including access to the blind that was the subject of a new international treaty that Canada actively participated in and was agreed to in June of this year, as well as reform of the Copyright Board of Canada that stakeholders on virtually all sides are increasingly calling for.

Let me focus though, as I suggested, on the potential unintended consequences of Bill C-8. I'll start by noting that the exception for individual travellers, the exclusion of patents and in-transit shipments, and the attempt to avoid application to grey market goods—some of the parallel import issues—I think are positive policy choices designed to ensure that the bill targets bad actors and doesn't allow border seizures to raise consumer costs. That said, there are some real concerns about potential unintended consequences, and I wish to highlight four.

First, as you know, the bill vests enormous power in the hands of customs officials, who are not copyright and trademark experts but will now be forced to assess infringement cases, including determining whether any copyright exceptions apply. The bill opens the door to detention of works if created without the consent of the copyright owner and the infringed copyright. Yet there are many works that are in fact created without consent of the owner, but rely upon exceptions such as fair dealing to do so, and are perfectly lawful. That often results in disputes over whether in fact the works infringe, an issue that is frankly best left to the courts and which even the courts often fight over. With this bill, though, it's now customs officials who are asked to make the determination and send the works to the copyright owner to consider whether they think it infringes copyright.

Some have claimed that the powers in this bill are consistent with international standards, yet the reality is that there are a number of countries—including allies such as Australia and Mexico—that do not have the ex officio powers envisioned by this bill in their laws. Using the courts for oversight is still viewed as a workable,

legitimate approach to dealing with counterfeiting. As I mentioned, you heard on Monday how the CBSA works with the RCMP and Health Canada on the safety and security concerns. To vest this kind of power in non-expert customs officials, and to go even further as you've just heard, could lead to unintended consequences.

You have heard only today that some want this legislation to go further, including cost-shifting enforcement to the public, ignoring the costs that are borne by small businesses that import goods and could get caught up in the seizures. In fact, even today others have called for even more expansive powers for customs officials, including destruction or forfeiture of goods without court oversight. In my respectful view, these proposals are enormously problematic and would alter the attempt at balance in the bill by removing both important safeguards, shifting private enforcement costs to the taxpayer, and ultimately raising consumer costs.

● (1605)

Further, detention of goods can be used to harm small Canadian businesses that could find the goods they are seeking to import detained, oftentimes by competitors. The absence of a misuse provision in this bill is particularly notable in this regard.

Second, the bill does include an exception for personal travellers. However, the bill is oddly drafted by speaking of “works” rather than “goods”. Both the Anti-Counterfeiting Trade Agreement and leaked drafts of the Trans-Pacific Partnership focus on physical goods. By focusing on works, it could also cover things like iPod and laptop searches. In fact, if the exception were removed—and there have been some proposals that the exception could be removed—it could lead to escalated searches of iPods, smartphones, and other electronic devices, on personal travellers when they come across Canadian borders.

Third, there are groups, as we just heard, that are arguing for expanded penalties. The bill already moves copyright and trademark into the world of criminal provisions in a manner that extends far beyond what we've had in conventional IP law. Further, some are looking, and we just heard this, for statutory damages for trademark infringement. With respect, statutory damages for trademark are unnecessary. Rights holders frequently cite the value of their goods and the harms associated with counterfeiting. If the claims are accurate, demonstrating the value for the purpose of a damage award should not be difficult. Moreover, other countries that have moved in this area have run into serious problems. For example, Taiwan actually scaled back their statutory damages for trademarks when they found courts awarding disproportionate awards. In the United States, the use of statutory damages for trademarks has led to what is known as trademark trolls, similar to patent trolling. We would engage in litigation primarily designed to obtain costly settlements against small businesses that can often ill afford to fight in court.

Fourth, as you again just heard in some of the debates on what was then Bill C-56, there has been the prospect of removing targeting in-transit shipments. I'd argue that the bill wisely excludes in-transit shipments, and, with respect, a removal of that would be a mistake. The seizure of generic pharmaceuticals in transit would pose a threat to international trade, development, and public welfare. Experience with such seizures in the European Union led, in 2010, to both India and Brazil filing complaints with the World Trade Organization. They highlighted several incidents of consignments of generic medicines that were being transited via the European Union and being detained there.

In fact, Doctors Without Borders reported that in 2008 and 2009 there were at least 19 shipments of generic meds from India headed for other countries that were impounded while in transit in Europe. In one instance, German customs authorities wrongfully seized a drug shipment of amoxicillin, on suspicion that it infringed the brand name Amoxil. The cargo was detained for four weeks during investigation and ultimately revealed there was no trademark infringement. In another instance, Dutch customs authorities seized a shipment of AIDS drugs that were en route from India to a Clinton Foundation project in Nigeria.

In 2011, the Court of Justice of the European Union ruled against in-transit seizures on the grounds that there was no infringement in the EU. A similar approach to exclude in-transit seizures is appropriate here, and any arguments that it should be removed, I believe, should be rejected.

Finally, from an international context perspective, notwithstanding some claims that this legislation is responding primarily to domestic concerns, much of the pressure comes from outside the country. Ms. Sgro asked about the Anti-Counterfeiting Trade Agreement, on Monday. In fact, the United States has not yet ratified ACTA. The only country to have done so is Japan. The vast majority of signatories to ACTA, the entire European Union—all their member states—as well as Switzerland, are out. They have rejected the Anti-Counterfeiting Trade Agreement through their votes at the European Parliament. There are doubts that ACTA will ever take effect, as it may not even receive the requisite number of ratifications to take effect. Frankly, even if it does, it now stands as damaged goods and a far cry from the relevant international standard that some had hoped. It elicited an enormous public backlash, and Canada would do well to move on.

Perhaps even more relevant is CETA, which apparently contains border provisions consistent with Bill C-8. The problem, as many will know, is that the government has not yet released the CETA text, so there is no way of knowing precisely what is required under that treaty and whether there is room for change under this bill. It is perhaps consistent, but without the text we can't know if alterations to the bill might still fall within treaty requirements.

Finally, there is also the possibility, indeed, some say the likelihood, of border measures provisions in the Trans-Pacific Partnership, which is also still under negotiation.

●(1610)

The net effect of these international pressures—and with this I'll conclude—is, I would argue, that Canada would do well to pause for the moment until these international treaties are concluded and our

obligations with regard to these kinds of border measure provisions are better understood.

I'll stop there, and I would welcome your questions.

The Chair: I'll see what we can do. In fairness, I'll go to the Conservative Party first, but please keep your preamble to 30 seconds and ask one question.

Please keep your answer brief.

Then I'll go to the NDP.

Mr. Phil McColeman (Brant, CPC): To clarify, Mr. Chair, is that one question per member?

The Chair: Yes.

Mr. Phil McColeman: Thank you, Mr. Chair.

I had more than one question, but thank you first of all to the witnesses for being here, and thank you for your suggestions for amendments. I know that many amendments have been proposed by your organizations for the consideration of the minister in the final drafting, and we appreciate that.

Mr. Edwards, because you seem to represent a broad group of organizations, I'd like to ask you what the major impacts of counterfeiting and piracy are, from your experience and your electoral experience, but also for the broader group that you represent here today.

Mr. Wayne Edwards: The one that comes to mind is the safety aspect. CSA indicated here the need for breakers. Having breakers in an electrical system is the key link between the system running well and an overload situation, in which the breaker should clear the fault. If it doesn't, you have a fire or electrocution.

From our perspective, the safety problem is probably the most significant issue to avoid, by trying to prevent counterfeit products from coming in.

●(1615)

The Chair: Ms. Charlton.

Ms. Chris Charlton: Thank you very much, Chair,

Thank you all for coming before us. I would love to have a forum in which Ms. Rowden and Mr. Geist could debate their perspectives at greater length. Unfortunately we don't have that.

A common theme in some of the comments is around the resourcing of CBSA to enforce this law. Frankly, without enforcement it doesn't mean anything.

Mr. Edwards, you talked about inadequate resourcing and the need for extra training.

You, Ms. Rowden, said that we need to assign more responsibilities to CBSA around goods in transit. Leaving aside the fact that Mr. Geist has a different perspective on that, with budget cuts of \$143 million to CBSA last year, how are we adding more responsibilities without expanding the budget? And if we don't, does this bill actually mean anything?

Mr. Wayne Edwards: Is that question directed to me? I think the bill, with some of the amendments we have suggested, would probably go a long way to help prevent and stop the products from coming across the border.

CACN is a not-for-profit organization. We're volunteers in it; we have very little funding. One of the things we like to pride ourselves on is that we try to train Canada Border Services Agency people and RCMP and other police forces. We have spent a bit of time on that.

But I'm continually frustrated by the fact that it's like a drop in the bucket. If we go to the Niagara Falls border and train 50 border guards, as we did last year, and then come back in three months, 50% of them have gone on to other jobs, and we start over again. It's very difficult to maintain a level of understanding of what products look like.

They need some help on their side, and we're willing to help them, but we don't have funding either.

The Chair: Thank you very much.

Again, we'll have another brief question.

Mrs. Cheryl Gallant: Dr. Geist, you made reference to parallel imports, which are not counterfeit product and may be targeted. Would you please explain what you mean by that? Give an example.

Dr. Michael Geist: The concern would arise when you have something that is legally made or licensed in one jurisdiction and someone tries to license a similar or the same product in multiple places.

We had a major Supreme Court of Canada case at one time, believe it or not, over chocolate, which was licensed for sale in Europe, and then similar chocolate, namely Toblerone, was licensed for sale here.

These are perfectly legitimate goods, except that the rights holder may have assigned the rights to sell that product in Canada to a different person from the one who may be selling it, let's say, in Europe.

When these same products come across the border, they are legitimate products and can in fact have the effect of reducing consumer costs, and so we come close to what the government has talked about, without having a differentiation whereby Canadians often feel that they are paying more than consumers, let's say, in the United States or elsewhere.

The danger is, we need to ensure within this legislation those kinds of imports don't get caught up, because they are not counterfeit, even though rights holders may not be particularly happy about seeing that legitimate product being sold here in Canada. It's actually good for consumers when they can engage in that, so that Canadians don't face the higher price tag that can sometimes occur.

Mrs. Cheryl Gallant: Thank you.

The Chair: Ms. Sgro.

Hon. Judy Sgro (York West, Lib.): Professor Geist, in your opening comments you spoke of health and safety, and of the value of the existing statutes and case law. You also spoke of the danger, of course, of unintended consequences. So with all of this in mind, would you please tell me briefly what you think of Bill C-8? Will it have unintended consequences, specifically for the generics industry?

Dr. Michael Geist: I think that the government has tried to craft certain things with the intention of trying to exclude some of that, although I know that you raised some concerns on some of the changes to the trademark definitions around distinctiveness. I think there are legitimate concerns on that.

I haven't been able to track claims that there are large numbers of cases that would bear out this change. I don't think that's the case.

My concern, particularly for generics and the distribution of generics, comes out of the in-transit issue. This is not speculation. In fact, I would argue it's not even unintended consequence. We know, based on the experience in other jurisdictions where you have the ability to target in-transit shipments, generic goods may well be swept up in that and the ability to see them shipped to the patients and people who need them most may be impeded.

The Chair: Thank you very much, Mr. Geist. So far so good.

Mr. Warawa, a brief question.

Mr. Mark Warawa: To CSA, what certification bodies are there in Canada? There is CSA and UL. Are there others?

• (1620)

Ms. Katalin Molnar: There is ETL and Intertek. They're the top three.

Mr. Mark Warawa: If an electronic product with a brand name came in and it was suspected that it was a counterfeit and possibly dangerous item, and it was seized, it was detained, where does CSA come in to the equation, if it had a counterfeit CSA mark? Is it the rights holder or CSA that would get involved, or both?

Ms. Katalin Molnar: It would be both. Most often, because the brand owner is our client, we hold sort of the liability to ensure that we are protecting our brand, and so we would work together in that situation.

Are you asking at present or how it would be in the future?

Mr. Mark Warawa: At present.

The Chair: That would be three questions.

Voices: Oh, oh!

The Chair: I'm going to have to...that was enough of a squeak that it's damaging my integrity already.

Okay, as brief as possible.

Mr. Glenn Thibeault (Sudbury, NDP): I'll be as brief as possible.

So my colleague Ms. Charlton talked about how CBSA right now is under-resourced. We've heard it from all of you that we need to provide more training. They need more skills. Ms. Rowden, in relation to your statement on trans-shipments, since CBSA resources are already stretched over many competing priorities and we're going to be seeing more and more of these coming with this bill, it seems that paying for enforcement on goods that neither originate from nor are destined for Canada will come with a hefty price tag.

Why should Canada pay for this kind of enforcement?

The Chair: Twenty seconds.

Ms. Cynthia Rowden: The bill is not designed to have CBSA enforce it. CBSA will simply review and look for counterfeiting. If they're well trained and they identify counterfeits coming in, then it

shouldn't matter to them if they identify counterfeits that are destined to stay here or counterfeits that are moving on through. In both cases they could advise the rights owner and the rights owner can decide what to do.

The Chair: Thank you very much, Madam Rowden.

Witnesses, would you kindly be available for recall? It will be up to the committee to make that decision at a later time.

Buses have been ordered, members.

Thank you very much. I give you my regrets. This is democracy in action, but we appreciate your testimony.

The meeting is adjourned.

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