

Testimony of

Mr Richard Willard

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Statement of Richard K. Willard
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"Counterfeiting and Theft of Tangible Intellectual Property:
Challenges and Solutions"

before the
Committee on the Judiciary
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Mr. Chairman and Members of the Committee, my name is Richard Willard, and I am the Senior Vice President and General Counsel of The Gillette Company. Gillette is a large, publicly held consumer product company based in Boston. The company manufactures and markets a broad range of products for shaving, personal care, and oral care, as well as alkaline batteries and small household appliances. Our brands include MACH3, Venus, Right Guard, Oral-B, Duracell, and Braun.

Gillette's Chairman and CEO, James M. Kilts, also serves as Chairman of the Board of the Grocery Manufacturers Association (GMA). GMA is the world's largest association of food, beverage, and consumer product companies with combined U.S. sales of more than \$460 billion.

I am here today on behalf of Gillette and GMA. In addition, I chair a working group on anti-counterfeiting at the National Association of Manufacturers (NAM). My company also participates in the U.S. Chamber of Commerce and the International Anti-Counterfeiting Coalition, each of which is represented by its own witness at today's hearing

I am delighted to have the opportunity to testify before you on an issue of intense concern to Gillette and to U.S. manufacturers nationwide - the counterfeiting of our products. Today I would like to focus my comments on three problems: the increasing scope and danger of counterfeiting, the legal barriers to punishing offenders here in the United States, and the lack of adequate enforcement abroad.

Counterfeiting is a Devastating Global Problem

Counterfeiting, both domestically and internationally, adversely affects all businesses with successful brands - from automakers to pharmaceutical companies. While corporations that sell well-known, branded products are the obvious and direct victims of counterfeiting, this illicit activity also poses a real threat to the livelihoods and lives of workers and consumers, though many may not realize it.

When the average American thinks about counterfeit goods, he or she may think of phony Rolex watches, fake high-fashion handbags, or cheap knock-offs of designer T-shirts. The purchasers of these items usually know the products are not originals, so they may readily conclude that buying a fake is no big deal, no harm done. What many consumers do not realize, however, is that this benign and somewhat limited picture of counterfeiting could not be farther from the truth. Counterfeiting is far more pervasive and dangerous than street vendors selling fake luxury

items. In fact, only a minute portion of counterfeit goods are luxury items; most product counterfeiting has a far more immediate, and sometimes devastating, impact.

I can illustrate the far-reaching, and very real, effects of counterfeiting with the two small packages of batteries that I am holding. Both are labeled Duracell?. I can tell you a lot about the package in my right hand. I know exactly where and when it was made, its chemical composition, and how well it will perform. I can also tell you how much Gillette and the retailer can expect to make from selling it and how much the government will receive in tax on its sale.

I cannot, however, tell you much about the package in my left hand, because it is a counterfeit. All I can tell you is that the consumer will get a product for half the price that works about one-tenth as well as the real thing, and Gillette, its shareholders and employees, the retailer, and the government will get nothing. And the public stands to lose even more: Consider for a moment the consequences should the counterfeit batteries wind up in firefighters' flashlights and fail during a major rescue operation? The counterfeiter, a criminal, is the only one who stands to gain.

My battery example involves just one package of one product at one company. The magnitude of the problem at Gillette alone is staggering. Our lawyers are working alongside law enforcement agencies worldwide to identify and arrest counterfeiters. Recently in China, over the span of one week, we seized more than 1.5 million fake Gillette products that were destined for France, Russia, South America, the Middle East, and English-speaking nations. In one province, we seized a substantial amount of fake packaging for several of our products. In another, we recovered 100,000 counterfeit razor blades, 400,000 fake disposable razors, more than one million counterfeit Duracell batteries, and 40,000 fake Oral-B toothbrushes. Again, all of this is in just one week, in just two Chinese provinces, and involving just Gillette's products. Imagine how much bigger the problem is for all U.S. manufacturers and for manufacturers around the world.

To put the enormity of the problem in financial terms, the U.S. Customs Service estimates that counterfeiting activity costs the U.S. more than \$200 billion annually and has resulted in the loss of 750,000 American jobs. Recently, the FTC stated that eradicating counterfeit auto parts could create 200,000 new jobs in the U.S. auto industry alone. The International Chamber of Commerce estimates that counterfeiting drains more than \$350 billion each year from the world's economy - this is 7 to 9 percent of total world trade. And each dollar lost to law-abiding, hard-working American citizens and companies winds up lining the pockets of criminals.

Counterfeiting frequently is part of a larger criminal enterprise involving the theft of legitimate goods. Criminals responsible for distributing counterfeit goods are also often the ringleaders of organized retail theft. They have become expert in mixing counterfeit goods with stolen goods to "sanitize" the stolen goods and move them back into the supply chain. They feed on those buyers or distributors who are willing to turn a blind eye in return for a good deal. Sometimes, the buyer is innocent. We have documented evidence of a U.S. retailer buying back the very stock stolen from it a few weeks earlier. Counterfeit distribution networks also ease the transport of illegal drugs into U.S. markets. Recently, heroin was discovered stitched inside fake Louis Vuitton and Chanel handbags recovered in the Northeast.

The danger of counterfeiting goes beyond mere financial harm and theft. Organized crime and terrorist groups use the sale of counterfeit goods to raise money for illegal activities and violence. The Basque separatist group, ETA, has been linked to the sale of counterfeit clothing and handbags. Paramilitary groups in Northern Ireland have funded terrorist activities through the sale of pirated products, including copies of Disney's *The Lion King*. Protection rackets in Italy no longer demand just money from retailers; instead, they want shelf space to sell counterfeit goods. Most alarming is that those who aim to terrorize United States citizens look to counterfeiting to help them achieve their deadly goal: Seized Al Qaeda training manuals recommend the sale of fake goods as a financing source for its terrorism.

In addition to aiding those who would intentionally harm us, counterfeiting leads directly to human suffering and death. Every day, thousands of sick people take counterfeit drugs that do nothing for them or, worse, hurt them. In the United States, there are dozens of recent cases involving everything from fake Viagra to phony meningitis vaccine. In China, the government-owned Shenzhen Evening News estimates that 192,000 Chinese died in 2001 as a result of taking fake drugs. In a documented case in Nigeria, 100 children died after ingesting antifreeze that had been sold as a popular cough syrup.

We also know that fake automotive and aerospace parts are causing accidents with inevitable tragic consequences. In particular, the FAA has estimated that 2% of all replacement parts used on commercial airliners are fake, putting passengers at risk.

Counterfeiting is not a victimless crime. On the contrary, it causes devastating financial and physical harm to United States companies, employees, investors, consumers, patients, and citizens.

So what can be done? The problem of counterfeiting is complex, but many of the solutions are straightforward. We need stronger laws domestically, and we need cooperation internationally.

Changes in Law are Needed at Home

The first step in combating counterfeiting worldwide is to improve enforcement at home. We need to close some of legal loopholes that allow counterfeiters to escape prosecution, and we need laws that give enforcement agencies better tools to fight counterfeiting.

Current federal criminal law, as interpreted by the courts, allows counterfeiters to escape prosecution for trafficking in stolen goods by simply selling or distributing the counterfeit labels separately from the counterfeit products. This disconnect arises from two statutes, Sections 2318 and 2320 of the federal criminal code. Section 2320 makes it unlawful for anyone intentionally to traffic in goods or services and knowingly use a counterfeit mark "on or in connection with" those goods. A recent case in the 10th Circuit Court of Appeals, *United States v. Giles*, held that a man could not be prosecuted for shipping fake Dooney & Burke labels to a buyer because the labels, while clearly fake, were not "on or in connection with" any counterfeit goods.

Section 2320 does not match Section 2318, which prohibits general trafficking in counterfeit labels and packaging, but only for albums, computer programs, motion pictures, and other audiovisual works. Congress should fix this problem: It should be illegal to traffic in counterfeit labels and packaging for any product.

These loopholes have global implications - international counterfeiters take advantage of them. We are now observing that in China, the assembly line and the packaging line are split as a deliberate strategy to avoid prosecution under current U.S. law. Counterfeiters ship their phony products to the United States without any brand markings, and the products pass through the port with no outward sign of any violation. These goods are then labeled, packaged, and wrapped here domestically, thousands of miles away from the actual point of manufacture. To stem the increase in counterfeited imports, we must be able to prosecute the people who do the labeling and packaging here.

In addition, Congress should expand the tools for law enforcement to combat counterfeiting. Law enforcement officials must have the ability to seize and confiscate not only the counterfeiter's inventory of phony goods, but also the equipment and assets - such as machine tools and computers - used to produce counterfeit products, labels, and packaging. Without this ability, law enforcement officers will be forced to chase the same counterfeiters over and over again. The counterfeiters can simply continue to use their infrastructure to replace seized inventory and resume their trade.

Finally, we suggest that Congress press forward to complete work it began two years ago to initiate a study of counterfeiting by earmarking money for a counterfeiting study. So far, the Department of Commerce has chosen not to commit funding for this study. Although Gillette in particular, and our manufacturing colleagues in general, is seeking to learn more on our own about markets for counterfeit, stolen, or illegally diverted goods, our efforts cannot take the place of a well-funded, comprehensive government study on the subject. The Department of Commerce should be urged to begin this study immediately.

Change Domestically Provides Leverage Globally

This afternoon, I have described the devastating global impact of counterfeiting. I have also suggested that this Committee might take action to close legal loopholes in current U.S. counterfeiting laws and strengthen law

enforcement. These changes are vital for our anti-counterfeiting efforts here in the United States. But they are also essential to our ability to improve anti-counterfeiting efforts abroad. We need international cooperation, but we will not get it unless we first put our own house in order.

As much as we need mandatory seizure and destruction of counterfeiting equipment here at home, we need it even more overseas. The Office of the U.S. Trade Representative has made clear, however, that it is not prepared to negotiate for mandatory confiscation and destruction abroad when U.S. law does not contain these provisions. Not surprisingly, our trade negotiators are loath to negotiate with other countries an agreement with which the United States could not comply under existing laws. We need to have mandatory seizure and destruction domestically right away so that our trade negotiators have a foundation to press for the minimum necessary enforcement around the world.

Finally, there is little prospect of making more progress in the fight against counterfeiting inside China unless its civil enforcement, currently limited to seizing inventory and imposing fines, is supplemented by more effective criminal enforcement with seizure and destruction of equipment and prison sentences. In some cases criminal enforcement does occur, but all too often counterfeiters continue in operation and view the occasional seizure of product as one more cost in an otherwise lucrative business.

China is the source of the vast majority of counterfeit goods sold in the United States. In addition to combating counterfeiting within its borders, the Chinese government also must stop the export of counterfeit products. The United States should work with the Chinese government to create an effective program to stop the trafficking of counterfeit goods at the point of export.

Now, around the globe, brand owners, industry coalitions, and governments are joining the fight against counterfeiting. This is not a problem we can solve overnight, and it is not a problem we can solve alone. We need global cooperation. To get it, however, we first need to close the loopholes in current federal criminal laws to criminalize trafficking in fake labels and packaging for all goods. We also need to provide our law enforcement agencies with authority to seize the machinery of counterfeiting. And we need to devote the resources to study this problem comprehensively, so that we can arm ourselves with more information about this problem in ways that will allow us more effectively to fight it.

I applaud the commitment and engagement of this Committee, as reflected in these hearings today, to renew governmental efforts to combat counterfeiting. In my testimony, I have described three modest measures that represent a ready starting point for these efforts. As leaders in global commerce, we owe it to shareholders, employees, and consumers here and around the world to protect the integrity of brand names and the quality of the products we sell.

Thank you for your time. I would be happy to answer your questions.