

TRADEMARK COUNTERFEITING IN THE THIRD DEGREE
Penal Law § 165.71
(Committed on or after June 28, 1993)¹

The (*specify*) count is Trademark Counterfeiting in the Third Degree.

Under our law, a person is guilty of Trademark Counterfeiting in the Third Degree when, with the intent to deceive or defraud some other person or with the intent to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods, he or she

[*NOTE: Select appropriate alternative:*

manufactures, distributes, sells, or offers for sale goods which bear a counterfeit trademark.

or possesses a trademark knowing it to be counterfeit for the purpose of affixing it to any goods.]

The following terms used in that definition have a special meaning:

INTENT means conscious objective or purpose.² Thus, a person acts with intent to deceive or defraud some other person or to evade a lawful restriction on the sale or resale or offering for sale or distribution of goods if that person's conscious objective or purpose is to do so.

[POSSESS means to have physical possession or otherwise to exercise dominion and control over tangible

¹ June 28, 1993, was the effective date of an amendment to the definition of "trademark" [Penal Law § 165.70(1)] specifically to encompass Olympic symbols and emblems. Excluding that change, this charge is applicable to crimes committed on or after November 1, 1992.

² See Penal Law § 15.05(1).

property.]³

[KNOWING a trademark to be counterfeit means being aware that such trademark is counterfeit.]⁴

GOODS means any products, services, objects, materials, devices or substances which are identified by the use of a trademark.⁵

TRADEMARK means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made by a person and which distinguishes them from those manufactured or sold by others which is in use and which is registered, filed, or recorded under the laws of this state [or of any other state] [or is registered in the principal register of the United States patent and trademark office].⁶

COUNTERFEIT TRADEMARK means a spurious trademark or an imitation of a trademark that is (a) used in connection with trafficking in goods; and (b) used in connection with the sale, offering for sale, or distribution of goods that are identical with or substantially indistinguishable from a trademark.⁷

[NOTE: Add if authorization to use the trademark is in issue:

The term counterfeit trademark does not include any mark used in connection with goods for which the person using such mark was authorized to use the trademark for the type of

³See Penal Law § 10.00(8). Where constructive possession is alleged, insert the appropriate instruction as found in the "Additional Charges" section at the end of this chapter.

⁴See Penal Law § 15.05(2).

⁵See Penal Law § 165.70(4).

⁶See Penal Law § 165.70(1)(a). For Olympic symbols and emblems, see Penal Law § 165.70(1)(b).

⁷See Penal Law § 165.70(2).

goods so manufactured or produced by the holder of the right to use such mark or designation, whether or not such goods were manufactured or produced in the United States or in another country.]⁸

[NOTE: Add if packaging is in issue:

The term counterfeit trademark does not include imitations of trade dress or packaging such as color, shape, and the like unless those features have been registered as trademarks.]⁹

The term TRAFFIC means to transport, transfer, or otherwise dispose of goods to another, as consideration for anything of value [*or* to obtain control of goods with intent to so transport, transfer, or otherwise dispose of them].¹⁰

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name),

[NOTE: Select appropriate alternative:

manufactured, distributed, sold, or offered for sale goods which bore a counterfeit trademark;

or possessed a trademark knowing it to be counterfeit for the purpose of affixing it to any goods;] and

⁸See Penal Law § 165.70(2).

⁹See Penal Law § 165.70(2).

¹⁰See Penal Law § 165.70(3).

2. That the defendant did so with the intent to deceive or defraud some other person or to evade a lawful restriction on the sale, resale, offering for sale, or distribution of goods.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.