

NEW JERSEY TRADEMARK COUNTERFEITING ACT
(N.J.S.A. 2C:21-32c)

Count _____ of the indictment charges the defendant with violating the New Jersey Trademark Counterfeiting Act.

[READ COUNT OF THE INDICTMENT]

The statute provides in pertinent part:

A person commits the offense of counterfeiting who, with the intent to deceive or defraud some other person, knowingly manufactures, uses, displays, advertises, distributes, offers for sale, sells, or possesses with intent to sell or distribute within, or in conjunction with commercial activities within New Jersey, any item, or services, bearing, or identified by, a counterfeit mark.

In order to convict the defendant of this charge, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant knowingly **[choose appropriate]** manufactured, used, displayed, advertised, distributed, offered for sale, sold, or possessed with intent to sell or distribute within New Jersey, or in conjunction with commercial activities within New Jersey, an item or service;
2. That the item[s] or service[s] was [were] identified by a counterfeit mark;
3. That the defendant knew that the items or services were identified by a counterfeit mark; and
4. That defendant acted with the purpose to deceive or defraud some other person.

The first element that the State must prove beyond a reasonable doubt is that defendant knowingly **[choose appropriate]** manufactured, used, displayed, advertised, distributed, offered for sale, sold, or possessed with intent to sell or distribute within New Jersey, or in conjunction with commercial activities within New Jersey, an item or service.

A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct will cause such result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning. Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inference from the defendant’s conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inference which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all the surrounding circumstances established by the evidence.

The second element that the State must prove beyond a reasonable doubt is that the item[s] or service[s] was [were] identified by a counterfeit mark.

Counterfeit mark means a spurious mark that is identical with or substantially indistinguishable from a genuine mark that is registered on the principal register in the United States

Patent and Trademark Office or registered in the New Jersey Secretary of State's office or a spurious mark that is identical with or substantially indistinguishable from the words, names, symbols, emblems, signs, insignias or any combination thereof, of the United States Olympic Committee or the International Olympic Committee; and that is used or is intended to be used on, or in conjunction with, goods or services for which the genuine mark is registered and in use.¹

The third element that the State must prove beyond a reasonable doubt is that the defendant knew that the item[s] or service[s] were identified by a counterfeit mark. "Knowing," "with knowledge," or equivalent terms have the same meaning as I earlier explained.

The fourth element that the State must prove beyond a reasonable doubt is that defendant acted with the intent to deceive or defraud some other person. That is that the defendant had the purpose to deceive or defraud some other person. A person acts purposely with respect to the nature of his/her conduct or a result of his/her conduct if it is the person's conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely if he/she means to act in a certain way or to cause a certain result. A person acts purposely with respect to attendant circumstances if the person is aware of the existence of such circumstances or believes or hopes that they exist.

Purpose refers to a condition of the mind. It cannot be seen. Often, it can be determined only by inferences from conduct, words or acts. It is not necessary, therefore, for the state to produce witnesses to testify that defendant stated, for example, that his purpose was to deceive or defraud some other person. It is within your power to find that proof of a state of mind has been furnished

¹ N.J.S.A. 2C:21-32b(1).

beyond a reasonable doubt by inference which may arise from the nature of the acts and the surrounding circumstances. Defendant's conduct and everything done or said by him/her preceding, connected with, and immediately succeeding his/her actions are among the circumstances to be considered. A person who has in his/her possession or under his/her control more than 25 items bearing a counterfeit mark you may infer to have violated this section. However, you are never required or compelled to draw this inference. It is your exclusive province to determine whether the facts and circumstances shown by the evidence support any inference and you are always free to accept them or reject them if you wish.

If you find that the State has failed to prove any of the four elements beyond a reasonable doubt then you must find the defendant not guilty of the crime charged.

On the other hand, if you find that the State has proven all four elements beyond a reasonable doubt, then you must find the defendant guilty of the crime charged.

If you find the defendant guilty beyond a reasonable doubt you must then determine whether the State has proven beyond a reasonable doubt if the offense involved:

[CHARGE AS APPLICABLE]

100 or more but fewer than 1000 items, or a total retail value of \$1,000.00 or more but less than \$15,000.00 bearing a counterfeit mark, or services identified by a counterfeit mark; or 1000 or more items, or a retail value of \$15,000.00 or more bearing a counterfeit mark or services identified by a counterfeit mark.

For purposes of this offense retail value means the counterfeiter's regular selling price for the

item or service bearing or identified by the counterfeit mark. In the case of items bearing a counterfeit mark which are components of a finished product, the retail value shall be the counterfeiter's regular selling price of the finished product on or in which the component would be utilized. Furthermore, the quantity or retail value of items or services shall include the aggregate quantity or retail value of all items bearing, or services identified by, every counterfeit mark the defendant [choose appropriate] manufactured, used, displayed, advertised, distributed, offered for sale, sold or possessed.^{2; 3}

² N.J.S.A. 2C:21-32b(2)

³ Final determination of the degree of offense shall be made by the Court at the time of sentencing based upon the defendant's prior convictions, if any, under this act, which the State shall establish by at least a preponderance of the evidence. See N.J.S.A. 2C:1-13d; N.J.S.A. 2C:44-4d; State v. Oliver, 162 N.J. 580 (2000). At that time the defendant shall be sentenced to the degree of offense controlled by the element satisfying the highest degree. For example, if the jury finds the quantity or value satisfying a third-degree offense and the defendant has no prior convictions under this act he/she shall be sentenced as a third-degree offender; if the jury finds the quantity or value satisfying a third-degree offense and the defendant has at least two prior convictions under this act, he/she shall be sentenced as a second-degree offender; if the jury finds the quantity or value satisfying a second-degree offense and the defendant has one or no prior convictions under this act he/she shall be sentenced as a second-degree offender.