

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 13, 1996

The Honorable James R. Metts, Ed.D.
Sheriff, Lexington County
Post Office Box 639
Lexington, South Carolina 29071

Re: Informal Opinion

Dear Sheriff Metts:

Your July 22, 1996 letter to this Office asked whether State law permitted the donation or sale of counterfeit goods to charitable groups after the fake trademark or label was removed. Although Title 27 of the Code of Laws prohibits the donation of confiscated property, your Department could sell the goods to those groups at a reasonable price at a public auction.

S.C. Code Ann. § 39-15-1190 (Supp. 1995) prohibits trafficking in goods bearing a "counterfeit mark" as defined by the statute. The statute classifies the crime as a misdemeanor and sets forth the maximum fine and sentence. However, the penal statute does not provide for the disposition of the counterfeit goods following a seizure.¹

"The only function of a trademark is to designate a product or service, and the misconduct... consists not in making the trademark without authorization but in affixing

¹In a civil action under Section 39-15-1170(A) (Supp. 1995), a judge can order the destruction of the goods at the request of the owner of the trademark. However, § 39-15-1170(B) explicitly states that "The enumeration of a right or remedy in this article does not affect a registrant's right to prosecute under any penal law of this State." Therefore, the destruction provisions of the civil statute do not apply to criminal prosecutions under § 39-15-1190.

The Honorable James R. Metts, Ed.D.

Page 2

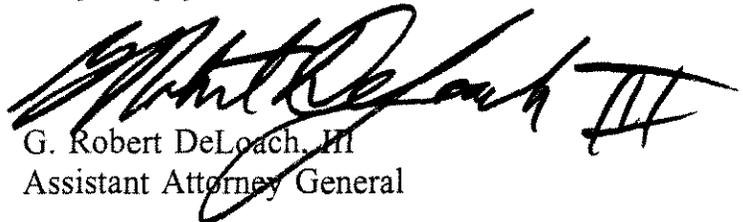
September 13, 1996

it to the wrong product...." General Elec. Co. v. Speicher, 877 F.2d 531, 535 (7th Cir. 1989). Accordingly, "the purpose of trademark law is not to guarantee genuine trademarks but to guarantee that every item sold under a trademark is the genuine trademarked product, and not a substitute." Id., 877 F.2d at 534. Thus, in a prosecution under the State Trademark laws, the placement of the counterfeit label or trademark is the essence of the crime. Presumably, after the fake label is removed, there is no possibility of confusion with goods bearing the registered trademark. Therefore, the destruction of the goods would be unnecessary.

Finally, S.C. Code Ann. § 27-21-10 (1991) states that property confiscated by your Department "**shall** be sold for cash, at auction, called and conducted by the Sheriff." Furthermore, "All funds derived from such sales **shall** be turned over to the treasurer of the county and credited to the general funds." If your Department intends to dispose of the counterfeit goods rather than destroy them, the mandatory language of the statute requires a sale at public auction. The charitable groups can participate in the auction and purchase the goods at a reasonable cost.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Very truly yours,



G. Robert DeLoach, III
Assistant Attorney General