Passin off in the federal republic of Nigeria

This writer will be discussing the significance of passing off in the federal republic of Nigeria, but before doing so, it is necessary for the sake of the advancement in this discuss to shine a light on the meaning of the term passing off.

Passing off can be defined as an act or an instance of falsely representing one’s own product as that of another in an attempt to deceive potential buyers.[[1]](#footnote-1)passing off is actionable in tort under the law of unfair competition. [[2]](#footnote-2)The tort of passing off is committed where the plaintiffs’ goods are passed off by the defendant as being his own (that is, the defendant’s) goods. The classic definition of passing off can be found in the case of *Erven Warnink BV v. J Townend & Sons (Hull) ltd* as[[3]](#footnote-3) Lord Diplock identified the five essential elements of the tort when he said it is:

“… possible to identify characteristics which must be present in order to create a valid cause of action for passing off: (1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and, (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or ( in a qui timet action) will probably do so.

The tort of passing off has been recognized as a tort under economic tort, but this faces various criticism from commentators who are skeptical about its classification. Many have argued that the tort of passing off is a part of injurious/malicious falsehood. The tort of passing off is also like the tort of deceit. The tort of deceit is committed when a misrepresentation is made with the express intention of defrauding a party, subsequently causing loss to a party.

Types of passing off

**Imitating the appearance of the plaintiff product.**

In the case of white Hudson v. Asian Organization ltd[[4]](#footnote-4) the plaintiff manufactured ‘hacks’ cough sweets in Singapore, which they sold in red cellophane wrappers and which came to be known as ‘ red papper cough sweets’. The plaintiffs were, at the time, the only persons who sold cough sweets in such form in Singapore. the defendant then started to import cough sweet into Singapore called ‘peckos’ which were also sold in red wrappers. The plaintiff then proved that most of the customers un Singapore could not read English and simply asked for red wrapper cough sweets, it was held that the court would protect the plaintiffs interest in the appearance of their product and that the plaintiffs would be granted an injunction to restrain them from passing off their sweets as if they were the goods of the plaintiff.

**Trading under the name so closely resembling that of the plaintiff**

In the case of Reddaway v. Banham,[[5]](#footnote-5) the plaintiffs were manufactures of camel hair beltin which they sold abroad. The belting contained a design with a camel and words ‘Camel Hair Belting’ on it. The defendants also made camel belting with words ‘camel hair belting’ on it, but without the camel. The defendants argued that these words were simply a description of the goods which they were selling and not passing off. It was held that the defendants had committed the tort of passing off because when the plaintiffs’ goods were sold abroad the words ‘camel hair belting’ the words ‘ camel hair belting’ were not simply a description of the good, but were a trademark of the plaintiffs.

**Marketing in a tradename already appropriated by the plaintiff**

Generally, the defendant is entitled to use his own name to advertise his products, but this is subject to the qualification that the defendant cannot do so where it would mislead the public. This can be seen in the case of parker knoll ltd v knoll international ltd.[[6]](#footnote-6) Both parties were furniture manufactures, the plaintiff being a well-known company traded in Great Britain, while the defendants traded in America. When the defendants started to trade in this country, the plaintiffs sought an injunction from the court to restrain the defendant from using their furniture without distinguishing it from the products of the plaintiffs, it was held by the majority of their House of Lords that the plaintiffs were entitled to their injunction because they had established that their name had come to be associated with goods made by themselves alone and that use by the defendants of their own name was likely to cause confusion among the public. It was not necessary for the plaintiffs to show that the defendant intends to deceive the public, it was sufficient if it was likely that the public would be deceived by yhe defendants use of their own name.

Other types of passing off includes

**False attribution of authorship**

**False endorsement**

RELEVANCE OF PASSING OFF IN NIGERIA

In Nigeria, the informal protection of rights by the tort of passing off closely resembles the formal rights created by trademark law, passing off is a common law tort which can be used to enforce an unregistered trade. This provision is in consonance to the fundamental maxim of law which is Ubi Jus ibi remedium meaning; “where there’s is a wrong, there is a remedy”. In Nigeria, as elsewhere, the major purpose underlying the tort of passing off is the protection od an established trade goodwill already acquired by trade name. it presupposes therefore, that such goodwill must be established by the party alleging infringement.

The important thing to note is that it is not easy to define what constitutes ‘goodwill’ in general purposes of suing for ‘passing off’. [[7]](#footnote-7) the cause of action in passing off and the existence of an established goodwill would then have to be decided by court in each case. See the case of IRC v. Muller Margarine[[8]](#footnote-8) the House of Lords, in part, described goodwill in relation to passing off, as the “ benefit and advantage of good name, reputation and connection of a business. It is the attractive force which brings custom”. It is good to note that the establishment of goodwill will serve as an element in succeeding in an anction for passing off, but this element alone will not be sufficient. In the case of Reckitt and Coleman Products v. Borden,[[9]](#footnote-9) the House of Lords adopted the ‘Trinity Test’ in establishing the ingredients of ‘passing off”. And explained as follow:

i. the claimant must establish the goodwill or reputation attaching to the goods or and services are offered to consumers;

ii. the claimant must also establish that there has been a misrepresentation by the defendant which has caused or has the potential of causing the members of the public to believe that good or service emanate from the claimant;

iii. finally, the claimant must demonstrate that he has suffered or is likely to suffer losses by reason of the defendant’s misrepresentation as to the source of defendants’ goods or services, which seems to suggest that they emanate from the claimant.

It is good to note that acts that could ground an action in passing off might relate to the misuse of trade names, trademarks or the design ‘get-up’ of the goods or business in question. See the case of Niger chemists ltd v. Nigeria Chemists[[10]](#footnote-10), the court granted an injunction against the defendant on the basis that their use of the name Nigeria Chemists was intended to deceive the members of the public to believe that they had a relationship of some sort with Niger Chemists.

Basically, the relevance of passing off in Nigeria is to protect the public from deceit: in the case of Trebor Nigeria Ltd v. Associated Industries ltd[[11]](#footnote-11), the plaintiff brought an action against associated industries ltd, the makers of Minta Super mint claiming that the wrapper used to package the product by the defendant was like that of the plaintiff and that they were guilty of passing off their products. the defendant raised dissimilarities in the two products as a defence to the action, the judge however found the defendants liable for passing off their products as that of the plaintiff. In this instance, passing off occurred using a package strongly similar with that of another product such as to deceive the public that they are one and the same.

In conclusion, the tort of passing off, is a common law tort which protects the goodwill of a trader from misrepresentation, misleading the public into believing falsely. The aim of this tort which is strictly to protect the reputation of manufacturers and win the trust of customers.

**Bibliography**

**.**Olarinde S and Chigbo C and Ikpeze N, The Modern Law of Torts, 1st edition, Afe Babalola University, Ekiti State, 2018.

1. Black’s Law Dictionary Ninth Edition [↑](#footnote-ref-1)
2. See E. Smaranda olarinde and C. Chigbo and Nnamdi G.I The Modern Law of Torts (1st ed) p.333 [↑](#footnote-ref-2)
3. [1979] AC 731 [↑](#footnote-ref-3)
4. [1964] 1 wlr 1466 [↑](#footnote-ref-4)
5. [1896] AC 199 [↑](#footnote-ref-5)
6. [1962] RPC 265 [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. [1901] AC 217, 223 et seq. [↑](#footnote-ref-8)
9. [1990] 1 AER 873. [↑](#footnote-ref-9)
10. [1961] ANLR 180 [↑](#footnote-ref-10)
11. [1972] NNLR 60 [↑](#footnote-ref-11)