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**MATRIC NO: 17/LAW01/053**

**LEVEL: 300**

**ASSIGNMENT TITLE: ECONOMIC TORTS**

**COURSE TITLE: LAW OF TORTS II**

**COURSE CODE: LPB 302**

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**INTRODUCTION**

There are times when we buy products solely because we’re confident about them and highly trust the products. Some of us buy these products without close inspection because we are conversant with their branding and packaging and most people tend to buy products that are similar without knowing it’s another product and not the trusted product. The worst part of it all is that these products may be similar, in the sense that they serve same purpose. Their logo may even be the same thereby misleading customers.

In society today, many products are similar in branding and packaging, and this often confuses the potential buyers of certain products. These goods are not properly labelled and tend to mislead potential buyers.

For instance, miss Sophia went to a shop to get the secrete to her delicious meals “knorr” and she was in a haste and picks another product that was branded like the “knorr” unknowingly to her it was labelled “khor” and she took it home. She noticed it was a different product from the one she usually gets. Miss Sophia thought about how the product might have damaged her food and how the product might have damaged her food and her health. She made a mental note to always check products closely before purchasing.

The producer of “khor” imitation of the original “knorr” can be seen as passing off. He has made his product in a way that can mislead customers into thinking the products are the same and there’s a law that can help such situations. This singular act by the producer or “khor” will most likely affect the rate of sales of the original product “knorr”. The producer of the copied product is benefiting from the already achieved reputation of the original producer. This act causes unfair competition.

This work will explain the principle of passing off, the remedies available to the plaintiff and also its relevance in society today.

The essence of passing off according to Kodilinye is the selling of goods or carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product is that of the plaintiff.

According to Duhaime’s Legal Dictionary, passing off is seen as making some false representation likely to induce a person to believe that the goods or services are those of another.

Passing off is described as an unfair competition by misrepresentation or literally speaking “the cause of confusion or deception”. An action for passing off arises where the deception is made in the course of trade, which could lead to confusion amongst customers.

Moving on, the law on this is designed to protect traders against the above form of unfair competition which consist of acquiring for oneself, my means of false misleading devices, the benefits of the reputation already achieved. The goodwill of the plaintiff is very important and if this is affected it would amount to passing off.

There are a lot of traders in the society today that benefits from the reputation already achieved by the rival traders. Take for instance, the example given in the ‘**Introduction’** where miss Sophia bought ‘khor’ thinking she bought ‘knorr’. The producer of ‘khor’ is benefiting from the already achieved reputation of the producer of ‘knorr’.

With the help of this law, if the passing off by the producer of ‘khor’ is proven then the original producer of ‘knorr’ will be entitled to an injunction and damages for any loss.

In **LEATHER CLOTH CO V AMERICAN LEATHER CLOTH CO, Lord Kingsdown** stated that the fundamental rule is that one man has no right to put off his goods for sake as the goods of a rival trader. This simply means that a person cannot sell his product as if it belongs to another. For example, a producer of seasoning shouldn’t sell his product as that of his rival because this would definitely lead to false representation. He may be profiting from this act and it may affect the goodwill of the other.

This law help traders avoid an unfair competition with other traders who ho tend to sell their products. The good thing about this law is that it no longer has to do with just goods but also services including electronic businesses.

Passing off as an economic tort is very relevant to this century because the world as evolved and so as this law. It helps electronic traders also which is the present business of the day. It helps in services also. In our present day, services can be easily passed off and this is because different people render different services as that of another. Let’s take for example, the delivery service, another company can act as if it’s under ‘DHL’ unknowing to others it’s a whole different service. If anything goes wrong along the line, this could affect the reputation of the original company that provides the service. With this law, the original company can sue for passing off and they will be entitled to an injunction and damages for the loss that has been incurred due to the passing off by the other company.

There are different forms of passing off, I will be listing five and explaining in details three from the listed.

1. Marketing a product as that of the plaintiff
2. Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same
3. Imitating the ‘get1up’ or ‘appearance ‘ of the plaintiff’s goods
4. Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff’s name as to be mistaken for it.
5. Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark

**MARKETING A PRODUCT AS THAT OF THE PLAINTIFF**

This would be seen as passing off when the defendant markets his products with a direct statement that the product is that of the plaintiff. For example, marketing your product as ‘blue band’ knowing that they are two different products. Marketing your ‘milk’ as ‘peak’ when it’s not. The above examples could be actionable passing off.

In our present day, different producers do this. There’re some ‘malt’(original) that are copied and sold as ‘mult’ (copied). They do this with the already achieved reputation of ‘malt’ company. With this the original company would be able to sue the other company thereby avoiding unnecessary production competition.

**Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same**

An example of this type of passing off is **HENDRIKS V MONTAGU** ; it was held in this case that passing off was committed and this is because the names were two similar for differentiation.

The principle derived in **HENDRIKS V MONTAGU**  was applied in **NIGER CHEMISTS LTD V NIGERIA CHEMISTS ;** it was seen in this case that there must be a grave risk of confusion and deception and this is possible because both businesses are in same town and using same name. The defendant was held liable for passing off.

This is very rampant now. There’s a known cosmetic company called **‘O&A cosmetics’** and there’s one other company that produces cosmetic and is also **‘O&A’**

This can mislead the customers of the former into thinking that they are same products and they’re both in Lagos. With the help of this law, the original company can sue and get an injunction and damages for the loss they’re presently experiencing.

**Imitating the get-up of appearance of the plaintiff’s goods**

If found that anything in the appearance or get-up of the plaintiff’s goods which particularly identifies those goods as that of the plaintiff, the defendant would be held liable for passing off. In **U.K TOBACCO CO LTD V ODUNMOTUN TRADING CO LTD** ; it was held to be an actionable imitation of the get-up of the plaintiff’s cigarettes.

For example **Mc Donald’s and Mc Dowell’s** are two different business but similar logo. The former is the original while the latter is copied. **Mc Donald’s**  can decide to sue **Mc Dowell’s**  because their products can be mistaken to be that of **Mc Donald’s** and it can be seen as passing off.

It was also in the case of **TREBOR NIGERIA LIMITED ASSOCIATED INDUSTRIES LIMITED** . The plaintiff brought an action against the defendant claiming that the wrapper used to package the product by the defendant is similar to that of the plaintiff and that they were guilty of passing off. It was held by the judge that the defendant was liable for passing off their product as that of the plaintiff. This law is a common law remedy and beneficial to all.

Also ‘**pringles’** is the original brand while ‘**PRINGLES’** imitates the appearance and also the name of the original and this could affect their business and their reputation might be put down.

**ELEMENTS**

1. Misrepresentation
2. The defendant’s conducted must be calculated or likely to deceive

**The defendant’s conduct must be calculated to deceive**

The defendant may be liable for passing off although his conduct was honest and innocent. He’ll be liable even though he had no intention to deceive or mislead the public. The liability in passing off is a strict one. All that is needed is for the plaintiff to be able to show that the defendant’s acts was likely to deceive or mislead the public. I’m some cases it isn’t necessary to prove that there was any intention to deceive. Some cases involves common sense, when it’s very obvious that the act will be misleading. Take for instance **The Niger Chemist case**, where the names of businesses were similar, they were in same town and are in same line of business; it’s very obvious that the defendant did it to divert some of the plaintiff’s reputation to themselves.

• It is not necessary to prove that there was any intention to deceive. It is not necessary to prove that the deception has taken place, it is sufficient for the plaintiff to prove that the deception is likely to occur in the future.if this is proven, the plaintiff may be awarded a **quia timet injunction** . In **Niger Chemist case**, it was pointed out that there was evidence of actual deception and confusion. Anyone could be deceived because both businesses use same name and deal in same line of business. In this case the plaintiff need not prove that deception has occurred because it’s obvious that it will occur in future.

The remedies for the tort of passing off are :

1. Injunction
2. Damages

**INJUNCTION:** this order is given by the court to restrain the defendant for carrying out activities that will not be of benefit to the plaintiff. It is an order compelling the defendant to carry out an act that would benefit the plaintiff. In the case of passing off, the defendant would be restrained from disposition of goods and services that are similar to that of the plaintiff. This will suspend the act of the defendant. It is the first response to the tort of passing off.

**DAMAGES:** these is the amount of money that the court would order the defendant to pay for the damage that has been incurred. A successful litigant in passing off is entitled to damages. This damages emanate from losses which are presumed to have been suffered by the plaintiff. It can either be general, specific or punitive.

In conclusion, the aim of the action of passing off Is to prevent one trade from exploiting the goodwill or reputation of built up by another. The framework of passing off action should be strengthened to defend the reputation of traders.

Small business owners or people who intend to start businesses should be enlightened on how the law of passing off works. They should be able to know how to explore these law and how it’ll help them against unfair competition in society.

Trade Marks organisations should have a list of registered marks and it should e circulated to all trade Marks organisations. They should have a current statistic of the marks that have been registered and also make Soto scrutinise their registered marks so as not to make the mistake of registering business names and designs that are similar enough to confuse or mislead the public. The trade marks Act should be amended to reflect the happenings in the society today.