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**17/LAW01/055**

**300 LEVEL**

**LAW OF TORTS II (LPI 302)**

**ASSIGNMENT**

**INTRODUCTION**

The essence of the tort of passing off in a country like Nigeria cannot be over emphasized. Usually, people infringe on other businesses and make fake products to deceive the general public that it is the same product as the one it is similar to, thereby subjecting the original brand to unfair competition.

The economic torts of passing off, intimidation, conspiracy, deceit, and injurious falsehood are employed by the common law courts not only to ensure fair competition in the market system but also to maintain and safeguard the individual of competitors “as well as public interest in fair and sound competitions”[[1]](#footnote-1)

**PASSING OFF:** Passing off is a branch under the law of tort that focuses on a representation of a person’s business or product by another in such a way that it deceives the society as to the relationship between the products.

So, passing off is said to be a false representation of one's product as that of another person which deceive the general public into patronizing that product.

**ECONOMIC TORT:**  Economic torts are tortious interference actions designed to protect trade or business. The "absence of any unifying principle drawing together the different heads of economic tort liability has often been remarked upon."[[2]](#footnote-2)

 The principal torts are: [passing off](https://en.wikipedia.org/wiki/Passing_off), [injurious falsehood](https://en.wikipedia.org/wiki/Injurious_falsehood) and [trade libel](https://en.wikipedia.org/wiki/Trade_libel), [conspiracy](https://en.wikipedia.org/wiki/Conspiracy_%28civil%29), inducement of [breach of contract](https://en.wikipedia.org/wiki/Breach_of_contract), negligent [misrepresentation](https://en.wikipedia.org/wiki/Misrepresentation), and Watching and besetting.

 **PASSING OFF AS AN ECONOMIC TORT**

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and is known as the tort of “passing off”. As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation*[[3]](#footnote-3)**

“A man may not sell his own goods under the pretence that they are the goods of another man.”

 The tort of passing off is designed to protect traders/ businessmen against unfair competition acquired by false or misleading information and to prevent a rival trader from benefitting from the reputation already achieved by a trader/ businessman.[[4]](#footnote-4) Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill.[[5]](#footnote-5)

To sum it up, the tort of passing off covers those cases where one trader falsely misrepresents his goods as those of another trader/brand.

Forms of passing off

Passing off could occur in any of the following ways:

1. Marketing a product as that of the plaintiff. This involves marketing your product as that of an already existing product. For instance, marketing your shoes as “adidas” or your air freshner as “gbc”.
2. Trading your product under a name that is similar to that of the public with the intention to deceive or mislead the public that both products are the same. This could involve substituting a letter of the name etc. ***Niger Chemists Limited v. Nigeria Chemists*[[6]](#footnote-6)** the plaintiff sold drugs as Chemists in Onitsha, Eastern Nigeria and the defendant opened shop on the same street and started the same line of business of dispensing drugs. On being sued, 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.
3. Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name that is similar to the plaintiff’s trade name as to be mistaken for it.
4. Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark. For instance marketing your shoes with three stripes (the trademark for adidas shoes)
5. Imitating the get up or appearance of the plaintiff’s goods. For instance “Royal Dansk cookies” and “Forrelli butter cookies”.

 Elements for the tort of passing off include:

1. Goodwill: The claimant must show the court that there is business value (Goodwill i.e. the attractive force that brings customers) which is attached to the goods and services he produces in a suit for passing off.
2. Misrepresentation: The claimant/ plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully (whether intentionally or not) are actually the goods and services of the claimant.

In a passing off action, the plaintiff must prove that there is a similarity in the trade names or marks and that the defendant is passing off his goods as those of the plaintiff’s***. Ogunlende v Babayemi[[7]](#footnote-7)*** where the plaintiffs carried on business as civil engineering contractors and plumbers under the name “Mercury Builders,” Taylor, C.J granted an injunction restraining the defendant from conducting a similar business under the name “Mercury Builders (Nigeria) Ltd.” he stated that; “there can be no doubt at all that the name of the defendant company is calculated to deceive due to its similarity with the name of the plaintiff association”.

1. Damage: The claimant/ plaintiff needs to show to the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the plaintiff/ claimant. (The Claimant / plaintiff needs to show that the defendant’s activities are calculated to deceive the public)

The following remedies can be claimed by the plaintiff in a Passing Off action;

* Damages: - A successful plaintiff in a suit for passing off is entitled to damages. The court can award general damages, special damages or punitive damages.[[8]](#footnote-8)
* Injunction: A plaintiff can ask the court to restrain or prohibit the use of a mark subject matter of the passing off suit in court. Further, a perpetual injunction can be granted by the court when the suit has been concluded i.e. the defendant will never use the mark again

**RELEVANCE OF PASSING OFF IN MODERN DAY NIGERIA**

The tort of passing off seeks to achieve the following in every common law legal system;

To enable businesses continue to earn profit and to protect the right of property that exists in goodwill (i.e. business value).[[9]](#footnote-9)

The most common form of passing off in Nigeria includes; using a name that is similar to that of an existing product, imitating the appearance of the plaintiff’s products, producing fake products using the plaintiff’s product etc.

**Example:** The Nigerian “**noreos”** biscuit/cookies is very similar to the famous “**oreos”** cookie which is one of the bestselling cookies in the United States. Note that the packaging of these cookies are very similar and their names too. Also, **“premier soap”** and “**supreme soap”** both have a very similar appearance. A regular buyer may mistake these products thinking they are the same.

Also, it is very obvious that some fake make up products are made and sold in Nigeria and they completely sell them to the public with the same packaging that one will not even suspect that the product is fake. For instance, the Kylie Jenner makeup products sold along the road at ridiculously cheap prices are fake and might even be harmful to users thereby tarnishing the image of the original producers because if buyers don’t look closely they might be unable to differentiate the real from the fake.

Things like this are very common in Nigeria and these are some of the reasons for the protection of products in Nigeria which are regulated by **The Copy Right Act**, **1988 as amended in 1992** and The **Trademarks Act** **of 1965**, and the **Patent of Designs Act of 1970** which protects products with registered trade mark **and the tort of passing off** which does not require trademark registration**.**

 Passing off seeks to protect brands, businesses and products in Nigeria in the following ways;

1. Passing off protects businesses against unfair competitors; using unregistered and unregistrable trademark, selling second hand goods of a business as new goods, using registered trademarks where registered trade mark infringement claims have no hope of succeeding, selling imitation goods and services or re-selling goods and services of the business, stealing credit for technological developments and claiming that its product or services made of its technology, licensed from another company or manufactured under license when it’s not.[[10]](#footnote-10)
2. Passing off protects the general public from deceit through fake business owners
3. It is designed to prevent misrepresentation during the course of trade to the public. In the sense that the tort law of passing off does not allow a business to use a brand name similar to an existing brand name which may cause confusion to the buyer.
4. It protects the reputation of the true/ original source of products and services. In the sense that a person producing a fake or harmful products under an existing brand name can tarnish the reputation of the original brand.
5. It extends to unregistered trademarks which the Trademarks Act do not protect.
6. The economic tort also grants remedies to business owners whose businesses have been infringed upon.

**CONCLUSION**

The study of the law of passing off and its application in Nigeria is necessary. In Nigeria, there is a high rate of infringement regarding trademark and products in Nigeria. Passing off enables businesses to prevent other businesses from unfairly using its goodwill. It protects against all activities of a business that may lead to the public into believing that they are another business. It is an adaptable are of law geared to protect what might be called the reputation and association of goods or services to a particular business.

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