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**What is Passing Off?**

Misleading the public into believing that the brand presented to then is the same as a well-known brand is wrong is known as a tort of “Passing Off”. In other words, passing is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. It is the selling of one’s products or presenting of ones as if it were that of another person whose reputation and goodwill one thereby enjoys. In the tort a person carries on his business or sells his goods under a name, trademark, description, or imitation of another person’s product in order to deceive the public to patronize it. It is basically deceiving people to patronize one’s business.

Passing Off is also the act of 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 an actionable tort under the law of unfair competition.

The Duhaime’s Legal Dictionary also defines Passing Off as making some false representation likely to induce a person to believe that the goods or services are those of another.

Whenever a person sells his goods, or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the products/ goods/business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off. Usually, passing off involves one form of misrepresentation, or the other to make the pubic patronize ones good or business. An action lies in passing for damages, an account, for profit, and seizure of the products and an injunction to restrain the defendant from continuing to do so in the future.

Generally, an action for Passing off arises where the deception is made in the course of trade. This applies in both ecommerce business and businesses with physical addresses.

**THE PURPOSE OF THE TORT OF PASSING**

Passing Off is a wrong, a common law tort that protects the goodwill of a trader from misrepresentation. The tort of Passing Off in a competitive business or economy. People make use of various strategies to expand their businesses and market their products. Often times when these products are not good enough or simply aren’t doing so good they disguise it as another to in crease the sale. The tort of passing off is therefore designed to protect a person’s business interest from the unfair trade practices and sharp practices of other people. Its objective is to protect the reputation and goodwill business has built up for itself. It enables a business owner to enjoy the protection of the good name, quality, reputation, patronage and customers of the business. It protects the attractive force of a business which brings customers.

**Sir John Salmon** in his book Law of Torts stated the reason for the tort of passing off thus:

“*The law is designed to protect traders against unfair competition which consists in acquiring for oneself, by means of false, or misleading devices, the benefit of the reputation already achieved by rival traders.*”[[2]](#footnote-2)

**Lord Langdale Mr.** explaining the law in ***Perry v Truefitt*** stated that: “*A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute the end.*”[[3]](#footnote-3)

In the law of Passing off, the basis of the legal action is that the passing off by the defendant of his goods and or business as that of the plaintiff, is injuring the right of the property, product, services and business of the plaintiff.

**ELEMENTS OF PASSING OFF.**

These fundamental elements are goodwill or reputation, misrepresentation and damage. These three elements known as the classical trinity were restated by the House of Lords in the case of ***Reckitt v Colman Products Ltd v Borden Inc.[[4]](#footnote-4)*** In a suit of passing off the claimant firstly establish goodwill or reputation attached to his goods or services. Secondly, he must prove a misrepresentation by the defendant to the public i.e. Leading or likely to lead the public to believe that the goods and services offered by him are that of the claimant. Lastly, he must demonstrate that he has suffered a loss due to the belief that the defendant’s goods are those of the claimant.

**FORMS OF PASSING OFF**

The elements of passing off need to be proved in any of the forms which passing off can take which include:

1. Trading under a name resembling that of the plaintiff/ claimant such name being likely to mislead the public: In this form the defendant is involved in the same type of business as the plaintiff. ***Hendriks v Montagu[[5]](#footnote-5)*** is an established case on this where the Universal Life Assurance Society were granted an injunction by the court in order to restrain the company of the defendant which was incorporated later on form carrying on business under the name “Universe Life Assurance Association.” In the similarly decided Nigerian case of ***Niger Chemists Ltd v Nigeria Chemists [1961] 1 All NLR 171***, Palmer J. granted an injunction restraining the defendants from using the name “Nigeria Chemists” as it was calculated to deceive those who had the intention to deal with Niger Chemists. It is important to note that both parties were engaged in similar business. Therefore, where a name s made to deceive the public due to its similarity with that of the claimant then there exist a tort of passing off.
2. Trading under a name already given for goods of that kind by the plaintiff or trading under a name so similar that of the plaintiff’s as to be mistaken for it: Where a trade name is already in use by the plaintiff for his good, it will be actionable for the defendant to trade under the name of the plaintiff.[[6]](#footnote-6) A trade name is a name under which goods and services are sold by a certain individual and which by established usage has become known to the public to that effect that the goods and services are that of the individual.[[7]](#footnote-7) Descriptive names are not protected unless it can proved that it has acquired a secondary name exclusively associated to the plaintiff’s own product. See ***Hines v Winnick[[8]](#footnote-8)*** where the plaintiff musician obtained an injunction to restrain the defendant from featuring another band on the programme using the same name.
3. Marketing a product as that of the plaintiff: *Lord Bryon v Johnston[[9]](#footnote-9)* where the defendants were refrained from selling a book with the name Lyon Bryon when in fact he was not its author.
4. Imitating the appearance of the plaintiff’s goods: It is passing when the defendant does anything to make his product appear like that of the plaintiff. This includes adopting any likeness of the plaintiff’s product that may confuse the public be it the package, label, design etc. thus, where the get up or appearance of the claimant’s goods is imitated, the defendant is liable. See ***Trebor Nigeria ltd v Associated Industries ltd (1972) NNLR 60 Suit no K/127/71 May 1972[[10]](#footnote-10)*** where the court held that the defendants marketing a product as similar as possible to that of the plaintiff.
5. Where the defendant trades under the trademark of plaintiff: ***Perry v Truefitt.[[11]](#footnote-11)***

**REMEDIES.**

* A plaintiff can approach the court to grant the delivery of the defendant’s goods which reach the trademark to be destroyed.
* Account for the profit or loss of sale.
* Damages: a successful plaintiff is entitled to damages. These can be general damages, or punitive damages. This is because it is presumed that the plaintiff must have suffered losses especially in the course of business.[[12]](#footnote-12)
* Injunction

**DEFENCES AVALABLE TO A DEFENDANT**

The following defences are available to a defendant faced with the claim of passing off:

1. Dissimilarities in the mark between that of the defendant and the plaintiff. See Trebor Nig. Ltd (Supra).
2. The mark of the plaintiff is not distinctive.
3. The name of the plaintiff or mark has become a common generic.
4. Consent of the plaintiff was sought before using the name or mark or slogan as the case may be.
5. Lastly, the defendant may plead innocent usage of the plaintiff’s name.

**RELEVANCE OF PASSING OFF IN NIGERIA.**

Don’t you dislike purchasing a product and then realizing that it isn’t the one you originally wanted but instead an identical brand made to look exactly the same. No one would like that. Often times this happens, especially in countries like Nigeria where imitation of products is very common. The worst part is that one has to look very closely to notice the problems in these products especially when it is of the same specification and supposedly does the same function of what you requested for.

Passing off is relevant in countries like Nigeria where a considerable percentage lives in rural areas. From pencils to shoes to biscuits and even seasonings, just name it and you realize that many of these products are being passed off. Since the passing off of goods is not a crime, it has been made a tort to ensure that justice is severed to the original business owner whose reputation and goodwill has been put in jeopardy.

The relevance of passing off is to protect the goodwill and reputation that a business has built for itself with its product’s and to ensure that the reputation of these companies is protected from the damage caused by the passing off of their products, it also helps to provide various remedies in various instances where loss has occurred. Passing off protects a business owner’s right to enjoy the benefits of his product without any form of hinderance. It simply protects the attractive force of a business.

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1. Black’s Law Dictionary 10th Edition Page 1299. [↑](#footnote-ref-1)
2. Salmond op cit. para 149. [↑](#footnote-ref-2)
3. (1842) 49 ER 749 at 725, Draper v Trist (1939) 3ALL ER 513 at 526. [↑](#footnote-ref-3)
4. HL 1990. [↑](#footnote-ref-4)
5. (1881) 17 Ch. D 638. [↑](#footnote-ref-5)
6. G. Kodilinye and O. Aluko, *Nigerian Law of Torts* (Spectrum Books Limited 1999). [↑](#footnote-ref-6)
7. R. F. V Houston*, Salmond on the Law of Torts* (16th edition, Sweet & Maxwell London, 1973). [↑](#footnote-ref-7)
8. Ibid *Kark Publication v Odhams Press Ltd* (1962) 1 All ER 636. [↑](#footnote-ref-8)
9. (1816) 35 ER 851. [↑](#footnote-ref-9)
10. Nigerian Law Intellectual Property. [↑](#footnote-ref-10)
11. 1942 49 ER 749. [↑](#footnote-ref-11)
12. T&A Legal, ‘Nigeria, An Appraisal of Passing Actions under Nigeria Law’ [↑](#footnote-ref-12)