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MATRIC NUMBER: 17/LAW01/240

LEVEL: 300

COURSE: LAW OF TORT

ASSIGNMENT

Discuss the relevance of passing off as a form of Economic Torts in the 21st century Nigeria. Use Nalt guidelines for footnotes, you should also include a bibliography at the end.

INTRODUCTION

It is important to start by clearly explaining the term ‘Economic Tort’. Economic torts in English law refer to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. Proving compensation for pure economic loss, examples of economic tort include interference with economic or business relationships. Economic torts protect people from interference with their trade or business. Economic torts are tortious interference actions designed to protect trade/ business.

Principal economic torts are:

Passing off

Injurious falsehood and trade libel

Conspiracy

Inducement of breach of contract

Tortious interference (such as interference with economic relations or unlawful interference with trade)

Negligent misrepresentation and

Watching and besetting.

 What is Passing off?

 Passing off is described as an unfair competition by **misrepresentation** or literally speaking **"the cause of confusion or deception".** Generally, an action for Passing off arises where the deception is made in the course of trade, which could lead to **confusion** amongst customers. This applies to both e-commerce businesses and businesses with physical addresses.Another definition of Passing off is the act or an instance of falsely representing one's own product as that of another in an attempt to **deceive potential buyers**.1 Passing off is actionable in tort under the law of unfair competition.The Duhaime's Legal Dictionary, defines Passing off as making some false representation likely to **induce a person to believe** that the goods or services are those of another.

PURPOSE OF PASSING OFF

The law of passing off prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true. The following are what the tort of passing off seeks to achieve in every common law legal system;

1. To enable businesses continue to earn profit and:
2. To protect the right of property that exists in goodwill.

### **PASSING OFF AND TRADEMARK INFRINGEMENT**

### **It is necessary to state that Passing off and trademarks infringement go hand in hand and are very similar in nature. Whilst, Passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. This means that a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade mark infringement.**

Another distinction is, whilst an action for infringement of trade mark is a statutory remedy conferred on the owner of a registered trade mark, for the enforcement of a right to use the trade mark in relation to the goods/services for which the mark has been registered; an action for Passing off is an action against the deceit on the colourable imitation of a mark adopted by a person/company in relation to goods/services which has acquired a distinctive reputation in the market and is known as belonging to or produced by that person/company only.

An action for Passing off is a common law remedy and the claimant need not establish title for same but must show that the goods/services have distinctive features.

A trademark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. Trade marks receive protection not only under the law of passing off but also, if registered, under the Trade Marks Act 1965, under which most actions are brought.

 TRADEMARK REGISTRATION

Trademark registration in Nigeria begins with an availability search of the mark and ends with the issuance of a certificate of trademark registration. This process takes as long as two years, however in between the availability search and the issuance of the certificate, each applicant is issued an acknowledgment form and thereafter an acceptance form.It is important to note that these forms do not indicate registration of the mark. Only the issuance of a certificate by the Registrar of Trademarks indicates trademarks registration which is only after the publication of the mark and the receipt of no objections from the public.As such, a person who has been issued acknowledgment and acceptance forms by the Trademarks Registry without more can at best bring an action for Passing off of the mark. In the Supreme Court decided case of Omnia (Nig.) v Dyktrade Ltd 11, it was held by the trial judge and upheld by Belgore J.S.C that a party is not entitled to sue for infringement of a trade mark which had not been registered and that the mere issuance of acceptance by the Registrar of Trade Marks of the applicant's application does not amount to registration until the issuance of the certificate of registration.

ELEMENTS OF PASSING OFF

The Dutch Advocaat4

case was the first case where the basic elements of the wrong of passing

off were put forth by Lord Fraser. They were as follows

 A misrepresentation

 Made by a trader in the course of trade, to prospective customers of his or ultimate

consumers of goods or services supplied by him,

 Which is calculated to injure the business or goodwill of another trader (in the sense that

this is a reasonably foreseeable consequence) and

 Which causes actual damage to a business or goodwill of the trader by whom the action is

brought or (in a quia timet action) will probably do so.

Later in the Jif Lemon5

case, Lord Oliver reduced these principles to three basic features or

elements (now known as the classical trinity) which included:

 Goodwill - you must prove that you own a 'reputation' in the mark that the public associates with

your specific product or service

 Misrepresentation- you must show that the trader has caused confusion and deceived or misled

the customers into believing that their goods and services are actually yours

 Damage - you must prove that the misrepresentation damaged or is likely to damage your

goodwill, or cause actual or foreseeable financial or reputational loss

Rights relating to passing off are established gradually with use. Goodwill in a mark can be

particularly difficult to define.

FORMS OF PASSING OFF

The following are forms of passing off:

 Marketing a product as that of the plaintiff

 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.

Marketing goods under a trade name that already appropriated for goods of that kind by

the plaintiff.

 Marketing goods with the trademark of the plaintiff or with any deceptive imitation of

such mark.

 Imitating the get up or appearance of the plaintiff goods.

REMEDIES IN A PASSING OFF ACTION

The following reliefs/ remedies can be claimed in a Passing up action as follows:

1. Injunction: This is an order of the Court to prohibit or suspend the use of a mark. This is

usually the first relief sought to suspend the use of the mark pending the outcome of the

case and a perpetual injunction when the case has been concluded to totally stop the use

of the mark.

2. Damages: It has been established through decided cases that a successful litigant in a

Passing off action is entitled to damages. Damages here could be general, special or

punitive. These usually emanate from losses which are presumed to have been suffered

by a Plaintiff in a Passing off action.

3. Delivery up for destruction of infringing goods: This is usually claimed where physical goods are involved. Thus, the Plaintiff usually claim for the goods to be delivered up

especially so that it can be destroyed.

4. Anton Piller Orders: This is an order for inspection and delivery up of infringing

materials in the possession or control of an infringer. Ferodo Limited & Anor. V. Ibeto

Industries Limited

5. Account of profit : Here the Plaintiff is entitled to profit on goods wrongly sold by the

infringer.

DEFENCES AVAILABLE TO A DEFENDANT IN A PASSING OFF ACTION

The defenses available against a claim of Passing off include the following:

1. Consent of the Plaintiff to the use of the name, mark, sign or slogan.

2. Indistinct name, mark, sign and slogan of the plaintiff

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3. That the Plaintiff's name, mark, sign hand slogan has become generic/common place.

4. Dissimilarities in the mark of the Plaintiff and Defendant.

5. Innocent usage of the Plaintiff's name.

In conclusion, the tort of passing off is very relevant to the Nigerian society as it shields businesses. It is not uncommon to see inferior brands made as rip off of bigger Nigerian brands today in markets. The economic tort of passing off helps bigger brands to protect their name and reputation from people who intend to mislead the public by creating knock off versions of their product . Brands will also be able to seek damage or redress from other businesses which have fallen in violation.

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