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PASSING OFF

Passing off is the false representation of ones product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of ones product, or the carrying on of ones business as if it were that of another person whose reputation and goodwill one thereby enjoys. In the tort of passing off, 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. Passing off is an unfair and unconscionable competition.

Another definition of passing off is the act or instance of falsely representing one’s own product as the product of another in an attempt to deceive potential buyers.[[1]](#footnote-2)

THE PURPOSE OF THE LAW OF PASSING OFF.

The tort of passing off is common in competitive business community or economy. People resort to every strategy to market their products and services, to survive and to expand their business: the tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. its object is to protect the reputation and goodwill a business has built up for itself. It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of business. It protects that attractive force of the business which brings customers to it. The tort of passing off protects a business against misreprensation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. SIR JOHN SALMOND in his book Law of tort stated the reason for the tort of passing off thus:

“*The law… is designed to protect traders against… unfair competition which consist in acquiring for oneslf, by false , or misleading devices, the benefits of the reputation already achieved by rival traders.”[[2]](#footnote-3)*

WHEN DOES ATION FOR PASSIN OFF LIE?

In the case of Warink BV v Townsend and sons,LORD DIPLOCK[[3]](#footnote-4) in the house of lords stated the five characteristics for determing when an action lies in passing off.

1. A misrepresentation
2. Made by a defendant in the course of trade
3. To prospective customers
4. When is calculated to injure the business and goodwill of another person
5. Which causes damage to that persons business and goodwill

PASSING OFF IS ACTIONABLE PER SE

The tort is actionable per se on its occurrence. A plantiff does not need to prove damages in order to succeed the right of action lies even though no damage has been suffered or proved.the probability of damage occurring is enough for a plantiff to succeed. Therefore, once passing off has been committed, the plantiff has right to sue and is entitled to remedy.[[4]](#footnote-5) ELEMENTS:

1. [**Goodwill**](https://en.wikipedia.org/wiki/Goodwill_(accounting))**owned by a trader**

The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brand, mark or the thing standing for itself.

1. **Misrepresentation**

The plaintiff also has the burden of proof to show false representation (intentional or otherwise) to the public to have them believe that goods/services of the defendant are that of the Plaintiff. There must be some connection between the plaintiff's and defendant's goods, services or trade and must show likelihood or actual deception or confusion by the public. It is the Court's duty to decide similarity or identity of the marks, goods or services. The criteria are often: aural, visual and conceptual similarity

1. **Damage to goodwill**

For the element of damage to goodwill, there may be a loss or diversion of trade or dilution of goodwill. The plaintiff need not prove [actual or special damage](https://en.wikipedia.org/wiki/Damages); real and tangible probability of damage is sufficient. This damage should however be reasonably foreseeable.

COMMON FORMS OF PASSING OFF

**Trading with a name resembling that of the plantiff**

In this form of passing off, the defendant is usually engaged in the same type of business as the plantiff, and he uses the plantiffs name or a name closely resembling that of the plantiff, as aresult the public is confused and mislead into thinking that they are one and same business, or that one is the extension of the other. The customers are thereby misled to patronize either of them.

Hendriks v Montague[[5]](#footnote-6):

The plantiffs who were insurers trading as “universal Life Assurance society;” obtained an injuction to restrain the defendant which subsequently incorporated as insurers from trading as “universe trading association”

Niger Chemist Ltd v Nigeria chemists:

The plantiffs chemist obtained an injuction to stop the defendant chemist from trading as Nigeria chemist. Granting the injuction PALMER J said:

*“ it seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calls its self Niger Chemist and the other Nigeria Chemist, there must be a grave risk of confusion and deception[[6]](#footnote-7)”*

**Marketing a product as that of the plantiff**

The tort of passing off is committed when a defendant sells his goods off to people by stating falsely that the goods are produced by the plantiff, whereas they are not. The defendant by advertising and selling the goods by falsely stating that they were manufactured by the pantiff, directly but wrongfully benefits and profits from the goodwill and reputation already built by the plantiff business.

Lord Byron v Johnston:[[7]](#footnote-8)

The defendant publishers were restrained from advertising and selling a book of poems with the name of lord Byron written on the cover and title of page, when in fact the famous poet was not its author.

**Marketing goods resembling that of the plantiffs goods**

It is a tort of passing off for a defendant to produce goods or market his goods with a name closely resembling the name of the plantiffs goods, with the result that the customers are confused, and the defendants gods are mistaken as made by the plantiff and are bought as the products of the plantiff. A trade name is defined by SIR JOHN SALMOND is one:

*“Under which goods sold or made by a certain person and which by established usage, has become known to the public as indicating that those goods of that person.”[[8]](#footnote-9)*

The protection of trade names does not only protect products, but also protects the trade nae of all kinds of businesses, professionals, and persons who havevgoods, or services to offer, such as artists, writers and so forth

Hines v Winnick:[[9]](#footnote-10)

The plantiff musician and band leader who used to broadcast his radio programme under the name “ Dr Crock and his Crack pots” obtained an injuction to restrain from featuring another band on the programme using the same name. VAISEY J granting the injuction was with the view that a musician gets known by a particular name and this becomes inevitably part of his stock-in-trade.

Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by section 3 of the Trademarks Act[[10]](#footnote-11) which provides that:

*No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark; but nothing in this act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.*

Remedies in a passing off tort

1. Injuction
2. Damages
3. Delivery for destruction of infringing goods
4. Anton piler orders
5. Account of profit

Passing off is important because it protect traders by allowing them to bring action against a trader attempting to ride off the back of their established reputation (goodwill) by using a similar mark or get-up as their own. Trademarks provide protection to registered goods and services whereas the action of passing off provides protection to the unregistered goods and services. The most important factor is that in both cases, the remedy is the same. But the distinction lies on the fact that trademarks are available only for registered goods whereas passing off is available for unregistered goods. Also the law of passing off prevents one trader from misrepresenting goods and services as the goods and services of another and 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. Passing off is used in retention of goodwill.

# Bibliography

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3. Tort of passing off –law essays <https://www.lawteacher.net/free-law-essays/business-law/>
4. Gilbert Kodilinye: Nigeria law of torts
5. Ese Malemi: Law Of Tort

1. Blacks Law Dictionary Ninth Edition [↑](#footnote-ref-2)
2. Salmond op cit. para 149 [↑](#footnote-ref-3)
3. (1979) All ER 927 at 932(1979)AC 472 HL [↑](#footnote-ref-4)
4. Draper v Trist (1939) 3 All ER 513 CA [↑](#footnote-ref-5)
5. (1881) 50 LJ Ch 456 [↑](#footnote-ref-6)
6. (1961) All NLR 180 at 182 [↑](#footnote-ref-7)
7. (1816) 35 ER 851 [↑](#footnote-ref-8)
8. Salmond op cit para 401 [↑](#footnote-ref-9)
9. Ibid, kark publication v Odhmas [↑](#footnote-ref-10)
10. CAP T13 Laws of the Federation of Nigeria,2004 [↑](#footnote-ref-11)