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**COURSE TITLE: LAW OF TORT**

**QUESTION: Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Nigerian Century**

**ANSWER:**

The objectives of this work include;

* Definition of Passing Off as a form of economic tort
* Briefly I’ll explain the principle of Passing Off
* The relevance of Passing Off as a form of Economic Tort in Nigeria

**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.[[1]](#footnote-2)

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. Passing off is actionable in tort under the law of unfair competition.[[2]](#footnote-3) 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 foods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off. 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. It’s 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 the business. It protects that attractive force of the business which brings customers to it. The tort of passing off protects the business against misrepresentation of the business directed at its customers and calculated to damage the reputation and goodwill of the business.

For instance, Mrs Bimbo went to a supermarket to purchase a seasoning powder, she was in a rush and merely picked the first bottle of her favorite seasoning powder, while cooking and about to add a dash of the powder, she was surprised to find that it was another seasoning powder with the same color and package, the only difference was the substitution of a letter in the name. So, let's say she intended to purchase ‘**Ajinomoto’** seasoning powder, what she held in her hands was **'Ajinimoto’** seasoning powder.

Unfortunately, Passing off is not a criminal offence, such that Mrs Bimbo above could make a report to the Police or relevant institution. However, any victim of Passing off may first make a report to the person/company manufacturing the product one intended to purchase to make them aware that another person/company is reproducing a similar product and passing it off as theirs. Mrs Bimbo may also go further to report the misrepresentation by the manufacturers of **Ajinimoto** seasoning powder to the Consumer Protection Council (CPC) and seek compensation as a dissatisfied consumer. Though she may not have the locus standi to pursue a civil suit in this regard, the CPC will be happy to investigate the subject matter. The main objective of this being to increase the awareness of Passing off towards the association of Passing off to bad business.

**The Principle of Passing Off as a form of Economic Tort**

It is arguable to state that Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act2 which provides that:

"No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; 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".[[3]](#footnote-4)

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim "There is no law without a remedy".

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

In the case of **Warning BV v. Townsend sons** [[4]](#footnote-5)the House of Lords states the guidelines for determining when an action lies in passing off. The five characteristics where;

* A misrepresentation
* Made by a defendant in the course of trade
* To prospective customers
* Which is calculated to injure the business and goodwill of another person
* Which causes damage to that person’s business and goodwill or likely to do so.

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. In the case of **Trebor Nigeria Limited v. Associated Industries Limited[[5]](#footnote-6)**Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of **“Minta Supermint”**claiming that the wrapper used to package the product by the Defendant was similar to that of the Plaintiff and that they were guilty of Passing off their products like that of the Defendant. The Defendants raised dissimilarities in the two products as a defence to the action, the Judge however found the defendants liable for Passing off their products as that of the Plaintiff. In this instance Passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.

**The relevance of Passing Off as a form of Economic Tort in Nigeria**

The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.

Furthermore, small and medium businesses should be enlightened and educated to explore the possibility of seeking legal actions on Passing off and take advantage of the remedies available to protect their goodwill, trade name and profits. The Supreme Court should also resolve with one voice the jurisdiction of the Federal High Court in line with the Constitution to prevent unnecessary objections and delay of justice at court.

In the case of **Niger Chemists Limited and Nigeria Chemist [1961][[6]](#footnote-7)the** Plaintiff had an established chemist business using the name "Niger Chemist" while the Defendants established the same business on the same street with the Plaintiff using the name "Nigeria Chemist". The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them. The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name. In this instance Passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

An action for infringement of registered trademarks should always be instituted in the Federal High Court only because the action arises in relation to a Federal enactment which is the Trade Mark Act. However, the courts have variant decisions on the jurisdiction of the courts on Passing off actions.

In the case of **Omnia (Nig.) v Dyktrade Ltd [2007]** [[7]](#footnote-8) it was held that the Federal High Court has exclusive jurisdiction to hear and determine a claim for Passing off whether the claim arises from the infringement of a registered or unregistered trade marks.

In the case of **Patkun** **Industries Ltd. v Niger Shoes Ltd [1988[[8]](#footnote-9)]** the Supreme Court held that the Federal High Court has jurisdiction in trademarks infringement and Passing off actions stemming from the infringement of trademarks, whether registered or unregistered

These divergent reasoning of learned justices have in no little measure created doubts on the courts to institute an action in Passing off nonetheless, the grundnorm proffers a lasting solution to the jurisdictional issue. The1999 Constitution of the Federal Republic of Nigeria specifically makes provisions for Passing off actions as follows[[9]](#footnote-10)

"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters on any Federal enactment relating to copyright, patent, designs, trademarks and Passing-off, industrial designs and merchandise marks, business names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards".

The 1999 Constitution of the Federal Republic of Nigeria [[10]](#footnote-11)also provides that, - If there is any other law that is inconsistent with its provisions, the Constitution will prevail, and that other law shall, to the extent of the inconsistency, be void. These provisions in the grundnorm places the correct position in perspective and emphasizes the position of the Federal High Court as the Court with exclusive jurisdiction in Passing off actions.

**Bibliography**

1. Ese Malemi, (2013). Revised Edition, Law of Torts (pp. 630-642)
2. Kodinloye and Aluko (1999). The Modern Law of Tort in Nigeria (pp. 221-223)

1. (1961) All NLR 171 [↑](#footnote-ref-2)
2. Black's Law Dictionary Ninth Edition [↑](#footnote-ref-3)
3. Black's Law Dictionary Ninth Edition [↑](#footnote-ref-4)
4. (1979) All ER 927 at 932 (1979) AC 731 at 432 HL [↑](#footnote-ref-5)
5. (1972) NNLR 60 [↑](#footnote-ref-6)
6. (1961) ANLR 180 [↑](#footnote-ref-7)
7. (2007) 15 NWLR (Pt. 1058) 576 [↑](#footnote-ref-8)
8. (1988) 5 NWLR (Pt 93) 138 [↑](#footnote-ref-9)
9. Section 251 (f) of the 1999 Nigerian Constitution. [↑](#footnote-ref-10)
10. Section 1 (3) of the 1999 Nigerian Constitution. [↑](#footnote-ref-11)