

**COLLEGE OF LAW**

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**COURSE TITLE: LAW OF TORTS II**

**COURSE CODE: LPB 302**

**MATRIC NUMBER: 17/LAW01/297**

**ASSIGNMENT TITLE: PASSING OFF**

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**Introduction**

Tort recognizes that, as with personal integrity or property, one’s business or livelihood can be open to negligent or intentional acts. As such, the law provides a framework by which malicious actors may be prevented from destroying an individual financially.[[1]](#footnote-1) Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Economic torts are torts which inflict economic losses. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life[[2]](#footnote-2). Economic torts include:

* Passing off;
* Breach of intellectual property rights; such as breach of copyright, patents, trademarks and other merchandise marks;
* Injurious falsehood/Malicious falsehood
* Interference with contracts
* Conspiracy to interfere, that, civil conspiracy and so forth.

These groups of torts protect some of a person’s intangible interests those which may loosely be called his business interests, from unlawful interference.

For the purpose of this paper, this writer shall focus on the tort of passing off, which shall be discussed subsequently.

**WHAT IS PASSING OFF?**

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 same as a well-known brand, is known as the tort of passing off. As held in the famous case of ***Dongre v. whirlpool coporation***; a man may not sell his own goods under the pretense that they are the goods of another man.[[3]](#footnote-3) 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 among customers. This applies to both e-commerce businesses and businesses with physical addresses[[4]](#footnote-4).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[[5]](#footnote-5). Passing off is the selling of one’s products, or the carrying on of one’s 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, trade mark, description, or imitation of another person’s product in order to deceive the public to patronize it[[6]](#footnote-6).

Take for instance, Mrs. Ramota went to a supermarket to purchase a seasoning powder, she was in a rush and merely picked the first bottle of her favourite seasoning powder, whilst cooking and about to add a dash of the powder, she was surprised to find that it was another seasoning powder with the same colours and package, the only difference was the substitution of a letter in the name. So, let's say she intended to purchase 'Turio' seasoning powder, what she held in her hands was 'Tunio' seasoning powder.[[7]](#footnote-7). This is a practical example of passing off.

In the case of ***Trebor Nigeria Limited v. Associated Industries*** ***Limited[[8]](#footnote-8)***, 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 defense 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.

In the case of ***Niger Chemists Limited and Nigeria Chemists[[9]](#footnote-9)***, 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.

**WHEN DOES AN ACTION FOR PASSING OFF LIE?**

In the case of **Warnink BV v. Townsend & sons**, Lord Diplock in the House of lords stated five guidelines, for determining when an action lies in passing off. These five characteristics are whether there is[[10]](#footnote-10);

* 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; and
* which causes damage to that person’s business and goodwill or will likely do so

**PASSING OFF IS ACTIONABLE PER SE**

The tort of passing off is actionable per se on its occurrence. A plaintiff does not have to prove damage in other to succeed.[[11]](#footnote-11) The right of action lies even though no damage has been suffered or proved. The probability of damage occurring is enough for a plaintiff to succeed. Therefore, once passing off has been committed, the plaintiff has right to sue and is entitled to remedy.[[12]](#footnote-12)

**THE COMMON FORMS OF PASSING OFF**

The tort of passing off is committed in various forms, as businesses resort to different strategies in imitating the products and businesses of their rivals. The common forms of passing off which are predominant are[[13]](#footnote-13);

* trading with a name resembling that of the plaintiff
* marketing a fake product as that of the plaintiff by using the plaintiffs label or design
* marketing a product with a name resembling that of the plaintiff’s goods
* marketing products with the plaintiff’s trademark or its imitation
* imitating the appearance of the plaintiff’s product
* selling inferior or expired goods of the plaintiff a current stock; and
* False advertisement by copying the plaintiff’s advertisement and so forth.

**ELEMENTS OF PASSING OFF**

To establish a claim for passing off, you must meet three key requirements[[14]](#footnote-14);

* **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 yours
* **Damage**-you must prove that the misrepresentation damaged or is calculated to damage your goodwill, or cause actual or foreseeable financial or reputational loss. The liability of passing off is strict so it is immaterial that the plaintiff suffered damage. Thus, a defendant may be liable for passing off, even though hi conduct is totally honest or innocent. Innocent passing off is not a defense.

**WHAT IS THE RELEVANCE OF THE TORT OF PASSING OFF?**

It is disheartening to buy a trusted product and then realize that it is only an identical brand made to look exactly like what you originally wanted. The worst part of this problem is that you need to look very closely at those products to tell the difference, especially when it is of the same specification and supposedly does the same function for what you requested for. This is a big issue especially in Nigeria where goods on the store shelves are not properly labeled[[15]](#footnote-15).

We hear of places like “Aba and Onitsha” where one will find experts in imitation. They can produce anything and almost everything at the detriment of good business owners both home and abroad. They produce inferior and fake versions of products of big brands and innocent persons who cannot tell the difference fall victim and purchase them. For instance, a popular brand like “Nike”, it has become really difficult to tell an original from a fake. These fake producers imitate original Nike products so well that you cannot tell its fake till you have bought and used it.

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 consists in acquiring for oneself, by means of false or misleading device, the benefit of the reputation already achieved by rival traders”*

In the words of LORD KINGSDOWN in ***leather cloth v. American leather cloth co***:

*“The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader*”

And LORD LANGDAL MR explaining the law in ***Perry v. Truefitt*** stated that:

*“A man is not to sell his own goods under the pretense that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end”.*

The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their products and services, to survive and to expand their business[[16]](#footnote-16). The tort of passing off protects a person’s business interests from the unfair trade practices and sharp practices of other person’s. The tort of passing off is relevant in Nigeria today for the following reasons;

* **It protects the financial interest of businesses-** the tort of passing off helps to protect the financial interests of businesses from the danger caused by producers of fake products.
* **It provides remedy to traders whose business product fall victim of passing off-** in an action for passing off, the plaintiff is awarded nominal damages and an injunction on the defendant.
* **It protects the reputation and goodwill a business has built for itself**-The benefit and advantage of the good name, quality, reputation, patronage and customers of the business, that attractive force of the business which brings customers to it.
* The tort of passing off protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation of the business
* **It assures consumers of quality products**- with the law on passing off in place, we’ll have lesser copy cats and business product imitators thereby ensuring consumers quality for their money.

**Conclusion and recommendation**

The main essence 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. I recommend that the necessary framework for Passing off actions should be strengthened to defend the goodwill and reputation of businesses. Also, 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. It is also suggested that the Trademarks Act be further amended to reflect the times, happenings and changes in Nigeria. In particular, it has been observed that the Trademarks Registry has witnessed a serious backlog in the successful completion of the registration of marks and this has the resultant effect of limiting the rights of most product owners to Passing off[[17]](#footnote-17).

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