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INTRODUCTION

Passing off can be described as an unfair competition by misrepresentation or literally speaking. Generally speaking an action for passing off arises where the deception is made in the cause of trade, which could lead to confusion among customer. The tort of passing off can be explained as the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff, and the law on this matter is designed to protect traders against that form of unfair competition which consist in acquiring for oneself, by means of false or misleading device, the benefit of the reputation already achieved by rival traders. The purpose of an action for passing off is to prevent one’s 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.

In the words of Lord Kingsdown, the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader. Where passing off is proved, the plaintiff would be entitled to an injunction restraining the defendant from continuing the wrong, to damage for any loss he has incurred thereby, and to an account of the profit made by the defendant in consequence of the tort. Passing off takes various forms, the most common of which are the following.

1. Marketing goods under the plaintiff’s trade name or one so like it has to be mistaken for it. For example in the case of **Niger chemist ltd V Nigeria chemist[[1]](#endnote-1)** the principle in **Hendricks V Montagu** was applied. It was held that the defendant used the name Nigeria chemists was calculated to deceive persons who intended to deal with Niger chemists … an injunction was granted.
2. Illicit using the plaintiff trade mark or an imitation of it.
3. Imitating the appearance or presentation of the plaintiff’s goods with intent to deceive.
4. Also use of similar names.

Generally, it is not passing off for a person to trade under his own name honestly, even though confusion is thereby caused with the trade or business of another, with detrained to the older established trader and benefits to the newer.

However, it is passing off for a person to use either his own name or an illicit assumed name deliberately to pass off his goods as those of another i.e. by taking advantage of the fact that his name happens to be that off a well-known product. It is not passing off for a person to trade under an assumed name by which he has become generally known.

Also, to add to the common forms of passing off which are easily noticed, the case of **Francis Day and Hunter ltd V Twentieth Century Fox Co. ltd[[2]](#footnote-1)** the most common forms as noticed are:

1. Trading with the name resembling that off the plaintiff.
2. Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design
3. Marketing a product with the name resembling that of the plaintiff’s goods.
4. Marketing products with the plaintiff trademark or imitation.
5. Imitating the appearance of the plaintiff’s product.
6. Selling inferior or expired goods of the plaintiff as current stock.
7. False advertisement by coping the plaintiff’s advertisement.

There are also elements of passing off

1. The effect of fraud by the defendant: where fraud is proved on the part of the defendant, it helps the plaintiff to prove the likelihood of damage, it makes it easier for the court to award aggravated or punitive damage.
2. Whether the public is likely to be confused: That is in order to determine whether the public is to be confused or misled by the activities of the defendant, the characteristics of buyers of the goods in question.
3. The likelihood of deception: All that the plaintiff has to prove is that the activities of the defendant is calculated to deceive the public.

Remedies to passing off includes:

1. Damages
2. Account for profit or loss of sales.
3. Injunction
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON etc.

Defences to passing off

1. Functional design or package- **Draper V Trist[[3]](#footnote-2)**
2. Innocent passing off.
3. Consent, such as licence given to him by the plaintiff to produce and or market the product. **Lee V Haley[[4]](#footnote-3)**

**Passing off in 21th century Nigeria**

The relevance off passing off in the 21th century Nigeria is important. In an environment like the one applicable in Nigeria, where the government employs less than a quarter of its own population the remaining three quarter of the population are free to be engaged in businesses which are not watertight with legal regulation, in this kind of environment, it is expected that that the high level and complexities of passing off will be expected.

In Nigeria today, even the war against unhygienic bread eaten by almost everybody is on the losing side by government agencies responsible for that sector of the economy. Variation of the same product by different companies and marketing and advertising agencies has brought the incident of passing off to a high level. In the health sector of the Nigerian economy, the problem of adulterated drugs is bane of that sector either in the estimation of individuals or estimation of experts in the government hospitals or even in the medical manufacturing sector.

Passing off action in Nigeria is thus a common law action preserved by section 3 of the trade mark Act. Trade mark gives an indication to the intending purchasers as to the manufacture and quality of the goods to be sold, to indicate by their appearance the trade source or the trade hands through which they have reached the market. Once a trade mark is validly registered, it gives the proprietor the exclusive right to use the mark in marketing or selling of his goods. If without his consent, anyone else uses an identical mark or one so nearly resembling it as to be likely to deceive or cause confusion, the registered proprietor will be entitled to sue for infringement of trade mark.

In conclusion, the relevance of passing off is very crucial, this is especially in a country like Nigeria, where there are series of cases of duplicated products. It is also necessary to note that passing off and trademark infringement go hand in hand. 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. To increase the awareness of passing off, small and medium businesses should be enlightened and educated, 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.

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2. Fleming, j. (1992), The law of tort (8th ed.) Sydney: The law book company limited.
3. Black’s law dictionary ninth edition.
4. Gummore: Carring of passing off (1974) 7 sydney L.R 224.

1. [↑](#endnote-ref-1)
2. (1939) 4 ALL ER 192 at 199 P.C [↑](#footnote-ref-1)
3. (1939) 3 ALL ER 513 at P.518, 525, 528 C.A [↑](#footnote-ref-2)
4. (1869) 5 ch app 155. [↑](#footnote-ref-3)