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Passing off is the misrepresentation of a trader’s product or business by another person thereby misleading the public to patronize it. Passing off protects the product of the trader from being plagiarized by another person. It is 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. The case of ***Niger Chemists Ltd v Nigeria Chemists***[[1]](#footnote-2) establishes the principle that an action in passing off may lie in cases of misuse of trade names, trademarks or the design get-up of the goods or businesses. Furthermore, Lord Kingsdown in ***Leather Cloth Co v American Leather Cloth Co[[2]](#footnote-3)*** stated that “The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader." Passing off is an action on unregistered marks which belong to a person or company. It is important to distinguish passing off from trademark infringement, in the case of ***Trebor Nigeria Ltd v Associated Industries Ltd[[3]](#footnote-4)***, the plaintiff action only succeeded in his passing off claim and not its trademark infringement claim.

Passing off protects the goodwill of a trader from being falsely represented by another. The defendant usually uses a trademark, name or description to deceive the public into thinking that his product is the plaintiff’s own thereby taking advantage of the plaintiff’s goodwill and reputation. The tort of passing off is practiced in common law countries such as Nigeria, Australia, New Zealand and so on.

The basis of the legal action in the law of passing off is that the passing off by the defendant of his good as that of the plaintiff’s is injuring the right to property and business of the plaintiff. There has to be a misrepresentation made by the 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 will likely do so.[[4]](#footnote-5)

It is important to note that passing off is actionable per se on its occurrence. The plaintiff does not have to prove damage in order to succeed in an action against the defendant. The likelihood of damage occurring is enough for a plaintiff to succeed. Once passing off has been committed, the plaintiff has the right to sue and be compensated. Passing off can take various forms and they are:

* Trading with a name similar to that of the plaintiff: In this form of passing off, the defendant is usually doing the same type of business as the plaintiff, he either uses the plaintiff’s name to trade or a name similar to the plaintiff’s name thereby misleading and confusing the public. In the case of ***Hendriks v Montague***[[5]](#footnote-6) , the plaintiff’s who were insurers trading as “Universal Life Assurance Society”, obtained an injunction to restrain the defendants which was subsequently incorporated as insurers from trading as “Universe Life Assurance Association”.
* Marketing fake products as that of the plaintiff by using the plaintiff’s label or design: This is committed when a defendant sells products off to people falsely by using the plaintiff’s label or design. This kind of passing off is disparaging to the business of the plaintiff, as inferior products which would have attracted little or low benefaction , or would have taken much time to catch a share of the market are packaged and sold off as the products of the plaintiff.
* Marketing products with the plaintiff’s trademark or its imitation: It occurs when a defendant uses a plaintiff’s trademark or design leading to the confusion of buyers. A trademark is any design, picture or mark associated with the plaintiff or his goods. Trademarks are protected under the Merchandise Marks Act.
* Imitating the appearance of the plaintiff’s product: It is passing of for a defendant to use or do anything which makes his products appear like the plaintiffs.
* Selling inferior or expired goods of the plaintiff as current stock: It is wrong for a defendant to sell inferior or expired products of the plaintiff thereby ruining his name or good reputation.
* False advertisement by copying the plaintiff’s advertisement, and so on.

To succeed in a claim for passing off, all that the plaintiff has to prove is that the activity of the defendant is done to swindle or mislead the public or likely to mislead the public. Liability in the tort of passing off is strict, so innocent passing off will not be considered as a defence.

The purpose of the tort of passing off is to protect the goodwill of the plaintiff. Its objective is to protect the benefit and advantage of the good name, quality, reputation and customers of the business. In the case of ***IRC v Muller Margarine[[6]](#footnote-7)***the House of Lords defined ‘goodwill’ in relation to passing off as the benefits, good name, reputation and connection of a business; it is the attractive force that brings in customers’. In the case of ***Ogundele v Babayemi[[7]](#footnote-8)*** the plaintiffs who were building and civil engineering contractors carrying on business as the “Mercury Builders” were granted an injunction to restrain the defendants, from carrying on a similar business under the name “Mercury Builders Nigeria Limited”. Goodwill is an expression used to describe the premium value of a business when it is sold. In other words, goodwill is not one-dimensional in nature, but instead, incorporates a variety of worth that includes reputation and long-term relationships. This often indicates potential hidden strength within the business. For example, a strong reputation and an excess of long-term clients and business relationships can permeate a business with both enhanced stability and longevity. Passing off protects intangible assets because they are not physical and very difficult to restore after a loss or breach.

The purpose of the tort of passing off is to protect the plaintiff’s intangible interests, that is, his business interests from unlawful interference by the defendant. It guards against unfair competition in the market as it is unjust for a plaintiff to invest capital, thoughts and ideas into a product only for it to be stolen by the defendant. Unfair competition is a term that applies to false or deceitful competition in trade and commerce. Individuals resort to every strategy to market their products and services, survive and expand their business and the law of passing off protects the manufacturer’s interests against this. It is illegal especially when there is no agreement between parties, or license given to the defendant. In the case of ***Lord Byron v Johnston***[[8]](#footnote-9) 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 page, when in fact the famous poet was not its author.

Furthermore, passing off helps business owners to continue to earn profits by protecting the attractive force of the business which brings customers to it. Passing off gives business owners exclusive rights to their businesses, the owner has sole ownership of his marks, design, products and name and can stop unlawful use. It makes easy for customers to find your products. It makes your product and identity of products different from that of the existing and foreseen competitors and acts as efficient commercial tool. The logo can communicate your vision, quality or unique characteristic of your company and any organisation. It inspires the positive image of the organisation and thus customers are attracted towards them easily. This reduces the cost towards hiring and related activities. In the case of ***Perry v Truefitt***[[9]](#footnote-10), the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations.

Also, in the case of ***U.K. Tobacco Co. Ltd v Carreras Ltd[[10]](#footnote-11)***the defendants who were marketing cigarettes called “Barrister”, on which packet was a white man wearing a barrister’s wig and gown were restrained from imitating the appearance of the plaintiff’s cigarettes called “Band Master” on which packet was a man in a band master’s uniform.

Passing off also protects the public from exploitation. It protects the buyers from being misled into buying goods he/she does not want, as they will not be easily manipulated into buying a substandard product. For example, serving suggestion pictures on food product boxes, which show additional ingredients beyond those included in the package. Although the "serving suggestion" disclaimer is a legal requirement of an illustration which includes items not included in the purchase, if a customer fails to notice or understand this caption, they may incorrectly assume that all depicted items are all included.

Furthermore, passing off helps in financial and economic development. The market has acquired an important place for the economic development of the whole country. It has also become a necessity for attaining the object of social welfare. Successful operation of marketing activities creates, maintains and increases the demand for goods and services in society. To meet this increased demand the companies need to increase the level of production in turn raising their income. This increase, in turn, increases the national income. The tort of passing off helps promote the goods making people aware about them and creating a demand for the goods, encouraging customers to use them. Thus, it improves the standard of living of the society.

Further effective marketing leads to exports adding to the national income. This is beneficial to the whole society.

The defences available to a defendant in an action for passing off include:

* Functional design or package.
* The mere descriptive name of the product.
* Consent, such as license given to him by the plaintiff to produce and or market the product.
* Innocent passing off and so forth.

The remedies for passing off include:

* Damages
* Account for profit; or for loss of sales
* Injunction
* Intervention by the relevant regulatory agencies such as NAFDAC, SON, etc.

In Conclusion, the main aim of the tort of passing off is to protect an individual from damaging or exploiting the goodwill and reputation of a business of another. Traders of both small and big businesses should be enlightened to explore the possibility of seeking legal actions on passing off and the remedies available.

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1. (1961) All NLR 171 [↑](#footnote-ref-2)
2. (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-3)
3. 14 NIPJD [HC. 1972] 127/1971 [↑](#footnote-ref-4)
4. Ese Malemi, Law of Torts (Princeton Publishing Co 2013) [↑](#footnote-ref-5)
5. (1881) 50 LJ Ch 456 [↑](#footnote-ref-6)
6. (1901) AC 217, 223 et seq [↑](#footnote-ref-7)
7. (1971) 1 UILR 417 [↑](#footnote-ref-8)
8. (1816) 35 ER 851 [↑](#footnote-ref-9)
9. (1842) 49 ER 749 [↑](#footnote-ref-10)
10. (1931) 16 NLR 1 [↑](#footnote-ref-11)