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**TOPIC: PASSING OFF**

**PASSING OFF**

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 buyers1. The essence of passing off is the selling of goods or carrying on of a business in such a manner as to mislead the public into believing that the defendant‘s products or business is that of the plaintiff.

The Duhaime's Legal Dictionary defines Passing off as making some false representation likely to induce a person to believe that the goods or services are those of another.

As held in the famous case of ***N. R. Dongre V. Whirlpool Corporation man*** “A man may not sell his own goods under the pretense that they are the goods of another man.”

The law aims to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival trader2.

The essence passing off is actionable in tort under the law of unfair competition.

**FORMS OF PASSING OFF**

Passing off takes various forms, the most common of which are the following:

1.    **Marketing a product as that of the plaintiff.**

It is actionable passing off for the defendant to sell merchandise with a direct statements that the goods are manufactured by the plaintiff when in fact they are not. It would be passing off if a manufacturer attempts to profit from the goodwill and reputation established by rival businesses.

2.    **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that’s of the plaintiff are one and the same.**

A well-known example of this type of passing off is ***Hendricks V. Montagu***, where the “universal life assurance” society where granted an injunction restraining the defendants company which was incorporated subsequently, from carrying on business under the name “universe life assurance association”. James L.J said that persons who have heard of the

Universal are likely to be misled into going to universe. The principal in ***Hendricks V. Montagu***3was applied in ***Naija chemist limited v. Nigeria chemist*** 4. In this case the plaintiffs carried on business as chemist and druggists for several years having branches in Onitsha and other towns. The defendants later founded a firm carrying on exactly the same type of business in Onitsha under the name Nigeria chemists. The plaintiffs contended that the defendant’s use of a similar name to their own was actually passing off and they sought an injunction to restrain it’s for the use. Palmer J. Granted the injunction, holding that the use of the name Nigeria chemist was calculated to deceive persons who know of intend to deal with Niger chemists.

3.              **Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff or under a name as similar to the plaintiff's trade name as to be mistaken for it.** A trade name is a name under which goods and services are sold or made by a certain individual and which by established usage has become known to the public to the effect that the goods and services are the goods of that individual5. Purely descriptive names which indicates the nature of the goods sold, for  example vacuum cleaners, are not protected unless the plaintiff can prove that the descriptive name and question has acquired a secondary meaning so exclusively associated with the plaintiff’s own product that its use by the defendant is calculated to deceive purchasers. The protection of trade names applies not only to traders and manufacturers but also to any artist, writer or musician who gets to be known under a particular name which inevitably becomes parts of his own stock in trade.

4.    **Marketing goods with the trademark of the plaintiff or with any deceptive imitation of such mark**. A trade mark is any design, picture, mark, name or other arrangements affixed to goods which identifies those goods with the plaintiff manufacturer or seller.

5.    **Imitating the get up or appearance of the plaintiffs good.**

  Where there is anything in the appearance of the plaintiff's goods which particularly identifies those goods as the merchandise of the plaintiff, the defendants will be liable for passing off if, in marketing his goods he imitates or copies such appearance or get up in a manner likely to confuse the public. In the case of ***U.K Tobacco Co. Ltd v. Carreras Ltd***, Where the

defendant’s marketed cigarettes called barrister in packets on which appeared a white man in a barristers wig and gown. This was held to be an actionable imitation off the get up of the plaintiff’s cigarettes called bandmaster, whose packet featured a white man in band masters uniform. An important limitation to this head of passing off is that an action will not succeed where the appearance is purely functional, that is, the appearance complained of is necessary for the better performance of the defendant’s goods or greater efficiency in handling them. For example, the manufacturers of the “Titus” sardine cannot sue other sardine manufacturers for using the same container already used by them. The use of a functional package having capricious design, size or shape closely resembling the plaintiff’s product did not constitute passing off 6.

Elements of passing off

To establish a claim for passing off, you must meet three key requirements: These (3) three elements known as the Classic Trinity were stated in the House of Lord’s case of ***Reckitt & Colman products ltd v. Borden Inc.*8 (HL 1990) per Lord Olive.**

* The claimant must show their goodwill exists- you must prove that you own a 'reputation' in the mark that the public associates with your specific product or service

* The defendant made a misrepresentation likely to deceive the public, you must show that the trader has caused confusion and deceived or misled the customers into believing that their goods and services are actually yours. The claimant/ plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public deceitfully (whether intentionally or not) are actually the goods and services of the claimant.
* This misrepresentation damages the goodwill of the claimant - you must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss.

**THE RELEVANCE OF PASSING OFF IN NIGERIA.**

 Passing off is an economic tort put in place to protect traders against that form of unfair competition. Where passing off is proved, the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong as in the case of Bollinger v. Costa Brave Wine Co. here an injunction was granted to restrain a producer of wine from marketing his product as “Spanish Champagne”, the plaintiff will never use the mark or name again7. The plaintiff if he is successful in his claim will also be awarded damages; the court can award general damages, special damages or punitive damages. This is because it is presumed that the plaintiff must have suffered losses especially in the course of business8. The relevance of passing off ultimately protects a traders rights but it also protects the consumers from deceit and false representation especially in Nigeria where there is a high population percentage of illiterates who have nothing to identify their preferred product but merely recollections, if the preferred product is a bread sold in yellow and brown wrapping paper and is known to the general public as “bread oniyelo9” meaning bread with the yellow coloring and another bread manufacturer uses the same wrapping paper closely resembling the preferred product, such would confuse an illiterate who uses the wrap to differentiate. This tort protects the general public from deceit.

Any victim of Passing off may first make a report to the person or company manufacturing the product one intended to purchase to make them aware that another person or company is reproducing a similar product and passing it off as theirs.

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 necessary that the framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses. In cases where there

is a risk of tarnishing the goodwill of a business it is essential to be able to rely on passing off for protection because as per Lord Macnaghten in ***IRC V Muller [1901]*** goodwill is the ‘attractive force which brings in custom”. Passing off therefore retains its importance in the protection of goodwill in such circumstances.

In conclusion, the common law tort of passing off remains a vital form of protection of intellectual property. It prevents the unlawful usage of a person’s mark, sign or goods and services.

References

***Books***

G. Kodilinye and O. Aluko, Nigerian Law of Torts (Spectrum Books Limited 1999)

Christopher Wadlow, The Law of Passing-off: Unfair Competition by Misrepresentation (Sweet & Maxwell, 2016)

***Online articles***

https://www.mondaq.com/Nigeria/Intellectual-Property/704160/An-Appraisal-Of-Passing-Off-Actions-Under-Nigerian-Law

<https://www.academia.edu/40734546/The_Tort_of_Passing_Off_in_Nigeria>

All Answers ltd, 'Tort of Passing-Off Project Assignment for Law of Tort (Lawteacher.net, May 2020) <[https://www.lawteacher.net/free-law](https://www.lawteacher.net/free-law-essays/b)business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1> accessed 3 May 2020

 Michael Carter, ‘How to prove “Passing Off”’, (Mondaq 13 December <https:www.mondaq.com/uk/x/65/578/Trademark/How+to+prove+Passing+Off>