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Matric No: 17/law01/283

Course: Law of Torts

Course code: LPB302

Assignment: Discuss the relevance of passing off as a form of economic torts in the 21st Century Nigeria.#

Use NALT guidelines for footnotes you should also include a bibliography at the end.

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**INTRODUCTION**

During the process of engaging in this work the reader would have to understand and be able to explain the concept of passing off and all other aspects areas and topics mentioned or discussed in this work. The law of passing off prevents one trader from misrepresenting goods or services as being the goods and services of another, and also prevents a trader from holding out his or her goods or services as having some association or connection with another when this is not true. The concept of passing off has undergone changes in the course of time. At first it was restricted to the representation of one person’s goods as those of another. Later it was extended to the business and services. Subsequently it was further extended to professions and non trading activities. Today it is applied to many forms of unfair trading and unfair competition where the activities of one person cause damage or injury to the goodwill associated with the activities of another person or group ofpersons. An action of passing off would be maintainable where the plaintiff could prove injury to its business or goodwill, which could take a variety of forms even though the defendant was not passing offits goods as the goods ofthe plaintiff. It is possible that the defendant states the truth in its label or in the description, but partly mixes it up with descriptions and devices which are misleading or which are likely to confuse an unwary purchaser of the product. In such a case, the defendant cannot escape liability for its misrepresentation or actionable wrong of passing off, i.e. causing injury to the plaintiffs business reputation and goodwill, merely because while describing its products, the defendant partly states the truth and then mixes up the same with colourable devices, marks, words or descriptions with which the product has no natural association.

First of start by describing what passing off is.

**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 ecommerce businesses and businesses with physical addresses.

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.

The Duhaime's Legal Dictionar , defines Passing off as making some false representation likely to **induce a person to believe** that the goods or services are those of another. 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 the same as a well known brand is a wrong and is known as the tort of “passing off”

As held in the famous case of N. R. Dongre Vs. Whirlpool Corporation

“A man may not sell his own goods under the pretence that they are the goods of another man.

Law aims to protect traders from this form of unfair competition.

Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill. Goodwill is defined as the part of business value over and above the value of identifiable business assets. So basically it is an intangible asset .

It enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It might be due to a particularly favourable location, reputation of the brand in the community, or the quality of its employer and employees. The value of goodwill of a brand can be calculated by a number of methods, like subtracting the value of all tangible assets from the total value to establish the value of the intangible assets the amount of earnings that are in excess of those normally earned by a similar business averaging the past five years net income and subtracting a reasonable expected rate of return for tangible assets and salary requirements capitalising the resulting value.

**Elements of Passing off**

For a plaintiff to succeed in a claim of passing off, the plaintiff has to be able to;

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, and it makes it easier for the court to award aggravated or punitive damage. The use of the name, mark, sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiff's business.

1. **Whether the public is likely to be confused**:

In order to determine whether the public is to be confused and misled by the activities of the defendant, the court usually looks at the characteristics of buyers of the goods in question e.g. the level of literacy or awareness of the buyer. One must prove the defendants who are engaged in a common field have used a name, mark, sign so resembling to the plaintiff's that it is likely or calculated to deceive or cause confusion in the minds of the common customer.

1. **The likelihood of deception**:

In order to succeed in a claim of passing off, all that a plaintiff has to prove is that the activity of the defendant is calculated to deceive the public. Liability in the tort of passing off is strict. Therefore, innocent passing off is not a defence, and once a plaintiff establishes that the activities of the defendant or the act alleged to be passing off is likely to deceive the public, claim succeeds, and he may obtain nominal damages, and an order of injunction.

**Remedies for Passing Off**

The remedies for the tort of passing off include the following:

1. Damages.
2. Account for profit or loss of sales.
3. Injunction.
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

**Defences to Passing Off**

In a claim for the tort of passing off, a defendant may plead a number of defences by saying that the passing off complained of is a;

1. **The mere descriptive name of the product**:

An action in passing off does not lie for the use of the purely general or descriptive name of products such as bread, radio, furniture, car, cutlery, fan, refrigerator, vacuum cleaner which are not exclusive name of the product of any particular person, accordingly no person can claim on them.

1. **Consent**:

The defendant may plea if he had obtain the products by consensual means such as licence given to him by the plaintiff to produce and or market the product.

1. **Innocent passing off**:

It should be noted that where a defendant pleads innocent passing off he will still be held liable for the tort of passing off. This defence only mitigates the effect on the amount of damages that may be awarded.

1. **Dissimilarities in the mark of the Plaintiff and Defendant.**
2. **Functional design or package**.

Relevance Of Passing off as a form of economic torts in the 21st Century 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.

Unfortunately, Passing off is not a criminal offence, such that Mrs. Ramota 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. Ramota may also go further to report the misrepresentation by the manufacturers of 'Tunio' 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.

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.

It is also suggested that the Trademarks Act be further amended to reflect the times, happenings and changes in the Nigeria. In particular, we have 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 as opposed to the an action on the infringement of a trademark.

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