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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. 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.[[1]](#footnote-1) Passing off is actionable in tort under the law of unfair competition.

The tort of passing off can be can be seen as the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one’s product, or carrying on of one’s business as if it were that of another person whose reputation and goodwill one thereby enjoys.[[2]](#footnote-2)

Whenever a person sell his goods, or carries on his business under a name, trademark, description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off.[[3]](#footnote-3) Passing off involves 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 e-commerce businesses with physical addresses.

**Passing off and Trademark infringement**

It is necessary to state that Passing off and trademark infringement go hand in hand and are similar in nature. Whilst, Passing off is an action on unregistered marks that have become notoriously attributable to a person or company, a trademark infringement action usually involves a registered mark. This means that a mark, brand, design, name must be registered as a trade mark before one can make a claim on trade infringement.[[4]](#footnote-4)

An action for Passing off is a common law remedy and the claimant need not establish title for same but show that the goods/services have distinctive features.

It is arguable to state that Passing off is both a common law and statutory remedy in Nigeria as it is statutorily supported by Section 3 of the Trademarks Act[[5]](#footnote-5) which provides that:

*“No person shall be entitled to institute any proceeding to prevent, or to prevent, or to recover damages for, the infringement of an unregistered trade mark; but nothing in this Act shall be taken to affect rights of action against any person for Passing off goods as the goods of another person or the remedies in respect thereof”*

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim, *“There is no law without a remedy”.*

In the case of ***Trebor Nigeria Limited v Associated Industries Limited[[6]](#footnote-6)***, Trebor Nigeria Limited the makers of Minta Super-mint 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 defence 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.

**THE RELEVANCE OF THE LAW OF PASSING OFF**

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: The tort of passing off is designed to protect a person’s business interests from the unfair trade practices and sharp practices of other persons. Its object is to protect the reputation and goodwill a business has built up for itself. It protects the benefits and advantage of the good name, quality, reputation, patronage and customers of the business. It protects 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 and goodwill of the business.

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 business which are not watertight with legal regulation. In this kind of environment, it is expected 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.[[7]](#footnote-7) These laws are aim to protect traders from this form of unfair competition.

The Passing off law in Nigeria helps to protect trader’s goodwill in relation to their goods and services. Goodwill is the brand reputation which is built-up in relation to specific goods or services and which attracts customers. It can be held by an individual trader or in some cases shared, such as between all the producers of a specific product in a specific areas.[[8]](#footnote-8)

The Passing off law is a vital instrument to the Nigerian Economy because it helps in the restriction and curbing of various violations of people’s goodwill such as[[9]](#footnote-9);

1. The trading with a name which resembles that of another company or brand
2. Marketing of a product as that of another company/business
3. Marketing Goods with the name resembling that of another company’s goods
4. Marketing products with the trademark of a known business or its imitation.

**The Trading with a name which resembles that of another Company or Brand:**

This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant product/business and that of the plaintiff are one and the same. S.13 Trade Marks Act[[10]](#footnote-10) provides for the respect of the registering of any trademark identical with a trade mark belonging to different proprietor.

**Marketing of a product as that of another Company/Business:**

It is actionable Passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, where as they are not. In Byron v. Johnston[[11]](#footnote-11)- it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship. Any person who falsely applies to goods any trademark or any marks so nearly resembling a trade mark as to be calculated to deceive is guilty of an offence.

**Marketing Goods with the name resembling that of another Company’s goods:**

It is the tort of Passing off to protect the right of the plaintiff in an instance when the defendant produces or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s products are mistaken as made by the plaintiff and are bought as the product of the plaintiff.

**Marketing Products with the trademark of a known business or its imitation:**

The law of Passing off helps in the curbing of a the defendant marketing of his goods using the plaintiff’s trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff.

Conclusion

The Law of Passing off is an important Economic tort in the present day Nigeria, it helps in the claim for the breaching of intellectual properties right. 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.

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2. Ese Malemi, Law of Tort (Princeton Publishers 2013) [↑](#footnote-ref-2)
3. Niger Chemists Ltd v. Nigeria Chemists (1961) ALL NLR 171; Associated Newspapers Plc v Insert Media (1991) 1 WLR 571 [↑](#footnote-ref-3)
4. T & A Legal, Nigeria: An Appraisal of Passing Off Actions Under Nigerian Law (2018) <http://mondaq.com/Nigeria/Intellectual-Property/704160>accessed 05 July 2018 [↑](#footnote-ref-4)
5. CAP T13 LFN, 2004 [↑](#footnote-ref-5)
6. (1972) NNLR 60 [↑](#footnote-ref-6)
7. NOUN; <http://nou.edu.ng/sites/default/files/2017>accessed 2017 [↑](#footnote-ref-7)
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9. Elton Blog, Enforcing claims following trademark and passing off violations in Nigeria <http//www.google.com/amp/s/legalpuzzles.wordpress.com/2017>accessed 2017 [↑](#footnote-ref-9)
10. CAP T13 LFN, 2004 [↑](#footnote-ref-10)
11. (1816) 35 ER 851 [↑](#footnote-ref-11)