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ASSIGNMENT

Discuss the relevance of Passing Off as a form of Economic Torts in the 21st century Nigeria.

**Introduction**

Passing off means making some false representation likely to induce a person to believe that the goods or services are those of another. Passing off is a form of economic tort which is primarily concerned with the protection of a business’ goodwill and prevention of unfair competition. In the 21st Century Nigeria, The Trade Mark Law of 1965 along with case law, protects against passing off.

**Meaning of Economic Torts**

Economic torts, which are also called business torts, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss. Economic torts are tortious interference actions designed to protect the trade or business. The area includes the doctrine of restraint of trade and, particularly in Nigeria, has largely been submerged in the twenty-first century by laws governing intellectual property, particularly Passing off and Trademark Infringement.

**Meaning of Passing off**

According to the Cambridge Dictionary, passing off is the illegal act of selling a product that is similar to one that another company has legally protected by a trademark.

Passing off is a cause of action that is primarily founded in tort and is historically rooted in common law. The key objective underlying the passing off tort in Nigeria, is to protect an existing commercial goodwill already acquired by a trade mark or trade name. The crucial point to notice is that it's hard to specifically delineate or define what constitutes ‘goodwill’ generally for purposes of suing for passing off. The existence or otherwise of a explanation for action in ‘passing-off’ and therefore the existence of a long-time goodwill would then need to be decided by the court in each particular case. In the case of *IRC v. Muller Margarine[[1]](#footnote-11554), T*he House of Lords described ‘goodwill’ in relation to passing off as, ‘the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.’

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 form of connection or association to another when this is not true.

**The Concept of Passing Off**

Passing off is the selling of goods or carrying on a business in such a manner as to mislead the public into believing that the defendant’s product or business is the plaintiff’s and take advantage of the plaintiff’s goodwill. The law on this matter is designed 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 traders[[2]](#footnote-2562).

In *The Jif Lemon Case (Reckitt & Colman Ltd v Borden Inc)[[3]](#footnote-12501)*, the House of Lords adopted the ‘Trinity Test’ in establishing the elements of Passing Off, and explained same as follows:

* The goods or services have acquired goodwill or reputation within the marketplace that distinguishes such goods or services from competitors;
* The defendant misrepresents his goods or services, either intentionally or unintentionally, so that the general public may have the impression that the offered goods or services are those of the claimant; and
* The claimant may suffer damages as a result of the misrepresentation.

To sum it up, in order for a claim of passing off to succeed, the defendant must have falsely misrepresented his goods as those of the plaintiff, which has a good reputation/goodwill in the market and thus leads to damaging his goodwill.

The plaintiff has the burden of proving goodwill in his goods or services, design of goods, brand, mark or the thing standing for itself. The plaintiff also has the burden of proof to show false representation to the public to have them believe that goods/ services of the defendant are that of the plaintiff. There must be some form of connection between the plaintiff’s and defendant’s goods, services or trade. The plaintiff must show the likelihood or actual deception or confusion by the public. It’s the court’s duty to determine the similarity or identity of the marks, goods, or services. In *Niger Chemists Ltd v Nigeria Chemists*[[4]](#footnote-31004), Palmer J, quoting Lord Cozens Hardy MR in *Ewing v. Buttercup*[[5]](#footnote-2034) held:

‘I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff or are carrying on a branch of the plaintiff’s business.’

It is important to note that acts of infringement that could lead to an action in passing off might relate to the misuse of trade names, trademarks or the design of the goods or business in question. In *U.K. Tobacco Co. Ltd v. Carreras Ltd*[[6]](#footnote-13948), the plaintiff marketed a popular cigarette known as ‘Bandmaster’ which has a white man in a bandmaster’s uniform on its pack. Subsequently, the defendant started to import and market another brand of cigarette known as ‘Barrister’ which also had a white man in a barrister’s uniform on its pack. An action for passing off by the plaintiff succeeded and the defendant was restrained from importing and marketing the Barrister brand.

**Remedies in an action for Passing off**

The following reliefs/ remedies can be claimed in a Passing up action as follows:

* Injunction: This is an order of the Court to ban or suspend the use of a mark. This is often usually the initial relief (preliminary injunction) sought to suspend the use of the mark pending the judgement of the court regarding the case and a perpetual injunction when the case has been concluded to totally stop the use of the mark. In *Hendriks v Montagu[[7]](#footnote-3938),* an injunction was granted to the plaintiff, Universal Life Assurance Society, restraining the defendant’s company from carrying out business under the name “Universal Life Assurance Association”. Similarly, in *Niger Chemists Ltd. V Nigeria Chemists*(supra.), an injunction was granted by the court to restrain the defendants from further use of the name, “Nigerian Chemists”
* Damages: It has been established through decided cases that a successful litigant in a Passing off action is entitled to damages. Damages here could be general, special or punitive. These usually emanate from losses which are presumed to have been suffered by a Plaintiff in a Passing off action.
* Account of profit: Here the Plaintiff is entitled to profit on goods wrongly sold by the defendant[[8]](#footnote-8459).
* Delivery up for destruction of infringing goods: This is usually claimed where physical goods are involved. this happens where goods are produced in breach of the trademark of another identical product. Thus, the Plaintiff usually claim for the products to be delivered up especially in order that it will be destroyed. *Ferodo Limited & Anor. V. Ibeto Industries Limited[[9]](#footnote-1971),* the plaintiffs brought a claim for the delivery up for the destruction of all brake linings, packages and labels containing the offending marks or being in the offending design including printing blocks and other materials the use of which would be a breach of the injunction requested for amongst other claims
* Anton Piller Orders: This is an order for inspection and delivery up of infringing materials in the possession or control of an infringer. In  *Ferodo Limited & Anor. V. Ibeto Industries Limited(*supra.) the court order for an inspection of the goods of the defendants.

**Defences available to a Defendant in a Passing off action**

Some defences available against a claim of Passing off include the following[[10]](#footnote-32064):

* Consent of the Plaintiff to the use of the name, mark, sign or slogan.
* Indistinct name, mark, sign and slogan of the plaintiff.
* That the Plaintiff's name, mark, sign hand slogan has become generic/common place.
* Dissimilarities in the mark of the Plaintiff and Defendant.
* Innocent usage of the Plaintiff's name.

**The Relevance of the law of Passing off**

The fundamental of the law of passing off is to protect a trader’s reputation. Passing off enables businesses to enforce their rights associated with its good name in the market. It prevents competitors stealing – and making use of - the traits of a product or service which has made it a success. It's the goodwill - the attractive force that brings in customers, the reputation of the product or service and the business owner(s) that produces or engages in the good or service - that passing off protects. The higher the degree of goodwill, the greater the protection granted by the law of passing off. When the defendant’s trade mark does little to differentiate itself from the plaintiff’s trademark thus leeching off of the plaintiff’s already established goodwill, the law of Passing off would serve as sufficient protection to the plaintiff. Passing off does so with the aid of enabling a business to prevent different groups from unfairly using its goodwill. It protects against all activities of a business that may lead the public into believing that they are another business, especially if the other business has a better reputation.

**Conclusion and Recommendations**

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 one is entitled to represent his goods or his business as that of another. Therefore, I recommend that the framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses as currently the only laws that back up actions in passing off are case laws and *The Trade Mark Law, 1965*. I also suggest that the Trademarks Act be further amended to reflect the times, happenings and changes in the Nigeria.

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5. (1917) 2 Ch 1 [↑](#footnote-ref-2034)
6. (1931) 16 N.L.R 1 [↑](#footnote-ref-13948)
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