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DISCUSS THE RELEVANCE OF PASSING OFF AS AN ECONOMIC TORT IN 21ST CENTURY IN NIGERIA .

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.

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 Passing off is actionable in tort under the law of unfair competition.

The study of the law of passing off and its application in Nigeria is necessary because there is a high rate of infringement regarding trademark and products in Nigeria. The situation in Nigeria has become one that the majority of the population do not even know what constitutes passing off and what does not constitute passing off.

The law of passing off is of great importance to trademark and copyright protection in Nigeria .

Typical forms of passing off in Nigeria

Everyone has a right to enjoy the benefits of what they create, be it monetary benefit or even simply the goodwill and reputation that comes with it. In a country such as Nigeria, where people have little or no regards for the rights of other people, infringement on the trademark of many people has become of great concern to the public. It is common to see goods in the shops bearing almost the same name or trademark or even having similar packages .

The most common forms of passing off in Nigeria includes: using a name that closely resembles the name of an existing product, imitating the appearance of the plaintiffs products, producing fake products using the plaintiffs trademark, copying the plaintiff's advertisement, selling the plaintiffs expired or inferior products thereby causing an injury to the plaintiffs reputation etc.

Another problem that is quite difficult to ascertain what exactly constitutes ‘goodwill’ when suing for an action in passing off. Goodwill is an important element in succeeding in an action of passing off, however, the existence of goodwill alone will not be enough to fulfill the other ingredients required for the Tort of passing off.

The House of Lords in the case of *IRC v. Muller Margarine* described goodwill in relation to the tort of passing off as ‘the benefits and advantage of the good name, the reputation and connection of a business. It is the attractive force which brings in custom.’

There is also the problem of jurisdiction. For the past few decades an important discourse has been going on regarding the jurisdiction of passing off in Nigeria and the question ‘whether Federal High Court and the State High Court could assume exclusive or concurrent jurisdiction in passing off?’ and the circumstances, if any, that would surround them. Even though this issue appears to be straightforward, it is a little more complicated than expected.

An action for copyright will lie where a defendant is involved in business very similar as a plaintiff and adopts a name which will make the public believe that his business and that of the plaintiff are the same or connected. In the case of *Beecham Group Ltd v. Esdee Food Product Nigeria Ltd* it was held that the trademark ‘glucose-aid’ is calculated to deceive the public in sound in consideration of the trademark ‘Lucozade.’

In the case of *Niger Chemist v. Nigerian Chemist*, Palmer J said that “it seems to me a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemist ‘ and the other “Nigerian Chemist,’ there must be a grave risk of confusion and deception.

Elements of passing off

The elements of passing off are the requirements that a person must prove in order to succeed in a claim of passing off.

- (i) Goodwill owned by the trader
- (ii) Misrepresentation
- (iii) Damage to goodwill

(i) Goodwill owned by the trader

The plaintiff must have acquired some kind of goodwill from the product that he feels necessary to protect. The existence or otherwise of a course of action in passing off and the existence of established goodwill will then have to be decided by the court in each particular case.

In the case of *ICR V Muller Margarine* goodwill and reputation with respect to passing off was defined as ‘the benefits and advantages of a good name, reputation, and connection of a business. It is the attractive force which brings in customers.’”

The establishment of goodwill is key to proving a claim of passing off but it cannot by itself suffice without the other two key elements of the classical trinity.

(ii) Misrepresentation

The plaintiff has the burden to prove that there had been a misrepresentation, whether intentional or otherwise, capable of misleading the public. There must be a likelihood, actual deception or confusion by the public. It is the court’s duty to decide the similarity or identity of the goods or services. The criteria used in measuring this are usually; visual, aural and conceptual similarities.

(iii) Damage to goodwill

It is not enough to prove that there is an existence of goodwill or misrepresentation; it is necessary to show that damage had occurred as regards to that misrepresentation. He must show that he had suffered or is likely to suffer loss from that misrepresentation.

The plaintiff does not need to prove actual or special damage; real or tangible probability of such damage will suffice. However, the damage must be reasonably foreseeable.

In such instances, the court must use common sense in determining the case based on the evidence provided and judicial discretion in opposition to witnesses.

Disclaimers may not be enough to avoid liability in cases of passing off.

Legal protection of products in Nigeria

Protecting your product can be the best thing you can do especially in a country like Nigeria where there is a high rate of passing off and copyright infringement. In cases of unregistered trademarks, a person may need to bring an action to prevent ‘passing off. A person can prevent

others from selling or marketing his products or confuse the public into believing they are one and the same products by proving the extent to which his goods are being sold.

The period of protection against passing off is indefinite as a person is allowed to take legal action for as long as his goods or services are being infringed on. Although, there are laws on the books dealing with intellectual property violations, Nigeria's legal and institutional infrastructure for protecting intellectual property rights is in need of further development.

Legal protection of products in Nigeria is regulated by The Copyright Act, 1988 as amended in 1992 and 1999, the Trademarks Act of 1965, and the Patent of Designs Act of 1970.

One of the most common forms of passing off is passing off on the name of a business.

In *Continental Pharmaceutical Ltd v. Sterling Products Nigeria PLC and SmithKline Beecham Plc*, the plaintiff, Continental Pharmaceutical Ltd were manufacturers of a registered trademark designed with the words 'Conphamol' brought an action against the defendants for allegedly infringing on the salient features only substituting Conphamol for Panadol. It was held that passing off had occurred due to the infringement of the Plaintiff's registered trademark.

Passing off law does not only highlight what constitutes an infringement in that aspect, rather it grants appropriate remedies to those whose products or business has been infringed upon whether there is a proof of actual damage or not, so long the ingredients of what constitutes an infringement is satisfied.

Passing off is something that needs to be taken seriously in this country because a lot of people have fallen victims to lack of knowledge on how to protect their goods or ensure that they get the right remedy when such infringement occurs.

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