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**QUESTION: DISCUSS THE RELEVANCE OF PASSING. OFF AS A FORM OF ECONOMIC TORTS IN 21ST CENTURY NIGERIA**

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**THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY NIGERIA**

The selling of goods and engaging in a business in a manner with the sole aim as to misdirect the public into believing that the product/goods in question is that of the plaintiff other than the defendant is the pith of the subject matter which is “passing off”.

Economic tort according to Wikipedia is also reffered to as ‘business tort’ which are torts that provide the common law rules on liability which arise out of business transactions.

In this regard this article is geared towards explaining the principle of passing off, some salient elements in some decided cases and remedies accessible to victims of this tort which major emphasis in the 21st century Nigeria.

Now we move on to the term “passing off” **What is Passing off?** Passing off can be construed as an unethical and biased competition by “misrepresentation” or literarily “seeking to cause confusion or an act of deception which arises in the course of trade, thereby causing confusion in the minds of the customers. It is however noteworthy that this does not only arise in physical businesses with physical addresses but is also found in the cause of e-commerce businesses.

Also, The Duhaime’s Legal Dictionary defines Passing Off as making some false representation which is most likely to **induce a person to believe that the goods or services are those of another person**.

Furthermore, Passing off can also be said to be an act of falsely representing one’s product as that of another person in an attempt to **deceive potential buyers.** This tort is actionable in tort under the **law of unfair competition**.

In passing off it is noteworthy that the plaintiff is entitled to recover damages for the loss of profits incurred as a result of customers being diverted from him as a result of the defendant’s actions.

**PASSING OFF AND TRADEMARK INFRINGEMENT.**

These two principles are almost alike and therefore go hand in hand. There are however some distinctions which make them unique in nature. Firstly, it can be stated that passing off is an action on unregistered marks which have been attributed to a person or company meanwhile trademark infringement deals with registered marks which implies that a mark, design, brand, name must be registered before any claim can be made regarding this tort.

An action in passing off is a common law remedy and the claimant needs not to establish title for same but is required to show that the goods and services have distinctive characteristics.

**PASSING OFF AND IT’S INPUT IN NIGERIA.**

As stated earlier “Passing Off” can be defined as an act of making false representations which is likely to induce a person into believing that the goods and services are those of another person. Nigeria right from the onset has always adopted written constitution with clearly stipulated rules and regulations regarding all spheres of law and wellbeing in the case of passing off it is not different as it is arguable to state that Passing Off is both a common law and statutory remedy in Nigeria with statutory support under ***section 3*** of the ***Trademarks act*** which states as follows:

***“no person shall be entitled to institute any proceeding to prevent, or to recover damages for the infringement of an unregistered trademark; 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 statements above state that a passing off action can be instituted when a mark is not registered and is supported by common law and is statutorily backed up which brings to light the legal maxim “***there is no law without a remedy***”.

In the case of ***Niger Chemists Limited and Nigeria Chemists*** the plaintiff had an established Chemist business under the name “Niger Chemist” meanwhile the defendants established this same business on the same street with the plaintiff bearing the name “ Nigeria Chemist”. The plaintiff in a claim that the name was similar and most likely to deceive the public that there is a relationship between them sued the defendants. The court while pronouncing judgement agreed with the plaintiff and thereby granted an injunction against the defendant on the use of that trade name. And therefore in this above instance passing off took effect by the use of a trade name similar with that of another in other to deceive the public that there is an existing relationship between them.

Also in the case of ***Trebor Nigeria Ltd v. Associated Industries Ltd*** the plaintiffs whom are the makers of peppermint brought an action against the defendants with a claim that the wrapper used in packaging the product of the defendants was similar to theirs and that they were guilty of passing off their product as similar to the plaintiffs. The defendants in their defence raised dissimilarities in the two products, however the judge found the defendants liable for Passing Off. In this case Passing Off took place by the use of a package strongly similar with that of another product in a bid to deceive the public that the products are one and the same.

**JURISDICTION OF THE COURTS IN PASSING OFF IN NIGERIA.**

In the case of ***Patkun industries Ltd v. Niger Shoes Ltd 1988*** the Supreme court held that the ***Federal High Court*** has jurisdiction in trademarks infringement and passing off actions.

It is also stated that an action as regards infringement of registered trademarks should always be in the Federal High Court because it arises in relation to a Federal enactment which is the ***Trade Mark Act.***

The opinion of Nnamani J.S.C, Uwais J.S.C the chief justice of Nigeria at the time and Mohammed J.S.C in the case of ***Ayman Enterprises Ltd v.Qkuma Industries Ltd &Ors 2003*** was that passing off actions for an unregistered trademark should not be instituted in the Federal High Court but rather the State High Court. Also it was held that the Federal High Court has ***Exclusive*** jurisdiction to hear and determine a claim for passing off as in the case of ***Omnia (Nig) v. Dyktrade 2007.***  This is also backed up by the grundnorm in Nigeria which is the Constitution.

**ELEMENTS TO PROVE PASSING OFF.**

Asides deception as a key element in proving passing off, Justice Agu N in the case of ***The Boots Company Ltd v. United Niger Imparts Ltd*** also gave some elements namely;

* The defendants engaging in a similar business have used a name, mark, or sign resembling to the plaintiffs and can deceive any potential customer
* The use of such name, mark, or sign is likely to cause injury actual or probable to the goodwill of the plaintiffs business. Etc..

**REMEDIES.**

* **Injunction;** an order issued by the court to prohibit the use of such name, mark or sign
* **Damages;** this could be special, general, or punitive.
* **Anton Piller Order;** an order for inspection and delivery up of infringing materials in the possession of an infringer.
* **Account of Profit;** the plaintiff here is entitled to profit on goods wrongly sold by the infringer.
* delivery up for destruction of infringing goods.

**DEFENCES AVAILABLE TO A DEFENDANT.**

* Innocent usage of the plaintiffs name
* Consent of the plaintiff to use the name, mark, or sign.
* Indistinct name, mark, or sign of the plaintiff.
* Dissimilarities in the mark of the plaintiff and the defendant