**NAME. UGBOME FAITH NNENNA**

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**COURSE. LAW OF TORT**

**LEVEL. 300 LEVEL**

Passing off is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. It is the selling of one’s product or carrying on ones business as if it were that of another person whose reputation and goodwill one thereby enjoys. In the tort of passing off, a person carries on his business or sells his goods under a name, trademark, description or imitation of another person’s product in order to deceive the public to patronize it. Passing off is a deceit of the public to patronize ones business. It is an unfair and unconscionable competition.

Whenever a person sells his goods or carries out his services under a name, trademark, and description or otherwise does anything to mislead the public into believing that the goods or services are those of another person and thereby takes advantage of that persons reputation and goodwill, he commits the tort of passing off. [[1]](#footnote-2) Usually, passing off involves one form of misrepresentation, or other to make the public patronize ones goods or business.

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. It involves making some false representation likely to induce a person to believe that goods or services are those of another. It is a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader which causes actual damage to a business or goodwill of the trader by whom the action is brought.

In CONSUMERS DISTRIBUTING CO. V. SEIKO TIME CANADA LTD.[[2]](#footnote-3), it was defined as the making of some false representation to the public, or to a third person, likely to induce them to believe that the goods or services of another are those of the plaintiff. This may be done by counterfeiting or imitating the plaintiff’s trademark or trade name, his wrappers, labels, or the appearance of his place of business.

In the case of MATTEL USA V. CANADA INC.[[3]](#footnote-4), it was established that in an action for passing off, it would have been necessary for the appellant to show that the respondent restaurateur intentionally or negligently misled consumers into believing its restaurant services originated with the appellant and that the appellant thereby suffered damage.

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 established 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 benefit and advantage of good name, quality, reputation, patronage and customers of the business. It protects that attractive force of the business which brings customers to it. It protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. According to Sir John Salmond, the purpose of the tort of passing off is to protect traders against 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. This tort is actionable per se.

In the case of WARNINK BV V TOWNSEND AND SONS[[4]](#footnote-5), Lord Diplock stated five characteristics for determining when an action lies in passing off; a. a misrepresentation, b made by a defendant in the course of trade, c to prospective customers, d which is calculated to injure the business and goodwill of another person, e which causes damage to that persons business and goodwill or will likely to do so.

ELEMENTS OF PASSING OFF

To succeed in a claim for passing off, all that a plaintiff has to prove is that the activity of the defendant is aimed at deceiving the public. The tort of passing off is a strict liability tort, therefore innocent passing off is not a defense 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, his claim succeeds, and may obtain nominal damages, and an order of injunction. It is not necessary for the plaintiff to prove that the defendants conduct has actually deceived the members of the public. It is sufficient if the plaintiff can prove that there is the likelihood of the public being deceived, or that it is likely to deceive the public in the future. This will entitle the plaintiff to an award of a *quia timet* injuction[[5]](#footnote-6), which is an injunction usually issued to prevent an occurrence of a future event which is proposed, or imminent.

However, where evidence exists that the public has actually been deceived, the plaintiff may give such evidence. Where there is no likelihood of the public being confused, there is no passing off.[[6]](#footnote-7)

FORMS OF PASSING OFF

1. Trading with a name resembling that of the plaintiff[[7]](#footnote-8)
2. Marketing a fake product as that of the plaintiff by using plaintiff’s label or design[[8]](#footnote-9)
3. Marketing a product with a name resembling that of the plaintiff’s goods[[9]](#footnote-10)
4. Marketing products with the plaintiff’s trademark or its imitation[[10]](#footnote-11)
5. Imitating the appearance of the plaintiff’s product[[11]](#footnote-12)
6. Selling inferior or expired goods of the plaintiff as current stock[[12]](#footnote-13)
7. Imitating the plaintiff’s advertisement [[13]](#footnote-14)

**THE RELEVANCE OF PASSING OFF 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. In a country where a considerable percentage of the population lives in rural areas such as Nigeria, it is very easy to pass off goods

. Passing off prevents competitors from stealing the traits of a product. . It protects against unfair competition whether it be intentional or not. Unfair competition in the sense that one business comes up with a trend and another business starts to copy that trend and therefore there is divided attention from the customers. For example if Mr. A decides that for every product a customer buys in his shop, he’d give them free can of milk and as a result many people are drawn to his shop, now Mr. B finds out and does the same exact thing, the customers acquired by Mr. A would start going to Mr. B as there is no difference thereby causing unnecessary unfair competition. Or when a big establishment sees that a smaller one is getting more customers than they are and decided to steal some of their ideas, they are in essence creating an unfair competition. The law has reduced the means where people copy other peoples businesses through setting certain rules against it and remedies for those who have suffered from it.

It protects the goodwill of a business from being misrepresented and secures every sellers right to be able to enforce the right to their goods. This means that the good name and reputation which a business has worked hard and long for can be protected. Another business cannot be benefiting from the hard work of another. It can also help to prevent the goodwill and reputation of the business from going to mud; it can help uphold it where there is an incident of misrepresentation. It protects the goodwill and reputation of the business, which is the standing that the business has.

It would ensure that customers in Nigeria would find sellers with ease with the advent of technology. Trademarks are an essential commercial communication tool to capture customer attention and help ones products to standout from others. It enforces fair trade practices. The customers would see the trademark and know who they are dealing with. It also protects businesses without registered signs or trademarks. Now that marketing has become easier with social media and telecommunications, it is easier for a brand to reach out to as many people as possible and also know how to make ones brand stand out from others so that when another brand decides to start copying you, it is easier to bring them to justice.

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2. [1984] SCR 583 [↑](#footnote-ref-3)
3. [2006] 1 SCR 772 [↑](#footnote-ref-4)
4. [1979] ALL ER 927 at 932 [↑](#footnote-ref-5)
5. Niger Chemists ltd v Nigeria Chemists ltd, supra [↑](#footnote-ref-6)
6. Cadbury Schweppes ltd v pub squash co ltd [1981] 1 ALLER 213 PC [↑](#footnote-ref-7)
7. Hendriks v montague [1881] 50 CH 456 [↑](#footnote-ref-8)
8. Lord Byron v Johnston [1816] 35 ER 851 [↑](#footnote-ref-9)
9. Hines v Winnick [1962] 1 ALLER 636 [↑](#footnote-ref-10)
10. Perry v Truefitt [1842] 49 ER 749 [↑](#footnote-ref-11)
11. De facto works ltd v Odumotun Trading co ltd [1959] LLR 33 [↑](#footnote-ref-12)
12. Harris v warren& Philips [1918] 87 LJ CH 491 [↑](#footnote-ref-13)
13. Cadbury Schweppes pty ltd v pub squash co pty ltd [1981] 1 ALL ER 213 PC [↑](#footnote-ref-14)