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

Passing off is a common law tort which protects the goodwill of a trader from misrepresentation. The law aims to protect traders from this form of unfair competition. Legally, classifying acts under this tort aims to protect the right of property that exists in goodwill.

Kelvin Garnett, Gillian Davies and G Wilym Harbottle “ the action of passing off is often concerned with the representation relating to a title, name, or get-up but it is not limited to these. It applies equally to other indicia or material which has given a business a distinctive character”

According to Clerk and Lindsell “it is an actionable wrong for a trader so to conduct his business as to lead to the trader so to conduct his business as to lead to the belief that his goods, services or business are the goods, services or business of another”

According to the Encyclopedic law dictionary by Biswas, passing off has been described as “selling goods or carrying on business in a manner calculated to mislead the public into believing that the goods, business,etc are those of another”

Duhaimes legal dictionary “making some false representation likely to induce a person to believe that the goods or services are those of another”

Where passing off is proved, the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, to damages for any loss he incurred and to an account of the profits made by the defendant in consequence of the tort. The tort of passing off takes various forms and the most common would be discussed below:

1. MARKETING A PRODUCT AS THAT OF THE PLAINTIFF

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff when in fact they are not. In **Byron v Johnson[[1]](#footnote-2) –** It was held that actionable for a book publisher to advertise and sell a book of poems with name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

1. TRADING WITH THE NAME RESEMBLING THAT OF THE PLAINTIFF

This 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 mislead the public into believing that the defendant’s product or business and that of the plaintiff are one and the same. In **Hendricks v Montague [[2]](#footnote-3) -** It was held that ‘Universal Life Assurance Society’ and ‘Universe Life Assurance Association’ are very likely. Also in **Niger Chemist Ltd v Nigeria Chemist (1961) ALL NLR 180 at 182[[3]](#footnote-4) –** It was held that as 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 Chemists’ and the other ‘Nigeria Chemists’ there must be grave risk of confusion and deception”.

1. MARKETING GOODS UNDER A TRADE NAME RESEMBLING THAT OF THE PLAINTIFF’S GOODS

A trade name is one under which goods are sold or made by a certain person and which by established usage has become known to the public as indicating that those goods are the goods of that person. It is a tort of passing off for a defendant to produce 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 defendants products are mistaken as made by the plaintiff and are bought as the product of the plaintiff **.** In **Hines v Winnick (1947) Ch 707 at pg 13[[4]](#footnote-5)** it was stated that the protection of trade names applies not only to the traders and manufacturers but also to any artist, writer or musician who gets to be known under a particular name which becomes inevitably part of his own stock-in-trade.

1. IMITATING THE GET-UP OR APPAERANCE OF THE **PLAINTIFF’S** PRODUCT AND ITS ADVERTISEMENT.

It is passing off where there is anything in the appearance or get-up of the plaintiff’s goods which particularly identifies those goods as the merchandise of the plaintiff, the defendant will be liable for in marketing his goods, he imitates or copies such appearance or get-up in a manner likely to confuse the public. For example the general appearance, package, label or design of the product. In **De Facto Works Ltd v Odumotun Trading Co. Ltd[[5]](#footnote-6)** the defendant were held liable in passing off where they sold bread wrapped in yellow and brown paper with the name “Odus” written in large scroll letters in chocolate colour, this being an imitation of the get-up of the plaintiff’s bread which for sometime previously had been wrapped in yellow and brown paper with the name ‘De Facto’ written in large chocolate coloured scroll letters. An important limitation to this head of passing off is that an action will not succeed were the appearance complained of is necessary for the better performance of the defendants goods or for greater efficiency in handling or processing them , that is where the appearance is purely functional.

Also an advertisement by the defendant which copies the plaintiff’s advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff as to be capable of misleading the buyers to patronize the defendant’s goods as those of the plaintiff. This is seen in **Cadbury Schweppes Ltd v Pub Squash Co. Pty Ltd[[6]](#footnote-7) (1981) All ER 2113 PC**

1. MARKETING GOODS WITH THE TRADEMARK OF THE PLAINTIFF OR WITH ANY DECEPTIVE IMITATION OF SUCH MARK.

A trademark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. It also receive protection not only under the law of passing off but also the Trade Marks Act 1965 under which most actions are brought.

In the 21st century Nigeria, Passing off as one of the remedies employed by common law courts not only to ensure fair competition in the market system of an unfair competition and unlawful interference with trade in the market system but also to maintain and safeguard the individual interest of competitors as well as public interest in fair and sound competitions[[7]](#footnote-8) is still relevant and essential.

The tort of passing off recognises and protects the proprietary right in business goodwill, and prevents a trade competitor for adopting the goodwill of the plaintiff’ business in a manner that is calculated to deceive the members of the public[[8]](#footnote-9)

There is no doubt that one of the major transcending factors of the 21st century is the emergence of high speed internet. Before the internet, businesses were done locally and the issue of unfair competition was limited to physical products. However, with the internet companies and given a wide range of opportunities to make their products and services better known.

Nigeria is no stranger to the benefit the internet has brought to the trade market and with its pros there inclusion of internet will definitely have its cons especially with reference to unfair completion.

The Internet and the World Wide Web are areas where claims of trademark infringement are becoming increasingly common[[9]](#footnote-10)

One of the more common ways infringement of trademark is done on the internet is by website marketing practice that will be referred to as search engine “baiting” with trademarks[[10]](#footnote-11)

Baiting occurs when a webmaster tricks a search engine into indexing his web site when keywords are entered in a search request. Baiting can be accomplished by inserting keywords into meta keyword tags, inserting keywords into meta description tags, and inserting text into the background of the web site.' Adding certain keywords onto the web site effectively puts "bait on the hook." That "bait" is then discovered by search engines and that keyword, the search engine will return an index with that site listed. Trademark infringement arguably occurs when those keywords are someone else's trademarks and they are used to bait the search engine into indexing the web site.

In such a situation the interest of the trademark owner can be protected by passing off as a remedy to that effect as passing off is actionable *per se.* because it is not necessary to prove that deception has actually taken place; it is sufficient for the plaintiff to show that the deception is likely to occur in the future.

Another relevance is the fact that Trademark registration in Nigeria begins with an availability search of the mark and ends with the issuance of a certificate of trademark registration. This process takes as long as two years, however in between the availability search and the issuance of the certificate, each applicant is issued an acknowledgment form and thereafter an acceptance form.

It is important to note that these forms do not indicate registration of the mark. Only the issuance of a certificate by the Registrar of Trademarks indicates trademarks registration which is only after the publication of the mark and the receipt of no objections from the public.

As such, a person who has been issued acknowledgment and acceptance forms by the Trademarks Registry without more can at best bring an action for Passing off of the mark. In the Supreme Court decided case of Omnia (Nig.) v Dyktrade Ltd, it was held by the trial judge and upheld by Belgore J.S.C that a party is not entitled to sue for infringement of a trade mark which had not been registered and that the mere issuance of acceptance by the Registrar of Trade Marks of the applicant’s application does not amount to registration until the issuance of the certificate of registration.[[11]](#footnote-12)

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2. (1881) 50 LJ CH 456 [↑](#footnote-ref-3)
3. (1961) ALL NLR 180 AT 182 [↑](#footnote-ref-4)
4. (1947) CH 708 AT 713 [↑](#footnote-ref-5)
5. (1959) LLR 33 [↑](#footnote-ref-6)
6. **(1981) All ER 2113 PC** [↑](#footnote-ref-7)
7. A.A. Owolabi, Unfair Competition: An Essay On Economic Torts<https://www.jstor.org/stable/43953397?read-now=1&seq=1#page_scan_tab_contents> accessed on 07/05/2020 [↑](#footnote-ref-8)
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