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INTELLECTUAL PROPERTY: THE LEGAL REMEDIES FOR INFRINGEMENT OF TRADE MARK AND COMMON LAW TORT OF PASSING OFF

FAGBEMI SUNDAY AKINLOLU

ABSTRACT

This study examines the mode of seeking redress for the infringement of trade marks both under the common law and under the statutory provision in Nigeria. In order to appreciate the economic woes inherent in unfair competitions amongst competing enterprises, the study highlights the nature and various types of infringements. The study also examines the effectiveness of the statutory provisions put in place to tackle problems of unhealthy business competitions among traders. Due to the recurrent problems on the proper forum to seeking legal redress for infringement of trade marks and unfair competitions claims, the study further examines the appropriate court invested with exclusive jurisdiction to adjudicate on action for infringement of trade mark in Nigeria.

INTRODUCTION

It's not exactly a battlefield out there, but all of us from time to time feel the pinch of increasing competition. The strategies we rely on to protect our positions reflect the level of competition, and our sophistication in dealing with it. Economic barriers to competition are increasingly being augmented by claims of legal rights.¹

In an economy where most goods and services come from competing enterprises, trade mark owners typically use their marks to distinguish their products and services from others on offer. The hope is that, this will trigger off an association in consumers' mind between origin and good value.² The usual infringement situation is where a third party uses a trade mark which is identical or confusingly similar to the one registered, so,

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if the goods are identical or so similar that there is a likelihood of unfair advantage, infringement has occurred. In spite of this, how far or to what extent should a trader be invested with power to sue upon the unfair competition of their rival is a matter for judicial decision.

Frankly speaking, it is not compulsory to register a trade mark before it is used; this is because, an unregistered trade mark enjoys protection under the common law tort of passing off. However, the common law protection is restricted and thus procuring an effective remedy can be onerous and expensive. Conversely, a trade mark registration provides a ready made protection and powerful remedies against infringement on proof of registration of the mark.

In view of the foregoing, this study aims to discuss various mechanisms put in place to seeking legal remedies for the infringement of both registered and unregistered trade mark, the study will, on comparable basis, examine the effectiveness of statutory and common law action for infringement of trade mark. In doing that, this study will highlight the types, nature and scope of infringement of trade mark and conclude with the proper forum to seeking legal redress in case of unauthorized infringement of trade mark under the Nigeria law.

THE LEGAL CONCEPT OF TRADE MARK, PASSING OFF AND THEIR ORIGINS

In section 67 (1) of the Trade Marks Act,³ a trade mark is defined as:

“Trade mark” means, except in relations to a certification trade mark, a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person, and means, in relation to a certification trade mark, a mark registered or deemed to have been registered under section 43 of the Act.”

The section further described mark to includes: *“a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof”*

From the foregoing, it can be safely said that, a trade mark is a letter, name, signature, word, numeric device, brand, heading, label or aspect of packaging, shape, and even a scent or sound which is used in business to indicate that the goods or services come from a particular manufacturer or service provider. Passing off, on the other hands, according to Black's Law Dictionary⁴ means:

“The act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers”

Passing off is actionable tort under the law of unfair competition. It may also be actionable as trade mark infringement.⁵ Due to the foregoing, under the common law, the doctrine of unfair competition was construed in a much more narrow way as being synonymous with passing off and essentially, the law relating to the tort of passing off and unfair competition stand against the act of one reaping more than he has sown.

Thus, the law on this matter is designed to protect traders against any 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.⁶

In the celebrated case of *Reddaway v. Banham*,⁷ Lord Halsbury L.C stated thus:

"I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else"

The right of the trader to invoke the help of the court in protecting his right to the exclusive use of a trade mark or trade name, or the distinctive dress or get-up of his goods, is not statutory in origin but emanated from the common law. This right is still exercisable under common law tort of passing off. Thus, in situation where defendant sells another trader's (plaintiff) genuine product, implying that it was superior model, when in fact it was not or inferior one, the court held the defendant liable in passing off.⁸

As could be seen above, the basic purpose of registration of a trade mark is to distinguish one's goods from those of others and to prevent a passing off of such goods as goods of the plaintiff, similarly, registration helps to entrench one's right in the mark.⁹ Like modern banking system, which could be traced to the activities of the gold smith in London, the evolution of trademarks could also be traced to London and some other large towns where there was concentration of traders and industries. Merchants and Craftsmen organized themselves into guilds and many of these guilds were established as corporations either by statute or by charter and the trade and craft of these was supervised under bye-laws.¹⁰ Some of these statutes and bye-laws, in addition, contained provisions for the allocation and use of trademarks. Sometimes the use of trademarks was made compulsory to avoid deceit. For instance, where those trademarks relate to gold and silver. However, the guilds eventually lost control over manufacturers with the Industrial Revolution that swept through Europe and thus trade marks and passing off began to develop as matters of general law.¹¹

In modern times, the growth in commerce has made various governments to put in place legislations to regulate the use of trade marks. The development of trade marks in Nigeria was largely dominated by the British practices owing to the fact that Nigeria is a British Colony, hence, many of the British legislations were applicable in Nigeria as a result of the Statute of General Application that were in place in Britain on the 1st of January, 1900..

The first indigenous statutory provision in Nigeria on trade mark was the Trade Marks Act, No. 29 of 1965; this Act was repealed by the Trade Marks Act of 1967 and was later codified in 1990 edition of the Laws of the Federation of Nigeria. At present, the legislation regulating registration and general administration of trade mark in Nigeria is the Amended copy of the 1990, Laws of the Federation of Nigeria now christened Trade Marks Act, Cap. T 13, Laws of the Federation of Nigeria, 2004.¹²

INFRINGEMENT OF TRADE MARKS

The typical infringer uses another's registered mark, or some confusingly similar sign, as a trade mark to indicate the sources of goods or services. In a market of competitors, if this conduct is not prevented, not only will the mark owner lose out, but consumers will not be able to trust the mark they see and possibilities of product differentiation will disintegrate, preventing such direct harm remains the prime objects in defining infringement and much is quite rightly heard of the "origin" function of marks, both from policy makers and from courts.¹³

Nowhere in the Nigerian Trade Marks Act is the word "infringement" defined. In view of this *lacunae*, reference will be made to other sources for assistance, for instance, Black's Law Dictionary¹⁴ defines "Infringement" as:

"An act that interferes with one of the exclusive rights of a patent, copy right, or trade mark"

In relating the above definition to the infringement of trade mark, the Author of the Black's Law Dictionary¹⁵ stated thus:

"The unauthorized use of a trademark or of a confusingly similar name, word, symbol, or any combination of these in connection with the same or related goods or services and in a manner that is likely to cause confusion, deception, or mistake about the sources of the goods or services"

Premised on the foregoing, any unauthorized act of the defendant on the mark own by the plaintiff, and calculate to mislead the consumers that the goods offer for sale emanate from the plaintiff will constitute infringement in law. One of the strongest ability of a trade mark registration is to fulfill economic and legal functions, that is, the mark must be able to identify the goods or services upon which it is used and to stimulate and maintain goodwill of the proprietor. To achieve these objectives, the mark must be distinct and indicate the origin of the goods or services without an iota of doubt as to the quality of the goods bought and or services received. Therefore, in order to prevent the embarrassment that may follow misrepresentation of mark, the proprietor requires his valuable property's right to be protected from unauthorized interference from his

competitors and this can only be achieved by that right being exclusive to him or his licensee through the medium of registration. As previously noted, it is not compulsory to register a trade mark before it is accorded legal protection, hence, section 3 of the Act provides thus:

“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; 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 legal implication of the above statutory provision was aptly captured by the Supreme Court in the case of *Patkun Industry Ltd. v. Niger Shoes Manufacturing Co., Ltd*¹⁶ in the following words:

“No person shall sue for infringement of an unregistered trade mark, any person can sue for passing off of an unregistered mark or sue for both infringement and for a registered mark”

From the foregoing, it is clear that only a registered trade mark can be subject of infringement, while an unregistered mark is actionable under the common law tort of passing off, the case law also entitles a proprietor of registered trade mark to bring cumulative action for both remedies. Furthermore, registration qualifies a proprietor to bring action for infringement under the Act. Thus, in the English case of *British Sugar v. James Robertson*,¹⁷ which case was decided under similar provision of English Trade Marks Act, the plaintiff sued for the infringement of an unregistered trade mark. It was held that the plaintiff was not entitled to sue for infringement of an unregistered trade mark, and that mere acceptance of application for registration by the trade mark Registrar did not amount to registration.

The Nigerian Supreme Court recently maintained the same position in the case of *Ferodo Limited v. Ibeto Industries Ltd.*¹⁸ where Dahiru Musdapher JSC said as follows:

“A trademark if registered gives the proprietor the exclusive right to use the trademark in marketing or selling his goods. And without his consent, if any one else uses an identical mark or one mark so nearly resembling it as to be likely to deceive or cause confusion, will entitle the proprietor to sue for infringement of the trade mark, or to sue in action for passing off or both”

TYPES AND NATURE OF INFRINGEMENT

The provision of section 5 (2) and (3) of the Act create two distinct types of infringement, distinct in the person who infringes and not necessarily in the act of infringement. These two types are:

- (a) Where a person not being the proprietor of the trade mark or a registered user thereof, using it by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered; or
- (b) Where the proprietor of trade mark or registered user uses a trade mark contrary to any conditions or limitations entered in the register in relations to the mark concerned.

Under the Act, the rights given to the registered proprietor of a trade mark were defined both positively as an "exclusive right of use"¹⁹ and negatively by statement of what constitute infringement.²⁰ The positive statement was very occasionally used to carry the range of protection beyond the actual language concerning infringing acts. Thus, the right of a registered proprietor is determined by the types of infringements under the Act.²¹

In discussing acts constituting infringement, the fact shall be on the acts of "likelihood of deception" or "confusion" of trade mark infringement. A trade mark is likely to deceive or cause confusion by its resemblance to another already in the register if it is likely to do so in the course of its legitimate use in a market where two marks are assumed to be in use by the traders in that market.²²

Confusion is perhaps an appropriate description of the state of mind of a customer who, on seeing a mark thinks that it differs from the mark or goods which he has previously bought, but doubtful whether that impression is not due to imperfect recollection.²³ Again, if trader having to dispatch a parcel in response to a written order given by reference to a trade name which he does not recognize sends goods under a different, though rather similar name, thinking that the customer has made a mistake the incident might be described as a case of "confusion". There are at least three routes of proof of likelihood of confusion: (i) survey evidence, (ii) evidence of actual confusion; and/or (iii) argument based on a clear inference arising from a comparison of the conflicting marks, and the context of their use.²⁴

It has been generally accepted that a trade mark calculated to deceive is not registrable, but what is the latitude of "calculated to deceive"? The phrase has been admirably defined by the Supreme Court in the case of *Bell Sons and Co., v. Ako & Anor*,²⁵ as follows:

"We are of the view that trade mark is calculated to deceive when by the representation which it presents, a customer, whether literate or not, going by his recollection of an already registered trade mark is not unlikely to mistake one for the other. Whether a mark is potentially capable of being so mistaken for another is a question of facts to be decided other than a comparison of one with the other....."

In Nigeria, one fact which must be taken into consideration always is the prevalent of illiteracy. Illiteracy came into sharp focus whenever one considers the likelihood of deception or confusion of customers. In the case of *U.K Tobacco Co., v. Carreras Ltd.*,²⁶ Butler L.J observed has follows:

"It is a well established principle, not only in this country, that the likelihood of deception varies with the intelligence and education of the consumer and in accordance with this principle, this court has repeatedly held to be likely to deceive illiterate natives marks which would certainly not have been likely to deceive an educated European.... The test is not whether a customer can distinguish the two marks when place side by side, but whether he has only on his own recollection of the one he likes to go by, he may not accept the other in mistake"

It could therefore be assumed that the more literate a customer is, the more likely he is able to discern the subtle differences between products. Thus, in determining whether confusion is likely, the court will take into account the experience, perceptiveness and standards of literacy of the prospective purchasers of the goods. This is a point, which has often been stressed by judges in Nigeria. Thus, in the case of *L.R.C.*

International Ltd v. Jena Trading Co.,²⁷ the decision of the court was based, not necessarily on the fact that the trade marks are so identical as to likely deceive, but that the majority of Nigerian public are illiterate or semi-illiterate and will therefore be deceived by the two identical trade marks. In that case, the plaintiffs were the registered owners of "Durex Gossamer"; "Sensitol"; and "Durex" for about fifty years; they have used the "Durex" upon pocket of rubber contraceptives or condoms. They have also for about twenty years used the word "Gossamer" and "Sensitol". The plaintiffs' trade mark had been registered under the appropriate law. The defendant sells rubber contraceptives in pockets containing the inscription "Dorex Gassomer", "Sensitively" and "Dorex". They bought these contraceptives from customers who ordered the products from overseas manufacturer, who in turn registered their own trade mark. There was no evidence nor was it suggested that the word "Dorex Gassomer" and "Sensitively" were ever registered in Nigeria as a trade marks by the manufacturer of the defendant in respect of the goods; rubber contraceptives, to which the words have been applied for the purpose of sale to member of the public in Nigeria. It was held per Omo-Ebo J that bearing in mind the conditions of trade in Nigeria, the different classes of people who ordinarily buy such products in Nigeria, the sound of each of the word and how they would sound to the illiterate or semi-illiterate, the word "Dorex" was so closely similar to the word "Durex" as to be likely to deceive and or confuse members of the public into mistaking rubber contraceptives of the defendants for those of the plaintiffs.

This is not to suggest that an educated person cannot be misled or be confused by a similar or deceptive trade mark. Otherwise, there would have been no need for trade mark law in highly educated and sophisticated western societies. For instance, in the English case of *Bollingers v Costa Brava Wine Co.*,²⁸ an injunction was granted to restrain a producer of wine from marketing his product as "Spanish Champagne", since it was to be expected that the ordinary members of the public who buy Champagne might confuse the defendant's wine with the genuine article produced in the Champagne region of France. However, where potential customers are not ordinary members of the public, but expert in the particular trade, a much higher degree of awareness is to be expected, and there will be less likelihood of deception.²⁹

SCOPE OF INFRINGEMENT

Registration gives the proprietor or user, exclusive right to the use of the trade mark in relation to the goods.³⁰ Trade marks are legally protected for the benefit of business and consumers because they are property interest of a business; a trade mark symbolizes a business goodwill and reputation.³¹ The acts amounting to infringement, if done without the permission of the proprietor, or registered user are specified in section 5 (2) of the Act. However, in spite of the stand of section 5 (2) and (3), the infringement of a registered trade mark is still subject to some limitations which are discussed hereunder seriatim:

Conflicts between Marks: So long as a trade mark remains registered, the use of it in its registered form cannot amount to infringement of any other mark.³² The owner of the conflicting mark may still be able to bring action for passing off, if he can make out a case entitling him to that tort.³³ It may be hard to make out the necessary reputation for passing off in cases where both parties have been trading in overlapping areas from much the same point in time. Alternatively, the latter owner may proceed for a declaration of invalidity of the mark on the relative ground of a prior mark at the time of registration.

The ability to invalidate a registration by showing a prior right at the time of application is subject to the twin limitations of the proprietor's consent to the conflicting registration and subsequent acquiescence in the registration by not objecting to known use. A different type of consent occurs where it is the proprietor or his licensee who has been responsible for marketing particular goods. Thus, in a comparative advertising, no accurate and *bonafide* use of a mark to identify goods or services as those of the proprietor or a licensee will infringe.³⁴

This principle continues to limit the usefulness of trade marks as a means of controlling parallel imports; this provision can justify a recipient of the proprietor's goods or those of a licensee in repackaging them or relabelling them.

Legitimate Uses of One's Name or Place of Business: Certain uses of a mark have always been permitted as legitimate forms of trading. For instance, the Act permits *bonafide* use of one's name or place of business. Accordingly, section 8 of the Act provides thus:

"The registration of a trade mark shall not interfere with: (a). any bonafide use by a person of his own name or the name of his place of business or that of his predecessors- in-business;³⁵ (b). the use by any person of any bonafide description of the character or quality of his goods...."

By virtue of the foregoing, defendant may be exempted, where the use of his name is purely descriptive or when it involves use of a *bonafide* description of the character or quality of his goods or services. On this basis, the name of a pop group may be used as the title for a book about them,³⁶ and a mark owners own product may be referred to in a comparative advertising,³⁷ if the use is not likely to be taken as a trade mark this will strengthen the case for exemption. In *British Sugar v. James Robertson*,³⁸ it was held that "treat" in the phrase "Toffee treat" on the label for a spread would not be taken as a trade mark use.

Thus, uses of a trade mark were excused if they were *bonafide*. The word *bonafide* in this context refers to objective standards, rather than subjective decision.³⁹ It is true that in this context, *bonafide* was held to mean that the defendant acted "without any intention to deceive anybody or without any intention to make use of the goodwill which has been acquired by another trader".⁴⁰ That could indeed mean that if a defendant started out in ignorance of the conflicting mark, he could continue his use when he comes to know of the conflict. At the same time, the courts paid attention to the likely effect of the defendant's mark in order to judge whether the action was *bonafide*. The issue is accordingly likely to be settled in much same way as before.

Of these two defences, the second is needed on a regular basis, for instance, a traders must be permitted to advertise their films as useable in a "Kodak" camera, or as a replacement cartridge for a "Xerox" copier. However, if the statement being made is misleading, the use of the mark would not be *bonafide* and could therefore be the subject of proceeding for infringement. Furthermore, a further exception added by the 2004 Trade Marks Act is contained in section 7 of the Act which protects an "honest concurrent user" of an unregistered mark. But the mark must have been in continuous use since a date before the registered mark was used or registered.

A person entitle to such a concurrent use may take advantage of this defence where his right to protection are being infringed by a registered proprietor. In fact, he can take positive steps to attack the registration being asserted against his marks, and if he fails to act, he risks being held to have acquiesced in the registration.⁴¹

ACTION FOR INFRINGEMENT OF TRADE MARKS

The purpose of section 3 of the Act is that it gives a proprietor of registered trade mark or registered user to either bring action for the infringement of the mark at common law for the tort of passing off or institute statutory action against the infringer. Although many of the principles applicable are common to both form of actions. It is essential to deal separately with actions which are brought to prevent or to recover damages for the infringement of trade marks, and with those which are compendiously described as "passing off action." The distinctions between the two classes of actions are as follows:⁴²

Statutorily, trade mark infringement may occur when the plaintiff complains that the defendant has infringed his trade mark by taking it in its entirety, or by taking a substantial portion of it, or by colourably imitating it, and that he is entitled to the exclusive use of the mark in question as against the defendant; conversely, in an action for passing off of goods or services, the plaintiff's case is less specialized, for he complains that the defendant is using means which are calculated to pass off, or to cause to be passed off the goods of the defendant's as and for those of the plaintiff, and the means may or may not comprise or consist of an infringement of a trade mark to which the plaintiff has an exclusive title.⁴³

Some examination of the distinction is necessary by reason of section 3 of the Act, which provides as follows:

"No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade marks; 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."

It should be noted that what the law protect in trade mark action is the property in the goods couple with the goodwill already established thereof, which has been infringed or passed off by the unauthorized use by the infringer. However, there still remains to be considered the question as to what practical differences can be traced in the way in which infringement actions were treated by the courts. It is difficult to give a complete answer, it may, however, be pointed out that the actions for infringement could not succeed without proof that the mark had been used by the plaintiff as a trade mark. Some of the tests applied in considering whether a party had used a mark as a trade mark under Nigerian Trade Marks Act may be regarded as rather arbitrary, and are now of little importance in this connection; but it was clear that the mark must have been used for the purpose of distinguishing the goods from those of other traders.

It was also the general practice to treat cases in which the right to a trade mark was established somewhat differently with regard to the relief granted, injunction in such

cases often take the form of an absolute prohibition which was generally qualified by adding such words as “without clearly distinguishing” or “so as to pass off the defendant’s goods as and for the plaintiff’s”⁴⁴

From the foregoing, the legal effect of the first part of section 3 of the Act is that it is not possible for the plaintiff to maintain an action for infringement of an unregistered trade mark under the Act. It may also be said that in practice, the courts will not ordinarily grant an injunction to restrain a party absolutely from using a mark unless the plaintiff can prove that it is an infringement of the statutory right conferred by its registration as trade mark.

For the above position the decision of the Nigeria Supreme Court in the case of *Dyktrade Ltd. v. Omnia Nigeria Ltd.*⁴⁵ is very instructive, in that case, the plaintiff claims in the Federal High Court against the defendant an injunction to restrain the defendant for infringing its trade mark “Super Rocket” applied for and accepted in Nigeria under No: TP/1933/19/5, passing off grinding stones used for the purpose of washing terrazzo floors inscribed with the trade mark “Super Rocket”, delivery up of the infringed material in possession of the defendant and claim for one million naira profits, and costs. The plaintiff filed along with its writ of summons a motion *ex-parte*, where it sought an injunctive relief to restrain the plaintiff from using the trade marks pending the hearing of the motion on notice for similar injunctive relief. The *ex-parte* application was granted, and the defendant filed a motion on notice to set aside/discharge the *ex-parte* order, this application was taken together with the plaintiff motion on notice for injunction. The trial court per Jinadu J of the Federal High Court dismissed the plaintiff’s motion on notice and set aside the interim injunction earlier granted. In addition, he struck out the entire suit on the ground that the plaintiff had no cause of action against the defendant. The learned Judge said as follows:

“(1). That once an application is accepted for registration the applicant can be said to have a voidable registration. This does not confer the right to sue conferred by section 22 (2) of the Trade Marks Act on such an applicant. What section 22 (2) did was to relate the date of registration of the trade mark back to the date of the application. It is my humble view that the exclusive right (to) a trade mark is based on its registration and it belongs to the person who first filed an application” (2). The plaintiff cannot have a cause of action for infringement of trade mark until the trade mark is registered and a certificate of registration is issued to it by the Registrar of trade marks.... I therefore hold that the plaintiff has not yet vested in it the legal interest in the trade mark Super Rocket to protect”

It was further held that the plaintiff is not entitled to any injunction in respect of the unregistered trade mark, the plaintiff appealed to the Court of Appeal, which court dismissed the appeal but held that the suit ought not to have been struck out at the court of trial. The plaintiff further appealed to the Supreme Court contending among others that it was entitled to injunction for its infringed mark. The Supreme Court in a unanimous decision rejected this view and held as follows”

“Trade mark’ when registered will entitle the proprietor to sue or institute an action for any infringement of the trade mark. Registration entitles the proprietor to the exclusive use of the trade mark and also right to sue for passing off the goods of the proprietor”

In that case Honourable Justice Belgore JSC (as he then was) observed as follows:

“The word “proprietor” may be misleading, if taken literally because what is being protected is the goodwill of a business, not a proprietary right as such. It is therefore clear that the right sought to be protected with injunction by the appellant has not matured The appellant has not indicated clearly the right he wanted protected either in the interim or substantive claim. What was before the trial court was not a matter of passing off but that of breach of appellant’s trade mark, the appellant has got no trade mark to protect”

It could be asserted positively that the purport of section 3 is the protection of a registered trade mark and to succeed, the plaintiff must base his claim on the fact that he is registered as proprietor of the trade mark.⁴⁶ Usually, though not invariably, if he has used the trade mark, he can also include in his claim remedy for passing off. The two forms of actions are considered hereunder.

Statutory Action for Infringement: The procedure for an action based on the statutory right conferred by registration could be assessed as follows: The plaintiff must establish his title either as proprietor or as a registered user, he must also prove that the defendant has acted or threatens to act in such a way as to infringe the right conferred by registration as defined by the Act. The following are essential in an action for infringement of registered trade mark.

Proprietor as Plaintiff: The plaintiff’s title as proprietor depends on the existence of a valid registration.⁴⁷ The entry on the register of trade mark, if not admitted, must be proved by the production of a certificate issued by the Registrar.⁴⁸

The fact that a person is registered as proprietor of a trade mark is a *prima facie* evidence of the validity of the original registration and of all subsequent assignments and transmission thereof.⁴⁹ Original registration in Part A must after the expiration of seven years from the date of that registration, be taken to be valid.⁵⁰

Note however that an action will not necessarily be dismissed on the ground that the plaintiff was not registered at the date of the writ; but he must have become registered before he can obtain judgment for a perpetual injunction. In *Inlee v. Henshaw*,⁵¹ it was held that, although the plaintiff had not registered himself as proprietor by virtue of an assignment before the action was begun, this was unnecessary.

Registered User as Plaintiff: In the case of a registered user, no question as to an incomplete title of this sort can arise as he has no right to use the trade mark before registration. A registered user can only sue for the infringement of the mark, if the registered proprietor has refused or neglected to sue after two months of being called upon to do so.⁵²

Joint Proprietor: In the case of joint proprietorship of trade mark, the provision of the Act is to have effect in relation to any rights to the use of the mark vested in the persons registered as if that right had been vested in a single person.⁵³ Again, joint proprietor of trade mark can sue together a third party who has infringed their trade mark. However, as between themselves, it is not clear whether either party can use the trade mark without the express consent of the other. It should be noted that there is no any direct judicial authority on this point, save that it could be inferred from the *Tarantella's case* that it was thought that the effect would be that either party would have the right to prevent the other from using the mark on any goods which had not passed through the hands of both.⁵⁴

The wording of section 64 of the Act is not very apt to describe the above conclusion; this is because the single person whose existence must be assumed may in fact have two minds. It is clear that anyone, whether a stranger or one of the proprietors who uses the mark with which all the proprietors are connected infringes the exclusive right conferred by registration. As the object of the section is presumably to enable an aggrieved proprietor to stop such conduct, the object cannot be attained unless any one of them could take proceedings. It is suggested that the rule that one partner can sue in the name of the firm to enforce the right of other should be applicable in this case.⁵⁵

For instance, if "A" and "B" are registered as joint proprietors and "B" who for this purpose must be treated as a person distinct from the two persons in whom the right is vested, were to infringe, "A" could constitute an action in name of the parties and make "B" a defendant.

Concurrent Registration: Where, as distinguished from a joint registration, there are concurrent registration of resembling marks, the use of a mark in relation to goods of a

stranger may be an infringement of the rights of mark than one proprietor. In such cases, any of the registered proprietors can sue by himself and obtain an injunction. The assessment of damages may present some difficulty, and, unless all the proprietors were parties, an account of profits could not, presumably, be ordered.

Death of Proprietor: Registration of trade mark confers proprietary interest on the proprietor, and as such, any unauthorized interference with the mark necessarily injure the proprietor's estate, hence, proceedings may be begun or continued by the executors of a deceased proprietor.⁵⁶ Beneficiaries under a will or intestacy who become entitled to the trade mark can secure registration and sue as proprietor.⁵⁷ However, a mortgagee who does not intend to use a mark cannot bring an action for infringement.⁵⁸

COMMON LAW PASSING OFF

It is an actionable wrong for the defendant to represent, for trading purpose, that his goods or merchandise is that of the plaintiff. It makes no difference whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known, or the use of any badges colourably resembling that of the plaintiff, in connection with goods or services offer to the public by the plaintiff. In the case of names or words used as a description of goods, the general rule may need some qualification, and such cases are discussed below. In the words of Lord Kingsdown:

"the fundamental rule is that one man has no right to pass off goods for sale as the goods of a rival trader"

Where passing off is proved, the plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, and to damages for any loss he has incurred thereby,⁵⁹ and to account of the profit made by the defendant in consequence of the tort of passing off. The tort of passing off takes various forms, the most common of which are as follows:

Marketing a Product as that of the Plaintiff: In the celebrated case of *Byron v. Johnston*,⁶⁰ the defendant advertised poems as written by the plaintiff, a famous Poet, who in fact had nothing to do with the authorship; the court granted an injunction against the defendant. Similarly, in *Leather Co., Ltd v. American Leather Cloth Co.*,⁶¹ Lord Kingsdown opined as follows:

"The fundamental rule is that one has no right to pass off his goods for sale as the goods of a rival trader and he cannot therefore (in the language of Lord Longdale in the case of Perry v. Truefit) be allowed to use names, marks or letters by which he may induce purchasers to believe that the goods which he is selling are the manufacturer of another persons."

Imitation of Trade Name: It is actionable passing off to sell goods with the trade mark of the plaintiff or any deceptive imitation attached thereto. A trade mark under the common law is a design or picture habitually attached by a trader to goods manufactured or sold by him in order to indicate that they are his merchandise, and by established usage known to the public as possessing that significance.⁶²

In *Hendricks v. Montagu*,⁶³ the plaintiff were granted injunction to restrain the defendant's company incorporated afterwards from carrying on business under the name Universe Life Assurance Association." The rationale behind the Court's decision was stated as follows:

"...is there such a similarity between those names as that in the ordinary course of human affairs likely to be confused with the other? Are persons who have heard of the 'Universal' likely to be misled into going to the Universe? I should think, speaking for myself, very likely indeed, many people do not care to bear in mind exactly the very letters of everything they have heard of"

Similar conclusion was reached in the Nigeria case of *Niger Chemists Ltd. v. Nigeria Chemists*.⁶⁴ In that case, the plaintiffs had carried on business as Chemists and Druggist for several years, and had several branches in Onitsha and other towns in the old Eastern Nigeria. The defendant later founded a firm carrying on exactly the same type of business. In granting an injunction to restrain the defendant from carrying on the business of the firm, Palmer J said as follows:

"....it seems to me 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 Chemist" and the other "Nigeria Chemists". There must be a grave risk of confusion and deception"

Misrepresentation of Trade Name: A trade name according to Salmond 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.⁶⁵

To succeed under this heading, the plaintiff must show that the name used actually connotes goods manufactured by him and not merely descriptive of those goods. For instance, in English Courts, "Linoleum"⁶⁶ was found non-distinctive, but the registration of "Vaseline"⁶⁷ as a trade mark survived.

For this purpose, the law maintains a distinction between 'fanciful' and descriptive names. The latter being those names, which merely indicated the nature and or characteristics of the goods sold and not that they are the goods or merchandise of any person. If the trade name in contention falls within the latter category, the law will ordinarily

not protect it not only when the defendant's use of it is truthful but also when it is false and substantially misrepresents the character of the defendant's goods, unless the plaintiff can prove that it refers to his merchandise⁶⁸.

The burden of proof is a heavy one and the plaintiff must establish that the descriptive name in question has acquired a 'secondary meaning' so exclusively associated with the plaintiff's own product by long and continuous usage that its use by the defendant is calculated to deceive purchasers based on the fact that on seeing the product, they will assume that it comes from the same source as other products on the market or a similar appearance.

The term 'secondary meaning' is normally applied to words, which identify goods with a common source of origin.⁶⁹ In the case of *Reddway v. Benham*,⁷⁰ the House of Lords held the words 'Camel-hair belting', not only described the composition of the plaintiff's product but also identified it to the purchaser 'Camel-hair belting' meant belting made by Reddaway.

The above demonstrate that misrepresentation lies at the heart of an action for passing off. They also demonstrate that a successful claimant must prove that the misrepresentation was operative or material in the sense that the allegedly misleading indicia was at least a course of deception or its likelihood amongst the relevant class of consumer and hence damaging to the claimant's goods.⁷¹

Imitating the Get-Up or Appearance of the Plaintiff's Goods

The most important means by which passing off is being committed in this country, as elsewhere is the imitation of the get-up or appearance of the plaintiff's goods. The get-up of goods is the 'dress' in which they are presented to the public, the shape, the size, a colour of the articles or the package, which contain them but does not include anything useful about these things⁷²

In the passing off action predicated on imitation of the get-up or appearance of the plaintiff's goods, the mere facts that the defendant uses a different name is no excuse, as long as there is a risk of confusion. Thus in the case of *U.K Tobacco v. Carreras Ltd.*,⁷³ the defendants marketed Cigarette 'Barrister' in packages on which appeared a white man in a Barrister's wig and gown. This was held to be an actionable imitation of the get-up of the plaintiff's Cigarette called 'Bandmaster' with a similar picture.⁷⁴

It has been contended that an important limitation to this head of passing off is that an actions will not succeed where the appearance complained of is necessary for the better performance of the defendant's goods or for greater efficiency in handling or processing them.⁷⁵ Thus the courts are always reluctant to accept as get-up anything, which has a utility value or purely functional. In *J.B William v. H. Bronnley*,⁷⁶ Fletcher Moulton L.J said as follows:

“Every man has the right to use that which is most useful.... It is only when the thing used is capricious that there can be any suggestion of passing off.”

The court in the above case did not prevent the defendant who manufactured shaving sticks from marketing a standard type of container already being used by the plaintiff since the appearance of the container was dictated primarily by functional considerations. Thus no case can be made out merely by showing an imitation of the parts of the get-up of goods which are common to the trade.⁷⁷ In *Payton v. Snelling*,⁷⁸ the claimant had been the first to put Coffee in tins enameled in bright colours; it was held that the claimant has no monopoly in such tins.

It should be noted that it is not necessary for passing off that every part of the get-up should be imitated. It is enough if any part of it, which are shown to be so identified with the claimant's goods that its use for similar goods is calculated to pass them off as his. For instance, a picture, label or wrapper of the goods may become a 'common law trade marks' if used in such a way as to lead to confusion. Similarly, passing off by get-up of shop or of an omnibus.⁷⁹

In the case of *Taylor Bros v. Taylor Group*,⁸⁰ the court found it a breach of an earlier injunction, which prohibited the defendant from trading under or by reference to the name 'Taylor' for the get-up of the shop to be used in such a way as to suggest continuity, even though the trading name had been changed to 'Layton'. The sign at the premises and on the vans and the stationery used.... corresponds exactly with the get-up previously used by the defendant.

REMEDIES AVAILABLE FOR THE TORT PASSING OFF

A fundamental maxim of law is *ubi jus ibi remedium*, which literally means, "where there is a wrong, there is a remedy". In other words, an owner of unregistered goods or services is not without legal remedy upon the infringement of his marks by defendant. The legal remedies available for the tort of passing off under the common law are still subsisting and will avail proprietor of an unregistered trade marks. The remedies recognized by the common law in this regard are as follows: (a) the grant of an injunction, which could either be interlocutory or perpetual to restrain the defendant from continuing the act which constitutes passing off. Interlocutory injunction are granted to avoid furtherance of damage to the plaintiff pending the determination of the action.

An injunction order is commonly used at an interlocutory stage such as for instance, the disclosure of the defendant's customer list or the name of his supplier or one can even seek a discovery order against someone who is not himself an infringer but who has got mixed up in the tortious acts of other.⁸¹ However, the grant of an injunction is at the discretion of the court and as such, the plaintiff must put sufficient materials before the court to persuade the court to decide in his favour.⁸²

- (b) Recovery of the profit made by the defendant as a result of the passing off. Equity never trespassed so directly upon the prerogative of the common law courts as to award damages for common law wrongs. However, as a corollary to the injunction, it might order a defendant to account to the plaintiff the profits made from his wrong doing.
- (c) Delivery up of articles in the possession of the defendant with which he is passing off the goods or services of the plaintiff. In order to ensure that injunction are properly effective, court of equity and its successors maintain a discretion to order delivery up of infringing articles, goods or materials. However, such an order may only be granted in respect of infringing goods, materials or articles which a person has in his possession, custody or control in the course of business.
- (d) Damages either special or nominal -- Damages are a common law remedy and the proprietor may be awarded damages on the proof of the infringement. The question of damages recoverable will be a matter for the court to determine base upon the available evidence. Thus, in pursuing the inquiry, the onus is on the plaintiff to show that he has suffered loss, which was caused by the defendant's wrong doing.
- (e) Anton Pillar order - the court has inherent power to make an order for the detention and preservation of the goods or services passed off by the defendant.⁸³

JURISDICTION OF COURT

To seek redress for infringement of trade mark, it is important for the plaintiff to know which court possesses jurisdiction to entertain the suit. In law, jurisdiction is the legal bedrock and or justification for the assumption and discharge of the judicial power constitutionally vested in courts of superior records. Because of the importance of jurisdiction of court in any judicial process, it is the master key to all proceedings; be it at the regular courts or tribunal, hence, in seeking legal redress in the event of infringement of trade mark, the plaintiff must first and foremost consider the appropriate court to institute his action, failing which, he might be thrown out on the ground of incompetence of the court.⁸⁴

To resolve the question of the proper court to institute action for infringement of trade mark, section 67 (1) of the Act, defines the court to which the Act applies to mean: "the Federal High Court." This was the position before the enactment of the Federal Republic of Nigeria Constitution, 1999. However, the statutory provision enunciated in section 67 (1) above has been reinforced further by the provision of section 251 (1) (f) of the 1999 Constitution which provide thus:

"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdictions as may be conferred upon it by an Act of the National Assembly, the Federal

High Court shall have and exercise jurisdiction to the exclusion of any other court in civil causes and matters:- (f) Any federal enactment relating to copyright, patent, designs, trade marks, and passing off, industrial designs and merchandise marks, business names, commercial and industrial monopolies combines and trusts, standard of goods and commodities and industrial standards."

The above position had also received judicial approval in the case of *Omnia Nig. Ltd. v. Dyktrade Ltd.*⁸⁵ where the Supreme Court per Honourable Justice Mukhtar JSC said as follows:

"I have no doubt in my mind that the cause of action is the infringement of the plaintiffs registered trade mark and passing off. By virtue of section 251 (1) (f) of the 1999 Constitution of Federal Republic of Nigeria, the Federal High Court was conferred with exclusive jurisdiction in matters relating to any Federal enactment on Copyright patent designs etc."

By virtue of the foregoing, the only court in Nigeria that has exclusive jurisdiction to entertain civil action in trade mark infringement, whether in an action for infringement simpliciter and or for the tort of passing off, is the Federal High Court of Nigeria.

CONCLUDING REMARKS

Intellectual property rights are usually expressed in the exclusive right of the holder to do certain things with the corollary that the right holder can take action to prevent anyone else from doing same. This right is not absolute.⁸⁶ To this end, the efficacy of the law of trade mark depends in the main on the remedies for the unauthorized infringement of the mark.

As could be seen above, trade mark infringement is both a common law and statutory matter. Hence, section 3 of the Trade Marks Act expressly provides legal remedies for the infringement of registered trade mark and at the same time recognizes the right of proprietor of unregistered trade mark to bring action in passing off. The effect of the statutory provision is to make both actions to be cumulative and not an alternative remedies.

The words of Dahiru Musdapher JSC in *Ferodo Limited V. Ibeto Industries Limited*⁸⁷ in this regard is instructive:

"A trade mark, if registered gives the proprietor the exclusive right to use the trade mark in marketing or selling his goods. And without his consent, if any one else uses an identical mark or one mark so

nearly resembling it as to be likely to deceive or cause confusion, will entitle the proprietor to sue for infringement of the trade mark, or to sue in action for passing off or both."

Consequently, the above statutory provisions and judicial authority give a proprietor of trade mark absolute discretion to seek legal action for the infringement of his registered trade mark or bring action for passing off where the mark is not registered or combine the two actions in one single suit.

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