

THE LAW  
OF  
PASSING-OFF  
UNFAIR COMPETITION  
BY MISREPRESENTATION

Professor Christopher Wadlow

SWEET & MAXWELL

# THE LAW OF PASSING-OFF

## UNFAIR COMPETITION BY MISREPRESENTATION

FOURTH EDITION

BY

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## PREFACE

It is gratifying to be able to report that this new edition of the *Law of Passing-off*—the fourth—is occasioned, rather than necessitated, by developments in the law since the previous one. There are no fundamental changes to report, but there has been a steady flow of reported decisions, both from this country and abroad, providing ample confirmation that the law of passing-off still has plenty of useful functions to serve, and perhaps that it still has a few surprises in store. At any rate I hope that this book will continue to be more than just a *tabula in naufragio*, to be reached for whenever trade marks have gone unregistered, or renewal fees unpaid.

This state of affairs is also personally gratifying in so far as all the major developments since the last edition are at the very least consistent with my previous treatment of the subject, and in several cases those responsible have paid me the compliment either of endorsing my suggestions for the future development of the law, as in the *Vodkat* case, or at least of expressing polite (if non-committal) approval, as in *Hotel Cipriani*.

The other side of the coin is that the increasing frequency with which the present work is cited in court militates against the expression of any unduly personal opinions as to the substance of the law. The primary duties of a textbook writer are owed to the law, and to his readers, and both are best served by not straying too far, or too often, from the paths of orthodoxy. Paradoxically, therefore, as I have settled into academic life after a career in practice I have become rather less inclined to use the present work as a vehicle for whatever is speculative or theoretical. The latter, at least, will hopefully find fulfilment one day, but most probably under another title.

A parting thought for those who still question the importance of passing-off in the real world is that the owners of the Hotel Cipriani are reported to have been awarded profits (and interest) of £7.5 million, though that is as nothing compared to the value of reasserting control over the “Cipriani” name.

I have endeavoured to state the law at January 1, 2011.

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## DEDICATION

This edition is dedicated to the memory of my late father  
Derek Wadlow  
(1929–2010)

## ACKNOWLEDGEMENTS

Michael Spence, “Passing off and the Misappropriation of Valuable Intangibles” (1996) 112 L.Q.R. 472.

Hazel Carty, “The Common Law and the Quest for the IP Effect” [2007] I.P.Q. 723.

## PLAN OF THE BOOK

### The book and its coverage

The basic plan of the book is carried over from previous editions, and there are no major rearrangements of material or additions to coverage. So far as passing-off is concerned, the structure continues to be defined by the "Classical Trinity" of goodwill, damage and misrepresentation. Each of these three essential elements receives at least one chapter to itself. However, the decided cases do not deal in anything like equal proportion with the theoretical issues into which passing-off may be resolved. The length of the treatment given to each issue has to take into account the size of the relevant body of law and the numerous subsidiary rules, presumptions, exceptions, and even inconsistencies which have evolved. In the case of the element of misrepresentation, this means that three chapters are required for its treatment in passing-off, moving progressively from general principles, through the intermediate level of actionable misrepresentations, to the one particular way in which the most common kind of misrepresentation is most typically made, which is by imitation of the claimant's distinctive sign.

Injurious falsehood also has a Trinity of its own, namely misrepresentation, malice, and damage; but the tort is less important than passing-off by at least an order of magnitude, and the body of decided cases is very much smaller. Malice and other matters which have no direct counterpart in passing-off are dealt with in a chapter (Ch.6) entirely devoted to injurious falsehood, but tracking so far as possible the structure of the corresponding chapter for passing-off, while examples of potentially actionable misrepresentations of every kind are included in a single chapter regardless of whether they are currently thought to constitute passing-off, injurious falsehood, both, or neither. Elsewhere, matters primarily or wholly relevant to injurious falsehood alone have been incorporated at appropriate places within the existing structure.

With peripheral and mostly obvious exceptions, the treatment of the substantive law of unfair competition by misrepresentation in the present work is entirely concerned with the common law torts of passing-off and



injurious falsehood. In these two fields the common law is rightly assumed, with surprisingly few necessary provisos, to be essentially uniform no matter wherever it may find itself applied, and by whomsoever it may be expounded. Extensive reference is therefore made, generally without further explanation or qualification, to the decisions of courts in the major common law jurisdictions other than the UK. Conversely, other bodies of law which may be relevant in specific instances, such as the other common law economic torts, defamation, and the statutory or European regimes for registered trade marks, geographical indications, trade descriptions and misleading advertising, receive only peripheral mention. Readers are referred to the appropriate specialist texts.

### **Passing-off, injurious falsehood, and “unfair competition”**

Section A of Ch.1 begins the book with the question of whether “unfair competition” deserves to supercede “passing-off”, either as a synonym, or as a more widely embracing term. There follows an overview of passing-off in section B in terms of its “Classical Trinity” of goodwill, misrepresentation and damage, with judicial definitions or summaries of passing-off from some of the leading cases. A corresponding overview of injurious falsehood in terms of misrepresentation, malice and damage follows in Section C. Section D provides an extended history of the development of the law.

Chapter 2 describes the treatment of unfair competition in international law. Section A distinguishes between the role of international law as defining substantive obligations on States, considered in the present chapter but not yet directly affecting day-to-day practice, and its adjectival effects on defences and enforcement, which are considered at appropriate places in Chs 9 and 10. Sections B and C concentrate on the provisions of the Paris Convention for the Protection of Industrial Property relevant to unfair competition, with Section B presenting a commentary on art.10bis of the latter and Section C describing in some detail its drafting and negotiating history, spanning half-a-dozen formal revision conferences from the first years of the 20th century onwards. The TRIPs Agreement has relatively little to say about mainstream unfair competition law, but its possible implications are considered in Section D. A new Section E considers the possible implications for passing-off of the Unfair Commercial Practices Directive.

### **Goodwill and damage**

After this introduction, the first substantial chapter on English law as such is Ch.3 which deals with goodwill in terms of its importance as the property right protected by the action for passing-off. Injurious falsehood protects a wider and indeed much vaguer class of pecuniary interests and requires only brief mention in this context. Section A explains the nature of goodwill and its importance as the basis of the action. Goodwill is also contrasted with reputation on the one hand, and statutory rights in registered marks on the other. Only traders may have goodwill, and Section B sets out the rather

elastic idea of what constitutes being a trader for the purposes of the law of passing-off. Sections C and D elaborate on this and respectively deal with two specific examples of claimants on the margin of trading activities, namely trade and professional associations and non-trading organisations such as charities. Goodwill is normally created by trading, but Section E discusses whether goodwill can exist before actual business commences. Sections F and G discuss the inherently territorial nature of goodwill and the circumstances in which a foreign enterprise can be said to have goodwill to protect. Section F presents an orthodox account in terms of the English authorities, and Section G gives an international overview for several common law jurisdictions which differ from the English point of view to a greater or lesser extent. The next three sections deal with goodwill as legal property. Section H introduces the question of ownership of goodwill in general terms by reference to a number of cases decided since the previous edition, and Section I discusses ownership in a variety of commercially important circumstances in which more than one party might plausibly be said to have a claim to the goodwill, or a share in it. Section J covers dealings with goodwill, their validity, effects and incidental consequences. Section K deals with extinction of goodwill, and Section L mentions some peripheral sources of law which may be relevant for non-traders.

Chapter 4 deals with damage. Only misrepresentations really likely to cause damage are actionable as passing-off, whatever their nature. Damage was the gist of the common law tort of passing-off, and its theoretical importance has been reaffirmed in modern law now that the class of actionable misrepresentations may perhaps be so wide as to be embarrassing if no such restriction is imposed. Section A deals with the theoretical importance of damage in the history of the tort and today. Section B qualifies this, because as a practical matter proof of likelihood of damage was never insisted upon in its own right in the majority of cases. The apparent contradiction may be resolved by saying that the legal burden of proving damage is always on the plaintiff, but that the evidential burden may shift to the defendant. It is on him to disprove damage in certain situations which have occurred so often before that damage may safely be assumed in the absence of proof to the contrary. Damage thus remains the acid test for unusual misrepresentations or unprecedented circumstances, but without requiring wasted effort in the ordinary case. Section C categorises the heads of damage in passing-off which are established or have received judicial consideration, and Section D deals with the treatment of damage in injurious falsehood.

## **The misrepresentation: basic principles**

Chapters 5 to 8 all deal with the element of misrepresentation from various standpoints, with Chs 5 and 8 being specific to passing-off, Ch.6 specific to injurious falsehood, and Ch.7 relevant to both.

Chapter 5 is entirely concerned with passing-off and sets out certain common principles which apply whatever the nature of the misrepresentation and however it may be made. Section A deals with the essential

importance of the misrepresentation to the cause of action and foreshadows certain situations in which there is no misrepresentation, or one which does not amount to passing-off. Passing-off is not confined to misrepresentations which are false in every conceivable sense, and Section B deals with those which are misleading in fact though literally or colourably true. As well as being false, the misrepresentation in passing-off must be a material one, as described in Section C. Section D deals with the contexts in which the claimant's distinctive name, mark or get-up can be used without misrepresentation and therefore without liability for passing-off. The next two Sections E and F deal with the defendant's state of mind: innocence is no defence and fraud is not essential, but the latter has evidential value. Section G deals with the status of the defendant as a trader, and Section H with the so-called "common field of activity", which, like fraud, remains of evidential value despite being repudiated as a component of the cause of action in its own right. Section I discusses the classes of person to whom the misrepresentation may be made. Customers and consumers are the obvious candidates but suppliers and others may also be relevant. Any definition of passing-off in terms of misrepresentation would be incomplete without mentioning that there is strict liability for putting deceptive goods into circulation even before any customer or consumer is deceived. This doctrine of "instruments of deception" is introduced in Section J as part of the wider topic of who may be liable for passing-off; and discussed in more detail in Section K, which includes the treatment of exports and the rather unsatisfactory way in which the original concept has been extended to goods which are incomplete or otherwise not inherently deceptive, and even to intangibles such as company and domain names. The final Section, L, discusses the relevant time for determining if the defendant's conduct is actionable. This section now includes the treatment of misrepresentations which for one reason or another are not operative at the time of sale, which has been moved from Section C.

Chapter 6 is the counterpart chapter for injurious falsehood, and deals with issues of general importance which have no parallel in passing-off, or which receive significantly different treatments in the two bodies of law. With those qualifications, it follows a similar order to Ch.5. Section A deals with the essential importance of the misrepresentation to the cause of action and asks what makes a false representation actionable as injurious falsehood, and in particular whether the misrepresentation need be a disparaging one. As in passing-off, the misrepresentation in injurious falsehood must be a material one, and Section B deals with this and the two related issues of identification of the claimant and the treatment of representations categorised as "puffing". Sections C and D deal with the mental element of malice, which, unlike fraud in passing-off, remains very much an essential element of injurious falsehood to this day. The (mis)representation in injurious falsehood is no longer interpreted in a different manner to that in passing-off, and the abolition of the former "single meaning rule" is considered in Section E.

## Is the misrepresentation actionable?

Chapter 7 discusses in more detail the categories of misrepresentation which are potentially actionable as passing-off or injurious falsehood, or both, and the manner in which the misrepresentation may be effected. (The most common manner, imitation of the claimant's distinctive sign, has the whole of Ch.8 to itself.) Since Ch.7 covers both passing-off and injurious falsehood, it begins with a short section A contrasting and attempting to distinguish the two torts. Thereafter, Sections B–L deal primarily with misrepresentations capable of amounting to passing-off and Sections M–P with those capable of amounting to injurious falsehood, although the boundary is not precise and a damaging misrepresentation may sometimes amount to both, or more often neither. The most fundamental kind of misrepresentation actionable as passing-off is that the defendant is the claimant, or is so closely associated with the claimant as to make no difference, and this is addressed in section B. More specifically, the earliest kind of misrepresentation recognised as passing-off, and still the most common, is that the goods of the defendant are those of the claimant or an associated enterprise. This provides the subject matter of Sections C and D, the latter dealing with passing-off where the defendant's goods are substituted in purportedly fulfilling orders for those of the claimant. In certain circumstances there may be passing-off even though the goods sold by the defendant really do originate from the claimant. Liability in these circumstances is dealt with in Section E.

Passing-off need not involve goods. There may be passing-off of businesses or services whether or not goods are also involved, and in broader circumstances than already discussed in section B. Section F deals with licensing and franchising, and Sections G and H discuss the problems of merchandising and endorsement in which real characters, or the creators of fictitious ones, have used or attempted to use the action for passing-off to restrain the unauthorised use of their names or likenesses. Producers of products such as "Champagne", "Scotch Whisky" and "Advocaat" are recognised as having a cause of action against misuse of those terms for spurious products, so Section I deals in general terms with misrepresentations or misdescriptions of this kind, while some of the more important specific products are dealt with individually in Section J. Section K deals with the extension of this kind of liability into the misuse of non-geographical terms, most recently "Vodkat". Section L deals what is sometimes called "inverse passing-off", because the misrepresentation is not that the goods or services of the defendant are those of the claimant, but that the claimant's goods or achievements are those of the defendant, who thereby misappropriates the credit due to the claimant.

The next four sections are principally concerned with misrepresentations actionable as injurious falsehood. Section M covers misrepresentations that the claimant has ceased to trade at all, or is under some other material disadvantage. Section N deals with various kinds of outright disparagements which fall more naturally under the head of injurious falsehood rather than defamation, and Section O with comparative advertising. Section P

addresses various kinds of disparagements relating to intellectual property rights. Section Q, the final section, revisits the question of whether or to what extent all or any of these categories can be embraced within a simple general rule.

### **Passing-off as a law of signs**

Chapter 8 concentrates on the one particular way in which the misrepresentation in passing-off is most often supposed to have been made. This is by the adoption by the defendant, innocently or otherwise, of a name, mark, get-up or other sign sufficiently close to what is distinctive of the claimant to deceive. The first three sections are of general relevance regardless of the type of mark or sign in issue. Section A discusses the concept of distinctiveness and Section B the factors which influence whether a sign is distinctive or not. Section C describes how one approaches the question of whether the defendant's sign is similar enough to that of the claimant for the relevant public to be deceived. Thereafter the chapter is divided up in terms of certain types of sign of recurring importance. Section D covers the related but logically distinct concepts of word marks which may be distinctive though *prima facie* descriptive, and terms which are really the generic name of the goods or services they describe. Section E deals with certain categories of verbal marks which raise specific issues, such as personal and geographical names. Cases on the titles of publications and the like raise few issues of principle but are sufficiently numerous to have a section to themselves, Section F. Sections G and H deal with the distinctiveness of get-up, and the important distinction between the get-up of packaging and the intrinsic appearance of the goods themselves. Get-up is not confined to goods sold: one may have a distinctive get-up for premises or business assets. Section I discusses a broader spectrum of visual marks, which may contribute to get-up or be relevant in their own right. Problems arising from the internet are no longer unfamiliar, and Section J addresses the response of the law to cybersquatting and similar abuses. Finally, Section K mentions some matters for which distinctiveness had been claimed, but which cannot easily be fitted into the previous categories.

### **Defences, remedies and procedure**

Chapter 9 deals with defences. A brief introduction in section A explains the sources of law and their different degrees of relevance to passing-off and injurious falsehood. Section B deals with the possible impact of the European Convention on Human Rights both by reference to unfair competition cases decided by the Strasbourg institutions, and, more relevantly, in terms of whether there is any likely effect in domestic law. The other potentially relevant body of European law in the form of the Community rules on free movement and competition is dealt with in section C. The remaining sections deal with defences under national law. Section D deals with misleading or illegal conduct by the claimant, including deceptive marks and unjustified claims to patent or trade mark protection.

Section E covers honest use of one's own name, which may perhaps still be a defence when the name is used as the name of a business, though it is no defence when the name is used on goods. Section F covers innocent passing-off in general, innocence being no defence to an injunction but possibly a defence, or a partial defence, to pecuniary remedies. Various situations can arise in which different parties assert mutually incompatible rights and these are the subject of Section G. Finally, Section H deals with defences which arise when the claimant fails to enforce his rights sufficiently promptly or vigorously.

Chapter 10 concentrates on remedies and certain aspects of procedure which are particularly relevant to passing-off. Section A deals with interim measures, which are still of considerable, if no longer overwhelming, importance. The pair of topics which follow are evidence and its admissibility in passing-off actions, including trade and survey evidence, and the various kinds of final relief, respectively considered at Sections B and C. The private international law of unfair competition is the subject of Section D, which now includes the regime of the Rome II Regulation on the applicable law in tort cases.



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