

# **IF CONSUMERS ARE NOT CONFUSED, IS THE LAW OF PASSING OFF CONFUSED? RE-EXAMINING THE ELEMENT OF DECEPTION IN PASSING OFF THROUGH CONSUMER BEHAVIOUR THEORY IN THE LUXURY INDUSTRY**

## **Summary**

This research examines a conceptual tension at the core of the tort of passing off: while the doctrine purports to protect commercial goodwill, it recognises harm only where consumer deception is established. In contemporary markets, particularly in high-value branding, consumers may knowingly purchase imitative products without being misled as to origin. Such conduct, described as non-deceptive brand appropriation, falls outside the scope of passing off. Drawing on consumer behaviour and marketing theory, the project argues that the deception element of passing off is under-theorised and rests on an outdated model of consumer cognition.

## **Detailed Explanation**

Passing off has long operated as a common law mechanism protecting commercial goodwill against misrepresentation that causes consumer deception and consequent damage. Passing off purports to protect commercial goodwill, yet its doctrinal structure recognises harm only where consumer deception is established. Traditionally, the tort is structured around a consumer-centred inquiry: whether the consumer is deceived or is likely to be deceived. Instead, the relevant inquiry should be action-centric: how misrepresentation exists where conduct is *capable* of deception, even if not every consumer is fooled. Conduct that has the capacity to mislead does not necessarily entail that consumers, at least a substantial portion of them, will actually experience deception. In fact, consumers may fully recognise the imitative nature of the product yet proceed with the purchase intentionally - “non-deceptive brand appropriation.” Such action well falls outside the cause of action of passing off which is rather absurd, which poses a conceptual difficulty: reputation matters only if consumers are mistaken, but if no one is deceived, your reputation is irrelevant.

This research project argues that the second element of passing off, misrepresentation leading to deception, is conceptually under-theorised because it relies on an implicit, and increasingly outdated, model of consumer behaviour.

Contemporary marketing theory has shifted from considering consumers as passive recipients of marketing signals to understanding them as active participants in shaping and interpreting brand meaning. Research in consumer culture theory shows that brands function as cultural resources through which individuals construct identity, express aspiration and position themselves within social hierarchies (Arnould & Thompson, 2005). Within this perspective, similarity between products does not automatically generate

confusion. Instead, visual proximity may facilitate aspirational identity work, allowing consumers to access elements of a desired status narrative without necessarily believing that two products share the same origin.

Luxury brands operate within what marketing scholars describe as customer-based brand equity systems. In Keller's framework, brand equity is built upon the strength, favourability and uniqueness of associations that shape how consumers perceive and interpret the brand (Keller, 1993). Distinctive design elements function as key reference markers within a brand's associative structure. When counterfeits incorporate similar design features, the concern is not necessarily consumer confusion, but associative interference and diminished perceived uniqueness. Brand dilution research shows that similarity alone can weaken brand strength and distinctiveness, even where consumers clearly recognise separate sources (Pullig et al., 2006).

Additionally, Veblen's theory of conspicuous consumption and subsequent signalling models in luxury research demonstrate that visible design functions as a social signal (Han et al., 2010). Consumers may knowingly purchase design similar products to access prestige signalling at a lower financial threshold. This phenomenon aligns with research on counterfeit consumption, which identifies the "knowingly willing consumer" who engages in deliberate symbolic appropriation rather than mistaken purchase (Bian & Moutinho, 2009). In this context, the absence of deception does not imply the absence of harm. Instead, symbolic value may gradually move across market tiers as imitation brands draw on meanings and associations originally built by luxury brands.

It therefore poses two research questions:

1. Whether the misrepresentation element of passing off should be expanded to include non-deceptive brand appropriation.
2. What lessons from marketing and consumer perception theory could provide a more tangible interpretative framework for assessing reciprocal "confusion" and "deception" in high involvement markets.

By transplanting consumer perception theory into legal analysis, the project proposes a tangible methodology to deduce misrepresentation that aligns passing off doctrine with contemporary market realities, while remaining grounded in its core concern with unfair appropriation of goodwill.

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