Introduction
This Briefing Note provides a basic introduction to the law of passing off, in particular for businesses whose reputations are being taken advantage of unfairly. It should not be relied upon as legal advice and you should contact us for advice on your specific circumstances.

What is passing off?
Passing off enables your business to take legal action against someone who creates the impression that their goods or services are provided by or are associated with you. To be successful in a passing off action, your business must show that each of the following elements are present:

Goodwill
You must show that there is goodwill attached to the goods or services that you sell. At a technical level, the goodwill of your business is the value of its reputation over and above the value of its assets. More helpfully, it can be described as `the benefit and advantage of the good name, reputation and connection of a business… the attractive force that brings in custom’. Goodwill distinguishes an established business from a new business.

Misrepresentation
There must be a misrepresentation by the defendant in the course of their business that leads (or is likely to lead) the public to believe that the goods or services offered by them are goods or services provided by your business (or that the wrongdoers and their goods and services are linked or associated with you).

Damage
You must be able to demonstrate that the misrepresentation made by the defendant is likely to cause, or has caused damage to your business. For example:

- Loss of profit.
- Damage to reputation.
- Loss of an opportunity to expand.

What remedies are available?

Interim remedies
If your business acts quickly, you may be able to obtain an interim injunction to restrain further dealings by the defendant pending a full trial. This will prevent further damage to the goodwill of your business during the intervening period.

Damages
If you are successful at trial, your business will normally be entitled to an award of damages or an account of profits. Damages are often difficult to assess, but are likely to involve quantification of:

- Loss of sales.
- Damage to goodwill and reputation.

Your business may also have the option of seeking an account of the defendant's profits, rather than an award of damages. However, it can be difficult to prove the proportion of the profits that were attributable to the passing off.
Delivery up or destruction
If your business is granted an injunction (or if the defendant voluntarily undertakes to cease dealing in the offending goods) the court may make an order requiring the goods to be either:

- Delivered to you or your solicitors.
- Destroyed by the defendant with the destruction verified on oath.

This approach ensures that the defendant is no longer in possession of the items.

What about trade marks?
You do not have to own a registered trade mark to bring a passing off claim. If you do, it is common to bring both trade mark infringement and passing off claims together.