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**QUESTIONS:** DISCUSS THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA.

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**PASSING OFF**

Passing off is an economic tort and so this means it is a tort which inflicts economic losses or financial injury. It is a branch of law of tort that is still developing and expanding. The tort was established to protect business men from the consequences of the diversion of his trade to a business rival.

**DEFINITION OF PASSING OFF**

The law of passing off contains sufficient nooks and crannies to make it difficult to formulate and satisfactory definition in short form[[1]](#footnote-2). The House of Lords (England) decision, as cited in ***Erven Warnink Besloten Vennootschap v J. Townend & Sons[[2]](#footnote-3), Nhl v Pepsi[[3]](#footnote-4)*** defined passing off as;

*"a* [*misrepresentation*](http://www.duhaime.org/LegalDictionary/M/Misrepresentation.aspx) *made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and which causes actual damage to a business or* [*goodwill*](http://www.duhaime.org/LegalDictionary/G/Goodwill.aspx) *of the trader by whom the action is brought or will probably do so."*

Therefore, passing off can simply be defined as the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. It is an unfair and unconscionable competition.

**THE PURPOSE OF THE LAW OF PASSING OFF**

The purpose of this tort is to protect the commercial goodwill and to ensure that people’s business reputations are not exploited. The tort of passing off is designed or established to protect a person’s business interests from the unfair trade practices as well as the reputation and goodwill a business has built up for itself.

According to **Sir John Salmond**, in his book, **law of tort**, the purpose or reason for the tort of passing off is stated thus:

*“The law… is designed to protect traders against… 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”[[4]](#footnote-5)*

**THE RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS IN THE 21ST CENTURY NIGERIA**

The law of passing off and its application in Nigeria is necessary because there is a high rate of infringement regarding trademark and products in Nigeria. The situation in Nigeria has become one that the majority of the populations do not even know what constitutes passing off and what does not constitute passing off. The law of passing off is very importance to trademark and copyright protection in Nigeria.

In order to under the relevance of passing off as an economic tort to the 21st century Nigeria, the following must be observed;

* **The law of passing off**

The law of passing off is a law that prevents a person from using another person’s name, trademark, description, etc. to sell his or her goods or rather it prevents the false representation of one’s product or business as that of another person thereby deceiving buyers to purchase it. Passing off is in consonance with the fundamental maxim of *‘ubi jus ubi remedium’* which means that **when there is a wrong, there is a remedy**. **Lord Kingslow** said that *“the fundamental rule is that no man has a right to put off his goods for sale as the goods of a rival trader.*

* **The importance of the law of passing off to the growing business sector in Nigeria**

The law of passing off is very important in Nigeria especially to the growing business sector because it protects traders against any form of unfair competition from rival traders. Every individual is entitled to their unique business name, mark or what identifies them and so these needs to be protected to avoid it being used by another person and this could lead to bad business for the original owner of the trade mark or name. It also protects one’s trade from damage or exploitation of the goodwill and reputation by another person.

* **Some instances where the law of passing off has occurred in Nigeria**

**Trebor Nigeria Limited v Associated Industries Limited***[[5]](#footnote-6)*

**Facts:**

Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint claiming that the wrapper used to package the product by the Defendant was similar to that of the Plaintiff and that they were guilty of Passing off their products like that of the Defendant. The Defendants raised dissimilarities in the two products as a defence to the action.

**Held:**

The Judge however found the Defendants liable for Passing off their products as that of the Plaintiff. In this instance passing off occurred by the use of a package strongly similar with that of another product such as to deceive the public that they are one and the same.

**Niger Chemists Limited v Nigeria Chemists*[[6]](#footnote-7)***

**Facts:**

The Plaintiff had an established chemist business using the name "Niger Chemist" while the Defendants established the same business on the same street with the Plaintiff using the name "Nigeria Chemist". The Plaintiff sued the Defendant claiming the name was too similar and likely to deceive the public that there was a relationship between them.

**Held:**

The Court agreed with the Plaintiff and granted an injunction against the Defendant on the use of the name. In this instance passing off occurred by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

* **The problems encountered as a result of the law of passing off**

1. It is difficult to ascertain what exactly constitutes “goodwill” when suing for an action in passing off
2. The problem of jurisdiction

* **Solutions to the problems encountered as a result of the law of passing** off

1. “Goodwill” is an important element in succeeding in an action of passing off, but, the mere existence of goodwill will not be enough to fulfill the other ingredients required for the Tort of passing off. **The House of Lords** in the case of ***IRC v Muller Margarine[[7]](#footnote-8)*** described “goodwill” in relation to the tort of passing off as *“the benefits and advantage of the good name, the reputation and connection of a business. It is the attractive force which brings in custom.”*
2. In the past few years, the issue of the jurisdiction of passing off in Nigeria has been dragged on and this has led to the question of *“whether Federal High Court and the State High Court could assume exclusive or concurrent jurisdiction in passing off?”* This is to be answered by viewing the circumstances around the passing off, if any. This seems to be straightforward; but this is not so because it is still a little more complicated than expected.

* **An analysis of the existing laws laid down for the law of passing off and its application in Nigeria**

The best thing you can do especially in a country like Nigeria where there is a high rate of passing off and copyright infringement is to protect one’s product. The period of protection against passing off is indefinite as a person is allowed to take legal action for as long as his goods or services are being infringed on. Nigeria’s legal and institutional infrastructure for protecting intellectual property rights is in need of further development. Some existing laws which when applied, aid the law of passing off in Nigeria include:

1. The Copyright Act, 1988 (as amended in 1992 and 1999)
2. The Trademarks Act of 1965
3. The Patent of Designs Act of 1970
4. The Companies and Allied Matters Act

These laws are used for the legal protection of products in Nigeria. For instance, Section 30 (a) and 579 (d) and (e)[[8]](#footnote-9) requires that *every individual, firm or corporation having a place of business in Nigeria, whether such a person is carried on in the individual’s name or in a corporate name, must be registered at the Corporate Affairs Commission within a period of 28 days of the commencement of such a business*. This is to ensure that no trade name can be used to deceive or cause confusion as to the distinctiveness of two different businesses in Nigeria.

***Continental Pharmaceutical Ltd v Sterling Products Nigeria PLC and SmithKline Beecham Plc[[9]](#footnote-10)***

**Facts:**

The plaintiff, Continental Pharmaceutical Ltd were manufacturers of a registered trademark designed with the words ‘Conphamol’ brought an action against the defendants for allegedly infringing on the salient features only substituting Conphamol for Panadol.

**Held:**

It was held that passing off had occurred due to the infringement of the Plaintiff’s registered trademark.

* **Conclusion**

In conclusion, it is trite to note that the passing off law does not only state what constitutes an infringement in that aspect, but rather it grants the remedies which are appropriate to individuals whose products or businesses have been infringed upon whether there is a proof of actual damage or not, as long as the elements to prove the tort of passing off are present; this shows that passing off is actionable *per se*.

Passing off is something that needs to be taken seriously in Nigeria because lots of people have suffered as a result of this tort and so there should be measures to ensure that these people get the right remedies which they deserve and this is what the law of passing off entails or encompasses.

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1. *Conaara Inc v McCain Foods ('Australia') Ptv Ltd* (1992) 106 ALR 465 [↑](#footnote-ref-2)
2. (1979) [AC](http://citations.duhaime.org/A/AC.aspx) 731 [↑](#footnote-ref-3)
3. 42 [CPR 3d](http://citations.duhaime.org/C/CPR.aspx) (1992) 390 ([BCSC](http://citations.duhaime.org/B/BCSC.aspx)) [↑](#footnote-ref-4)
4. Salmond (7th Ed. 1928) 67 [↑](#footnote-ref-5)
5. (1972) NNLR 60 [↑](#footnote-ref-6)
6. (1961) ANLR 180 [↑](#footnote-ref-7)
7. (1901) AC 217 [↑](#footnote-ref-8)
8. CAMA [↑](#footnote-ref-9)
9. 38 NIPJD (FHC. 1995) [↑](#footnote-ref-10)