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The tort of passing off is very important in the life of a society. Individual person in a society has the right to life and the right to engage in any legal kind of economic activity to sustain the kind of life style that the individual has chosen.

The law of tort especially protects the individual in whatever economic activity one is engaged in. It protects business names, names of product, trademarks among others. Anybody who attempts to cause confusion by illegal activities bordering on imitation, deceit, fraud in economic activities may be liable for the tort of passing off.

The tort of passing off is committed in various forms. **Francis Day & Hunter Ltd v. Twentieth Century Fox Co**. Ltd[[1]](#footnote-1) the common forms of passing off which are easily noticed are as follows:

1) Trading with a name resembling that of the plaintiff.

2) Marketing a fake product as that of the plaintiff by using the plaintiff’s label or design.

3) Marketing a product with a name resembling that of the plaintiff’s goods.

4) Marketing products with the plaintiff trademark or its imitation.

5) Imitating the appearance of the plaintiff’s product.

6) Selling inferior or expired goods of the plaintiff as current stock.

7) False advertisement by copying the plaintiff’s advertisement

**1. Trading with a name resembling that of the plaintiff:** This is where the defendant is engaged in the same type of business as the plaintiff and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendant’s product/business and that of the plaintiff are one and the same. In **Hendricks v. Montague[[2]](#footnote-2)** it was held that 'Universal Life Assurance Society’ and ‘Universe Life Assurance Association’ are very likely. Also in **Niger Chemist Ltd v. Nigeria Chemist (1961) ALL NLR 180 at 182;[[3]](#footnote-3)** it was held that;

“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 Chemists’ and the other ‘Nigeria Chemists’, there must be a grave risk of confusion and deception”.

**2. Marketing a product as that of the plaintiff:** It is actionable passing off for the defendant to sell his goods with a direct statement that the goods are manufactured by the plaintiff, whereas they are not. In **Byron v. Johnston[[4]](#footnote-4)** – it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

**3. Marketing goods with the name resembling that of the plaintiffs goods**:It is a tort of passing off for a defendant to produce or market his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and the defendant’s products are mistaken as made by the plaintiff and are bought as the product of the plaintiff. In **Hines v. Winnick[[5]](#footnote-5)**, the plaintiff musician and band leader who used to broadcast his radio program under the name ‘Dr. Crock and his crack pots’ obtained an injunction to restrain the defendant from featuring another band on the program using the same name. VAISEY J granting the injunction was of the view that a musician gets known by a particular name and this becomes inevitably part of his stock-in-trade.

**4. Marketing products with the plaintiff’s trade mark or its imitation:** It is actionable in passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation leading to a confusion of the buyers, who then patronize his product thinking that they are the product of the plaintiff. Trademarks are usually registered and also protected under the **Merchandise Marks Act 2004[[6]](#footnote-6).** Also in **Perry v. Truefitt[[7]](#footnote-7)** – the plaintiff obtained an injunction to restrain the defendants from selling a certain hair cream under the name of ‘Medicated Mexican Balm’ or other similar designations. **Reckitt & Colman Ltd v. Borden[[8]](#footnote-8).**

**5. Imitating the appearance of the plaintiff’s product and its advertisement:** It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s product. This passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public e.g. general appearance, package, label, or design of the product. **De facto Works Ltd v. Odumotun Trading Co Ltd.[[9]](#footnote-9)** and **Hudson & Co. v. Asian[[10]](#footnote-10).** Also an advertisement by the defendant which copies, or imitates the plaintiff’s advertisement of his products, may amount to passing off, where such advertisement so resembles that of the plaintiff, as to be capable of misleading the buyers to patronize the defendant’s goods as those of the plaintiff.

**6. Selling inferior or expired goods of the as original or current stock:** It is a passing off for a defendant to sell inferior or expired goods/products of the plaintiff as current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed to lay hands on the goods, which are unfit for human consumption sell them off as current stock of the plaintiff. **See Wilts Ltd v. Thomas Robinson Sons & Co Ltd[[11]](#footnote-11)** and **Gittette Safety Razor Co & Amor v. Franks[[12]](#footnote-12).**

Note: There is no passing off, when old goods/products or second hand goods are sold off as such without pretending or falsely representing that they are new ones – **General Electric Co v. Pryce’s Stores[[13]](#footnote-13).**

**Relevance/importance/purpose of law of passing off** Anyone committing the tort of passing off is causing financial harm to the original owner of the goodwill because if the customers are not satisfied or aren’t met with the expectation they promised or have been getting, it could hinder the customers from wanting to get more of that good/service and considering the high level of the tort of passing off that Nigeria has, there is a clear need for the law of passing of in Nigeria today. Passing off is also relevant due to the bad stain on the person’s name/ business as a result of certain persons who deem it fit for them to break the law and take advantage of another person’s goodwill

The tort of passing off is very common in country’s with competitive business economy like Nigeria whereby people resort to every marketing strategy to market their product and services to survive/ expand. The law of passing of protects the reputation and goodwill a business has built up for itself. It protects the benefits and advantages of the good name, quantity, reputation, patronage and customers of business. It protects that attractive force of the business which brings customers to it. The tort of passing of protects a business against misrepresentation of the business, directed at its customers and calculated to damage the reputation and goodwill of the business. SIR JOHN SALMOND[[14]](#footnote-14) in his book law of tort stated the reason for the tort of passing off 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 benefits of the reputation already achieved by rival traders”

In the words of LORD KINGSDOM in **leather Cloth Co v American leather Cloth Co[[15]](#footnote-15)**: “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”

With the rapid growth in the economic sector and the country at large, anyone with the zeal to succeed would instinctively want to get in on the opportunity to cash out and would do so by all means some legal, some illegal/unlawful. Whilst taking advantage of another person’s goodwill, that is the value or the good name the person has made for his business/ himself. Which is where the law of passing off comes to play. It is very essential to this 21st century Nigeria which makes passing off relevant in many ways.

1. (1939) 4 ALL ER 192 at 199 P.C. [↑](#footnote-ref-1)
2. (1881) 50 LJ Ch 456 [↑](#footnote-ref-2)
3. (1961) ALL NLR 180 at 182 [↑](#footnote-ref-3)
4. (1816) 35 ER 851 [↑](#footnote-ref-4)
5. (1947) Ch 707 at pg 13 [↑](#footnote-ref-5)
6. MMA 2004 [↑](#footnote-ref-6)
7. (1842) 49 ET 749 [↑](#footnote-ref-7)
8. (1990) I WLR 491 HL [↑](#footnote-ref-8)
9. (1959) LLR 33 [↑](#footnote-ref-9)
10. (1964) I WLR 466 PC [↑](#footnote-ref-10)
11. (1958) RPC 94 CA [↑](#footnote-ref-11)
12. (1924) 40 TLR 606 [↑](#footnote-ref-12)
13. (1933) 50 RPC 232 [↑](#footnote-ref-13)
14. Salmond op cit. para 149 [↑](#footnote-ref-14)
15. (1865) 11 HL Cas 523 at 538; (1865) 11ER 1435

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    Ese Malemi. “Passing off.” *Law of tort in Nigeria*, 631-644, England: APA 2007 [↑](#footnote-ref-15)