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***The relevance of passing off as a form of Economic Torts in the 21st century Nigeria***

**ABSTRACT**

This paper focuses on the relevance of passing off as a form of economic tort in the 21st century Nigeria. Passing off is a common law tort which can be used to enforce unregistered trademark rights. There is much overlap between the laws relating to trademarks, designs and copyright, but passing off may fill any gaps that may occur. Passing off first came about to protect traders whose goods were being substituted by the goods of another. Taking business by presenting goods or services as someone else’s is actionable at common law.

The tort of passing off is common in a competitive business community or economy. [[1]](#footnote-2) Right from garments to tobacco to toothpaste to pencils to pens, you name it, you find it. For instance, Mr Tolu goes to a store to buy Dangote spaghetti, buys it then upon getting home he notices that he bought Dangoto spaghetti and with the exact design and color of Dangote spaghetti, this is known as passing off. People resort to every strategy to market their products and services, to survive and to expand their business. A famous case example would be Diageo North America Inc v Intercontinental Brands (ICB) Ltd where the defendant marketed a drink named “Vodkat”, which was actually not vodka, but the marketing did not actually make it clear that it wasn’t so. The plaintiffs were the biggest manufacturers of vodka and they filed a suit against the defendants for passing off and it was held so.

But with the Trademarks Act[[2]](#footnote-3), providing protection against passing off, situation has improved. Businesses can use common law rights to protect their names, signs, slogans or trademarks against **passing off**. An action for Passing off is a common law remedy and the claimant need not establish title for same but must show that the goods/services have distinctive features. It is arguable to state that Passing off is both a common law and statutory remedy in Nigeria.

The passing off action was first developed to meet the classic case of what Lord Halsbury observed: “nobody has any right to represent his goods as the goods of somebody else.”The root of passing off action is the tort of deceit. The concept of passing off is a form of tort which has undergone changes in the course of time.

**KEYWORDS:** economic torts passing off, 21st century

**ECONOMIC TORTS**

Economic torts are torts which inflict mainly economic losses. In other words, economic torts are torts which inflict financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Although, passing off will only be fully examined in this paper but there are also other types of Economic torts which would only be listed. [[3]](#footnote-4)

1. Passing off,
2. Breach of intellectual property rights; such as breach of copyright, patents, trademarks, and other merchandise marks,
3. Injurious falsehood
4. Interference with contracts,
5. Conspiracy to interfere; that, civil conspiracy and so forth[[4]](#footnote-5)

**PASSING OFF**

Passing off is in relation to trade in goods. It applies equally to services as well. The use of another’s name in relation to the provision of services could also be actionable as passing off. See ***Harrods Ltd v. R. Harrod Ltd***[[5]](#footnote-6).

Passing off is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person or business, causing financial or reputational damage. In the tort of passing off, a person carries on his business or sells goods under a name, trade mark, description, or imitation of another person’s product in order to deceive the public to patronize it.

Passing off is a deceit of the public to patronize one’s business, product or services, passing off is an unfair and unconscious competition.[[6]](#footnote-7). Whenever a person sells his goods, or carries on his business under a name, trademark, and description or otherwise does anything to mislead the public into believing that the goods or business are those of another person and thereby takes advantage of that person’s reputation and goodwill, he commits the tort of passing off.[[7]](#footnote-8). An action lies in passing off for damages, an account, for profit, and seizure of the products and an injunction to restrain the defendant from continuing to do so in the future. In ***Trebor (Nigeria) Ltd v. Associated Industries Ltd***[[8]](#footnote-9), the court held that the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader.

In the case of ***Trebor Nigeria Limited v. Associated Industries Limited***[[9]](#footnote-10), 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, 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.

In the case of *Niger Chemists Limited and Nigeria Chemists[[10]](#footnote-11)*, 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. 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.

**Jurisdiction of the Courts**

An action for infringement of registered trademarks should always be instituted in the Federal High Court only because the action arises in relation to a Federal enactment which is the Trade Mark Act. However, the courts have variant decisions on the jurisdiction of the courts on Passing off actions.

In *Patkun Industries Ltd. v Niger Shoes Ltd5,* a 1988 decision, the Supreme Court held that the Federal High Court has jurisdiction in trademarks infringement and Passing off actions stemming from the infringement of trademarks, whether registered or unregistered.

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

The object of the law of passing off is to protect some form of property-usually the goodwill of the plaintiff in his business or his goods or his services or in the work which he produces or something of that kind. The goodwill of the business is ordinarily represented by a mark, name, get up or other badge.[[11]](#footnote-12) The tort of passing off is designed to protect a person’s business interests from the unfair trade practices from other people.

And LORD LANGDALE MR explaining the law in **Perry v Truefitt** stated that :

“*A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such deception, nor to use the means which contribute to that end”[[12]](#footnote-13)*

**RELEVANCE OF PASSING OF AS A FORM OF ECONOMIC TORT IN THE 21ST CENTURY.**

Passing-off is a cause of action that is primarily founded in torts and is historically rooted in common law. It is a cause of action that has undergone dramatic changes over the years but still potent in protecting the entrenched rights in areas to which it relates. The law of passing off is a law that protects both the consumer and the trader from an unhealthy competition. During the last century the law of passing off was developed extensively to meet the needs of the modern commercial environment. The purpose for Passing off as a tort is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.

The origins of passing off protection formed the basis for these developments however recently the courts have pushed the boundaries of passing off beyond its origins. Passing off originally protected trade names as badges of origin, that is a link to the source of the goods. The judges have given several groundbreaking judgments while interpreting the tort of passing off. During the last century the law of passing off has developed extensively to meet the needs of the modem commercial environment. The tort of passing off has developed into a powerful branch of intellectual property law, expanding to be of application far from its original use in the nineteenth and twentieth century. In the competitive business environment of the twenty first century, it matters more than ever to traders that they can protect various aspects of their intellectual property rights. In the past years, passing off has gone through a process of growth, extending its traditional boundaries, and being successfully applied by traders to provide remedies in many novel situations. There is still ample scope for developing and extending the tort of passing off to meet new kinds of unfair trade practices which may arise.

Passing off is very important in the business sector, as businessmen can be able to protect their business from unfair competition. In cases such as this where there is a risk of tarnishment to the goodwill of a business it is essential to be able to rely on passing off for protection. Passing off therefore retains its importance in the protection of goodwill in such circumstances. In conclusion the common law tort of passing off remains a vital form of protection of intellectual property which is important in the law of torts.

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2. CAP T13 Laws of the Federation of Nigeria, 2004 [↑](#footnote-ref-3)
3. Ese malemi law of torts 2nd edition by Princeton [↑](#footnote-ref-4)
4. *Ibid* [↑](#footnote-ref-5)
5. (1924) 41 RPC 74 [↑](#footnote-ref-6)
6. Ibid [↑](#footnote-ref-7)
7. *Niger Chemists ltd v Nigeria Chemists (1961) ALL NLR. Bollinger v Costa Brava Wine Co (1960)* [↑](#footnote-ref-8)
8. {1972) NMLR 60 [↑](#footnote-ref-9)
9. *Ibid* [↑](#footnote-ref-10)
10. (1961) ANLR 180 [↑](#footnote-ref-11)
11. P Narayanan- “Law of Trade Marks and Passing off’ p.685 (2004, 6th Edition). [↑](#footnote-ref-12)
12. (1842) 49 ER 749 at 725. Draper v Trist (1939) 3ALL ER 513 at 526 [↑](#footnote-ref-13)