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**QUESTION**

Discuss the relevance of Passing off as a form of Economic Torts in the 21st century Nigeria.

Economic tort comes into play when an individual interferes with another individual’s business in a manner that is unacceptable in law. This interference is one that inflict economic loss or financial injury unto the plaintiff as it would only occur in the commercial sector and may be through interference with contract, breach of Intellectual Property Rights, Conspiracy to interfere, Passing off, etc. By the doctrine of consideration, the court is justified to protect the expected interest of individuals in a bargain promise, who have provided consideration. A business is said to be registered when, it has exclusive right over the name and also the right to sue anybody that uses the name or a name similar to it in such a way that deceives the public.

In this paper, our focus will be on the economic tort of Passing off and we will be highlighting the relevance of the tort since the year 2000. The tort is common law tort established long before trade marks became register-able and is simply defined as an unfair competition by misrepresentation. Passing off is a cause of action that is primarily founded in tort and is historically rooted in common while rights in trademark are traceable to the British Statute of General Application that were in place in Britain on the 1st January, 1900 and are governed in Nigeria by the some Acts. It is stated to be act of an unregistered mark becoming notoriously attributed to a person or company, the retailing of goods in a way that deceives the public into believing the product is the plaintiff’s own when it is actually that of the defendant. The law rejects this to protect traders from unfair competition from traders that would unlawfully rely on the reputation of the rival trader. The Black’s law Dictionary defined, “Passing off as the act of falsely representing one’s own product as that of another in an attempt to deceive potential buyers”. The principle for this tort is stated in ***Perry v Truefitt[[1]](#footnote-0)*** that a man is not to sell his own goods under the pretence that they are the goods of another man. The tort of Passing off is actionable ‘per se’ (this means that there is need to establish actual damage before the court)[[2]](#footnote-1). it applies to both e-commerce businesses and businesses with physical addresses.

The ***Companies and Allied Matters Act 2004[[3]](#footnote-2)*** provides guidelines for the registration of business names in Nigeria. By ***Section 579(1)(d) CAMA***, a name is prohibited and restricted where it identical with or similar to a name which is already registered under the Act. The Act says that once a business or product name is found to go against this section, the aggrieved company can apply to have the defaulting company change the name but if the offending business is not registered under the act or after 6 months from the date the offenders name was registered, the application can no longer be made to the Corporate Affairs Commission. In this case, the only solution would be an action under the economic tort of Passing off. It is to be noted that, Passing off and Trademark Infringement are very similar and the same facts can give rise to both trade mark infringement and passing off. An action for infringement of trademark is a statutory remedy conferred on the owner of a registered trade mark for the enforcement of a right to use the trademark in relation to the goods and services for which the mark is registered. Passing off, on the other hand, deals with unregistered rights as stated by **section 3 of the Trademark Ac**t:[[4]](#footnote-3)

“*No person shall be entitled to institute any proceeding to prevent, or to recover damages for, infringement of an unregistered trademark; but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof*”

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim "There is no law without a remedy".

Justice Nnaemeka Agu in the case of ***The Boots Company Limited v United Niger imports Limited****[[5]](#footnote-4)* highlighted the elements of passing off as the following:

1. The name, mark or sign of the plaintiff’s goods or service has become to distinctive by a substantial number of the public as coming from a particular source.
2. The defendant had used the name, mark or sign of the plaintiff’s product or services on his own product to deceive the public or cause confusion in the minds of the common customer.
3. The use of the Plaintiff’s product’s or service’s name, mark or sign would likely cause the Plaintiff’s business to suffer economic injury.

Even before the 21st century, the economic tort of passing off has been emphasized by the growing nature of Intellectual Property Right laws both in Nigeria and around the whole world. The court has always been of the view that an individual has no right to put off his goods for sale as the goods of a rival trader without the person’s confirmation and will hold the defendant liable if he were to package and market his own goods as those of the plaintiff.[[6]](#footnote-5) An action for infringement of registered trademarks is always be instituted in the Federal High Court as 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 the 2003 case of ***Ayman Enterprises Limited v Akuma Industries Limited & Ors[[7]](#footnote-6)*** was reasoned that, a Passing off action for an unregistered trademark should not be instituted in the Federal High Court but a State High Court as the right of action in a Passing off did not arise from the infringement of any Federal enactment and so may only be a common law right but that the Federal High Court has jurisdiction over Passing off claims arising from the infringement of a trademark only if the trademark allegedly infringed was registered. In 2007, it was held in ***Omnia (Nig.) v Dyktrade Ltd*** that, the Federal High Court has exclusive jurisdiction to hear and determine a claim for Passing off whether the claim arises from the infringement of a registered or unregistered trade mark. It can also be reaffirmed by **Section 251(1) Constitution of the Federal Republic of Nigeria 1999 (as amended)** which gives the Federal High Court exclusive jurisdiction on matters relating to passing off.

The relevance of the doctrine of Passing off in Nigeria today is majorly as a result of commerce and Intellectual Property Rights especially the growing rate of E-commerce in the country. This doctrine is applied to many forms of unfair trading and unfair competition where the activities of one person cause damage or injury to the reputation associated with another individual’s business. In order to prove passing off, the plaintiff must first prove that their particular trade mark has goodwill or reputation attached to it and these take time to develop. In this sense, with the development of intellectual property laws in Nigeria, those individual who venture into Intellectual property as a business will still have there products protected. Intellectual Property is any product that has commercial value:a piece of literature, a painting, an invention, a trademark, a trade secret, etc. By the use of the passing off concept those individual works which are not yet registered will be protected. By the use of this in Nigeria, developing businesses will be able to secure their creations or product from competitors who would lie that the product is theirs.

 The remedies a court would give in an action for Passing off are either; Damages(general or specific), Account of profit(where the plaintiff would be entitled to profit on infringed goods sold), Anton Piller Order(in which the infringing goods are delivered into the possession of the plaintiff)[[8]](#footnote-7), Delivery for Destruction(where the infringing goods are given to the plaintiff for disposal) or Injunction(to stop a form of passing off whether in motion or about to take place). Defenses for Economic tort of Passing off are; Consent of the Plaintiff(where the defendant states that he had received to consent of the plaintiff to create the imitating product), Indistinct name of the plaintiff(which means that the business or product name of the plaintiff is not so unique), Plaintiff’s business or product’s name or sign has become generic, Dissimilarities between the plaintiff and defendant’s marks[[9]](#footnote-8) and Innocent usage of the Plaintiff’s name.

In conclusion, the main relevance of the Passing off concept in Nigeria today, is that though the trademark act provides protection to registered goods and services, the passing off concept provides protection to unregistered goods and services. In this way, businesses that are not registered under the Trademark Act can still be protected from unfair competition. Also, with the advancement of Intellectual Property Rights in Nigeria, the issue of passing off is gradually becoming a cornerstone in Nigerian law.

**References**

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* Kodilinye G. Aluko O., *The Nigerian Law of Torts* (Spectrum Books 1999)
1. (1842) 49 ER 749 [↑](#footnote-ref-0)
2. (1939) 3 All ER 513 [↑](#footnote-ref-1)
3. Chapter C20 LFRN 2004 [↑](#footnote-ref-2)
4. CAP T13 LFN 2004 [↑](#footnote-ref-3)
5. (1977) 1 ANSLR 144 [↑](#footnote-ref-4)
6. *Trebor Nigeria Ltd v Associated Industries Ltd.* (1972) [↑](#footnote-ref-5)
7. (2003) 13 NWLR (Pt.836)22 [↑](#footnote-ref-6)
8. Ferodo Limited & Anor. v Ibeto Industries Limited (2004) SC 1275 [↑](#footnote-ref-7)
9. Supra [↑](#footnote-ref-8)