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# **ABSTRACT**

It is a fundamental element for business that businesses compete with one another so it is likely that one business may succeed to the disadvantage of another but the tort of passing off provides that a competitor using a similar name of a particular business because of the success of that particular business or name deceiving the public to buy such products is an act which is unacceptable. This based on the simple principle that a person is not to sell his goods or his services under the pretense that thy are those of another.

This paper considers economic tort with focus on passing off and the significance of passing of in Nigeria today. A compact assessment of the concept of passing off as a whole and how it relates and influences the 21st century Nigeria.

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# **INTRODUCTION**

 The tort of passing off is part of a much wider canvas of legal remedies controlling unfair competitive practices. This action arose in the 19th century and it depended upon the simple rule that a person is not to sell his goods or his services under the pretense that they are those of another[[1]](#footnote-1) It has three elements:

1. A goodwill or reputation attached to and recognized by the public as distinctive of the claimant’s goods or services.
2. A misrepresentation by the defendant leading the public to believe that his goods or services are those of the claimant.
3. Damage or likely damage.[[2]](#footnote-2)

Passing off can be perceived as a form of economic tort. Economic tort seeks to ensure that businesses are protected from acts of unacceptable interference. Economic tort offer protection for a person’s trade or business from acts which the law considers to be intolerable.

**PASSING OFF**

Passing off is a wrong, a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well-known brand is a wrong and is known as the tort of “passing off”. It is the oldest of the modem legal regimes for the protection of trade symbols. It arises when there has been an infringement of a registered trademark. That is, the action for passing off occurs when there has been an infringement of a registered trademark and this is based on the Trademarks Act. The importance of the law of passing off was reduced by the Trademarks Act 1994, particularly in so far as the Act allowed a trademark to be registered in respect of a container or the “get up” of the goods. Nevertheless, even where there appears to be a strong case of trademark infringement it remains common to run a parallel claim for passing off and it will be the only remedy where the law of trade marks is inapplicable or the registration is invalid, or , of course, where there has been no attempt at registration[[3]](#footnote-3)

The passing off action allows trader A to prevent competitor B from passing their goods off as if they were A’s[[4]](#footnote-4) It may also consist of the defendant misappropriating the plaintiffs (or the claimant’s mark) by supplying his own goods when he receives an order for the plaintiff.[[5]](#footnote-5) Passing off is therefore referred as the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize the plaintiffs products. In other words, it is the selling of goods or the carrying on of business in such a way to mislead or confuse the public into believing that the defendant’s product or business is that of the plaintiff.

One cannot talk about ‘passing off ‘without talking about ‘torts,’ which is the umbrella that covers passing off and other related laws.

# **PASSING OFF IN NIGERIA**

Passing off in Nigeria is generally a common law cause of action but this is in relation to trademarks. Passing off is not only of common law origin but it also has a statutory flavor under the Trade Marks Act.[[6]](#footnote-6) Section 3 of the Trademarks Act which provides that: “***No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; 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**”.

Nigeria’s historical linkage with Britain and also its position as a member in the community of nations suggest that our laws on industrial property rights cannot be much different from that of Britain or other industrial nations or any other multilateral treaty to which Nigeria or Britain is a party. The passing off action was first developed to meet a classic case of Reddaway v. Banham. In **REDDAWAY V. BANHAM**[[7]](#footnote-7), The plaintiff manufactured and sold Camel Hair Belting. The defendant also began to sell belting made of camel’s hair in the name of Camel Hair Belting. The trader claimed a right in the term ‘Camel Hair’. It was held that the term was descriptive. Where a trader uses a mark or a name which is descriptive of its products or services, the trader must show that the public understands that the products or services come from him when they see the mark so that the mark has in this way acquired a ‘secondary meaning’ in order to found a claim for a trade mark.

Nigeria has also come across disputes being brought to court relating to passing off ; an example is in the case of **TREBOR NIGERIA LIMITED V. ASSOCIATED INDUSTRIES LIMITED[[8]](#footnote-8)**, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Super mint 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 defense 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. Similarly, in the case of **NIGER CHEMISTS LIMITED AND NIGERIA CHEMISTS**[[9]](#footnote-9), 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 using a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

In Nigeria, 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 Trademark Act. However, the courts have variant decisions on the jurisdiction of the courts on Passing off actions.

# **THE RELEVANCE OF PASSING OFF IN THE 21ST CENTURY NIGERIA**

Passing off is very essential especially in Nigeria today where goods on the store shelves are not properly labelled. Just visualize going to a store to buy your trusted product but when you get home, you realize that it is an identical brand made to look exactly like what you originally wanted. The worst part of this problem is that you need to look very closely at those products to tell the difference, especially when it is of the same specification and supposedly does the same function for what you requested for. That would be a waste of money and time.

Nigerians are known to be notorious for using a similar business name, slogan, sign or mark because of the success of that particular name or mark.

The most common forms of passing off in Nigeria includes: using a name that closely resembles the name of an existing product, imitating the appearance of the plaintiffs products, producing fake products using the plaintiffs trademark, copying the plaintiff’s advertisement, selling the plaintiffs expired or inferior products thereby causing an injury to the plaintiffs reputation etc.

Everyone has a right to enjoy the benefits of what they create, be it monetary benefit or even simply the goodwill and reputation that comes with it. In a country such as Nigeria, where people have little or no regards for the rights of other people, infringement on the trademark of many people has become of great concern to the public. It is common to see goods in the shops bearing almost the same name or trademark or even having similar packages.

The relevance of passing off therefore cannot be overemphasized; passing off action is concerned with

* the preservation of business goodwill
* protecting consumers from deception[[10]](#footnote-10).

Passing off therefore retains its importance in the protection of goodwill; Goodwill is a form of intangible property that is easy to describe but at the same time, difficult to describe. It is what leads customers to return to the same business or to buy the same brand. In **IRC V. MULLER &CO.’S MARGARINE**[[11]](#footnote-11)per **LORD MACNAGHTEN** where it was stated that Goodwill is the benefit and advantage of the good name, reputation, and connection of a business. Therefore, the owner of the goodwill has a property right that can be protected by an action in passing off. An example where goodwill is associated with a name is for instance, “Marks &Spencer” or “Nike” or “Coca-Cola”.[[12]](#footnote-12) Goodwill is also associated or linked with packaging, trade dress of products, and advertising style. The preservation of business goodwill is the prime concern of passing off and the protection of consumers from deception is merely an additional effect.

 This is something that needs to be taken seriously in this country because a lot of people have fallen victims to lack of knowledge on how to protect their goods or ensure that they get the right remedy when such infringement occurs.

In conclusion, the relevance of passing off in Nigeria toady cannot be exaggerated 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 population do not even know what constitutes passing off and what does not constitute passing off. Every Nigerian should be fully aware that they are entitled to enjoy the profits of their hard work and that it the relevance of passing off to prevent false representation of one's product as that of another person which deceive the general public into patronizing that product by using the person’s trade mark, advertisement etc. . Passing off first came about to protect traders whose goods were being substituted by the goods of another.

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1. *Perry v Truefitt* (1842) 6 Beav 66 at 73 per Lord Langdale MR; *Spalding & Bros v AW Gamage Ltd* (1915) 84 L.J. Ch. 449 at 450 per Lord Parker. [↑](#footnote-ref-1)
2. Damage may take the form of sales or erosion of the distinctiveness of the trade name sought to be protected: *Erwen Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 745 per Lord Diplock. [↑](#footnote-ref-2)
3. A trademark is not to be registered in so far at its use is liable to be prevented by the law of passing off: Trade marks Act 1994, s. 5 (4)(a). Similarly, passing off claims may be brought in parallel to claims for infringement of copyright. The gist of passing off is deceptive resemblance; but in the case of copyright, although there typically is resemblance [↑](#footnote-ref-3)
4. *Bently, L. & Sherman B.* (2014) Intellectual Property Law. (4th Edition) Oxford University Press at pg. 826; *Patkun Industries Ltd. V. Niger Shoes manufacturing Co. Ltd* [1988] 5 NWLR (Pt.93) 138 SC at 162. [↑](#footnote-ref-4)
5. Cornish, W. & Llewelyn, D. (2007) Intellectual Property: Patents. Copyright. Trademarks and Allied Rights (Sixth Edition) Sweet & Maxwell at p.627 [↑](#footnote-ref-5)
6. Section 3, T.M Act, LFN 2004 [↑](#footnote-ref-6)
7. [1896] A.C. 199 [↑](#footnote-ref-7)
8. (1972) NNLR 60 [↑](#footnote-ref-8)
9. [1961] 1 ALL NLR 171 [↑](#footnote-ref-9)
10. Ibid, at p.859 [↑](#footnote-ref-10)
11. [1901] AC 217, 224 [↑](#footnote-ref-11)
12. Sherman, L. & Bently, B. (2014) Intellectual Property Law (4th Edition) Oxford University Press [↑](#footnote-ref-12)