

AFE BABALOLA UNIVERSITY ADO-EKITI (ABUAD)

**COLLEGE OF LAW**

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| **COURSE TITLE;** LAW OF TORT  **COURSE CODE;** LPB302  **NAME;** OJUKWU EBUBECHUKWU IRUOMA  **MATRIC NO;** 17/LAW01/212 |
| **QUESTION;**  Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria. |
| **INSTRUCTION;**  Use NALT guidelines for footnotes, you should also include a bibliography at the end.  Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages |

**What is an economic tort?**

Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable. Although it is a fundamental element of business that businesses compete with one another and therefore to this extent, one business may succeed to the disadvantage of another; the economic torts seek to ensure that businesses are protected from acts of unacceptable interference.

**What is passing off?**

Passing off is the false representation of one’s product or business as that of another person, thereby deceiving buyers to patronize it. It is the selling of one’s product or carrying on of one’s business as if it were that of another person whose reputation and goodwill one enjoys. Reputation and goodwill of a business is something that is used to try to give an identity to a business and its goods/services that distinguishes them from those of their competitors. Goodwill has been described as 'the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom'. Passing off is a deceit of the patronize one’s business, product or services. Passing off is an unfair and unconscionable competition. It is an economic tort. In sum, ‘passing-off’ is a cause of action that is primarily founded in tort[[1]](#footnote-1). In the case of ***N. R. Dongre Vs. Whirlpool Corporation[[2]](#footnote-2)***it was held that[[3]](#footnote-3);

*“A man may not sell his own goods under the pretense that they are the goods of another man.”*

**Purpose of passing off**

It is designed to protect a person’s business, interests from an unfair trade practices and sharp practices of the other person. It is put in place to protect the reputation and goodwill a business has built up for itself.

LORD LANDGDALE MR explained further in the case of ***Perry v. Truefitt[[4]](#footnote-4)***that

*“A man is not to sell his goods under the pretense 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.”*

This tort is actionable per se on its occurrence. A plaintiff does not have to prove damage in order to succeed[[5]](#footnote-5). The probability of damage occurring is enough for the plaintiff to succeed. Therefor once passing off is committed, the plaintiff has no right to sue and is entitled to remedy[[6]](#footnote-6)

If someone (defendant) uses this goodwill and reputation, the owner of the business (claimant) can stop this by using the law against passing off. In order to succeed in a passing off action the claimant has to prove that:

• They possess a reputation or goodwill that is associated with their goods or services; To succeed in a claim for passing off, the claimant must first prove that they have established the necessary goodwill. Passing off claims often concern misuse by the defendant of a name, mark or get-up. However, although goodwill may be represented by words, names, colours, shapes or get-up, passing off protects the goodwill of the claimant's business as a whole and not individual elements.

• There has been a misrepresentation by the defendant which has led to confusion; The claimant must prove that in the course of trade, the defendant made a representation that confuses, deceives or is likely to confuse or deceive the public. It does not matter if the representation is true if, at the same time, it has the effect of confusing the public as to the origin of the defendant's goods or services. Moreover, there is no need for the representation to be made by the defendant with the intention that confusion will result. Innocence (i.e. a lack of awareness that the relevant activity amounts to passing off) is not a defence to an action for passing off. The misrepresentation must concern the source of the goods.

• This misrepresentation has caused damage to the claimant's reputation or goodwill in the claimant's goods or services.[[7]](#footnote-7) To succeed in a passing off claim, the claimant has to show that the misrepresentation by the defendant caused damage to their goodwill or that damage to the claimant's goodwill is reasonably foreseeable.

The damage may take the following forms:

• Loss of sales resulting from the public being led by the defendant's misrepresentation to buy the defendant's goods or services where they would otherwise have bought the claimant's

• Damage to reputation

• Damage by association, e.g., caused because the defendant has a bad reputation or supplies goods or services of an inferior quality

• Loss of the opportunity to expand where the defendant's field of business is one into which the claimant might naturally be expected to seek to enter

• Erosion of goodwill resulting from a proportion of the public ceasing to associate a mark with one particular business, leading to the claimant's exclusivity being reduced, blurred or diminished

**The Relevance**

The relevance of this tort law to the 21st century is that it is designed to protect a person’s business, interests from an unfair trade practices and sharp practices of the other person. It is put in place to protect the reputation and goodwill a business has built up for itself as stated earlier above. In recent times we have more products, more advanced technologies which are obviously the ideas of people, that need protection from people who want to pass off goods as theirs, it is the duty of the government to make such laws to protect and safeguard these ideas and a person from using another person’s good name to their own advantage. Examples of some of these technologies are; Samsung products, iPhone etc.

In a country where a considerable percentage of the population lives in rural areas, it is very easy to pass off goods. Thousands of instances of passing off can be found out throughout Nigeria. Right from products like coffee, biscuits, shoes, garments, tobacco, toothpaste, pencils, pens etc. are passed off as someone’s property just so that they can sell the goods and trick the customers into purchasing those products. Now where those products are bought and the customer does not like it, it causes damage to the actual owner’s products. So, in order to stop this trick and devious means these laws have to be put in place. This makes the owners of the good business name have a sense of insecurity and it will discourage others from being creative or inventive.

**Remedies**

The claimant in a passing off action may claim any of the following remedies:

• An injunction to restrain further dealings by the defendant on an interim or final basis. An interim injunction may continue until the full trial of the claim and its purpose is to prevent further damage to the claimant's goodwill during the intervening period

• A search and seizure order to compel the defendant to allow the claimant's representatives to take possession of infringing articles which the defendant is expected to have concealed, or to obtain evidence and documents which the defendant is expected to suppress

• Damages or an account of the defendant's profits

• An order for the delivery up or destruction of the infringing articles

**Conclusion**

In conclusion it should be noted that the tort of passing off is a cause of action that is historically rooted in common law. *Sections 249 to 254 of the 1999 Constitution* establish the Federal High Court and made provisions for its composition and jurisdiction[[8]](#footnote-8). These laws should be enforced seeing as people are still not taking it seriously. This gives the people producing the products a sense of security and it encourages them.

**Bibliography**

* All Answers ltd, 'Tort of Passing-Off Project Assignment for Law of Torts.' (Lawteacher.net, May 2020) <https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php?vref=1> accessed 7 May 2020
* TEMPLARS, TRADEMARK INFRINGEMENT: SUING FOR ‘PASSING-OFF’ IN NIGERIAN COURTS
* Ese Malemi, *law of Tort* (2nd edition, Princeton Publishing co. 2013).

1. Details as to the nature and content of the law of torts are beyond the scope of this newsletter. However, for such discussions, see Margaret Brazier et al (eds) Clerk and Lindsell on Torts (15th ed 1981). [↑](#footnote-ref-1)
2. [1996] 5 (ssc) 714 [↑](#footnote-ref-2)
3. https://www.lawteacher.net/free-law-essays/business-law/tort-of-passing-off-project-assignment-law-essays.php#ftn2 [↑](#footnote-ref-3)
4. [1842] 49(ER) 749 at 725 [↑](#footnote-ref-4)
5. Draper v. Trist [1939] 3(All ER) 513 (CA) [↑](#footnote-ref-5)
6. McCulloch v. May produce Distribution Ltd [1947] 2 (All ER) 845 [↑](#footnote-ref-6)
7. https://www.mylawyer.co.uk/law-a-A76063D76421/?A76063D76421= [↑](#footnote-ref-7)
8. section 251 of the 1999 Constitution [↑](#footnote-ref-8)