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

Passing off, which refers to the false representation of one’s product as that of another; thereby deceitfully gaining people to patronize them is a form of economic tort. Economic tort on the whole refers to those tortuous acts which amount to financial losses or financial injury. Simply put, when a person suffers economic loss or financial loss, he or she can seek remedy under economic tort and this tort covers acts which occur within the economic or commercial sphere of life. Passing off is one of the forms of economic tort and it is committed where the plaintiff’s goods are falsely represented by the defendant as being his, that is, being the defendant’s goods. Passing off can also be regarded as the pretence of an individual that the goods of another are his, in a bid to get the patronage and good will which that other enjoys. The tort of passing off is a civil wrong which involves an individual acquiring for himself, by way of false representation, the benefit of reputation or patronage already achieved and enjoyed by rival traders. The reasoning behind the tort of passing off is that “The law… is designed to protect traders against… unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders”.[[1]](#footnote-2) According to the case of *Leather Cloth Co v American Leather Cloth Co*[[2]](#footnote-3), Lord Kingsdown stated, “the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”. Passing off creates an unfair competition in such a way that the plaintiff’s goodwill is adopted through a manner calculated to deceive the public that such an individual is marketing the plaintiff’s product. This tort, in simple terms, is similar to a company, other than coca-cola, producing soft drinks with a slightly different logo and naming it coke or fanta or even sprite. This new company therefore derives patronage or benefits from the goodwill which the coca-cola company has acquired over the years; thus, making the competition between the two companies unfair and resulting in damage for the plaintiff or the plaintiff’s company. Passing off may occur in various forms such as: trading with a name resembling that of the plaintiff; for instance, where the defendant and plaintiff are engaged in the same line of business such as in the production of tyres, and the defendant uses the plaintiff’s business name or a name similar to that of the plaintiff for his product. This can be further seen in the case of  *Niger Chemists Limited v Nigeria Chemists and D.K. Brown*[[3]](#footnote-4), the plaintiff company had carried on business as chemists and druggists for some years and had several branches in Onitsha and other towns of Eastern Nigeria under the name “Niger Chemists”. The second defendant and his partners found another firm carrying on the same kind of business under the name “Nigeria Chemists” and even had an outlet on the same street as one of the plaintiff’s company outlets. The court granted an injunction against the defendants on the basis that the use of the name “Nigeria Chemists” was intended to deceive the purchasing public that there was a sort of relationship between Niger Chemists Limited and Nigeria Chemists. The next form of passing off is by means of marketing a product as that of the plaintiff. This can occur where the defendant passes off his goods as goods produced by the plaintiff whereas they are not. Thus, it would amount to passing off where A, who produces cement, calls his cement ‘Dangote’ cement, in a bid to gain from the patronage which ‘Dangote’ cement enjoys. This also applies to book publishers as can be seen in the case of *Byron v Johnston*[[4]](#footnote-5), where the defendant publishers were restrained from advertising and selling a book of poems with Lord Byron’s name on the cover and title page, whereas, he was not the author. Passing off can also be in the form of marketing goods under a trade name already appropriated for goods of that kind by the plaintiff or under a name similar to that of the plaintiff such that it can be mistaken for that of the defendant. In an instance where a person or company who engages in the manufacturing of beverages, trades under the name ‘Cadbury’ or a name similar to that such as ‘Cadelburry’; to the end that it could be mistaken to be ‘Cadbury’, it falls under the tort of passing off and is actionable. A trade name is one under which goods are sold; thus where a rival company sells goods under a trade name peculiar to a particular company, or a name similar to that of the latter, for the purpose of enjoying the goodwill of the original company, to the extent that the original company suffers loss, can be categorized as a form of passing off. The tort can also occur where an individual or company markets their goods using the trade mark of the plaintiff or any deceptive imitation of the mark. A trademark can be defined as any design, picture or mark attached to goods which identify the goods with the plaintiff seller or manufacturer. Instances may include brand names such as Adidas, Gucci, Chanel, being adulterated and sold. Trademarks generally receive protection under the tort of passing off and under the Trade Marks Act 1965, where the trade mark has been registered. The case of *Perry v Truefitt[[5]](#footnote-6)* highlighted this form of passing off where the plaintiff obtained an injunction restraining the defendant from selling a certain hair cream under the name of “Medicated Mexican Balm” or other similar designations. By virtue of the Company and Allied Matters Act 1990, section 579(1)(d): where any business name under which the business of a person is carried on or to be carried on is identical with or similar to a name by which any firm, company or individual is registered under this part of the Act or any company is registered under this Act; and the Registrar is of the opinion that the registration would likely mislead the public, would refuse to register the business name or cancel the registration thereof.[[6]](#footnote-7) Another form of passing off is with regards to the imitation of the appearance of the defendant’s goods as that of the plaintiff. This can be seen in instances where a peculiar feature of the plaintiff’s goods are imitated by the defendant and used in the marketing of his goods. In the case of *U.K. Tobacco Company Limited v Carreras Limited[[7]](#footnote-8),* the defendants marketed cigarettes, “Barrister”, which were similar in appearance to that of the plaintiff, “Band Master”. In order to succeed in a claim for the tort of passing off, one needs to prove that, the acts of the defendant is calculated to deceive the general public whether or not the defendant’s intentions are pure. It will also suffice to prove that damage is likely to occur in future. It can also be to the advantage of the plaintiff to prove that the acts of the defendant is likely to deceive or confuse the purchasing public and as this tort is one of strict liability, innocent passing off is not a defense. It was clearly stated “it is not necessary to prove, that there was any intention to deceive: this has been held in a long series of cases, and is not disputed”.[[8]](#footnote-9)

The importance of this tort is numerous in that it protects , on the whole, the intellectual property rights of individuals and their creativity by providing some form of contingency plan in the event that a rival trader’s goods are passed off as theirs. This also serves as incentives and will on the long run encourage people to be more creative because they can rest assured that their ideas and goods and even services which they provide are safeguarded by the law. Narrowing it down to Nigeria in the 21st century, the tort of passing off is seen as an important part of economic tort because it helps to protect traders from running into financial or economic loss by protecting the goodwill, which can be defined as, the reputation of a business which amounts to its value when it is sold, from misrepresentation by rival traders. The Nigerian economy today is ridden with a lot of people venturing into the same kinds of business such as selling of wigs, make up, even selling of food and clothes as well; thus, this law comes into play in the sense that if a particular brand of cloth vendor or food vendor enjoys a lot of patronage or has a good reputation, the tort of passing off helps to keep it that way. It was clearly stated in the case of *Reedaway v Banham*,[[9]](#footnote-10) that nobody has any right to represent his goods as the goods of another person. In a case between PayPal and Pandora, where PayPal(a payment app), alleged that Pandora, another payment app, which was struggling, used a logo that was similar to that of PayPal and they brought an action in order to restrain the defendants from using the logo out of the belief that the use of that logo was deceiving customers into mistaking the one service for the other, especially on mobile.[[10]](#footnote-11)

Another benefit to be derived from the tort of passing off is that it enables businesses to continue to earn profit because in scenarios where goods are passed off as those of a rival company, the plaintiff may suffer huge losses, ranging from financial loss to even the loss of customers and that, in the long run, is not beneficial or good for the growth of the business. So, this tort, not only looks out for the well being of people’s businesses in the short run, it also protects it from folding up in the long run, from actions resulting from the tort of passing off.

Passing off is a tort that helps to protect new and sprouting businesses which are also unregistered from tortfeasors. According to Trade Marks Act 1965, section 3(a)(b)(c), it is stated that no person shall sue for infringement of an unregistered trademark; any person can sue for passing off of an unregistered trademark; any person can sue for infringement and passing off of a registered trade mark.[[11]](#footnote-12) This section is relevant especially when bringing an action for trade mark infringement based on registered trademark. An unregistered trademark may fail under trademark infringement, however, under the tort of passing off, it will succeed, especially if the plaintiff is able to prove the elements necessary to succeed.

Passing off helps to protect the purchasing public from exploitation and from the purchase of inferior products. Many a times, these companies or individuals that pass off their goods as those of rival traders do so at a high price; in the sense that, the prices of these goods are ridiculous and most of them might be sub standard. These traders make use of the goodwill of the plaintiff company to carry out the trade of these goods and services which turn out to be inferior, at ridiculous prices, resulting in damage, economically speaking, to the plaintiff. In an instance where someone who intends to buy a pair of Chanel shoes, ends up accidentally buying Channel shoes, which are not durable and at a higher price, under the conception that it was actually ‘Chanel’, the latter company may suffer damages or the repercussions of the act of the rival company; thus, the tort of passing off serves to reduce or completely stamp such out. In a rising economy as that of Nigeria, where many traders are into the same kind of trade, passing off is almost inevitable, thus, the tort of passing off is very relevant to keep at bay those who intend to take advantage of the good will of another company and resultantly put that company in danger of suffering damage.

In conclusion, passing off is an economic tort, because it has to do with financial loss or damage; it is a tort of strict liability because one need not prove actual damage in order to succeed, however, it would suffice to prove that there is a likelihood of the occurrence of damage resulting from the tort of passing off. Passing off has a wide range of importance or relevance on the Nigerian economy despite the pitfalls it may face; in that, it aids and enhances, the birth of new companies and trades and protects the creativity of such innovators from those who want to pass off. It also on the whole, contributes to the development of the Nigerian economy, seeing as there are other sectors which people can venture into apart from the oil and entertainment sector. The Nigerian economy will benefit greatly from the efficient enforcement of this tort as it would build a very strong economy in the long run, and secure the right of property that exists in goodwill and generally protect the purchasing public from exploitation and inferior goods.

**BIBLIOGRAPHY**

**--**https://www.theverge.com/2017/5/22/1515678296/paypal-pandora-lawsuit-logo-design

--https://m.guardian.ng/business-services/checking-unfair-competition-in-nigeria-real-sector-with-fccp-bill/amp

--https://www.templars-law.com/wp-content/uploads/2015/05/Trademark-Infringement.pdf

--The Tort of passing off: An Overview by Atteh T.P

--Aluko O, & Kodilinye G, *Nigerian Law of Torts* (Spectrum Law Publishing 1999)

-Malemi E, *Law of Tort* (Princeton Publishing Company)

-Salmond J, *Law of Tort* (Sweet & Maxwell Publishers 1928)

1. J. Salmond, *Law of Tort,*(7th edition,1928) [↑](#footnote-ref-2)
2. *Leather Cloth Co v American Leather Cloth Co* (1865) HL 11 ER 1435 [↑](#footnote-ref-3)
3. Niger Chemists Limited v Nigeria Chemists Limited and D.K. Brown(1961) HC ALL NLR 180 [↑](#footnote-ref-4)
4. *Byron v Johnston*(1816) 35 ER 851 [↑](#footnote-ref-5)
5. (1842) 49 ER 749 [↑](#footnote-ref-6)
6. CAMA 1990 s579(1)(d) [↑](#footnote-ref-7)
7. (1931) 16 NLR 1 [↑](#footnote-ref-8)
8. Niger Chemists Limited v Nigeria Chemists Limited (1961) ALL NLR 171 [↑](#footnote-ref-9)
9. (1896) AC 199 HL [↑](#footnote-ref-10)
10. https://www.theverge.com/2017/5/22/15678296/paypal-pandora-lawsuit-logo-design [↑](#footnote-ref-11)
11. TMA 1965 s3(a)(b)(c) [↑](#footnote-ref-12)