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This purpose of this paper is to discuss the relevance of the passing of as a form of Economic Torts in the 21st century Nigeria

**Economic tort**

Economic tort refers to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. The tort provides a framework in law for dealing with negligent or intentional acts done against a person’s means of livelihood. Economic torts include (a) Passing off (b) Breach of intellectual property rights (c) Injurious falsehood (d) Interference with contracts (d) conspiracy to interfere**. For the purpose of this paper, focus shall be placed on the tort of passing off and its economic importance** in **Nigeria**

**Passing off defined**

Passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant’s product or business is that of the plaintiff’s. It can also be defined as the making of false representation likely to induce a person to believe that the goods or services are those of another. In other words, passing off means misleading the public into believing falsely, that the brand being projected was the same as any well-known brand.

The law of passing off can be summarised in one general proposition as stated in N.R Dorgue ***v Whirlpool*** ‘***a man may not sell his own goods under the pretence that they are the goods of another man’[[1]](#footnote-1)***

**The forms of passing off**

The tort of passing off is committed in various as established in ***Francis Day & Hunter Ltd* v** ***Twentieth Century Fox*[[2]](#footnote-2)** . The common forms of passing off are

1. Trading with a name resembling that of the plaintiff ; this is where the defendant is engaged in the same type of business as the plaintiff, and uses the name so closely resembling that of the plaintiff in order to mislead the public into believing that the defendants product/ business are the same. In ***Hendricks v Montague***[[3]](#footnote-3) it was held that ‘universal life Assurance society” and “universal Life Assurance Association” are very likely.
2. Marketing Goods with a name resembling that of the plaintiff’s goods : this occurs where a defendant produces or markets his goods with a name closely resembling the name of the plaintiff’s goods, with the result that the customers are confused, and defendant’s products are mistaken as made by the plaintiff In ***Hines v Winnick***[[4]](#footnote-4) the court granted an injunction to restrain the defendant from airing a programme with the same name as the defendant’s radio show.
3. Marketing products with the plaintiff’s trademark or its imitation: it is actionable passing off for a defendant to market his goods using the plaintiff’s trademark or its imitation leading to a confusion of the buyers who patronize his products thinking they are products of the plaintiff. **In *Perry v Truefit***[[5]](#footnote-5) the court restrained the defendant’s from selling hair cream under the name “medicated Mexican Balm” or similar designations.
4. Imitating the appearance of the plaintiff’s product and its advertisement : it will be considered as passing off for the plaintiff to do anything to do anything, which makes his product appear like the plaintiff’s product such as copying the likeness or appearance of the plaintiff’s product as seen *in* ***De facto works v Odumotun***[[6]](#footnote-6)***.***
5. Selling inferior or Expired goods of the plaintiff as original or current goods: it is passing off to sell inferior or expired goods/products of the plaintiff’s current stock, where such has been discarded by the plaintiff. In this passing off, the defendant who has managed consumption sell them off as current stock of the plaintiff. In ***Gittette safety razor Co & Amor v Franks[[7]](#footnote-7).***

**Elements**

Formerly, it was held that to prove passing off one must establish three essential elements known as the classical trinity as established by the house of lords in ***Reckitt & Colman v*** **Borden[[8]](#footnote-8).** However, in the case of ***Erven Warnick v Townend[[9]](#footnote-9)*** Lord Diplock expanded the elements of the tort. Therefore, to prove passing off one must establish the following :

1. Misrepresentation
2. Made by a person in the course of trade
3. To prospective customers of his or her ultimate consumer of goods and services
4. Which is calculated to injure the business or goodwill of another trader by whom the action is brought.

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**The Economic relevance of the tort of passing off**

The tort of passing off has proved itself instrumental to the preservation of the economy in more ways than one, some of which include:

1. **The tort of passing off guards against unfair competition**

It cannot be denied that for the Nigerian economy to develop, it is essential that there must be competition between businesses such that one business must succeed to the disadvantage of the other. However, there must be a fine line between what should be considered as competition as opposed to exploitation and manipulation of another person’s business to one’s advantage

Competition becomes unfair where the law allows any man to acquire for himself the benefit of a reputation already built by another. According to Lord Kingsdown and further buttressed in **N.R** ***Dongre v Whirlpool*** ***corporation*** ***‘a man may not sell his own goods under the pretence that they are the goods of another man’*** passing off aims to protect traders in Nigeria from this from of unfair competition.

To safeguard the economy, the law uses the economic tort of passing off as a means to balance ‘the protection of a plaintiff’s investment in his product and the protection of ‘free competition’ in the market system.

It will be considered unfair competition for a company engaged in a similar business as the plaintiff, to adopt a similar name in a manner that is calculated to make the consumers of the goods or services to believe that he is part of plaintiff’s business. As in ***Beecham Group v Esdee*** ***Food products[[10]](#footnote-10)*** in Nigeria the court in the case held that the name “Glusoce Aid’’ is calculated to confuse and deceive the public in its sound consideration of the trademark ‘lucozade’’

Passing off is an economically relevant tort as it ensures that businesses are able to compete fairly and to ensure this, the law of passing off will not allow any business man to gain an unfair business advantage over the other by misleading the public into believing that their business is the same as that of their rivals, and derive the benefit of reputation already built by a rival business. Passing off protects the economy by giving a business man who’s trademark or product has been passed off by a competitor bring an action in court to claim damages and disallow the continuance of such act.

1. **The tort of passing off is a means of protecting the reputation and good will of companies**

The economic relevance of passing off is exemplified in its function. It protects Nigerian traders by allowing them to bring an action against another person for attempting to ride off the back of their established reputation or goodwill by using a similar mark as their own.

Good will is the established reputation of a business regarded as an intangible asset and calculated as part of its value .Goodwill of any company must be protected by law because it enables a business to continue to earn a profit that is in excess of the normal or basic rate of profit earned by other businesses of similar type. It operates as a form of advantage a business owner has over other business owners.

Because goodwill is an important economic strategy used by business owners, It is important in order to preserve the economy, that no person should be able to use the goodwill of another to his advantage.

The tort of passing off is a legal mechanism used to maintain the Nigerian economy. It aims to protect the right of property that exists in goodwill by prohibiting a person from misleading the public into believing falsely, that the brand being projected was the same as any well-known brand. Thus, potentially destroying the good will of the company.

1. **The tort of passing off protects the public from exploitation.**

The economic relevance of the tort of passing off cannot be overemphasized in 21st century Nigeria. Although, its primary function is to protect business owners, by extension, it protects consumers from exploitation.

By Committing the act of passing off, business owners seek to confuse, deceive, and mislead the masses into purchasing substandard products passed off as that of a trusted brand. in ***Niger Chemists v Nigeria Chemist***[[11]](#footnote-11) it was stated that ‘it seems to be a matter of common sense that when two firms in trade in the same town in the same manner of business, one calling itself ‘Niger chemist’ and the other ‘Nigeria Chemist**’ *there must be a grave risk of* *confusion’.*** In ***Ogundele v Babayemi***[[12]](#footnote-12) ***it was held that there is no doubt that passing off is calculated to deceive***

In order that people are not be left at the mercy of wrongdoing business owners, the tort of passing off comes into play to protects the public from the risk of exploitation by disallowing the sale of fake or adulterated products.

1. **The tort of passing off guards against economic loss as a result of decline trade**

The intention of a business owner who passes off products of his rival as his own, is to divert some of the business profit of the rival to himself. This means that the said rival business is at risk of losing much profit.

Without a protection of ideas, products, businesses and services, individuals would not reap the full benefits of their creations. This will discourage establishment of more enterprises.

Thus, if passing off is allowed to continue unchecked, it will lead to a fold up of many businesses and consequently a collapse of the Nigerian economy.

Therefore, the tort of passing off is economically relevant because it acts as a guard against such losses by providing a legal defence for a business owner whose products have been unjustly adapted or copied. The tort ensures that the creators or owners of a product or service are rewarded with the incentive of their sale.

1. **Protection against infringement**

The tort of passing off protects a business from infringement. The tort disallows other persons from using signs, symbols and logos of another. More importantly, in the case that one uses the marks or logos or name of another without the approval of the owner, the tort is a means by which the owner can get the legal protection under the law and stop the wrongdoer from perpetrating the act.

Passing off safeguards the exclusive rights of the creators or owners of products and services against any misuse.

In conclusion, from the indications made, it is evident that passing off is a viable and important tort for the safeguard of businesses, business owners, customers and the economy of the 21st century Nigeria. This writer concludes that passing off is in no way a redundant tort, and the important role it plays in the preservation of the economy cannot be overstated.

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1. (1996) SC 583 [↑](#footnote-ref-1)
2. (1939) ALL ER 192 at 199 PC [↑](#footnote-ref-2)
3. *(1881) 50 LJ CH 456* [↑](#footnote-ref-3)
4. *(1947) CH 707 pg 13* [↑](#footnote-ref-4)
5. (1842) 1 WLR 49 ET 749 [↑](#footnote-ref-5)
6. ( 1981) LLR 33 [↑](#footnote-ref-6)
7. ( 1933) 40 TLR 606 [↑](#footnote-ref-7)
8. (1990) ALL E.R 873 [↑](#footnote-ref-8)
9. (1979) AC 731, [↑](#footnote-ref-9)
10. (1985) JELR 42523 [↑](#footnote-ref-10)
11. (1961) All NLR 171 [↑](#footnote-ref-11)
12. (1971) 1 UILR 417 [↑](#footnote-ref-12)