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It is important to start by clearly explaining the term ‘Economic Tort’. Economic torts in English law refer to a species of civil wrong which protects the economic wealth that a person will gain in the ordinary course of business. Proving compensation for pure economic loss, examples of economic tort include interference with economic or business relationships. Economic torts protect people from interference with their trade or business. Economic torts are tortious interference actions designed to protect trade/ business.

Principal economic torts are:

Passing off

Injurious falsehood and trade libel

Conspiracy

Inducement of breach of contract

Tortious interference (such as interference with economic relations or unlawful interference with trade)

Negligent misrepresentation and

Watching and besetting.

The focus in answering the question is put on Passing off as a form of economic tort in the 21st century Nigeria. Therefore it is important to explain the term ‘Passing Off’ and its purposes and relevance. Passing off is easily described as an unfair competition by misrepresentation or literally speaking “the cause of confusion or deception”. Passing off is the false representation of ones product or business as that of another person, thereby deceiving buyers to patronize it.[[1]](#footnote-1)

Passing off happens when someone deliberately or unintentionally passes off their goods or services as those belonging to another party. This action of misrepresentation often damages the goodwill of a person of business or business, causing financial damages. The law on this matter is designed to protect traders against that form of 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. It can also be said that Passing off is a wrong, a common law tort which protects the goodwill of a trade from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well known brand is wrong and is known as the tort of “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”.

As held in the famous case of ***N. R. Dongre Vs. Whirlpool Corporation***[[2]](#footnote-2)

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

Law aims to protect traders from this form of unfair competition.

“…the fundamental rule is that one man has no right to put off his goods for sale as goods of a rival trader” – Per Lord Kingsdown in ***Leather Co v American Leather Cloth Co****.*[[3]](#footnote-3)There are various types of Passing Off such as,

1. Marketing a product as that of the plaintiff: for example you market your insecticide as Mobil or Mortein, market your tyres as Dunlop or Michelin, etc
2. Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same.

This can be seen the case of **Niger Chemists Limited and Nigeria Chemist***[[4]](#footnote-4)* ,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 by the use of a trade name similar with that of another such as to deceive the public that there exists a business relationship between the two.

“… It seems to me as a matter of common sense that when two firms trade in the same town, in the same street and in the same line of business, one calling itself ‘Niger Chemists’ and the other ‘Nigeria Chemists’, there must be a grave risk of confusion and deception” – Per Palmer, J.

1. Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff’s trade name as to be mistaken for it. A trade name is one under which goods are sold and which by established usage has become known to the public as indicating that those goods are the goods of that person.
2. Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark. A trade mark is any design, picture, mark or other arrangement affixed to goods which identifies those goods with the plaintiff manufacturer or seller. Trademarks receive protection not only under the law of passing off but also, if registered, under the Trade Marks Act 1965, under which most actions are brought.
3. Imitating the get-up or appearance of the plaintiff’s goods.

An example of passing off is seen in In the case of ***Trebor Nigeria Limited v. Associated Industries Limited****[[5]](#footnote-5)*, Trebor Nigeria Limited the makers of Trebor Peppermint brought an action against Associated Industries Limited the makers of Minta Supermint 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.

The purpose of the tort of passing off is to protect the commercial goodwill and to ensure that people’s business reputations are not exploited. Since ‘goodwill’ in business is an asset, and therefore, a species of property, the law protects it against encroachment.

In a passing off action, the plaintiff must prove that there is a similarity in the trade names or marks and that the defendant is passing off his goods as those of the plaintiff’s . Remedies could include injunction or damages or both. Damage or likelihood of damage form the core all passing off actions. The concepts of reverse passing off and extended passing off also hold significance.

Extended passing off consists of those cases where misrepresentation of a particular quality of a product or services causes harm to the plaintiff’s goodwill. A famous case example would be ***Diageo North America Inc v Intercontinental Brands (ICB) Ltd***[[6]](#footnote-6) where the defendant marketed a drink named “Vodkat”, which was actually not vodka, but the marketing did not actually make it clear that it wasn’t so. The plaintiffs were the biggest manufacturers of vodka and they filed a suit against the defendants for passing off and it was held so.

If a defendant markets the products made by the plaintiff as the products of the defendant, the tort committed is known as reverse passing off.

In Nigeria, the right of action of passing off relating to the infringement of registered trade is statutory and can be found only in ***Section 3 of Trade Marks Act 1965***[[7]](#footnote-7).

In conclusion the common law tort of passing off remains a vital form of protection of an intellectual property despite the introduction of a registered system of trade mark protection. Although the scope of protection under trade mark law has been extended by the 1994 TMA certain limitations remain which leave an action of passing off as the only form of protection in such instances. The gap in Section 10 of the TMA also calls for reliance on the common law and this will be the case until statutory amendments are made.

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1. Ese Malemi,*Law of tort(*1st Edn Princeton publishing co. 2008) [↑](#footnote-ref-1)
2. 1996 (16) PTC 583 (SC) [↑](#footnote-ref-2)
3. 1865(11) H.L cas 523/538 [↑](#footnote-ref-3)
4. 1961 ALL N.L.R [↑](#footnote-ref-4)
5. 14 NIP JD [HC. 1972] 127/1971 [↑](#footnote-ref-5)
6. [2012] BUS LR 401 [↑](#footnote-ref-6)
7. Trade marks act 1965 [↑](#footnote-ref-7)