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**ANSWER**

**Economic torts**, which are also called **business torts**, are torts that provide the common law rules on liability which arise out of business transactions such as interference with economic or business relationships and are likely to involve pure economic loss[[1]](#footnote-1). Economic torts are tortious  interference actions designed to protect trade or business.

Passing off as a form of economic tort is relevant in 21st Century Nigeria.

Passing off is the false representation of ones product or business as that of another person, thereby deceiving buyers to patronize it. Passing off is the selling of one's products, or carrying on of one's business as if it were that of another person whose reputation and goodwill one thereby enjoys.

Passing off is the pretence by one person, that his goods or business are those of another person in other to capture the patronage of the customers of a rival trader and enjoy his goodwill.

**TYPES OF PASSING OFF**

The tort of passing off is committed in various forms. *Francis Day & Hunter*

*Ltd v. Twentieth Century Fox Co. Ltd[[2]](#footnote-2)*. The common forms of passing off which are easily noticed are as follows:

1)Trading with 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.

*Niger Chemist Ltd v. Nigeria Chemist[[3]](#footnote-3)*; it was held that;

*“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”*

2) Marketing a product as that of the plaintiff

In *Byron v. Johnston[[4]](#footnote-4)*– it was held actionable for a book publisher to advertise and sell a book of poems with the name of Lord Bryon on the title page, when in fact that famous poet had nothing to do with its authorship.

3) Marketing goods under a trade name already appropriated for goods of that kind for the plaintiff, or under a name so similar to the plaintiff's trade name as to be mistaken for it.

4) Marketing products with the plaintiff trademark or with any deceptive imitation of such mark.

5) Imitating the get-up or appearance of the plaintiff’s product.

It is passing off for the defendant to do anything, which makes his product appear like the plaintiff’s product. This passing off includes any copying of the likeness or appearance of the plaintiff’s product, in a manner to confuse the public e.g. general appearance, package, label, or design of the product.

*De facto Works Ltd v. Odumotun Trading Co Ltd.[[5]](#footnote-5)*

**ELEMENTS**

1. Misrepresentation
2. Made by a trader in the course of the trade
3. To prospective customers of his or ultimate consumers of goods and services supplied by him
4. Which is calculated/likely to injure the business or goodwill of another trader
5. Which causes actual damage to a business or goodwill of the trader by whom the action is brought.

The **purpose** of the law of passing off entails its relevance

The tort of passing off is common in a competitive business community or economy. People resort to every strategy to market their products and services, to survive and to expand their business.

* The tort of passing off is designed to protect a person's business interests from the unfair trade practices and sharp practices of other persons.
* Its object is to protect the reputation and goodwill a business has built up for itself.
* It protects the benefit and advantage of the good name, quality, reputation, patronage and customers of the business.
* It protects that attractive force of the business, which brings customers to it
* It protects a business from misrepresentation of the business.

**Sir John Salmond** in his book ***Law of Tort*** stated the reason for the tort of passing of thus:

*“ 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.”*

In the words of **Lord Kingsdown** in **Leather Cloth Co v American Leather Cloth Co:**

“*The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”[[6]](#footnote-6)*

And **Lord Langdale MR** explaining the law in **Perry v Truefit** stated that:

“*A man is not to sell his own goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end”[[7]](#footnote-7)*

The tort of passing off is a complex, dynamic and an ever increasing aspect of the law of tort because it relates to economic activities of citizens of a given state.

In an environment like the one applicable in Nigeria where the government employs less than a quarter of its own population the remaining three quarter of the population are free to be engaged in businesses which are not watertight with legal regulation.

In a country where a considerable percentage of the lives in rural areas, it is very easy to pass off goods. Right from garments to tobacco to toothpaste to pencils and pens, shoes, you name it, you find it.

In this kind of environment, it is expected that the high level and complexities of passing off will be expected.

In Nigeria today, even the war against unhygienic bread eaten by almost everybody is on the losing side by government agencies responsible for that sector of the economy.

Variation of the same product by different companies and marketing and advertising agencies has brought the incidence of passing off to a high level. In the health sector of the Nigerian economy, the problem of adulterated drugs is the bane of that sector either in the estimation of individuals or in the estimation of experts in the government hospitals and even experts in the medical manufacturing sector.

There are a lot of deceptions and remedies to stem the tide of the increase in the level of passing off [[8]](#footnote-8)

In Nigeria, the whole regime of Intellectual Property (IP) and the protection of Intellectual Property Rights (IPRs) is defined and regulated by several statutes and regulations. These include the *Copyright Act[[9]](#footnote-9), the Patents and Designs Act[[10]](#footnote-10),* and the *Trade Marks Act*,[[11]](#footnote-11) among others. These legislative instruments provide for ways of protecting trade marks and other IPRs through the courts by a melange of remedies for any infringement on guaranteed rights.

These are a few recent cases of passing off in 21st Century Nigeria

In *Ayman Enterprises Limited v. Akuma Industries Limited*,[[12]](#footnote-12) the issue involved the alleged infringement, through ‘passing-off’, of an unregistered trade mark. At the Supreme Court, the pivotal issue turned on ‘whether the Federal High Court should have assumed jurisdiction to adjudicate on a case of damages for ‘passing-off of an unregistered trade mark?’ In reaching its decision, the Supreme Court held that in other for the Federal High Court to assume jurisdiction over ‘passing-off’ related infringements, the concerned trade mark(s) must have been registered. In essence, that where the trade mark(s) in issue was not registered, that, ipso facto, denies the Federal High Court of jurisdiction.

The Supreme Court finally had the opportunity in the case of *Omnia Nigeria Limited v.* *Dyke Trade Limited[[13]](#footnote-13)* to re-examine the provisions of *Section 3 of the Trade Marks Act.* In the operative part of the decision, the Court held, without expressly overruling Ayman v. Akuma, that Federal High Court has the jurisdiction to hear and determine cases of ‘passing off, and this, whether arising from registered or unregistered trade marks[[14]](#footnote-14). It is submitted that this is the correct position of the law as it presently stands in Nigeria.

In conclusion, the common law tort of passing off remains a vital form of Protection of Intellectual Property in Nigeria and the world at large.

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2. (1939) 4 ALL ER 192 at 199 P.C. [↑](#footnote-ref-2)
3. ALL NLR 180 at 182 [↑](#footnote-ref-3)
4. (1816) 35 ER 851 [↑](#footnote-ref-4)
5. (1959) LLR 33 [↑](#footnote-ref-5)
6. (1865) 11 HL Cas 523 at 538; (1865) 11 ER 1435 [↑](#footnote-ref-6)
7. (1842) 49 ER 749 at 725 [↑](#footnote-ref-7)
8. Tort of Passing off Project Assignment for Law of Torts' <LawTeacher.com> accessed May 7 2020 [↑](#footnote-ref-8)
9. CAP C 28 LFN 2004 [↑](#footnote-ref-9)
10. CAP P2 LFN 2004 [↑](#footnote-ref-10)
11. CAP T13 LFN 2004 [↑](#footnote-ref-11)
12. (2003) 12 NWLR Pt 836, 22. [↑](#footnote-ref-12)
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