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**INTRODUCTION**

**WHAT ARE ECONOMIC TORTS?**

**Economic torts** which are also referred to as **business torts** are [torts](https://en.wikipedia.org/wiki/Tort) that provide the [common law](https://en.wikipedia.org/wiki/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](https://en.wikipedia.org/wiki/Pure_economic_loss).

Economic torts are [tortuous interference](https://en.wikipedia.org/wiki/Tortious_interference) actions designed to protect trade or business from acts the law deems unacceptable. These torts represent the common law's historical attempt to balance the need to protect claimants against those who inflict economic harm and the wider need to allow effective, even aggressive, competition (including competition between employers and their workers) as it is a fundamental element of business to compete with one another[[1]](#footnote-2)

The forms of economic torts include:

* [passing off](https://en.wikipedia.org/wiki/Passing_off),
* [injurious falsehood](https://en.wikipedia.org/wiki/Injurious_falsehood) and [trade libel](https://en.wikipedia.org/wiki/Trade_libel) (see also [Food libel laws](https://en.wikipedia.org/wiki/Food_libel_laws)),
* [conspiracy](https://en.wikipedia.org/wiki/Conspiracy_(civil)),
* inducement of [breach of contract](https://en.wikipedia.org/wiki/Breach_of_contract),
* [tortuous interference](https://en.wikipedia.org/wiki/Tortious_interference) (such as interference with economic relations or unlawful interference with trade),
* negligent [misrepresentation](https://en.wikipedia.org/wiki/Misrepresentation), and
* Watching and besetting.

The writer of this paper shall be focusing on passing off as a form of economic tort

**WHAT IS PASSING OFF AS A FORM OF ECONOMIC TORT** Passing off refers to a situation where someone delibrately 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 or business, causing financial or reputational damage.A [cause of action](https://en.wikipedia.org/wiki/Cause_of_action) for passing off is a form of [intellectual property](https://en.wikipedia.org/wiki/Intellectual_property) enforcement against the unauthorized use of a [get-up](https://en.wikipedia.org/w/index.php?title=Get-up&action=edit&redlink=1) (the whole external appearance or look-and-feel of a product, including any marks or other indicia used) which is considered to be similar to that of another party's product, including any registered or unregistered trademarks. Passing off is of particular significance where an action for [trade mark infringement](https://en.wikipedia.org/wiki/Trade_mark_infringement) based on a registered trade mark is unlikely to be successful (due to the differences between the registered trade mark and the unregistered mark). Passing off is a common law cause of action, whereas [statutory law](https://en.wikipedia.org/wiki/Statutory_law) such as the [United Kingdom](https://en.wikipedia.org/wiki/United_Kingdom) [Trade Marks Act 1994](https://en.wikipedia.org/wiki/Trade_Marks_Act_1994) provides for enforcement of registered trademarks through infringement proceedings. Passing off and the law of registered trademarks deal with overlapping factual situations, but deal with them in different ways. Passing off does not confer monopoly rights to any names, marks, [get-up](https://en.wikipedia.org/w/index.php?title=Get-up&action=edit&redlink=1) or other [indicia](https://en.wikipedia.org/wiki/Indicia_(publishing)). It does not recognize them as property in its own right. Instead, the law of passing off is designed to prevent misrepresentation in the course of trade to the public, for example, that there is some sort of association between the businesses of two traders. It is also important to note that is addition to straight passing off, there can also be;

* Extended passing off
* Reserve passing off

**The** **extended form of passing off** happens where a misrepresentation as to the particular *quality* of a product or service causes harm to another's goodwill. An example of this is [*Erven Warnink v. Townend & Sons Ltd.*](https://en.wikipedia.org/wiki/Erven_Warnink_v._Townend_%26_Sons_Ltd.), in which the makers of [advocaat](https://en.wikipedia.org/wiki/Advocaat) sued a manufacturer of a drink similar but not identical to advocaat, but which was successfully marketed as being advocaat.

The extended form of passing off is used by celebrities as a means of enforcing their [personality rights](https://en.wikipedia.org/wiki/Personality_rights) in common law jurisdictions. Accordingly, celebrities whose images or names have been used can successfully sue if there is a representation that a product or service is being endorsed or sponsored by them or that the use of their likenesses was authorized when this is not true.[[2]](#footnote-3)

**Reverse passing off'** occurs where a trader markets another's product or service as being his own. It is usually covered by the same court rulings as straight passing off.[[3]](#footnote-4)

**THE ELEMENTS OF PASSING OFF** When coming to Court, there are three elements, often referred to as the Classic Trinity, in the tort which must be fulfilled. In [*Reckitt & Colman Products Ltd v Borden Inc*](https://en.wikipedia.org/wiki/Reckitt_%26_Colman_Products_Ltd_v_Borden_Inc)[[4]](#footnote-5)[[5]](#footnote-6)*,* Lord Oliver reduced the five guidelines laid out by Lord Diplock in [*Erven Warnink v. Townend & Sons Ltd.*](https://en.wikipedia.org/wiki/Erven_Warnink_v._Townend_%26_Sons_Ltd.)[[6]](#footnote-7) (The "Advocate Case") to three elements, which are:

1. [Goodwill](https://en.wikipedia.org/wiki/Goodwill_(accounting)) owned by a trader
2. Misrepresentation
3. Damage to goodwill

* **Goodwill owned by trader** :The plaintiff has the burden of proving goodwill in its goods or services, get-up of goods, brand, mark or the thing standing for itself or the plaintiff must prove that you own a 'reputation' in the mark that the public associates with your specific product or service.
* **Misrepresentation**: The plaintiff also has the burden of proof to show false representation (intentional or otherwise) to the public to have them believe that goods/services of the defendant are that of the Plaintiff. There must be some connection between the plaintiff's and defendant's goods, services or trade. They must show likelihood or actual deception or confusion by the public. It is the Court's duty to decide similarity or identity of the marks, goods or services. The criteria are often: aural, visual and conceptual similarity (often applied in trademark infringement cases).
* **Damage to goodwil**l: For the element of damage to goodwill, there may be a loss or diversion of trade or dilution of goodwill. The plaintiff need not prove [actual or special damage](https://en.wikipedia.org/wiki/Damages); real and tangible probability of damage is sufficient. This damage should however be reasonably foreseeable. It is not enough just to show likelihood or actual deception or confusion. In other words, the plaintiff must prove that the misrepresentation damaged or is likely to damage your goodwill, or cause actual or foreseeable financial or reputational loss

Ultimately, the Court must use its discretion in determining the case, based on evidence and judicial discretion, and not witnesses.

**THE RELEVANCE OF PASSING OFF IN 21ST CENTURY NIGERIA**

DICTUM: *“…the fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader”*

per Lord Kingsdown in **Leather Cloth Co. v. American Leather Cloth Co.** (1865) 11 H.L Cas. 523/538 [[7]](#footnote-8)

The general essence of passing off as a form of economic tort is to protect traders from or against a form of unfair competition which is deviant from the normal competition between traders which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by the rival traders. The major aim of this form of economic tort is the protection of a person product from false representation to belonging to another person thereby leading to the deception of the general public and patronization of such product. In the 21st century, Nigeria operates an economy with a free market which implies that there are a lot of entrepreneurs, traders, manufacturers who determine the production and prices of products etc and as such the relevance of passing off as a form of economic tort in Nigeria today is a topic which is of importance. The relevance of passing off in 21st century Nigeria boils down to the protection of products of numerous traders from being patronized by the general public under the names of traders who through false representation had deceived the public into believing such products are theirs. Passing off as a form of economic tort also looks into protecting the goodwill and reputation of traders for the product they had produced in Nigeria. Also, passing off as form of economic tort basically protects traders from losing their gains from such products and being jilted as the sale of these products is the source of their income in Nigeria. Amongst others passing off protects traders of 21st century Nigeria in the following way;

* Ensuring products of the traders are not being marketed by other traders as theirs
* Passing off as a form of economic tort also guarantees that no other products are traded under a specific name so closely related to that of the plaintiff(trader) that it may be mistaken for it
* It certifies that products are marketed with trademarks
* The appearance or get up of products are protected from being imitated

**CONCLUSION**

In a country as diverse as Nigeria it will be only logical to believe that there will be a lot of cases involving the tort of passing off, however passing off is in consonance with the Latin maxim **“ubi jus ubi remedium**” which means “**for every wrong the law provides a remedy**”. In that sense an unregistered owner of certain goods and services is not without remedy when there is an infringement on his products, trademark, trade name etc.

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* Rvine v Talksport Ltd [2003] FSR 35, ChD)
* **^** [Dastar Corp. v. Twentieth Century Fox Film Corp.](https://en.wikipedia.org/wiki/Dastar_Corp._v._Twentieth_Century_Fox_Film_Corp.)
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1. * 1. Deakin, Simon; Markesinis, Basil; Johnston, Angus (2003). Markesinis and Deakin's Tort Law (5th ed.). [*Oxford University Press*](https://en.wikipedia.org/wiki/Oxford_University_Press). p. 509. [*ISBN*](https://en.wikipedia.org/wiki/ISBN_(identifier)) [*0-19925712-4*](https://en.wikipedia.org/wiki/Special:BookSources/0-19925712-4).

   [↑](#footnote-ref-2)
2. rvine v Talksport Ltd [2003] FSR 35, ChD) [↑](#footnote-ref-3)
3. **^** [Dastar Corp. v. Twentieth Century Fox Film Corp.](https://en.wikipedia.org/wiki/Dastar_Corp._v._Twentieth_Century_Fox_Film_Corp.) [↑](#footnote-ref-4)
4. [**^**](https://en.wikipedia.org/wiki/Passing_off#cite_ref-2) [1990] 1 All ER 873 [↑](#footnote-ref-5)
5. *Mosawi, Anthony (24 March 1995). "The fire line between trademarks". New Law Journal.* ***145*** *(6688): 410*  [↑](#footnote-ref-6)
6. [1979] AC 731, 742 (HL) [↑](#footnote-ref-7)
7. (1865) 11 H.L Cas. 523/538 [↑](#footnote-ref-8)