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RESEARCH TOPIC: THE RELEVANCE OF PASSING OFF AS AN ECONOMIC TORT IN 21st CENTURY NIGERIA

**ABSTRACT**

The world is becoming a global village and one major impact of this renaissance would be the transition and advancement in the law regarding economics and trade. With this transition of human interaction comes the need to protect and prevent unfair appropriation of goodwill- which is central to the law of Passing Off.

This paper explores the concept of Passing Off as an economic tort**.**

The scope of study cuts across the forms it may take, the elements which are essential in establishing a claim, remedies available to aggrieved persons. An interesting finding is the basis of this tort on likelihood.

The study goes to review the relevance of the tort of Passing Off in 21st century Nigeria.

**INTRODUCTION**

The law of tort recognises four basic heads of compensable injury, namely; personal injury- literal injury or death, property damage- destruction of possessions, psychiatric damage (also nervous shock)- psychological illness or trauma obtained from an incident, and economic loss- financial loss suffered by a party which is not necessarily accompanied by damage to person or property.

Economic torts are the torts which inflict economic or financial losses. In view of the fact that economic loss may be speculative or contemplative in nature, the subject of economic tort seeks to protect businesses from acts of unacceptable interference. Examples of economic torts include: interference with contracts, breach of intellectual property rights, injurious falsehood and passing off. This writer will proceed to discuss the economic tort of passing off.

The purpose of passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. It enables businesses to enforce their rights associated with its good name in the market. Hence, we can say that passing off is a flexible and adaptable area of law, geared to protect what might be called the reputation and association of goods or services to a particular business.

**PASSING OFF**

In the literal sense, passing off is defined as the cause of confusion or deception by misrepresentation; the act of giving something a false identity or character. It involves “*making some false representation likely to induce a person to believe that the goods or services are those of another*.”[[1]](#footnote-1)

The tort of passing off comprises the exploitation of a plaintiff’s reputation for delivering a particular kind of good or service through an act of misrepresentation by the defendant, consequently exacting of some degree of damage to the plaintiff’s reputation. The tort is based on the principle that no man is entitled to represent his goods or his business as that of another. **Lord Langdale** stated in the case of **Perry v Truefitt*[[2]](#footnote-2)*** that, “*A man is not to sell his ow goods under the pretence that they are the goods of another person; he cannot be permitted to practice such a deception, nor use the means which contribute to that end*.” the It involves the sale of one’s goods under the façade of another’s name, trademark, description or product in order to hoax the public to patronise it. would be said to be committed where a person deliberately or unintentionally passes off their product, service or business to potential buyers as that belonging to another party in order to obtain patronage and hereby taking advantage of the other party’s reputation and goodwill. Basically, the rationale is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another and the **enforcement of fair trade practices.**

**Common Examples of Passing Off**

Some acts constituting passing off include[[3]](#footnote-3):

* Trading with a name resembling the plaintiff’s
* False attribution of authorship
* False endorsement
* Marketing a product with a name resembling the plaintiff’s goods
* Marketing fake products as the plaintiff’s by using the plaintiff’s label or design
* Imitating the appearance of the plaintiff’s product
* Marketing a trademark with the name resembling that of the plaintiff’s products
* Selling inferior or expired goods of the plaintiff as current stock.

**WHEN WOULD PASSING OFF ENSUE? {ELEMENTS OF PASSING OFF}**

Orthodoxly, the legal test adopted by the court in determining Passing Off claims developed from the leading decision of the House of Lords in the case of **Erven Warnick BV v Townend & Sons**[[4]](#footnote-4), where Lord Diplock established 5 criteria for a claim in passing off as:

1. A misrepresentation
2. Made by a defendant in the course of trade
3. To prospective buyers or ultimate consumers of goods supplied by him
4. Which is calculated to injure the business and goodwill of another person and
5. which causes actual damage to the business or goodwill of the plaintiff trader.

In the famous Jif Lemon case[[5]](#footnote-5), [Reckitt](https://en.wikipedia.org/wiki/Reckitt_Benckiser), sold [lemon juice](https://en.wikipedia.org/wiki/Lemon_juice) under the name "[Jif Lemon](https://en.wikipedia.org/wiki/Jif_(lemon_juice))" which came in plastic yellow containers shaped like a [lemon](https://en.wikipedia.org/wiki/Lemon)s. Borden, a competitor, started to produce lemon juice in similar lemon-shaped plastic containers that were only slightly larger with a flattened side. In an action for passing off, trial court ruled in favour of the plaintiff, which was subsequently upheld at the [Court of Appeal](https://en.wikipedia.org/wiki/Court_of_Appeal_of_England_and_Wales).

As established by Lord Oliver, the current position of the law concerning Passing Off claims is captured in three major elements, which were re-iterated by Justice Nnaemeka Agu, in the 1977 case of **The Boots Company Limited V United Niger Imports Limited** as:

1. **Reputation**: The plaintiff must establish that his goods or services have acquired **goodwill or reputation** which distinguishes them from other products in the market. He should be able to prove that the brand name, trade description or labelling mark of which he claims ownership is recognised by the purchasing public as specifically distinctive of his goods or services and is regarded by a substantial number of members of the public or persons involved in the relevant trade as coming from a particular source.
2. **Misrepresentation**: To succeed in a claim for Passing Off, the plaintiff has to prove that the act of the defendant is likely to deceive the public. The plaintiff must establish that his product or service has been misrepresented by the defendant (whether or not intentional) so **that the public is led or likely to be led to believe** that the goods or services offered by the defendant are his. Given that the tort is one of strict liability, is immaterial whether the defendant intended it or not. Palmer J.[[6]](#footnote-6) stated as follows: “*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.*” Thus, it is not necessary for the plaintif to prove that the defendant’s conduct has actually deceived members of the public, it is sufficient to prove that there’s a likelihood of the public being deceived.[[7]](#footnote-7)
3. **Damage**: The plaintiff must show that **he suffers or is likely to suffer** damage by reason of the fallacious belief incited by the defendant.   
   It is essential to note that the tort of passing off is actionable per se. Implicitly, the plaintiff does not need to prove damage to succeed. The likelihood of the damage occurring is enough for a plaintiff to succeed.

**FORMS OF PASSING OFF**

The forms of passing off include:

1. **The Classic or Straight Passing Off:** Under this form, a representation by the defendant leads the buying public to believe that there is a connection between his product or service and those owned by the plaintiff. The defendant must have instilled a belief in the minds of the buying public - or those that influence buying decisions - that there is a connection between their goods or services and those owned by the owner of the goodwill. In other words, there's no passing off unless the defendant somehow misrepresents the origin of goods or services as their own.
2. **The Reverse or Inverse Passing Off**:  This form of passing off occurs when the defendant identifies himself or herself as being the source for a good or service created by the plaintiff. Under this form of passing off, the competitor uses the goodwill of the seller for the advancement of the sale of his own goods. Here, he doesn’t try to sell the seller’s product off as his own, rather he tries to sell his own products by passing the seller’s products off as his own. In other words, the competitor seeks to get sales by falsely implying that work actually done by the protected business is done by him. For example, at the official opening of X bakery, the business owner, Mr X provides a photo catalogue of different confectionaries “available at the bakery” whereas some of the confectionaries displayed in the catalogue were made by Y bakery. He takes credit for the confectionaries made by Y bakery in order to sell his own confectionaries. In *Bristol Conservatories Ltd. v Conservatories Custom Built*[[8]](#footnote-8), the court held that when defendant claims the claimant's work as his own; it can be condered as a case of reverse passing off. (see John Roberts Powers School v Tessensohn [1995] FSR 947)
3. **Extended Passing Off**: This form of passing off protects the use of a descriptive term associated with a distinctive and recognisable product. it occurs where a misrepresentation as to the particular quality of a product or service causes harm to another's goodwill. This form of passing off may also occur where there is goodwill in a general class of goods, rather than in a specific brand, and the defendant seeks to pass off his/her goods as belonging to that class. In [**Erven Warnink v. Townend & Sons Ltd.**](https://en.wikipedia.org/wiki/Erven_Warnink_v._Townend_%26_Sons_Ltd.)**,[[9]](#footnote-9)** the makers of ‘[advocaat](https://en.wikipedia.org/wiki/Advocaat" \o "Advocaat)’ brought an action against the manufacturer of a drink similar but not identical to ‘advocaat’, but which was successfully marketed as being ‘advocaat’. extended passing off protects use of a descriptive term associated with a distinctive and recognisable product. Basically[[10]](#footnote-10);

* A particular sign has obtained some distinctiveness in relation to goods of a particular quality;
* Goods not having that quality are sold under that sign (or a confusingly similar one); and,
* Any business having goodwill from dealing properly in those goods under that sign has, or is likely to, suffer damage**.**

**REMEDIES**

Like most civil offenses, the basic remedy in an action for passing off is damages, In addition to damages, the aggrieved party may also be entitled to: an account of profits, an injunction to restrain the competitor from further passing off in the future, orders for delivery-up and destruction of articles which pass off and intervention by relevant regulatory agencies

**THE RELEVANCE OF PASSING OFF AS AN ECONOMIC TORT IN 21st CENTURY NIGERIA**

As earlier stated, economic loss refers to damage allegedly suffered by a plaintiff which may be speculative or anticipatory in nature. In other words, the loss may not have eventuated and may not occur, but is based on likelihood. Being an economic tort, claims in passing off may be difficult to prove, as the evidential burden of proof is solely on the claimant.

Arguably, the tort of passing off in 21st century Nigeria, is not only a Common Law remedy but statutory remedy in Nigeria[[11]](#footnote-11), however there is a need for the legal framework for passing off actions to be enhanced in order to defend the goodwill and reputation of business. Perhaps the Trademarks Act be looked into and further amended to reflect the development and changes in the Nigeria.

Furthermore, passing off can be used as a means to catch loose ends which registered trademarks may not, hence the importance of organising enlightenment programs to create awareness of the concept. Small and medium businesses need to be enlightened to help them explore the possibilities of seeking legal actions on passing off and take advantage of the remedies available to protect their goodwill, trade name and profits.

**CONCLUSION**

Passing off prevents the unfriendly appropriation of the distinctive traits of a product and attractive forces of a business. The law of passing off is designed from the ground up to protect the goodwill of businesses. It is also well-established that passing off also **protects against a likelihood of damage.** So even if damage has not actually been caused, the likelihood of it is enough to obtain legal remedies. It is important that the legal structure moves at the pace of human development. With the rapid transition of technology in Nigeria in the 21st century, it is imperative that individuals can exclusively harness their goodwill and reputation.

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1. Duhaime’s Legal Dictionary [↑](#footnote-ref-1)
2. [1842] 49 ER 749 [↑](#footnote-ref-2)
3. Malemi.E, Law of Tort (2017) [↑](#footnote-ref-3)
4. [1979] AC 731 [↑](#footnote-ref-4)
5. Reckitt & Colman Products Ltd v Borden Inc. [1990] 1 wlr 491 [↑](#footnote-ref-5)
6. Niger Chemists Ltd v Nigerian Chemists [1961] All NLR 180 [↑](#footnote-ref-6)
7. Malemi, E. [2017] Law of Tort. (2nd ed.) Princeton, 641 [↑](#footnote-ref-7)
8. [1989] RPC 455) [↑](#footnote-ref-8)
9. [1979] AC 731, [1980] R.P.C. 31 [↑](#footnote-ref-9)
10. [Biplab Kumar Lenin](https://www.blogger.com/profile/16157521118567685570), ‘Passing off, Extended Forms of Passing off and Reverse Passing Off’ [2011] <<https://justlegalip.blogspot.com/2011/09/passing-off-extended-forms-of-passing.html>> [↑](#footnote-ref-10)
11. Section 3 of the Trademarks Act  [↑](#footnote-ref-11)