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The relevance of passing off as a form of Economic Torts in the 21st century Nigeria

**Abstract**

*This paper examines the relevance of passing off as a form of economic tort in 21st century Nigeria. In this connection, not only will various definitions of passing off and economic torts be rendered, but also a brief elaboration of its purpose, elements, various forms as well as available remedies and defences. Various cases will also be proffered to aid in illuminating its impact and relevance as a form of economic tort in 21st century Nigeria. The writer goes further to recommend that more publication be given to the tort of passing off, especially in the market environment to possibly increase the seriousness attached to this wrong.*

**Introduction**

In the course of everyday business, or commerce, there may occur various situations in which there is a false representation of one’s product or business as that of another. Such situations may include that in which an individual buys a trusted product and then realizes that it is an identical brand rather than the trusted product which he intended to buy. Such a false representation may, consequently, deceive buyers or customers to patronize it. This occurrence is what is known as passing off, and it mainly occurs in ecommerce businesses or businesses with a physical address where individuals are able to interact with the products physically.

The common law tort of passing off can therefore be defined as a tort which can be used to enforce unregistered trade mark rights. Passing off is the misleading of the public into believing falsely, that the brand being projected, was the same as a well-known brand.**[[1]](#footnote-1)** Passing off is a misrepresentation made by a trader in the course of trade to prospective customers of his or ultimate consumers of goods or services supplied by him, which is calculated to injure the business or goodwill of another trader and which causes actual damage to a business or goodwill of the trader by whom the action is brought or will probably do so**.[[2]](#footnote-2)** It may also be seen as making of some false representation to the public, or to third persons, likely to induce them to believe that the goods or services of another are those of the plaintiff.[[3]](#footnote-3) Passing off involves the enjoyment of another person’s reputation and good will.**[[4]](#footnote-4)**

The tort of passing off has as its purpose the protection of a person’s business interest from the unfair trade practices of other persons that usually occur in competitive business environments. Its aim is the protection of the reputation, good will, and attractive force that a business has built up for itself over the course of time**. Lord Langdale MR** in ***Perry v. Truefitt*****[[5]](#footnote-5)** stated that “a man is not to sell his own goods under the pretense 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.”

Passing off is actionable per se on its occurrence, meaning that the plaintiff does not have to prove damage for his or her action to succeed.**[[6]](#footnote-6)** Liability is strict and all the plaintiff needs to show is that the defendants activities are likely to deceive the public It is also pertinent to state that for an action for passing will lie where there is:

1. A misrepresentation.
2. The misrepresentation made by the defendant in the course of trade.
3. To prospective customers.
4. Which is calculated to injure the business and goodwill of another person.
5. Which causes damage to that person’s business and goodwill or likely to do so.

**The various forms of passing off include:**

1. **Marketing a product as that of the plaintiff:** Where a defendant sells his goods off to people by stating falsely that such goods being sold are produced by the plaintiff, the tort of passing off is committed.**[[7]](#footnote-7)** Hence, where the defendant markets his noodles product as indomie noodles, when in fact, it is not indomie noodles, the tort is committed.
2. **Trading with a name resembling that of the plaintiff**: This occurs where the defendant misleads customers to patronize his own product by means of using either the plaintiff’s name, or a name so closely related to that of the plaintiff therefore making the customers think that they are one and the same business.**[[8]](#footnote-8)** It should be noted that bona fide honesty of the defendant or innocence does not serve as a valid defence valid defense.
3. **Marketing goods with a name resembling that of the plaintiff’s goods**: Where a defendant markets his goods with a name so closely resembling that of the plaintiff’s goods, with the intention to confuse the customers and reap from the reputation of the plaintiff’s product, the tort of passing off is committed. A trade name is one in which goods are sold, or made by a certain person which, by established usage, has become known to the public as indicating that those goods are the goods of that person.**[[9]](#footnote-9)** It is important to note that an action for passing off will not lie where the name is that of a purely general or descriptive name of products. Thus, various names such a bread, refrigerator, dictionary, car, furniture, and so forth, are not the exclusive name of product of any particular person and no one can claim them for himself. The rationale behind this is the fact that it is not right to appropriate for the exclusive use of one person, what rightly belongs to the public or the whole world.**[[10]](#footnote-10)**
4. **Marketing goods with the trade mark of the plaintiff or its implications:** A trademark can be defined as any design, picture, mark, name or merchandise mark, affixed to goods which identifies those goods with the manufacturer or seller. Thee trademarks are registered and protected under the **Merchandise Marks Act [[11]](#footnote-11)** and the **Trademarks Act**.**[[12]](#footnote-12)** This is exemplified in the case of **Perry *v. Truefitt*** **[[13]](#footnote-13)** wherethe plaintiff successfully obtained an injunction to restrain the defendants from selling a certain hair cream under the name of “Medicated Mexican Balm” or any other similar designation.
5. **Imitating the appearance of the plaintiff’s product**: Anything which makes the defendants product appear like the plaintiff’s product is passing off. This, generally, includes the general appearance, package, label or design of the product.**[[14]](#footnote-14)** In ***De Facto Works Ltd v. Odumotun Trading Co Ltd***.**[[15]](#footnote-15)** The plaintiff obtained an injunction restraining the defendant from marketing cigarettes which imitated his own product of cigarettes.
6. **Selling inferior or expired goods of the plaintiff as current stock:** The tort of passing off will be committed where a defendant sells inferior or expired products of the plaintiff as current stock which has been castoff by the plaintiff. This form of passing off has a high potential for injuring the business, reputation and goodwill of the plaintiff. This is due to the fact that when ill health or injury is reported as a result of the consumption of goods which are unfit for human consumption, the plaintiff may have to remove or recall all products which have been sent out to the market.**[[16]](#footnote-16)**

**Available Defences in an action for passing off.**

The following defences are at the beck of the defendant if he can successful prove any of the following:

1. Functional design or package
2. The mere descriptive name of the product
3. Consent
4. Innocent passing off.

**Remedies available to the [plaintiff in an action for passing off:**

1. Injunctions
2. Damages
3. Account for profit
4. Intervention by the relevant regulatory agencies such as NAFDAC, SON, Intellectual Property Commission and so forth.

**The relevance of passing off as a form of economic tort in 21st century Nigeria**

Economic torts are tortious interference actions designed to protect trade or business. Economic torts offer protection for a person’s trade or business from acts which the law considers to be unacceptable and they are torts which inflict mainly economic or financial losses or injury. It is pertinent to state that such torts mainly occur in the economic, commercial, or business sectors of life. Consequently, it is only right to state that the tort of passing off, can be seen as forming part of economic torts. In Nigeria, a country with over a population of 195 million individuals, the country is undoubtedly vested with a plethora of markets which involve a multitude of businesses and commercial transactions daily. As a result of this, in line with capitalism which includes a monopoly of funds and the vast control of the market in the hands of the few, competition in the aforementioned sectors is intense and subsequently harder for newer or less funded individuals to make as much sales as the dominant names who have made their mark before them either through investments or long term service. These dominant names and companies, that have built a good and lucrative reputation over time and are usually the “go to first” brands, goods or products of the consumers. Consequently, other companies or individuals who feel no need to invest in their own brand or who also feel that they may not do the same or desired amount of financial numbers as the dominant brands, may wrongfully feel the need to reap from the reputation and goodwill of these popular names or brands.

For instance, an individual may desire to buy main brand “Nasco Cornflakes” but instead, subconsciously ends up buying “Nacso Cornflakes” which belongs to a competitor. It is obvious from the aforementioned example, that the aim and intention of the owner of “Nacso Cornflakes” was to deceive the potential customers or purchasers of Nasco Cornflakes, into buying his own brand as the average man may not necessarily pay attention to such details at first sight. This is a false representation of one’s product as that of another in an attempt to deceive potential buyers and it mainly occurs when the goods or items sought to be purchased are of the same specification and supposedly perform the same functions as what you requested for. As stated earlier on, this is known as passing off and it is very prevalent in the Nigerian economic, commercial and business sectors. Apt judicial support will be rendered below to provide real life examples as to how this tort is committed and its relevance in 21st century Nigeria.

In ***Ogunlende v. Babayemi* [[17]](#footnote-17)** the plaintiffs who were building and civil engineering contractors carrying on business as “mercury builders’ were granted an injunction to restrain the defendants from carrying on a similar business under the name “Mercury Builders Nigeria Limited.” Also in ***Niger Chemists Ltd v. Nigeria Chemists* [[18]](#footnote-18)** the plaintiffs successfully obtained an injunction to stop the defendant chemist from trading as “Nigeria Chemist”. The court, **per Palmer J**, went further to emphasize 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”, must come with a grave risk of confusion and deception.

Judicial credence can also be found ***Omnia Nigeria Limited v. Dyktrade Limited* [[19]](#footnote-19)** where the court held that the use of the trade mark “Super Rocket” by the defendant infringed the plaintiffs registered trade mark and was thereby passing off its grinding stones as and for the plaintiff’s products. In ***Trebor Nigeria Limited v. Associated Industries Limited [[20]](#footnote-20)***, 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 court found the defendants liable for passing off their products as that of the plaintiff.

By virtue of the judicial authorities above, it is extremely hard not to see the relevance of passing off as an economic tort in 21st century Nigeria. The 21st century is characterized by a desperate, and competitive market place and it is common knowledge that people now, more than ever, have come up with numerous unfair marketing and advertising strategies to increase or boost the sales of such goods and products. In this connection, marketers or traders may often put off their goods for sale as the goods of a rival trader. As seen in the aforementioned cases, the passing off of goods is very common all over Nigeria. Popular goods, products, and services ranging from food seasoning to even medicine and businesses suffer from this unfair and unjust act.

The existence of this tort provides a platform on which aggrieved individuals can stand on with the aim of protecting their hard earned goodwill and reputation, from being wrongfully enjoyed by other competitors or rivals in the market environment. As the main purpose of this tort is to prevent one’s trade from damaging or exploiting the goodwill and reputation built up by another, the writer deems it so relevant that its absence will undoubtedly lead to chaos in the market environment. Individuals will not hesitate to copy the names, logos, or even packaging of their competitors, but there will also be no suitable remedy available for the aggrieved. The tort of passing off therefore helps aggrieved individuals, in the aforementioned situations, to recover financially, and prevent such competitors or rivals from passing off their goods in the future or perpetually. It also promotes trademark registration within the Nigerian market place as individuals will understand the importance of such registration and the safeguard or protection it proffers down the long run

It is pertinent to state that this tort also, in a way, provides for consumer protection. The rationale behind this statement is the fact that once the plaintiff successfully wins an action for passing off against the defendant, the defendant may be ordered to remove such goods from the market place. Thus, in a situation where the defendant’s goods that were on shelf were actually hazardous, the public will be informed and the goods perpetually taken down. Ultimately, the tort of passing off fulfills its purpose and can be seen as a protective weapon to be used at the beck of the plaintiff

**Conclusion and Recommendation**

The writer finds that the common law tort of passing off is of utmost importance as an economic tort in 21st century Nigeria. In fact, its absence will undoubtedly throw all spheres of the market environment in anarchy as individuals will begin to feel that it is their right to enjoy from the reputation and good will of their rivals. Even as it is now, there are still a lot of people who pass off others goods as their own either due to lack of required knowledge, or ignorance of the law. The writer therefore recommends that passing off should be more publicized along with its possible sanctions with the aim of increasing the seriousness attached to this wrong. If possible, it should be criminalized and coupled with appropriate and reasonable penalties. More provisions should also be included in the grund norm, being the Nigerian Constitution with regards to the jurisdiction of the court surrounding passing off in Nigeria. This will enable the faster delivery of justice with regard to passing off actions.

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1. S.P Mittal v. Union of India 1983 SCR (1) 729 [↑](#footnote-ref-1)
2. Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd., [1979] AC 731 [↑](#footnote-ref-2)
3. Consumers Distributing Co. v. Seiko Time Canada Ltd. [1984] 1 SCR 583 [↑](#footnote-ref-3)
4. Goodwill is defined as the part of business value over and above the value of identifiable business assets. [↑](#footnote-ref-4)
5. (1842) 49 ER 749 at 725 [↑](#footnote-ref-5)
6. Draper v. Trist (1939) 3 ALL ER 513 CA [↑](#footnote-ref-6)
7. Lord Byron v. Johnson (1816) 2 Meriv. 29 [↑](#footnote-ref-7)
8. Niger Chemist Ltd v. Nigeria Chemists (1961) ALL NLR 180 at 182, Hendriks v. Montague (1881)50 LJ CH 456 [↑](#footnote-ref-8)
9. Salmond op cit para 401 [↑](#footnote-ref-9)
10. Havana Cigar & Tobacco Factories Ltd v. Oddenino (1924) 1 Ch 179 CA [↑](#footnote-ref-10)
11. 2004 [↑](#footnote-ref-11)
12. 1956 [↑](#footnote-ref-12)
13. (1842) 49 ER 749 [↑](#footnote-ref-13)
14. U.K. Tobacco Co. Ltd v. Carreras Ltd (1931) 16 NLR 1 [↑](#footnote-ref-14)
15. (1959) LLR 33 [↑](#footnote-ref-15)
16. Wilts United Dairies Ltd v. Thomas Robinson Sons & and Co Ltd ( 1958) RPC 94 CA [↑](#footnote-ref-16)
17. !1971) 1 UILR 417 [↑](#footnote-ref-17)
18. (1961) ALL NLR [↑](#footnote-ref-18)
19. (2007) LCN/3695(SC). [↑](#footnote-ref-19)
20. (1972) NNLR 60 [↑](#footnote-ref-20)