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**ASSIGNMENT: A FIVE-PAGE DISCUSSION ON THE RELEVANCE OF TORT OF PASSING OFF AS AN ECONOMIC TORT IN THE 21ST CENTURY NIGERIA.**

**Introduction:** The tort of passing off definitely is of great relevance as an economic tort in Nigeria today. This is a big issue especially in Nigeria where goods on the store shelves are not properly labeled. Today, original brand owners suffer great losses as a result of copying of their brands by traders thereby ridding them of their profits. What then was the necessary step taken so as to curb copying of brands from the original source? It was the development of the concepts of ‘trademarks’ and ‘passing off’. The two concepts go hand in hand, however this paper would focus on passing off as well as its overall relevance as an economic tort in the 21st century.

**Brief Analysis of the meaning of economic tort of passing off**

Attempts to define passing off has been at times confusing, in that, ‘this is not a branch of the law in which reference to other cases is not of real assistance except analogically[[1]](#footnote-1) Hence, its development is based on a case by case basis and different factual situations have led to an expansion of the law. [[2]](#footnote-2) Passing off is defined as a misrepresentation in the course of trade by one trader which damages the goodwill of another.[[3]](#footnote-3) When it is said that something is passed off as something, it means no more than that something is falsely represented as something. [[4]](#footnote-4) **A tort** is generally understood as an act or omission, other than a breach of contract, which gives rise to injury or harm to another, and amounts to a civil wrong for which courts impose liability.[[5]](#footnote-5) In other words, a wrong has been committed and the remedy is money damages to the person wronged. This implies that an **economic tort** is simply a tortious interference act designed to protect trade or business. Therefore, from the above assertions, we can infer that the tort of passing off is the tort which entails making some false representation likely to induce a person to believe that the goods or services are those of another.

**History of the tort of passing off under the Nigerian Legislation**

Liability in the tort of passing off ultimately boils down to misrepresentation. It all started in the 17th century, in the cases Southern v. How [[6]](#footnote-6)and Dean v. Steel [[7]](#footnote-7) Usually, the judges categorised such torts under deceit or defamation. Later, in the eighteenth century, all cases of passing off were classified as cases of deceit, where the action was usually brought not by the deceived, but by the one whose mark was used to deceive. (Blanchard v. Hill , limiting the tort to cases where there was a proof of bad faith. [[8]](#footnote-8) Later, in the nineteenth century, in the case Millington v. Fox  , it [[9]](#footnote-9)was decided that proof of fraud was not necessary in such a wrong and it was from here that the actual tort of passing off began building its own definition. The concept of equity was largely used to realise the scope of passing off. The predominant view was that equity intervened to restrain what would be a fraud if allowed to go ahead and that it protected proprietary rights. This particular viewpoint led to the equity courts to awarding compensations instead of injunctions. This idea was based on the theory that, in such a tort, constructively, the defendant was an agent of the plaintiff . Later, in the case Cartier v. Carlile [[10]](#footnote-10), it was decided that a “man must be taken to intend” the natural consequences of his act and mere proof of likelihood of deception was sufficient to prove the wrong. In Nigeria, a cause of action in ‘passing-off’ forms part of the several aspects of the Common Law and the doctrines of Equity that were received from England into the Colony of Lagos.5 This was done under the reception legislation, that is, Ordinance No. 3 of 1863 effective from the 4th of March 1863.6 This effectively introduced the British legal system into the Colony and was a lead-up to the establishment of the first Supreme Court for the Colony in 1863 that exercised civil and criminal jurisdiction.[[11]](#footnote-11)

**The Principle as well as Aims of the Tort of Passing Off**

The following are what the tort of passing off seeks to achieve in every common law legal system;

1) To enable businesses continue to earn profit and

2) To protect the right of property that exists in goodwill (i.e. business value).[[12]](#footnote-12)

The principle behind the tort of passing off is that no man is entitled to represent his goods or his business as that of another. It is therefore our recommendation that the necessary framework for Passing off actions be strengthened to defend the goodwill and reputation of businesses.[[13]](#footnote-13)

**Elements of the Tort 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,[[14]](#footnote-14)* Lord Oliver reduced the five guidelines laid out by Lord Diplock in *Erven Warnink v. Townend & Sons Ltd.* (the "Advocaat Case")[[15]](#footnote-15) to three elements:

1) Goodwill: The claimant must prove to the court that there is a business value (Goodwill qhich is the attractive force that brings customers) which is attached to the goods and services he or she produces in a suit for passing off. In the case of IRC v. Muller Margarine [[16]](#footnote-16) the House of Lords, in part, described ‘goodwill’ in relation to ‘passingoff’, as ‘the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.’

2) Misrepresentation: The claimant needs to prove that the goods and services the defendant is offering to the public deceitfully are actually the goods of the plaintiff. In the case of *Trebor Nigeria Limited v. Associated Industries Limited*[[17]](#footnote-17), 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 defence to the action, the Judge however found the Defendants liable for Passing off their products as that of the plaintiff.

3) Damage: The claimant needs to prove to the court that a loss has been suffered due to the belief that the goods and services of the defendant are those of the claimant.

**Forms of Passing Off**

 1) Trading under a name which is closely related to that of the claimant/ plaintiff such name being likely to mislead the public.

B) Trading under a name already given for goods of that kind by the plaintiff or trading under a name so similar to that of the plaintiff’s as to be mistaken for it.

C) A direct statement by the defendant that the goods and services are that of the plaintiff:-Actionable passing off occurs where the defendant markets his products as that of the plaintiff.

**Remedies in Passing Off**

1) Damages: - A successful plaintiff in a suit for passing off is entitled to damages. The courtcan award general damages, special damages or punitive damages. 2) Injunction: - A plaintiff can ask the court to restrain or prohibit the use of a mark subject matter of the passing off suit in court.

**Defenses available to a Defendant**: Dissimilarities in the mark between that of the defendant and that of the plaintiff [[18]](#footnote-18),Consent of the plaintiff was sought before using the name or mark or slogan as the case may be, the plaintiff’s name or mark has become common/ generic, the mark of the plaintiff is not distinctive.

**The Relevance of Passing Off as a form of Economic Tort in the 21st Century Nigeria.**

The major aim of every business venture in Nigeria is to make profit through reaching out to vast customers. This unfortunately would be prevented if traders are allowed to copy off another traders products as his own. In a bid to prevent such from occurring, the tort of ‘passing off’ was introduced in Nigeria so as to ensure protecting people’s business originality. such introduction of tort of passing off has obviously made a positive impact in 21st CENTURY Nigeria. This paper would go ahead to discuss areas where such tort has played a positive role and made an impact.

Firstly**,** passing off can protect a business against competitors:in areas such as using unregistered trademarks, selling second-hand goods of a business as new goods, using registered trademarks, where registered trademark infringement claims have no hope of succeeding, selling imitation goods and services, or re-selling goods and services of the business, stealing credit for technological developments, claiming that its product or services is made of or uses its technology, licensed from another company, or manufactured under licence when it’s not.

Again, passing off claims enforce fair trade practices against an exacting standard: honesty: It protects against unfair competition in its own unique way; dishonesty does not need to be intentional. Whether or not the competitor intends to do the wrong thing or not doesn’t come into it. The dishonesty for passing off is an entirely different type to that required for business fraud cases. Again, deception of the buying public – and those that can influence purchasing decisions - can’t even be unintentionally unfair. Also, buyers of goods and services who are deceived don’t even need to know of the business that is protected. Again, a competitor’s entire distribution chain can be brought to a halt in an appropriate case. In the case of  *Trebor Nigeria Limited v. Associated Industries Limited*[[19]](#footnote-19) 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 defence to the action, the Judge however found the Defendants liable for Passing off their products as that of the Plaintiff.

Also, goodwill is protected by Passing Off: Passing off doesn’t protect trademarks used by a business directly. It protects against harm to the goodwill and reputation of the business, which is: the standing or recognition that the business has, as result of sales, marketing and promotion of its products and services to the relevant market. In passing off language, it’s known as goodwill. This is is required as an essential element of passing off as stipulated in the case of *Erven Warnick BV v Townend & Sons. [[20]](#footnote-20)*

Again,it prevents competitors stealing - or over-borrowing - the traits of a product or service which has made it a success. The law passing off stops one trader from misrepresenting the goods of another trader as being the goods and services of his own. Additionally, it secures every sellers right to be able to enforce right towards their goods in the court of law. The case of *Trevor Nigeria Ltd V Associated Industries Ltd* [[21]](#footnote-21) clearly illustrated this principle when the court held that marketing a product as similar as possible to another traders would amount to passing off.

**The downside of passing off**

We have established that passing off actions should always be considered when facing unlawful use of your brand, especially when you have no registered rights. However, you have to be aware that passing off actions have to be brought before Nigerian courts, and this is very costly and time consuming. This is because a high amount of evidence has to be presented to prove passing off. When you are a small or medium sized business, this can be very damaging and often leave people defenseless.

**CONCLUSION**

In conclusion, with careful consideration of every area which the tort of passing off covers, it is safe and secure to state that the development passing off as an economic tort in Nigeria has made a grave positive impact in the Nigerian business sector.

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2. Erven Warnink V J. Townsend & Sons (Hull) Ltd (1979) AC 731, (1979) 2 All ER 927 [↑](#footnote-ref-2)
3. Davis J.. Intellectual Property Law (Oxford: Oxford University Press 2008) p. 143 [↑](#footnote-ref-3)
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5. Linda Williams, ‘LAW101: Fundamentals of the Law ‘ (2016 – 2020) [↑](#footnote-ref-5)
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7. Dean V Steel (1626) 82 ER 339 (Doderidge J) [↑](#footnote-ref-7)
8. Blanchard V Hill (1742) 2 ATK 484 [↑](#footnote-ref-8)
9. Millington V Fox, 13 NYS 334 (1891) [↑](#footnote-ref-9)
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16. 4 (1901) AC 217, 223 et seq [↑](#footnote-ref-16)
17. (1972) NNLR 60 [↑](#footnote-ref-17)
18. SeeTrebor Nig. Ltd. (Supra).2. [↑](#footnote-ref-18)
19. (1972) NNLR 60 [↑](#footnote-ref-19)
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