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QUESTION: Discuss the relevance of passing off as a form of economic tort in the 21st century Nigeria

Use NALT guidelines for footnotes, you should also include a bibliography at the end

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To start with, passing off comes under a form of economic tort. Economic tort which occurs mainly in the commercial, business, or economic sector of life is the category of tort that seeks to protect businesses or trade of a person from acts which the law considers unacceptable, as this tort inflict financial injury. Passing off in inclusion, there are four remaining types of economic tort and this include interference with contract, injurious or malicious falsehood, conspiracy to interfere and breach of intellectual property right.

The main focus which is passing off is the false representation of one’s product or business as another, thereby deceiving buyers to patronize it. Passing off ultimately involves the carrying as ones product or business idea as his own in order to deceive the public to patronize ones business, product, or services. The person does business under a name, trade mark, description or imitation of another person’s product in order to mislead people form thinking it’s his own and in the process they patronize it. Usually it involves some form of misrepresentation and it is an unfair and unconscionable competition. In the case of ***Niger Chemists Limited v. Nigeria Chemists***[[1]](#footnote-1) the plaintiff had an established chemist business using the name “Niger Chemist’ while the defendant establishes the same business on the same street with the plaintiff’s name on it. The Plaintiff sued claiming that the name was too similar and likely to deceive the public that there was a relationship between them. The court found the defendants liable an granted an injunction against the defendant.

It’s the most common situation with fake products. We’ve all seen fakes of popular brands and products. The likes of adadis instead of adidas, mike instead of Nike and so on. It is an unhealthy competition to allow these kinds of acts to mislead the public. Little differences that are not easy noticed would count as passing off. With the definition explained, it is obvious that it is necessary to protect a person for such misrepresentation and that is what the law seeks to protect

Once the element of misrepresentation that has the potential to deceive intending consumers as to the origin of particular goods or services has been established, such a situation is actionable at the instance of the right owner to the goods or services being ‘passed off.’ In such a situation, it is usually left to the courts to determine whether any particular circumstance(s) falls within the prohibited degree of unauthorized semblance, and therefore capable of deceiving or creating confusion in the minds of potential consumers. For instance, in the case of ***Trebor Nigeria Limited v. Associated Industries*** ***Limited[[2]](#footnote-2)***, an action was held to lie in ‘passing off’ where the defendant packaged and marketed its good to resemble those of the plaintiff.

Quickly in explaining what passing off entails there are three requirements one has to prove in order to succeed in the claim for passing off. They are

Goodwill: the claimant must show the court that there is business value (goodwill i.e. the attractive force that brings customers) which is attached to the goods he produces in a suit for passing off. The use of another’s name, mark or sign is likely to cause or has caused injury, actual or probable to the goodwill of the plaintiffs business. We know Mary Kay products are good and do not cause skin reactions. Nike Shoes are durable. These are the good will and reputation of the business.

Misrepresentation: the plaintiff needs to demonstrate and explain to the court that the goods and services the defendant is offering the public is deceitful (whether intentionally or not) are actually goods and services of the plaintiff

Damage: the plaintiff needs to show 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 plaintiff (the claimant/plaintiff needs to show that the defendant’s activities are calculated to deceive the public

These are the three elements known as the Classic Trinity were stated in the House of Lord’s case of ***Reckitt & Colman products ltd v. Borden Inc. [[3]](#footnote-3) .*** It is arguable to state that passing off is both a common law and a statutory remedy in Nigeria as it is statutorily supported by ***Section 3 of the Trademark Act*** which provides that:

“No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trademark but nothing in this Act shall be taken to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof”

In sum, ‘passing-off’ is a cause of action that is primarily founded in tort and is historically rooted in common law. It is a cause of action that has undergone dramatic changes over the years but still potent in protecting the entrenched rights in areas to which it relates (economic or business part of life). In Nigeria, as elsewhere the major purpose underlying the tort of passing off is the protection of an established trade goodwill already acquired by a trademark or trade name. Now that passing off has been explained. It is pertinent to note that this category of economic tort is very vital as it protects a person’s intangible interest from unlawful interference. As the world is evolving, people have come up with different ways in which the tort of passing off can be committed. Due to this it is relevant for a business owner to know the rules, theories and relevance of this tort.

The relevance of passing off cannot be overemphasized especially in this century where different ways of violating this principle comes up every day, and so this principle is very important in order to prevent unwarranted and unlawful disturbance of one’s business as explained above. Some of the relevance of passing off may include:

**It protects consumers and families:** This tort ensures products are authentic and of high quality that consumers recognize and expect. It therein fosters confidence and ease of mind that consumers demand, and markets rely on. When this tort is intact it helps consumers make an educated choice about safety, reliability and effectiveness of their purchases. The originators of product tend to make their products the best that could possibly be in order to get consumers to purchase them. This tort protects that fact that it is the best of product that is delivered, not some imitated or false version of the product that is copied. Hence the consumers are reliant on the fact that they are not being cheated or misled into believing that the fake or copied product is the original.

**Recognition of products quality:** It gives recognition to a products quality and it gives such product the credit it deserves. Everyone loves quality products and the qualities of products are attached to the brands name. Consumers love when they get value for what they paid for and when they do they attach high importance to it as this image is created in the market about the quality of a particular brand which helps in attracting new customers as they can differentiate the quality of a product by the logo or brand name. It also encourages the commitment of additional quality resources and the reputation of such business is likely is remain positively intact and customers are less likely to look for alternatives.

**Differentiate products:** With the help of this tort, when your product is being sought for, it is easy to find without any confusion. It makes a product stand out and the identity of the product to be different from that of the existing and foreseen competitors and acts as efficient commercial and communication tool. A products logo or motto, slogan and so on, can communicate to consumers the authenticity, uniqueness, value, vision of the organization or business as a whole without any interference of any kind. It aids in the free will of a business and encourages owners of products to be different in their innovations and their ability to attain the specific and distinctive needs of their consumers. The market place is crowded and it’s hard to distinguish one’s business form competitors. This tort gives room for a product to capture customer’s attention and make ones product stand one.

**Encourage innovations and rewards entrepreneurs:** An entrepreneur, I would say is a risk taker and the rights present in this tort reassures and encourages the art of such value. Risk and occasional failure are the essence of the innovation economy and this tort will help to incentivize entrepreneurs to keep pushing for new advances in the face of adversity. It will aid free flow of information by sharing the protected know-how of critical to original invention. In turn this process leads to new innovations and improvement of existing ones, to gives these risk takers a platform keeps creating new ideas and assures them of complete protection and autonomy over this their ideas and in the process it inspires or gives room for more innovators to expand their horizon without any limits

**It drives economic growth and competitiveness:** It creates jobs and industries and enhances the quality of life and enjoyment. Passing off promotes economic development by encouraging creativity in the industrial as well as the manufacturing sectors because designs contributes to the expansion of commercial activity and export of national products. Brands can inspire positive feelings in people’s minds. As a result, employment opportunities are more attractive to applicants

**Helps in social and financial development:** It promotes initiative and enterprise by rewarding the owners of products or works with financial profit. The tort also hinders the efforts of unfair competitors such as counterfeiters to use similar distinctive signs to market inferior or different products or services. The system enables people to produce and market goods in the fairest way possible conditions thereby facilitating international trade. It assures exclusive rights and protection against unauthorized copying or imitation of designs or innovations. It helps to ensure a fair return of investment.

**Protection against infringement and exclusive rights:** No competitor or other person can use the word mark or log registered by you under trademark. However, if in any case one uses it without the approval of the owner of trademark or mark any deceptive use of same, the owner can get the legal protection under the Act and stop the person doing so. In ***Ayman Enterprises Limited v. Akuma Industries Limited[[4]](#footnote-4),*** the issue involved the alleged infringement, through ‘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. The owner of a registered product that is protected under the rights enjoys exclusive rights over the trademark.

**Passing off builds trust and goodwill:** Goodwill is one of the most important features of passing off as a whole. In the case of ***IRC v. Muller*** ***Margarine[[5]](#footnote-5)***, The House of Lords, in part, described ‘goodwill’ in relation to ‘passing off’, as ‘the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.’ The established quality of one’s product and services are known by everyone with the help of the rights of passing off, which establishes trust and goodwill among customers in the market. It helps in creating permanent customers who are loyal and always opt for the same brand.

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1. (1961) ANLR 180 [↑](#footnote-ref-1)
2. 1972 NNLR 60 [↑](#footnote-ref-2)
3. (1990) 1AER 873 [↑](#footnote-ref-3)
4. (2003) 12 NWLR Pt 836, 22 [↑](#footnote-ref-4)
5. (1901) AC 217, 223 et seq [↑](#footnote-ref-5)