**NAME: UNWENE KINGDOM KINGDOM**

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**Course Title: Law of Torts II**

**Course Code: LPB 302**

**Question**

**Discuss the relevance of Passing Off as a form of Economic Torts in the 21st Century Nigeria.**

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

**Times New Roman Font size 12, 1.5 spacing, maximum of 5 pages**

**INTRODUCTION**

This paper in answering the question asked will examine what economic torts are, as it is impossible to know what passing off entails without having an understanding of economic torts. This paper will also discuss economic torts placing emphasis on its elements and inevitably an examination of the relevance of passing off as a form of economic torts in present day Nigeria, followed by conclusion and recommendation.

**WHAT ARE ECONOMIC TORTS**

Economic torts offer protection for a persons trade or business from acts which the law considers to be unacceptable. It is an intentional tort wherein a defendant uses an unlawful means to cause a plaintiff some economic loss. They are torts which inflict financial losses or financial injury. Economic torts occur mainly in the economic, commercial or business sector of life. Also known as business torts. Economic torts includes: passing off; interference with contracts, etc.

**EXAMINATION OF THE TORT OF PASSING OFF**

According to the Blacks Law Dictionary passing off is “the act or an instance of falsely representing one's own product as that of another in an attempt to deceive potential buyers”. Passing off is actionable in tort under the law of unfair competition. Passing off enables your business to take legal action against someone who creates the impression that their goods or services are provided by or associated with you.

The fundamental rule is that “no man has aright to put off his goods for sale as the goods of a rival trader” as Per Lord Kingsdown in Leather Cloth Co. v. American Leather Cloth Co[[1]](#footnote-1)

Passing off is a common law tort which protects the goodwill of a trader from misrepresentation. Misleading the public into believing falsely, that the brand being projected was the same as a well known brand is a wrong and is known as the tort of “passing off”, as held in the famous case of N. R. Dongre Vs. Whirlpool Corporation[[2]](#footnote-2)

Types of passing off: marketing a product as that of the plaintiff; Trading under a name so closely resembling that of the plaintiff as to likely mislead the public into believing that the defendant’s business and that of the plaintiff are one and the same as seen in Niger Chemist Ltd v Nigeria Chemists[[3]](#footnote-3); Imitating the get-up or appearance of the plaintiffs goods; Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark[[4]](#footnote-4); etc.

**RELEVANCE OF PASSING OFF AS A FORM OF ECONOMIC TORTS**

Trading is simple, however it is embedded with complex and distinct practices associated with various forms of trade by traders who look for various means to make profit and get over their competitors. These trade practices apply everywhere, however in developing countries where trading practices are not perfectly regulated, this could lead to a lot of problem as there will inevitably be the sale of counterfeit and fake products disguised as that of a more competent producer, etc. In the course of trading, some merchants with ill will may knowingly or unknowingly try various devious schemes to get ahead of their competitors. And in trying to regulate the trade practice, the economic tort of passing off comes in, essentially regulating instances where a trader tries to sell or market his product in a similar way to that of his competition so as to deceive the public into thinking his product is that of the latter.

Therefore it can be seen that the main aim of the tort of passing off in Nigeria is to regulate fair trade and to provide remedy to traders who have by injured by the deceitful acts of another. The following are the relevance of passing off in Nigeria;

1. Passing off widens the scope of trademark infringement
2. Offers remedy to the injured trader
3. It ensures fair trade practices
4. Passing off protects the members of the public I.e. consumers
5. Passing off protects the original trader
6. **Passing Off widens the scope of trademark infringement**

Originally, a trader could not bring an action in court as regards the use of an unregistered trade mark by another, however with the evolution of passing off, this has changed. In passing off a trader can institute an action against another for the deceitful use of his products name or packaging style or the implementation of a mark solely attributed to the formers goods. This was held in Ogunlende v Babayemi[[5]](#footnote-5). This is very helpful in Nigeria as a lot of traders do not register their trademarks due to poor access to information, strenuous registration process, etc.

Section 3 of the Trademarks Act[[6]](#footnote-6) gives support to the enforcement of unregistered trademarks as it provides that:

“**No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark; 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**".

The above connotes that a Passing off action instituted when a mark is not registered is both supported by common law and statutorily backed up, thus giving effect to the legal maxim "There is no law without a remedy".

1. **Passing Off ensures fair trade practices**

In the 21st century where Nigeria’s trade practices has been corrupted with many illegal, unfair, and dishonest trade practices such as the the packaging of goods similar to that of another trader, marketing goods with the trademark of the plaintiff or a deceptive imitation of the mark, trading under a name so closely associated with that of another trader so as to mislead the plaintiff into thinking that both products are the same, marketing a profuct as that of the plaintiff, as seen in Byron(Lord) v Johnston[[7]](#footnote-7). With the level of all these dishonest trade practices, the tort of passing serves as a mechanism of ensuring fair trade practices as traders know that if they engage in those acts, they will be held liable and they shalll pay damages to the injured party,”

1. **Passing off protects the members of the public I.e the consumers**

Some traders make poor quality products but package and name similarly to that of a major and standard product therefore causing confusion as consumers buy these poor products. This at times causes a major health hazard. As such the tort of passing off has come to protect the customers from these practices by placing injunctions against these products and awarding damages against their producers.

1. **Passing off protects the original trader**

As an economic tort, the sole aim of passing off is to protect a person’s trade from acts which the law considers to be unlawful, to which disguising one’s product as that of another is part. After these disguised and usually poor quality goods are sold to the customers who assume that they are purchasing the same product as that of the main brand, the customers usually suffer injuries and suits are brought against the main brand. Passing off protects the main brand company from any liability establishing that it indeed was not their product rightly shifting liability to the deceptive trade company for any loss suffered.

1. **Passing off offers remedy to the injured trade company**

It’s 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. It's enough to obtain an interim injunction to restrain passing off pending the trial.

After the deceptive products are sold to the consumers often causing injury, suits are usually brought against the company causing the trade company a fortune due to damaged reputation. Remedy are granted in terms of;

1. **Injunction**: An injunction to restrain further dealings by the defendant on an interim or final basis. An interim injunction may continue until the full trial of the claim and its purpose is to prevent further damage to the claimant's goodwill during the intervening period;
2. **Damages**: The following are the types of damages recognized by the tort of passing off. They all affect the value of the goodwill of the business:

* Diversion of Trade and Sales: When a defendant competes directly with the claimant, sales will be diverted to the defendant. It’s a natural consequence of the misrepresentation: the buyer buys from the defendant, rather than the claimant.
* Erosion or Dilution of Reputation: When a competitor acts to reduce, blur or diminish the goodwill and reputation, it causes damage.When a competitor uses a trade name, or other indication of the owner of the goodwill, the distinctiveness of the trade name diminishes. It’s vindication of the claimant's exclusive right to the reputation or goodwill. It was said in Taittinger SA v Allbev Ltd[[8]](#footnote-8), the “Elderflower Champagne” case: ... the effect [of allowing competitors to use the word champagne] would be to demolish the distinctiveness the word champagne, and that would inevitably damage the goodwill of the champagne houses
* **Injurious Association**: Recovery of damage in cases of passing off is not limited to loss of sales, or cases where the defendant's goods or services are inferior to those of the claimant. An injurious association is enough.
* Loss of the opportunity to expand where the defendant's field of business is one into which the claimant might naturally be expected to seek to enter
* **An order to cover up the marks or repackage the goods**
* **An order for delivery up or destructions of the offending items**
* **A declarations as to rights in the products in question.**

**Conclusion**

Passing off enables businesses to enforce their rights associated with its good name in the market. It prevents competitors stealing - or over-borrowing - the traits of a product or service which has made it a success. It's the goodwill - the attractive force that brings in customers - that passing off protects. The purpose of an action for Passing off is to prevent one trade from damaging or exploiting the goodwill and reputation built up by another. The principle is that no man is entitled to represent his goods or his business as that of another.

**Recommendations**

This part highly recommends that the Trademarks Act be further amended to reflect the evolution of trade in Nigeria. It is highly evident and vivid that the Trademarks Registry has witnessed a serious backlog in the successful completion of the registration of marks and this has resulted in the restriction of the rights of most product owners to Passing off as opposed to the an action on the infringement of a trademark.

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1. (1865) 11 H.L Cas. 523/538 [↑](#footnote-ref-1)
2. (1995) Delhi High Court [↑](#footnote-ref-2)
3. (1961) All N.L.R 171 [↑](#footnote-ref-3)
4. R. F V Heuston, Salmond on the Law of Torts(16th edn, Sweet and Maxwell London,

   1973 [↑](#footnote-ref-4)
5. (1971) 1 U.I.L.R 417 [↑](#footnote-ref-5)
6. CAP T13 Laws of the Federation of Nigeria, 2004. [↑](#footnote-ref-6)
7. (1816) 2 Mer. 29. [↑](#footnote-ref-7)
8. (1993) FSR 641 [↑](#footnote-ref-8)