

Legislative Insufficiency in the Legal Regulation of the Trademark A Study of the Iraqi Law

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Abstract

Introduction

Trademark is very important in differentiating products because it became an Advertising mean to increase the demand for a specific item. The increase in consumption of that item is evidence of the increase in the reputation of the brand which makes it a right for its owner with an enormous financial value in some cases. This right needs protection against counterfeiting, forgery, and various forms of abuse. Therefore, states have intended to establish local laws that guarantee and regulate the protection of the trademark.

The Iraqi trademarks legislation has shortcomings which required legislative treatment. The latter was distorted and delayed which led to confusion in the application of the provisions of this legislation and made it contradicted. Moreover, this legislative treatment added international provisions that were not based in Iraq, including the provisions contained in TRIPS Agreement. The reason is that this legislative treatment was from people who have no knowledge of the reality of the Iraqi economy. The legislative treatment was carried out by the Coalition Provisional Authority, which is far from the legal, social, and economic reality of the country. Therefore, there was a need for a legislative intervention to address trademark rules. The amendment should result from a purely national will to restore balance to the provisions of this law in a manner that removes any ambiguity or contradiction and achieves the purpose for which it was legislated. In order to study the legal rules governing the trademark, and to determine the deficiencies therein, it is necessary to find out the truth of this mark. It will not be possible for us to do so unless we discuss trademark in three sections as follows:

- 1- Definition of Trademark
- 2- Registration of Trademark
- 3- Civic Protection of Trademark

Definition of Trademark

Defining trademark requires introducing it and explaining its types. A trademark is defined as: “Every sign or distinctive material connotation taken by the manufacturer, merchant, or service provider to distinguish his industry, goods, or services from those that are manufactured, traded, or provided by others” (Zain Aldin, 2006: p.29). Others define it as: "A sign in which goods, commodities, and products are labeled, distinguishing them from similar merchandise goods of another merchant or the owners of other industries” (Alnahi, 1983: p.233).

Some other people define it as: “Every sign or indication that the merchant or manufacturer places on the products that he sells or manufactures to distinguish these products from other similar goods” (Alqaliobi, 2007: P.461).

Trademark is one of the terms that were the subject of legislative definitions. It was defined by Act 1 of the Trademarks and Commercial Data Law No. 21 of 1957, as amended by Order No. 80 of 2004, as “Any sign or group of signs that can constitute a trademark through which the goods of a project can be distinguished from the goods of other enterprises such as signs, especially words, including personal names, letters, numbers, symbolic shapes, and colors. Moreover, any combination of these signs can be registered as a trademark. If the signs are incapable of distinguishing goods or services, then the possibility of registration depends on the distinctive feature acquired from the use. The sign is not required to be visually perceptible in order to be suitable for protection as a trademark.”

According to this text, the Iraqi legislator expanded the definition of trademark. He clarified its types and conditions of its registration. This broad concept is consistent with the concept stated in Act 15 of the 1994 TRIPS Agreement, which is unfortunate; because the legislator had to avoid anything that might mix and contradict the concepts.

Therefore, we define trademark as any form that can be conceived as a distinguishing mark that does not violate public order and public morals and that aims at distinguishing one good or service from another.

Types of Trademark

Trademarks vary according to the diversity of activity practiced by people whether industrial, commercial, or service. Furthermore, it varies according to the nature of use, whether individual or collective, and according to the scope of its circulation to local or famous brands. In all of these types, it takes a specific concept and goal that is subject to the general concept of the brand.

First: Trademark, industrial mark, and service mark

A trademark is any sign or indication taken by the manufacturer, trader, or service provider to distinguish his products from others' similar products (T'aiys & Almosawi, 2011: p.114), industrial mark distinguishes the manufactured goods from their counterparts, and service mark is used to distinguish the services performed by the project from other products, such as the TWA (Abdulghani,1993: p.18) airline distinctive mark.

Some people say (p.18) that the difference in naming is verbal and formal rather than objective because all the designations are part of the general concept of the trademark. However, The Iraqi legislator in the Trademarks and Commercial Data Law No. 21 of 1957, defined the service mark in Act 1 as “Any

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sign or group of signs that a person uses to identify and distinguish a person's services, including unique services, from those of others.”

Second: Single and collective trademarks

The ownership of trademarks belongs to either private individuals or specific groups. Single trademarks are owned by an individual, family, company, or association, regardless of the type of activity used whether it is service, industrial, or commercial (Zain Aldin, 2007: p.75).

Collective trademarks are owned by more than one party such as institutions or unions. It is used by any legal person to certify the source of goods which are not of his manufacture or if he does not own the materials manufactured from them, their quality, method of production, accuracy in their manufacture, or other characteristics and of these goods (p.74).

The Iraqi legislator in the amended Law of Trademarks and Commercial Data No. 21 of 1957 has defined a collective mark in Act 1 of it as “A trademark or service mark used by members of a cooperative, association, or any group or cooperative organization. It contains marks indicating membership in a union, assembly, or other organization.”

The main difference between individual trademarks and collective trademarks is that the latter may not be transferred except with the agreement of all their owners, while the former can be transferred without such an agreement.

Third: National trademark and famous trademark

A brand is considered national when it is registered in its country and becomes known in it regardless of whether it is industrial, commercial, service, or owned by a person or group.

The trademark is considered famous or known internationally when it acquires its fame outside its country of origin, such as Coca-Cola or Ford mark. It must be said here that the issue of the reputation of the mark is limited to the public sector concerned with the products and services subject of the mark, and this is what was stipulated in Act 2/16 of the Agreement on Trade Related Aspects (TRIPS) of 1994 which emphasized that member countries take into account the extent of knowledge of the trademark in the public sector and in the member country as a result of the brand promotion.

The well-known trademark is distinct from the regular trademark in the following aspects:

- 1- The well-known trademark is not subject to the principle of territoriality of laws, which means that the law of the state applies to all of its region, and to all persons in its region, whether they are foreigners or citizens without extending outside the state. Hence, trademark protection has no effect except in that country whether this right to the mark is its acquisition, registration or use of the mark, is limited to the country in which the registration was made. However, the matter differs with regard to the well-known trademark because it deviates from the principle of regional laws and enjoys global protection.
- 2- The well-known trademark is not subject to the principle of assignment. It is intended to determine the scope of protection for the well-known trademark within the limits of the goods and services covered by the mark, and this is what is observed in the registration application. Hence, this

protection includes the unregistered goods and services of others that are similar to those found in the registration application. According to this, the use of the same mark on goods and services different from the goods and services included in the registration application constitutes an infringement of the owner's right to the mark. In other means, the right of the owner to the mark is absolute and not relative in the sense that the owner of the mark can invoke his right in the mark regardless of the type of his goods and services. Hence, this means that no person can use any famous mark, which is the opposite of the view of the Iraqi legislator who limited protection to the same type of goods and services. Then, it means that any person can use any trademark provided that the goods and services are not the same. This may harm the well-known trademark owner as well as the consumer. It would have been better for the Iraqi legislator to emphasize the protection of the well-known trademark outside the framework of similar goods and services if its use would lead others to believe that there is a link between the famous mark and the goods and services.

Fourth: Audio trademark and scent brand

Some stipulated that the trademark should be perceptible by looking (Alkharshoom, 2000: p.153). Comparatively, we find an opinion (Alqaliobi, 2007: P.292), in the Egyptian jurisprudence that it is permissible to record audio trademarks and scent brands. This last opinion is consistent with recent trends in comparative legislation in light of technological development in the field of industry and commerce. In some countries, legislation includes explicit provisions allowing the registration of audio trademarks. The Iraqi legislature has permitted this type of trademark and granted protection to it in accordance with the text of Act 1 of the amended Trademarks and Commercial Evidence Law No. 21 of 1957 which states that "The brand is not required to be visually perceptible in order to be suitable for protection as a trademark."

The Iraqi legislative position in not requiring the visual perception of a trademark leads to extreme difficulty in distinguishing the original trademark from the counterfeit. This would expose the consumer to misleading due to his dependence on the sound or smell, and then the conflict emerges with the goal that the legislator was seeking to protect the trademark. Therefore, some strict conditions must be imposed that the audio brand must fulfill in order for it to be registrable. It must be visually represented in a clear, accurate, comprehensive, and objective way. Thus, the sound that can be represented with a complete musical note that determines its distances and dimensions accurately can be registered as a trademark unlike animal or engine noise which cannot be represented accurately according even if it can be recorded by a machine.

Registration of Trademark

Trademark Law has established a system for registering a trademark. Although this registration is voluntary, the trademark owner's interest requires that its registration because of the advantages and legal implications of this registration. One of these advantages is the legal protection of the legal rights and interests arising from the registration. The legal protection resulting from the registration is not over the trademark itself, but rather on its use. Consequently, if a person possesses a brand owned by others and does not use it he cannot be held accountable.

The general rule in trademarks states that in order for the protection mentioned in the law to exist, registration must be established. With registration the protection begins, not from the date on which

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the right to the trademark is acquired through use. In order for the registration to take place and the right to legal protection arises, certain conditions must be met including formal conditions and other substantive conditions in the application submitted to obtain a trademark registration. The formal requirements are stipulated by law and are not very ambiguous. They are specific procedures stipulated in the amended Trademarks and Commercial Data Law No. 21 of 1957. Therefore, the formal requirements will be briefly discussed in this section and the focus will be on the objective conditions necessary for a trademark to be registered. Thus, the current section is divided into two parts: first, formal conditions for trademark registration and second, objective conditions for trademark registration.

Formal Conditions for Trademark Registration

These conditions are the ones that must be followed when claiming the official recognition of a trademark by registering it in the Trademark Registry based on the availability of the objective conditions. These conditions are:

First: Registration application

A trademark before registration has no real existence that is reflected in its use. If this presence is to acquire an official character and be reinforced by the protection contained in the Trademarks Law, an application must be submitted to register the trademark with the Trademark Registrar (Act 6 of the amended Trademarks and Commercial Evidence Law No. 21 of 1957). The one who submits the application for registration is the owner of the trademark or his authorized agent with a special mandate. The application is submitted to the registrar. If the registrant rejects this request, his decision is subject to objection to the court within 30 days from the date of notification (Act 10 of the amended Trademarks and Commercial Evidence Law No. 21 of 1957).

The law allows trademark registration in a foreign language provided that the trademark is written in Arabic. This matter would create a trademark with a vague, incorrect, or incomprehensible concept. The trademark must be clearly written in Arabic.

Second: Registration announcement and publication

Act 11/1 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957 stipulated that “the registrant, if he accepts the trademark primarily, should announce it in three successive issues of the Bulletin of the General Trade Directorate”. It appears from the text that the advertisement is a way of informing the concerned parties that the registrant accepts the registration of the trademark in the name of the applicant. Any person may submit to the registrar within ninety days from the date of the last announcement a written notification of his objections to the registration of the trademark (Act 11/2 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957). The registrar must inform the applicant of the registration of the objection, and the latter must reply to the registrar within thirty days in writing. If the response did not arrive within the determined period, the applicant for registration of the trademark was deemed to have waived his application (Act 11/3 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957).

Third: Issuance of a registration certificate

If the application submitted for registration of the trademark is accepted - when the opposition period of 90 days has expired from the date of announcing the registration by the registrar without anyone submitting an objection or if an objection is made to it and a decision is issued to reject the objection - the registrar registers the trademark in the trademark registry. The trademark is registered from the date of the application by describing the latter as the date of registration (Act 14 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957). In other words, registration has a retroactive effect, and then the trademark owner is given a certificate of registration for the mark (Act 15 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957). The registration of a trademark is a legal evidence of its ownership (Act 15/2 of the amended Iraqi Trademarks and Commercial Evidence Law No. 21 of 1957).

The Objective Conditions of the Trademark Registration

In order for a trademark to be registered and to be legally protected, objective conditions are required. These conditions can be summarized as follows:

To Be a Distinctive Brand

The trademark should not be in common use. It should have its own characteristics to prevent customers from confusing products with a similar brand. The trademark to be registered must be composed of names, letters, numbers, shapes, or a mixture of these things, with a distinct and perceptible quality by looking in a way that ensures distinguishing the goods of the trademark owner from the goods of other people (Alkharshoom, 2000: p.149). This is what was referred to in Act 1 of the amended Law No. 21 of 1957 which says “any trademark which can constitute a trademark by which the commodities of one project can be distinguished from the goods of other projects.”

To be brand new trademark (novelty requirement)

Novelty requirement means that the trademark is New in its general form so that it has never been used or registered on the same goods, products or services by another person. However, the material constituting the trademark is not required to be new because the colors, letters, and numbers are the same and will not be new indefinitely, but rather these things must be in a distinct and new form or method that was not used or registered by others (Alnahi, 1983: p.234). In order for the trademark to be considered new, it must have at least one element distinct from any other similar mark, so that it must be new in order not to cause misleading or confusion on the part of the consumer using the product that carries it (Abdulhameed, 2006: p.30). This is confirmed by Act 5/8 of the amended Trademarks and Commercial Data Law No. 21 of 1957 which says “A trademark shall not be registered for the purpose of this law if it is identical or similar to a famous trademark or one which is identical or similar to a previously registered trademark if the registration of that mark would lead to confusion among the consumers of the goods distinguished by it.”

The trademark to be legitimate

Legitimacy in this context means that the trademark does not violate the law, public order, and public morals. Article (5) of the amended Trademarks and Commercial Evidence Law No. (21) of 1957 has listed the cases in which it is not permissible to register a trademark. The trademark violates public order or morals. It is not possible to use drawings that are offensive to social traditions, or that imitate

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the slogan of the parties or the flags of countries, and this is what the Iraqi Court of Cassation confirmed that it was not permissible to register a mark similar to the emblem of one of the countries. In that case, the trademark mark consisted of three united lions to distinguish the type of tea. It was not registered because this trademark was similar to the emblem of the Indian state (Alqaliobi, 2007: p.485).

The trademark must be visually perceptible

The most important function of a trademark is its ability to distinguish goods and services in a manner that ensures the consumer is familiar with the good or service without confusion. This may not be achieved unless the mark is visible in its physical and tangible form. There are (Alkharshoom, 2000: p.153) those who claim that the trademark, when it is not perceived in a tangible way, should not be registered. In other means, a trademark is not registrable if it is composed of non-material elements. The Iraqi legislator took a different approach when explicitly legalizing the trademark and providing it with protection even if it was not visually perceptible. This is referred to in Act 1 of the amended Trademarks and Commercial Evidence Law No. 21 of 1957 which says “The sign is not required to be visually perceptible in order to be suitable for protection as a trademark.”

Civic Protection of Trademark

The trademark is the most widespread and related item to the trade and the economy, which made it occupies an important and distinctive position among intellectual property rights. It has a value to be added to the commercial store itself, which calls for providing legal protection as a result of trademark infringement. In the following sections we will clarify the forms of infringement and then clarify the methods of protection.

Trademark Infringement Methods

The protection in general can be restored to a material fact, which is use, and a legal fact, that is registration. However, violation the right of trademark takes many forms, the most important of which is forgery and imitation of the trademark, the use of a forged or imitated trademark, and the use of a trademark owned by others. Each one of these types is discussed separately in the upcoming sections.

Trademark forgery and counterfeiting

Trademark fraud means the verbatim transfer of the trademark (Alqaliobi, 2007: p.313).

Therefore, a complete copying or at least copying of the main distinct part of the trademark is not considered forgery in a way that misleads the consumer when purchasing the goods, especially when the two marks are not present under the consumer's eyes (Zain Aldin, 2007: p.403).

Trademark abuse is also shown by imitating that mark. Imitation is “Closing the resemblance between the counterfeit trademark and the real one. This imitation could cause confusion between the two trademarks making it difficult for the consumer to differentiate between them.” (Ahmed, 1955: p.338).

Therefore, the imitation of the trademark is limited to only transferring the basic elements, or literally transferring some of these elements, removing part of them, or changing their color. The Trademarks and Commercial Evidence Law No. 21 of 1957, as amended by Ordinance No. 80 of 2004, prohibited the registration of a trademark if it is identical to or similar to a well-known mark in Article 5/8: “The

trademark shall not be registered for the purpose of this law if it is identical or similar to a famous mark or if it is identical or similar to a previously registered trademark if the registration of that mark would cause confusion among the consumers of the goods distinguished by it.”

In this context, the Federal Court of Cassation ruled in its decision that “The great similarity in several visual and audio aspects between the world-famous trademark of the plaintiff (Marlboro) registered in several countries since the eighties of the last century, and the trademark of the defendant company (marble), leads to incidents of fraud or confusion for the public. Act 5 of the Trademarks Law has explicitly stated that it is not permissible to register marks that are identical or similar to a trademark belonging to others. Therefore, the ratified distinguished judgment decided to oblige the registrant to mark the cancellation of the defendant’s trademark and publish the advertisement, and to charge the defendant the attorney fees.” (Decision issued by the Federal Court of Cassation on 27/9/2007, No. 399 (unpublished)).

The Iraqi legislator has punished, according to the Evidence and Trademarks Law in Act 35/1, whoever intends to forge or imitate the trademark and considers such act as a crime punishable by law whenever the forger is to transfer the registered trademark and place it on the products with the intention of fraud and misleading. The Act states the following: “Every person who commits any of the following acts shall be punished with imprisonment for a period of not less than one year and not exceeding five years and a fine not less than 50,000,000 dinars and not exceeding 1,000,000,000, whoever forges a legally registered trademark or imitates it in a way intended to deceive the public.”

The aim of the legislator in providing that protection is to ward off the risks arising from forgery or counterfeiting with the aim of protecting the owner of the original mark, and thus combating unfair competition between merchants working in a similar commercial activity. It must be noted here that the Iraqi Consumer Protection Law No. 1 of 2010 obligated the supplier or advertiser to refrain from practicing fraud and deception in goods and services as a guarantee for the consumer (Act 9/1).

The Use of a Forged or a Counterfeit Trademark

It is intended to place the forged or counterfeit mark on goods or on the front of the commercial store or on the papers and publications of the perpetrator of the act (Alburairi, 1987: p.716).The law punishes this act and considers it a crime independent of falsification and counterfeiting of the trademark in order to limit the evasion of the accused, because the perpetrator may be caught before the goods are offered for sale and he gets away.

Thus, the legislator did not limit the imposition of a penalty on forgery or imitation of the trademark, but rather on those who use the forged or imitated one. This is what Act 35/1 referred to by saying: “Every person who commits any of the following acts shall be punished with imprisonment for a period of no less than a year and not exceeding five years and a fine not less than 50,000,000dinars and not exceeding 1,000,000,000 dinars, Whoever uses in bad intention a forged or a counterfeit trademark.”

Use of a Trademark Owned by Others

Trademark abuse may occur as a theft of the trademark owned by others. This act is represented by a person placing a real trademark owned by others, which means that it is registered in his name on

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products of his manufacture that have not been assigned a real trademark (Alqaliobi, 2007: p.319). The imposition here, unlike the previous cases, despite the union of the goal, which is to dispose of products made by the stealer of the mark, and to delude the consumer in a manner that leads to confusion between the products and the reality of the source of the commodity while we find that the method here is a real trademark owned by others and registered in his name and not a forged trademark.

The Iraqi legislator, in Act 35/2 and Act 3 of the Data and Trademarks Law, has held accountable everyone who puts a mark owned by others on their products and everyone who puts a mark on the products of others that is not their own. The Iraqi legislator's position was praiseworthy as it prevented anyone who puts a mark on the products of others not owned by them from escaping. Failure to regulate this situation leads to the escape of imitators. An example of this case is the commission agent who replaces the trademark placed on the products assigned to distribute them with another trademark due to its spread in the market without the knowledge of the manufacturer supplying this commodity, and there is no doubt that the goods are not his property. The Act says "1- Every person who commits any of the following acts shall be punished with imprisonment for a period of not less than one year and not exceeding five years and a fine not less than 50,000,000 dinars and not more than 1,000,000,000,000. 2 - Whoever unlawfully uses a registered trademark owned by another party. 3- Whoever puts in bad intention a registered trademark owned by another party on his products."

Thus, the Iraqi legislator settled the responsibility of someone who uses a trademark owned by others and puts it on his products and someone who uses a trademark owned by others and puts it on the products of others.

The same applies to those who intentionally offer to perform services based on forgery, imitation, or unlawful use of a mark, as he is asked about the action and is sentenced to the fine stipulated in Article 35 which states the following: "Every person who commits any of the following acts shall be punished with imprisonment for a period of no less than one year and not exceeding five years and a fine not less than 50,000,000 dinars and not more than 1,000,000,000,000: 4- Whoever intentionally offers to perform services according to forgery, imitation, or by using a trademark Illegally."

Finally, the Iraqi legislator has set a unified punishment for all the previous cases, which is the punishment of the sources stated in Act (53) as "In all cases, the court may order the confiscation of the infringing products, the goods, the address of the company, the means of packaging, papers, cards, stickers, etc. that contain the trademark subject to the infringement, the proceeds, profits of the products, and the tools used in the infringement."

Trademark Protection Methods

The unfair competition lawsuit is one of the most important forms of trademark protection. However, the Trademarks Law did not regulate this lawsuit in terms of how to file it, nor did it explain its conditions, but only mentioned it indicatively not explicitly. Hence, it is necessary to define what unfair competition is, the conditions for achieving it, and the effects that result from it.

Unfair Competition

Commercial competition is one of the most important principles governing the economies of countries that believe in free trade. The basic principle in commercial life is the legitimacy of competition

because it is recognized in the field of commercial activity. Jurists defined competition as the process of merchants competing to attract customers and promote the largest possible number of products and services in order to ensure that trade flourishes and leads to the survival of the fittest (Awadh: p.117).

The right to legitimate competition is available to every trader, and this right is represented in a set of powers that enable a merchant to use all fair means that do not conflict with commercial customs in order to achieve the best results. If the merchant deviates from these powers and legal controls, then his actions are described as unlawful so that he will be held responsible. Legal jurisprudence differed in defining unfair competition. Some of them define it as “The merchant's use of methods contrary to law or commercial customs or contrary to honesty and truthfulness in trading.” (Talibani & Aljaza’iry, 1979: p.322).

However, the repealed Iraqi Trade Law No. 149 of 1970 defined unfair competition in the text of the first Article of Act 98 as “Every act that contravenes the honest customs and principles observed in commercial transactions”.

Through the previous definitions of unfair competition it is possible to establish general characteristics of unfair competition which are:

- 1- Adopting methods that are inconsistent with commercial norms and trust rules. In other words, competition in itself is insufficient to be a reason for incurring responsibility but rather error must be united with competition, whether the competitor is well-intentioned or ill-intentioned, because it is unreasonable to assume good will in a person who has committed acts that he knows are contrary to customs and commercial laws.
- 2- In order to face unfair competition, there must be two or more merchants practicing a similar craft. This is a very important condition. We will see later that the unfair competition lawsuit is filed only by one merchant against another merchant only.

Civil Protection Requirements of the Trademark

Since the civil protection lawsuit is based on the basis of civil liability, the conditions of this lawsuit are the act of unlawful infringement (error), which results in the realization of the damage as a result of the existence of a causal relationship between them. These conditions are as follows:

- 1- The act of infringement (error) requires filing a civil protection lawsuit to verify the error in the act of commercial competition in a harmful way to the owner of the trademark by creating a state of similarity (Tu’ais,: p.155). In other means, a mistake on which to base the lawsuit of unfair competition requires real competition between two merchants practicing similar trade (Almawla, 2005: p.238). The use of a third-party trademark for the purposes of advertising the products is an act of error. The wrong act may occur when the perpetrator displays goods of poor specifications and claims that they bear a well-known trademark, likewise other actions that are done with the intention of harming commercial shops in general and industrial property rights in particular (Nasif: p.113).
- 2- Damage: Unlawful competition lawsuit may not be instituted unless damage results from the mistake, whether this material damage is related to a financial right, such as the loss that befalls the merchant as a result of imitating his mark. The damage may be moral to a non-financial right,

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for example damage to the commercial reputation. Furthermore, compensation is not limited to the achieved damage, but to the probable harm. Then the judge does not rule for compensation, but rather rules to take measures to prevent this damage from occurring (Almawla, 2005: p.239).

- 3- Causal link: There must be a causal link between the acts of unfair competition and the damages that occurred to the merchant, so it is required in this lawsuit that the plaintiff prove that the damage was due to acts in violation of the law. Consequently, there is no way for the defendant to evade responsibility unless he proves the legality of the act or denies its promulgation. Causal link means that the damage caused was a natural consequence of the error, but this matter may be considered easy in terms of the occurred harm. The existence of a causal relationship between error and damage can be proven by all methods of proof, however; the situation differs with regard to potential harm. The aggrieved person must establish evidence that the error caused the potential harm, the causal link requires the similarity between the activities of each of the perpetrators of the harmful act and the injured person, and that similar activity is what leads to the finding of the unfair competition lawsuit in this case.

Civil Protection Effects of the Mark

If the act of infringement on the trademark is realized, then the right holders may file a lawsuit to address this abuse. This may need taking a temporary measure to preserve the rights of the owner of the trademark subject of the infringement, and the procedure may be objective related to redressing the damage by compensation through the unfair competition lawsuit as we explain in the following.

- 1- Precautionary measures: Most of the industrial property legislations gave the aggrieved party the right to request a precautionary measures before filing a lawsuit including the Iraqi Trademarks and Commercial Data Law No. 21 of 1957 amended by order 80 of 2004, which in Act 37/1 thereof authorized the owner of a registered trademark before filing a lawsuit to demand precautionary measures provided that his application is accompanied by evidence of registration. The Act states that “1- The owner of the trademark may at any time, even before filing any civil or criminal lawsuit, based on a request accompanied by evidence indicating the registration of his trademark, an order from the investigating judge or the competent court to look into the crime, determine the damages, take precautionary measures, and seize machinery and tools used in committing the crime, goods, name of the store, covers, papers, charts, posters and other things on which the trademark has been placed. This includes the confiscation of products, commodities, the name of the shop, means of packaging, papers, graphic cards, posters, etc. imported from abroad. 2- The judicial authorities have the power to set precautionary measures without notice if required especially if it is found that the delay may cause irreparable harm to the right holder or if there is an apparent risk of losing the evidence. 3- Precautionary measures taken on the basis of items 1 and 2 may be canceled or suspended at the request of the defendant if the lawsuit was not commenced within 20 working days or 31 calendar days. 4- Judicial authorities, based on the defendant’s request, may order the seizure applicant when the precautionary measures are canceled or invalidated by him in a certain act or negligence or because there is no infringement or threat of assault to pay the defendant adequate compensation for any damage caused by those procedures.” We can note the following based on this Act:

- a. The Iraqi legislator has fallen into contradiction when he authorized precautionary measures by the court then required the court to verify whether the infringement had acquired the protected trademark or that he became imminent before taking the precautionary decision. Here there is confusion between the urgent decision and the prejudice to the original right.
 - b. The Iraqi legislator has overlooked the necessity to provide a guarantee from the applicant for the precautionary measure before taking action to ensure harm to the other party. The owner of the trademark may be the victim of the ploy of the applicant for the precautionary measure. When the claim is verified, the person who was subjected to the precautionary measure will not find any guarantee of the harm he suffered as a result of the precautionary measure.
 - c. In the previous text, the legislator authorized the competent court to issue confiscation decisions within the precautionary measures even without notifying the trademark owner, despite the fact that these decisions affected the substantive rights that are considered among the decisive provisions in the case.
- 2- Compensation: The defendant shall be obligated to compensate the damages suffered by the plaintiff. Compensation is intended to take out the damage, if possible, or mitigate its impact in a way that leads to a re-balance between the interests of the perpetrator and the injured. Accordingly, the court does not award compensation in the unfair competition lawsuit unless the damage has actually occurred. However, if the damage is likely to occur it does not rule compensation, but rather orders necessary measures to be taken to prevent it (Al'ugaili, 1998: p.248). Compensation in the unfair competition lawsuit is often monetary, so the court orders compensation for all material and moral damages that were caused to the plaintiff. The compensation may also be in kind (Tu'ais: p.160). To a large extent, it is the courts that determine the appropriate method of compensation in each case. It may order to prevent the trader from continuing to use the trademark or to order amendments to it. The injured person may obtain compensation for the loss he suffered as a result of the infringement, provided that the compensation includes the profits achieved as a result of using the trademark. The court may order the destruction of the materials and tools that were used in the manufacture or formation of the counterfeit goods and destroying the counterfeit goods themselves. The court may also clarify the results of the investigation related to the incident and the conclusion or the legal basis on which the decision is based. It may publish this decision or grant it to every person who requests it publicly if such publication is not possible too.

To conclude, what the general rules for civil liability have settled on affirm that compensation includes the injured property including material or moral damages. However, the Iraqi legislator has followed a different direction limiting compensation to material loss ignoring what happened to the injured as a result of the assault on his mark.

Conclusion

Results

- 1- The Iraqi legislator has expanded its definition of a trademark explaining its types and the conditions for its registration. However, the definition must be far from the purpose and limited to the identity of the trademark.

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- 2- The legislator aim of providing this protection is to avoid dangers of fraud or imitation and to counterpart illegal competition between merchants. It was better to expand the protection to include the consumer who is the mostly affected party of using a non-original trademark.
- 3- Legislation in Iraq does not require sight recognition of the trademark which causes great difficulty in determining an original trademark. As a result, the consumer will be misled because of depending on sound or smell.
- 4- The owner's right of the trademark is absolute, which means he can use this right against all people and all those who use the same trademark despite the kind of goods of services. In other means, no one can use a famous trademark, which is unlike the position of the Iraqi legislator who limited protection to the same kind of goods and services. Thus, anyone can use the trademark providing that goods and services are different.
- 5- The law allowed the registration of the trademark in the foreign language providing that it is written in Arabic. Thus, a trademark might carry an ambiguous or misleading concept. A trademark should be written in Arabic clearly.
- 6- The law provides temporary protection to goods and services. It is a protection that aims at stabilizing rights and legal positions after registration deadlines. Other temporary protection is granted to deserted trademarks to give the chance to their owners to restore them.
- 7- Ordinary protection time of a ten years trademark starts at the time of the registration application unlike other legislations which considers the protection granted retroactively from the date of the registration application and it is a special protection for the applicant until his application is decided upon and does not fall within the time limit for normal protection.
- 8- The Iraqi legislator has fallen into contradiction when he authorized precautionary measures by the court then required the court to verify whether the infringement had acquired the protected trademark or that he became imminent before taking the precautionary decision. Here there is confusion between the urgent decision and the prejudice to the original right.
- 9- The Iraqi legislator has neglected the necessity of presenting a guarantor from the applicant of the precautionary measure before taking the action in order to ensure that the other party suffers from harm. When the allegation is confirmed to be incorrect, the person who was subjected to the precautionary measure does not find any guarantee of the harm he suffered.
- 10- The competent court can issue confiscation decisions within the precautionary measures even without informing the trademark owner, despite these decisions touching on the substantive rights that are among the decisive judgments in the lawsuit. It would have been more appropriate for the legislator to leave its assessment of the decisive judgments that the court makes on the origin of the dispute.
- 11- Our legislator imposes severe penalties for the perpetrators of the act of infringement of the trademark.
- 12- The provision as one of the complementary penalties is correct because such penalty preserves the reputation of the true trademark owner.

- 13- The Iraqi legislator follows a different direction to the compensation rules by limiting compensation to material loss ignoring the moral damages suffered by the person affected by the abuse of his trademark, which may be reflected in one way or another to tangible material damages.

Suggestions

- 1- Modify Article 1 of the Iraqi Trademarks and Commercial Data Law No. 21 of 1957 amended by order 80 of 2004 as the following “A trademark is any form that can be conceived as a distinctive mark that does not violate public order and public morals, the aim of which is to distinguish one good or service from another.”
- 2- Include a condition requiring the applicant to provide the precautionary measure with a guarantee of the right of the other party, especially when the procedure involves seizing products or goods or their means of production or requesting precautionary seizure on them.
- 3- Emphasize the protection of the well-known trademark outside the framework of similar goods and services if its use would lead to the belief of others that there is a connection between the famous mark and some goods and services.
- 4- Not limiting the compensation to the material loss when infringing the trademark. The material damage suffered by the person affected by the assault on his trademark and the moral damages which may be reflected in one way or another to tangible material damage.
- 5- Reconsidering the distinction between the responsibility of someone who uses a trademark owned by others and puts it on his products and someone who uses a trademark owned by others and puts it on the products of others illegally.
- 6- Reconsidering the penalty for the destruction of goods whether in a civil or criminal lawsuit resulting from trademark infringement and granting the court the possibility to distribute it for charitable purposes with the necessity to remove the trademark that has been infringed, provided that the assault bears the costs of removing it.
- 7- Update methods to address violations of the rights of the consumer and trademark owner in coordination with the General Authority for Customs and Border Crossings, and activating the role of the standardization and quality control apparatus.

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