

EXPUNGING THE TRADEMARK FOR VIOLATING THE REGISTRATION PROCEDURES: AN INVESTIGATION IN IRAQI LAW

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ABSTRACT

The issue of expunging the registered trademark is of special significance, because of the effects may be removed by expunging. There are several reasons that can lead to expunging the registered trademark, as well as several people can request to expunge the trademark, in addition to parties that can decide to expunge. Therefore, the registered trademark is worthy of removing if it appears that registering it lacks the formal requirements, including a violation in registration procedures. The right to have a trademark is acquired through using and registering it at the trademarks registrar, who works on the final registration of the trademark in the trademarks register. It is deemed to fulfill the conditions stipulated in the trademarks law, starting from the submitting application to issuing a certificate thereof. As for the holders of the right to request to expunge the registered trademark, they are either its owner or others who have an interest in this removing. The trademarks registrar is the one who decides this expunge by counting on the powers granted by law, or by a judicial ruling issued by the competent courts such as the Supreme Court of Justice in Jordan, the administrative court in Egypt and the court of First Instance specialized in the commercial lawsuits in Iraq regarding expunging the trademark.

Keyword: Trademark, Expunge, Registration, Formality, Trademark Registration

INTRODUCTION

The trademark is one of the key elements in commercial relations between traders and investors, since it gives the right to its owner within industrial and commercial property rights, because this right is different from other ones. This necessitated the individualizing a legal system in both international agreements and national laws, where the trend began to develop a legal regulation. The legislation regulating trademarks took a permanent and continuous development in the national, regional and international sectors. The trademark has gained legislative attention and played a major role in economic and commercial life. It was one of the most important intangible elements in many commercial institutions and companies (Hamdi, 1999).

Researching the issue of expunging the trademark for violating the registration procedures requires knowing the procedures to be taken into account for the purposes of registering a trademark. It is noted that Jordanian, Egyptian and Iraqi legislators have permitted anyone to use a trademark to distinguish his products, goods, or services, to submit an application to register this mark with the trademarks registrar in accordance with the provisions and rules established in this regard. Therefore, this research falls into two main parts, namely, the procedures for registering a trademark and cases of expunging the trademark for violating the registration procedures.

Procedures of Registering Trademark

The Jordanian law and the trademark system issued under it, the Egyptian by-law regulations, and the Iraqi trademark law and its system have specified the procedures to be followed

in registering trademarks for those who choose to register their trademark. The French and English laws did not include a text stating that the issue of trademark registration is obligatory, and the same applies to the Jordanian, Egyptian and Iraqi laws. (Coleman, 1994)

Therefore, the research will tackle these procedures in terms of their clarification, starting from the submission of the application until the issuance of the certificate, which can be listed as follows:

First: The Competent Authority to Receive Trademark Registration Applications

Registration Procedures was the title of the second part of the Iraqi law, which began with the text of article (6) related to the law of trademarks and commercial data “The application for registration of a mark shall be submitted to the registrar in the form and conditions set forth in the system issued under this law.” It is noted that after the issuance of the law and its amendments for the year 2004 and 2010, there was no regulation issued according to this law; but the trademark system No (26) 1957 remained effective until now, which is the system adopted for trademark registration. This is considered a flaw, as the article was clear, which necessitated the issuance of a new system under the law after amending. It is clear from the legal texts that have been reviewed that the authority competent to receive applications for registration of trademarks in Jordan is the trademarks registrar, in Egypt, it is the commercial registration authority, and in Iraq is the trademarks registrar. It is worth mentioning that the trademarks registry, which was affiliated to the Ministry of Economy when law No. 21 of 1957 was issued, being the authority responsible for registering trademarks, then transferred to this authority to the Ministry of Industry and Minerals in the Central Agency for Standardization and Quality Control to exercise the competencies stipulated in the law above. In 1987, the dissolved Revolutionary Command Council issued its resolution No. (70) which stipulates “First: The General Federation of Iraqi Chambers of Commerce and Industry replaces the Central Organization for standardization and quality control initiated duties stipulated in trademark amended law No. 21 of 1957 and the system issued thereunder”. Of what was mentioned, the competence of the trademarks registrar was transferred by virtue of this decision to the General Federation of Chambers of Commerce and Industry. After that, the General Federation of Chambers of Commerce and Industry was disbanded according to the Federation of Iraqi Chambers of Commerce Law No. (43) 1989.

The judgment of the trademarks registrar remained associated the federation of Iraqi industries based on Law No. (44) 1989 which states that “registering trademarks in accordance with the provisions that regulate them, keeping their records, and providing the relevant authorities with the data and certificates necessary for them.” The situation continued until 2004. Based on the order 80 of 2004 by amending paragraph (1) of article (2), the jurisdiction returned to the trademarks registrar in the Ministry of Industry and Minerals. The researcher finds that there is an implicit expunge in law No. (21) 1957 amended by order 80 of 2004 and between the same law in the last amendment to the trademarks and commercial data law No. (9) 2010. The amendment of article (2) was in amendment No. 80 of 2004. Paragraph (1) of article (2) stipulates that “a register shall be kept in the Ministry of Industry and Minerals under the registrar’s custody, in which all trademarks and commercial data are recorded without reference to the resolution of Revolutionary Command council No. (70) 1987 and its suspension. This can be explained firstly by the article amended as indicated above has legal force restricting other decisions, including those issued by the dissolved Revolutionary Command council. It has been performed since the date of its publication in the gazette, but it is surprising that the Iraqi legislator in the last amendment No. (9) 2010 has suspended the resolution of the Revolutionary Command Council No. (70) 1987. This means that the Iraqi legislator acknowledges that the above resolution was effective from 2004 until the 2010 amendment without implementing it. This is considered a legislative vacuum and a contradiction to law. The researcher believes that the Iraqi legislator was wrong for suspending the resolution when amending Law No. (9) of 2010, as the amendment in order (80) of 2004 has given the legal cover to

suspend the resolution above. The law has been effective in entire articles since 2004, where amending it and suspending the resolution of the Revolutionary Command council in 2010 were a mistake and acknowledgment of a legal contradiction for (6) years. This did not exist at all, as the trademarks registry in the Ministry of Industry and Minerals, initiated since the issuance of the amendment by order (80) of 2004. The annulment of this order is implicit because the new law deals with the same issue and therefore the resolution of the dissolved Revolutionary Command Council is considered annulled.

Second - Persons Who May Apply for a Trademark

The Jordanian legislator in the trademarks law did not specify the persons who may apply for a trademark in order to distinguish products, merchandise, or services. Rather, he permitted anyone claiming to be the owner of a trademark used, or intending to use and wishing to register it, to submit a written application to the trademarks registrar on a form prepared for this purpose, requesting the registration of his trademark (Hatab, 2007).

As for the Iraqi law, the legislator in the trademarks law gave the right to request the registration of a trademark for every person, whether natural or moral, and did not specify the applicant's nationality. So, it allowed both the Iraqi and the foreigner to submit the application. This is what article (4) of the amended trademarks law states that every natural person or legal entity, whether Iraqi or foreign, has the right to request the registration of a trademark with related rights in accordance with the provisions of this law. It did not specify the persons who may apply for a trademark in order to distinguish their products, goods or services. Rather, he gave the right to that to anyone who claims to be the owner of the trademark to actually use it or if he intends to use it and wishes to register it. There is a restriction on what was stated in article (4) above which is what was clarified in paragraph (A) of article (6) repeated regarding the foreign person's nationality. He specified that any person whose country of origin is required to be either a member of the Paris Union or the World Trade Organization or any agreements or treaties related to the trademark, where Iraq is a member or any country that deals in the same way. Article (7) of the trademarks law No (26) 1957 clarified that letters and registration applications submitted by a company must be signed by its authorized manager or his power attorney. If the request is submitted by a department, association or institution, the authorized signatory shall be the one who signs the request or his power attorney.

It is noticed that the phrases "a department, an association or an institution" could raise a question "To what extent these legal persons are considered to have commercial activities? Because trademarks carry commercial activity and therefore they are profitable. How can the department, association or institution be profitable and have a commercial activity? This is taken to the Iraqi legislator's account. Through the practical application in the trademarks registry, there were not any applications in this regard. The researcher believes that it is necessary to amend this article in the system and make it confined to natural persons and legal persons who practice commercial activities. It is also conditioned that the agency must be valid. The expiration of validity of power of attorney invalidates registering the trademark, even if it has already been registered without noticing. In a judicial resolution (3955) issued by the court of First Instance specialized in commercial cases and ratified by the Iraqi federal court of Cassation states: "It was proven to the court from facts and evidence that the application submitted by the distinguished power attorney, whose job is a plaintiff, on 16/4/2019 was for the purpose of registering the trademark. Despite the fact that the power attorney in that period was expired without noticing it by the trademarks registrar and continued registering until the publication of the trademark by counting on that power of attorney referred to which was issued by the public authority for employment and real estate registration in the Islamic Republic of Iran No (112016) on February 27, 2018.

The authorized representative in this case is the lawyer (S. H. D) and the authorizer (Sanati & Bazar Kani Company) where the power of attorney expires on 3/20/2019. All applications and letters are signed by the applicant, his legal representative or the person authorized to sign in accordance with the provisions of article (7) of the trademarks and data system No. (26) for 1957. It was proven that the registration request submitted by the distinguished agent, whose job is a plaintiff, on 16/4/2019 was based on an expired power of attorney. Thus, the request in this case is submitted by a person who does not have a legal capacity to submit it. All procedures based on this application and subsequent ones shall be invalid, which requires annulling the trademark registration for the invalidity of the procedures” It is also conditioned that the lawyer hold a valid registration agency issued by the department of registering companies in the Ministry of Commerce, based on article (2) of the registration power of attorney law No. 4 of 1999, which stipulates that “the provisions of this law shall be applied to business works related to registering companies, names, trademarks, industrial models and patents, in addition to the claims and procedures arising from.

Third - Authority of the Department to Accept or Refuse to Register a Trademark

After submitting a trademark registration application to the registrar at the competent department, the registrar examines the application and investigates between previously registered trademarks and applications for registration that have not yet been decided. This is to ascertain whether there are registered trademarks related to the same goods or the same category of goods identical to the mark to be registered, or if they are so similar in a way that leads to deceiving the public (Zain-Addin, 2005). This is what was stated in the text of article (22) of the Jordanian trademark law “Upon receipt of an application for the registration of a trademark, the registrar shall order an investigation between the registered trademarks and the undisputed applications for registration; To ascertain whether in the entries registered marks related to the same goods, or to the same class of goods, identical to the mark required to be registered, or close to it to a degree that could lead to fraud.” Accordingly, if it appears to the registrar, after this investigation, that there is no objection to registering the trademark, he can accept the application unconditionally, or under restrictions and conditions that he deems necessary to impose. He shall inform the applicant about these conditions in writing. In this case, if the applicant objects to those conditions, restrictions or modifications set by the registrar, he must request the registrar to consider his case within one month from the date of his notification of application acceptance. Otherwise, he shall be regarded to have withdrawn his application and if it is accepted, he shall inform the registrar in writing.

However, if the registrar objects to the request or the data given by the applicant, the registrar shall send a written statement of these objections to the applicant, who must request consideration of those objections within one month. Otherwise, he is considered to have retracted his request. The date of notification shall be the date of the registrar's decision for the purposes of appeal. This is what was clarified by the provisions of articles (23), (24) and (25) of the Jordanian trademarks law and what was also stated in the Egyptian law (Al-Ghuwairi, 2006).

As for the Iraqi trademarks and commercial data law, article (9) allows the registrar to impose restrictions and amendments to define and clarify the mark and the method of using in order to prevent confusion with other similar marks or other reasons. In the case of pending-condition rejection or acceptance, the applicant must be notified of the reasons for the decision within (30) days to respond, otherwise the applicant shall be deemed to have given up his application. This is what was stated in article (12) of the Iraqi trademarks and commercial data system, which specified (15) days for the registrar from the date of submitting the application to the registrar to notify the applicant of the absolute, restricted, or refusal acceptance. Others may object to the acceptance within (30) days from the date of announcement. Consequently, we find that the comparative laws are close in formulating the articles of accepting or rejecting registration, objecting to it, requesting amending it, and so on until the completion of registration and its respective periods. Here, a

question arises about the legal periods in the application process and waiting for a response from the registrar.

The laws have always specified the legal periods imposed on the applicant and did not specify a certain period for answering the applicant. We believe that this is a defect that must be addressed by adding a legal article that obliges the department of the trademark registrar to respond to the applicant by rejecting, accepting, amending, or otherwise within a certain period, in order not to abuse the right by the registrar. Through practical application in cassation court: 171 on 9/1/2019, the suffering is in the delay in responding to the request submitted by the registration applicant or his authorized agent, where no answer given till long periods of time because they are not limited to a legal period. This order applies not only to the request for examination or registration, but also extends to inspection, amendment, acceptance decision, and other requests. The law did not obligate the registrar for any legal period to answer or decide on the requests submitted to him. The Iraqi Court of Cassation issued a principle stipulating that “If it is confirmed that the investigations conducted by the trial court concluded that no decision was issued rejecting the registration of the trademark, issued by the defendant (the registrar) towards the distinguished plaintiff. Thus, there is no decision that is subject to appeal, so the suit of the distinguished plaintiff has lost its legal basis and is required to respond (Qalubi, 1952).

Accordingly, we suggest to the Iraqi legislator to add a legal article to the above law that states “the trademarks registrar shall be obligated to respond to applications submitted for registration within 30 days from the date of submitting the application; otherwise the application is considered rejected, where the applicant may object according to article (10) of this law.

Fourth: The Stage of Trademark Registration

It is the final stage in which a final decision is issued to register the trademark, which requires publishing an advertisement thereof at the expense of the applicant in the gazette for the period specified and in an appropriate form. This is what is stated in article (32) of the Jordanian trademarks law. This is in accordance with what the Egyptian legislator has legislated and clarified by article (80) of the Egyptian Intellectual Property law and article (88) of the by-law regulations. As for the Iraqi law, article (11) of the law of trademarks and commercial data, article (15) and (16) of the trademarks law stipulate that the acceptance of the mark must be announced in three successive issues of the journal of trademarks registry for (90) days from the date of advertising. This is the period during which any person is allowed to object to the acceptance of the trademark registration before the competent authority in both of the Jordanian and Iraqi laws, while the period in Egyptian law is (60) days. The objection must be submitted in writing, explaining the reasons for the objection, and the registrar shall send a copy of the objection to the applicant, who must send to the registrar his answer sheet in response to the objection including the reasons on which he bases his application. If he does not do so, he would be considered to have abandoned the application (Qalubi, 1986).

The decision issued by the registrar is subject to appeal before the Jordanian High Court of Justice within 20 days from the date of the registrar's decision. As for the Egyptian legislator, the period is (30) days, according to article (80) of the Egyptian law. In Iraq, the decision is subject to appeal before the Court of First Instance specialized in commercial cases, and within a period of 30 days from the date of notification, based on article 10 of the Iraqi law. We find that the Jordanian legislator indicated the necessity of publishing from the date of the issuance of the registrar's decision, whereas, the Egyptian legislator did not specify the date of the issuance of the decision or notification. The Iraqi legislator was accurate, as it specified the period from the date of notification, which is the most suitable. The trademark shall be announced and publicized if the application is accepted by the registrar gazette. If the application submitted for registration is rejected, the applicant must submit a grievance to the competent authority within the period specified in the law

to find out the reasons for rejection. If the registrar refuses to appeal, the applicant must appeal the registrar's decision before the court. If the specified period has expired without objecting to the application for registration of the mark, an administrative decision was issued to reject it, or a court ruling was issued to challenge the decision of the management. The registrar must publicize the trademark by registering it in the trademark register. The trademark owner is granted a certificate of acceptance of the trademark that includes his name, nickname, nationality, address, trademark number, application date, registration date, and type of products.

Cases of Expunging Trademark for Violating Registration Procedures

After stating the required procedures for registering a trademark, beginning with the entity authorized to receive applications for registration, passing through the documents required to be attached with the registration application, until registering the mark in the register, and then the issuance of the registration certificate in the name of the applicant. The question arisen is: What are the cases in which the registered trademark is expunged for violating the routine registration procedures? The registration procedures are represented by the normal conditions that must be met in the trademark, which are the procedures for registering the trademark with the competent authority from the person concerned or his representative with a special power of attorney (Khashroom, 2009). There are conditions related to the formality of the trademark registration, which means the possibility of requesting to expunge the mark from the trademark register in the case that any of the formal conditions are missed, because it is the registration mechanism specified by the law. Any error related to these steps leads to expunging it.

First: Expunging the Trademark if the Application was accepted by Mistake.

The Jordanian legislator affirmed that “everyone affected by the failure to take down a note in the register, or because of deleting an item, or by the writing any item without a sufficient reason to justify, or because any item in the registry, may submit an application duly to the trademark registrar or to the Supreme court according to one’s will. If the application is submitted to the registrar, the latter would have the right to refer it to the competent court, or to judge it after hearing the persons concerned. If the application is decided upon, the decision is subject to appeal before the Supreme Court. Zain-Addin (2009) The Jordanian legislator has granted the trademark registrar the right to correct the error in the register without restriction or condition as specified by law, provided that the correction does not harm others. This is in terms of the name, address, or any change that occurred to the person registered for the trademark. According to the text of article (15) of the Jordanian law, trademarks can be “deleted” or “expunged” if they were registered in error, or if the trademark registration was accepted, but it was registered other than what the court indicated, or in a manner different from what it judged. In this regard, the Jordanian Supreme court of Justice judged that “The registration which is legally considered is the one that fulfills its legal requirements in accordance with the provisions of articles (11, 13 and 15) of the trademarks law and articles (47 and 49) of the trademarks system and its amendments. Registering the trademark (Eternity) which was duly registered in the name of Ab-Diet Garment Company on 6/1/2008, which is a date later than the date of the appellant's submission to the trademarks registrar to re-register his expunged trademark is a legal violation. The legislator has devised a way to register the trademark and another way to re-register it. Thus, what the trademarks registrar has reached with his appealed decision becomes contradictive to the law and real by rescinding.”

One of the opinions states that expunging the trademark in this case is based on the text of Article (6) of the Jordanian law, which indicates the following: Whoever wishes to be independent in using a trademark to distinguish the goods that are of his production, manufacture, selection, or of

which he issued a certificate, or the goods he trades, or intends to trade in, can request the registration of that mark in accordance with the provisions of this law” (Bouchoux, 2009).

This opinion considered that the aforementioned article was referred to by Article (24/5) of the Trademarks Law, which states: “Every application submitted to expunge a trademark from the register because there is no justification for its registration under the provisions of articles (6, 7 and 8) of this law, or because the registration of that mark creates unfair competition for the applicant’s rights in Jordan, must be submitted within five years of the mark registration. According to this opinion, the trademark shall be expunged if the application was accepted in error, or was accepted contradictive to what the court indicated in accordance with the provisions of article (15) of the trademarks law. In Egyptian law, it is possible to rely on the text of article (94) of the law which is of benefit that the authority and any interested one may resort to the competent court with a request to add any statement to the registry that was neglected to record, or to delete or amend any statement that was unlawfully entered or was not in conformity with the truth. This is done by requesting to expunge the registration of the trademark that was registered as a result of a mistake from the registrar, or in a manner other than what the court indicated. The Iraqi legislator allowed the owner of a mark that has been duly registered, to submit a request to the mark registrar for amendments and additions to correct his mark at any time. It stipulated that these amendments do not affect the trademark (Assaf, 2011). The application stipulates that “the owner of a mark that has been previously registered may submit a request to the registrar, at any time, to introduce any additions or modifications to his mark, provided that this application does not affect the mark. The registrar’s decision to accept this is issued in principle in accordance with the conditions set for the decisions related to the original registration applications. This decision must be notified, provided that it is subject to objection in accordance with the mentioned above. It is noted on the text of the articles referred to in the Egyptian and Iraqi law that they did not specify a period after which the request for deletion is prohibited. The researcher supports that as long as it is related to a trademark that was unduly registered, or was not in conformity with the truth, in order for the record to be a clear mirror of what is recorded in.

Second: Cancelling the Application for Forgery in Registering the Trademark

If forgery is found during or after the registration of the trademark, the court may request the amendment of the register by expunging the registered trademark. paragraph (4) of article (24) of the Jordanian Law stipulates the following: “The registrar may, in the case of forgery when registering any trademark, or transferring it, to submit an application to the Supreme Court of Justice in accordance with the provisions of this article. According to this article, it is permissible to expunge a trademark indicating forgery when registered (Assaf: 2011). This shall be made by a request from the registrar and under a judgment of the Supreme Court of Justice. Article (94) of the Egyptian law also stipulates the following: “The authority and any concerned part, in cases other than those stipulated in article (85) of this law, may resort to the competent court with a request to add any statement to the registry that was neglected to record, or to delete or amend any statement that was unlawfully entered or was inconsistent to the truth.”

Any change in the mark register such as modification, correction or expunging may not be made by the registrar, but based on a decision issued by the court. From the context of the articles, the registrar has the right to request an amendment to the register by requesting to expunge the trademark that was found. It was forged during its registration, because it was registered by fraud or false information or based on providing data contrary to the truth. In the Iraqi law, Article (21/2/T) stipulates that “...a request to expunge the registration of the mark may be submitted ... D- that the registration of the mark was done by fraud or in violation of the provisions of registration.” The researcher notes that, in the case of forgery when registering a trademark, the Jordanian legislator just asked the court to amend the register or expunge the mark, but the question here is “Does what

stated in the legal text allow suing a prosecution against those in who obtained a registered trademark for the crime of forgery in a registered trademark? What is the role of the registrar before referring the application to the court to amend or delete the mark? What is the role of the Supreme Court of Justice after referring the request to? In the Iraqi trademark system, paragraph (b) of article (37) states, “The registrar shall request that legal measures be taken against any person who committed a crime in accordance with the provisions of the law,” as the legislator gave the registrar the absolute right more than what was stated in article (35) of the trademarks law and commercial data.

CONCLUSION

Talking about the provisions related to trademarks in general and those related to expunging trademarks for violating the registration conditions in particular was not a coincidence nor a research or academic luxury as much as it was closely related to the extent of the importance of these fields. It affects all societies on their economic effects and those based on the emergence of modern phenomena as a result of economic, social and even political openness, the integration of societies and the intertwining of interests. This called for more attention to be paid in the field of trademark branding and expunging it. However, the current research dealt with expunging the trademark for violating the conditions of registration through a study in Iraqi law, whether related to registration, or the any addition to the provisions related to removing the mark or the role of the registrar in what is presented. It is necessary and useful to review the overall conclusion of this research, a summary of the results and recommendations as follows:

RESULTS

- 1- The Iraqi legislator did not issue a new system for trademarks; the system remained the same since issuance in 1957.
- 2- The researcher believes that the Iraqi legislator was wrong when suspended the resolution for amending law No. (9) of 2010, because the amendment in order (80) of 2004 has given the legal cover to suspend the above resolution. The law has been effective in all its articles since 2004. Amending that law and suspending the resolution of Revolutionary Command Council in 2010 was a mistake and acknowledgement of a legal contradiction for (6) years. This was not existed, where the trademarks registry in Ministry of Industry and Minerals initiated working on since the issuance of the amendment by order (80) for 2004. Expunging this order is implicit because the new law deals with the same issue and therefore the resolution of the dissolved Revolutionary Command Council is considered null and void.
- 3- An Iraqi lawyer cannot carry out trademark registration procedures or plead before the trademark courts unless he obtains an official power of attorney from the trademark owner. Moreover, he holds the registration license, which is issued by the Companies Registry under the Registration Agency Act No. (4) of 1999.
- 4- The Iraqi legislator did not oblige the trademarks registrar’s department to notify the applicant for a specific period, but rather kept silent.
- 5- The Iraqi legislator gave the right to (a department, association or institution) to submit an application for the registration of a trademark. Those persons are non-profitable and it is not possible to register a trademark with a commercial and profitable character

RECOMMENDATIONS

- 1- We recommend the Iraqi legislator to add a legal article to the law aforementioned, which states “the trademarks registrar is obliged to respond to applications submitted for registration within 30 days from the date of submitting the registration application; otherwise the application for registration is considered rejected, and the applicant may object according to article (10) of this law”.
- 2- We recommend the Iraqi legislator to issue a new trademark system that is in line and consistent with the amendments included in the amended Iraqi trademarks and data law No. 21 of 1957.
- 3- We recommend the Iraqi legislator to amend article (7) of the Iraqi trademark system and make it restricted to ordinary persons and to persons practicing commercial activities, but not departments, associations and institutions of a non-profit governmental character.

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