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**Crime of imitating the registered trade mark: comparative analytical study**

*Delito de imitación de la marca Registrada: estudio analítico comparativo*

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**ABSTRACT**

The subject of the crime of imitating the registered trademark is considered one of the most important and vital issues because it relates to the consumer and countries' economy. Its development on the one hand, and the increasing role of the trademark in distinguishing goods and services for other goods and services similar to them and preventing theft on the other, as international interest in intellectual property and its elements, especially trademarks, has increased. It should be noted that the trademarks are subject to many assaults especially the imitating, which is not limited to local brands but also includes foreign marks.

**Keywords:** Crime, trademark, imitation, registered trademark.

**RESUMEN**

El tema del delito de imitación de la marca registrada se considera una de las cuestiones importantes y vitales porque se relaciona con el consumidor y la economía de los países y su desarrollo, por un lado, y el papel cada vez más importante de la marca en la distinción de productos y servicios para otros bienes y servicios similares a ellos y la prevención del robo por otro, ya que el interés internacional en la propiedad intelectual y sus elementos, especialmente las marcas, han aumentado en los últimos tiempos. Estas últimas, están sujetas a muchos ataques, especialmente la imitación que no se limita a las marcas locales.

**Palabras clave:** Delito, marca registrada, imitación, marca registrada.

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## **INTRODUCTION**

Intellectual property is a real capital at present because of the extremely dangerous role it plays in merchants' lives, and among the elements of intellectual property in trademarks and the importance of the brand has increased as a result of the scientific and technological control that prevails in the global economy at present on the one hand, and the tremendous increase in commercial transactions on the other, as well as increased competition for marketing products and services in the market on the third hand, as they play an important role in the speed of executing transactions. As it has become a propaganda tool to increase the demand for a particular good or product, increasing the consumption of that commodity is evidence of the increasing popularity of its trademark, which leads to counting the trademark as a right of its owner. These right needs protection from various forms of abuse, so most countries put national legislation to regulate and protect the trademark (Jamshidi et al.: 2020, pp. 12-28).

To keep Iraq in line with the new economic, commercial, and legal concepts on the one hand, and for joining the World Trade Organization, Law on Trademarks and Commercial Data No. (21) Of 1957 was amended by Law No. (80) of 2004 on trademarks and geographical indications (Beebe & Hemphill: 2017, pp. 1339-1358).

Research on the topic of "the crime of imitating the registered trademark" raises many problems that can be asked in the form of questions, what are the pillars of the trademark crime? Are there special pillars? Are the penalties mentioned in Iraqi and comparative law a deterrent to the perpetrators? Is the criminal and penal policy sufficient to eliminate the crime of imitating the registered trademark or reducing its commission?

The importance of this research is the seriousness of this the crime is closely related to the state's economy, and crime become form an assault on economic ingredients for countries, and the absence of in-depth and detailed studies in the criminal and national aspects of the topic, as the studies deal with research in the civil and international aspects.

## **METHODOLOGY**

Research on the topic "the crime of imitating the registered trademark" requires two approaches: the first approach is the comparative approach, as it will compare the Law of marks and Commercial Data No. (21) For the year 1957 amended by Law No. (82) For the year 2002 on intellectual property rights Egyptian, and Order Algerian No. 03/06 of 2003. And the second approach is the analytical approach, as the comparative legal texts will be analyzed to reach the legal protection of the trademark (Beebe & Hemphill: 2017, pp. 1339-1358).

To clarify what is the crime of imitating the trademark, this crime must be defined and its legal nature explained as follows:

### **Definition of the crime of imitating the registered trademark:**

I will discuss here the definition of the crime of imitating a trademark registered in jurisprudence, law, and the judiciary as follows:

### **Defining the crime of imitating trademark in the jurisprudence:**

The jurists did not define the crime of imitating a trademark but rather provided definitions of the trademark and imitated the brand.

A trademark has multiple definitions. In general, a trademark is a logo for his factory or the goods he produces or sells to distinguish it from similar products and goods.

The imitating of the trademark was defined as (the transfer of the basic elements of the original brand or the transfer of some of it literally, with the addition of something from another mark to become closely resembling its whole with that mark, which leads to the occurrence of the average consumer being careful in the illusion and not being able to distinguish between them) (Clarke et al.: 2017).

### **Defining the crime of imitating the trademark in the judiciary and law:**

We will divide this point into two paragraphs, as follows:

#### **Defining the crime of the imitating trademark in the judiciary:**

The judiciary did not define the crime of imitating the trademark. Some decisions have been limited to the definition of imitating in general. There are judicial decisions that have clarified the concept of imitating Trademark, as The Algerian Supreme Court defines imitating by saying (imitation is to make something out of nowhere and make it similar to the original).

The decision of the Egyptian Court of Cassation No. (719) of 1955 came to define the tradition as (making a mark similar to the imitating marking in its entirety so that it is difficult for the average consumer to be careful and attentive to distinguish between them) (Zhang: 2020).

**Defining the crime of imitating the trademark in the Law:** By referring to the comparative laws, it was noted that it did not define the crime of imitation of the trademark, as it mentioned what is meant by trademarks, and sometimes it indicates what is meant imitation.

## **RESULTS**

Article (1) of the French trademark Law of 1991 defined it by saying (A mark of manufacture, trade, or service: a linear representation symbol used to distinguish a person's goods or services, whether natural or moral). Law No. (82) For the year 2002 on intellectual property rights, Article (63) clarified the concept of the trademark, as it stipulated that "trademark: It is everything that distinguishes a product or commodity or service from others." It includes names taken with a distinctive shape, signatures, words, letters, and numbers. In all cases, the trademark must be what is perceived by sight.

And Article (First) of the Law on Marks and Geographical Indications No. (21) of 1957 defined the mark by saying (the following words mean the meanings indicated thereon ... the sign: everything that takes a distinct form of words, signatures, letters, numbers, drawings, symbols, addresses, seals, pictures, inscriptions or Any sum of it if he used or asked to use it for a commodity or had an attachment to it to indicate that that merchandise belongs to the owner of the mark because of its manufacture, election, trade, or offer for sale).

It is worth noting that international agreements related to the protection of intellectual property rights, including industrial and commercial property rights, did not provide a concept for the trademark except for the TRIPS Agreement, as it stipulated that (any mark or group of marks that allow the distinguish of goods and services produced by an institution is considered to be considered as Trademark Names, letters, numbers, shapes, and color combinations, and any combination thereof is suitable for registration as a trademark).

Article (274) of the Iraqi Penal Code No. (111) of 1969 defined the tradition by saying (tradition: creating a false thing that resembles a valid thing), and Article (26) of the Algerian order related to marks stated: (Every action that violates the exclusive rights of a mark that a third party has committed in violation of for the rights of the owner of the mark (Beebe: 2018, pp. 389-395).

We can define the crime of imitation (Every behavior that the perpetrator undertakes with the intent to deceive the consumer and induce him to believe that the trademark is original).

The legal nature of the crime of imitating the registered trademark: The crime of imitating the registered trademark has its legal nature, namely:

The crime of imitation of the registered trademark is a misdemeanor: The Iraqi legislator has divided the types of crimes in terms of their gravity into three types, which are felonies, misdemeanors, and Irregularities, Where the type of crime is determined by the original maximum legally prescribed penalty, This division is considered one of the most important divisions, which is what most comparative laws have taken.

A misdemeanor is a punishable crime, either by severe or simple imprisonment (3) months to (5) years or a fine.

By referring to the comparative laws, we find that it is considered the crime of imitating the trademark from misdemeanors.

The Algerian law made the penalty for this crime imprisonment term of 6 months and not exceeding two years. With a fine of no less than two million five hundred thousand dinars and not more than ten million dinars or one of the two penalties.

The Egyptian law made the penalty for the crime of imitation the trademark by imprisonment for not less than two months and a fine of no less than five thousand pounds and not exceeding twenty thousand pounds or one of these two penalty (Article 113/1). The Iraqi law made the penalty for this crime imprisonment for not exceeding three years and the fine (Hall: 2005).

The crime of imitation of the registered trademark is considered a positive crime: the crimes are divided in terms of the appearance of criminal behavior into positive crimes, and negative crimes, so positive crime is that crime whose criminal behavior constituting the positive element is a positive crime like murder, while what is meant by negative crime is that crime that is Criminal behavior constituting a negative element in it is negative, that is, refraining from work that the law commands to do and punishes those who fail to do it.

Comparative laws have considered the crime of imitating the registered trademark to be a crime of positive behavior. The Algerian law considers the crime of trademarking to be a crime if the offender commits (the act of imitating), as Article (26) of the Algerian Order on Marks states that (imitation: every work that infringes on the exclusive rights of the mark), and here the Algerian legislator took the broad concept of imitation, which is all actions and affecting the trademark owner, meaning that this crime does not occur with negative criminal behavior, it is a positive crime.

Also, the Iraqi legislator in the Law of Marks and Geographical Indications considered the crime of imitation the trademark as a positive rather than negative crime (Jafarzadeh & Lajmorak: 2020, pp. 159-182).

The crime of imitation of the registered trademark is a money crime: the crimes are divided according to the interest protected to the crimes of persons and money crimes.

Money crimes have intended that decrease or modify the positive elements of financial disclosure or increase their negative elements by increasing the debts of the victim, and the crime of imitating the registered trademark is a money crime because criminal behavior (the act of imitation) focuses on the trademark and it is an industrial property right, and it is immaterial money that can be owned, as the trademark has a great material value (Orlov & Tkachenia: 2017).

The crime of imitation of the registered trademark is considered a temporary crime: crimes are divided according to the time taken temporarily to crime verify the material pillar elements of the crime into temporary crimes and continuous crimes. Temporary crimes are those crimes that constitute the criminal behavior consisting of the crime from an action that occurs and ends with the occurrence of the crime.

The crime of imitation of the registered trademark is considered a temporary crime that occurs once the criminal behavior that constitutes the material pillar of the crime (the act of imitation).

The Egyptian Court of Cassation decided in Resolution (1297) of 1954 that (the crime of counterfeiting and imitating a trademark is by its nature a temporary crime that is carried out as soon as counterfeiting or imitating the trademark regardless of the use that comes later to it, which is by its nature an ongoing crime) (FOX et al.: 2020).

That is, the crime of imitating a trademark is temporary because it takes place once the trademark is imitated regardless of its use.

The Pillars of The Crime of Imitating The Registered Trademark and Its Penalty:

Pillars of the crime of imitating the registered trademark

Each crime has a legal structure, and its pillars are the general pillars of the crime (the physical pillar and the moral pillar), and some crimes provide another type of pillar which is the pillars of special.

-General Pillars of Crime: The general pillars of the crime of imitating the trademark registered in the physical pillar and the moral pillar.

-The physical pillar of the crime: The physical pillar of the crime is to imitate the trademark registered with criminal behavior, criminal result, and causal relationship.

-Criminal behavior: The physical pillar of the crime of imitation of the registered trademark does not take place unless the perpetrator issues the criminal behavior, and this behavior is represented by a positive act, which is imitation.

The comparative laws did not specify the forms of criminal behavior (the act of imitation), but jurisprudence held that the imitation was either in the form of transfer or in the form of an analogy. The imitation does not have to be complete, as it is achieved by changing or removing one of the letters of the word, as imitation is available and even if some of the surrounding fees increase to mislead the consumer.

It is worth noting that this form of criminal behavior constituting the physical pillar of the crime of trademark imitation is less likely. However, if additions lose the brand's itself, it is not an imitation, and it does not matter if the imitation trademark was used on goods because the misdemeanor of imitation is a temporary crime that occurs as soon as the trademark is imitated regardless of the subsequent use which is by its nature a continuous crime (Thomas: 2018, pp. 1-13).

The second form of criminal behavior is to imitate the mark in the analogy image. The analogy is the creation of a mark similar to the approximate image of the original mark. This image requires a physical element based on an analogy of a fundamental nature that leads to confusion between the two signs. An unphysical element which is that the perpetrator of the crime has likened with the intent to deceive the consumer, it is more dangerous in the case of imitation the medication mark, as it affects public health on the one hand, and affects the national economy because it does not help to innovate, but what is the criterion of similarity between the original and imitation marks?

The comparative laws did not stipulate the standard of similarity, while the judiciary specified a set of criteria, namely the lesson in terms of similarities between the two signs, not with the differences between them, the lesson in the general appearance in the two marks, not with partial elements, and not looking at the two signs adjacent but rather looking For them separately.

For imitation to constitute the criminal behavior of the material pillar of a trademark crime, two conditions must be met: the first condition: that the trademark is imitated without the consent of the trademark owner. The second condition is that imitation of the brand leads to misleading or deceiving consumers. The offense of imitating a trademark is realized even if the consumer confuses the original and the imitation sign with a potential occurrence or if the consumer falls under the influence of deception.

The offense of imitating a trademark is considered to be committed as of the date of transfer of the original trademark, and it is sufficient for the existence of this crime to prove the act of creating a trademark in full conformity with the original trademark (Ertekin et al.: 2018, pp. 45-65).

The criminal result: it is the effect of the criminal behavior that the offender has performed, and in the crime of imitating the trademark, the perpetrator commits a positive criminal behavior, which is (the act of imitation) achieved a harmful criminal result, which is causing physical damage to the owner of the trademark or losing it, as well as (The act of imitation) leads to (deceiving and misleading the consumer) and his inability to distinguish between products bearing an imitating sign and the original products, and accordingly the judiciary went to one of its decisions to the effect that (It is not necessary for the imitation that there be a match between the two marks, but rather it is sufficient for the availability of the imitation to have similarities between them that would mislead the public).

As for the position of the comparative laws on the criminal result, the Egyptian intellectual property protection law went to make the criminal result resulting from criminal behavior a harmful result and defined it as (misleading the public), article (113/1) stipulated that (and everyone who forges a trademark registered by the law or imitated in a manner that calls for misleading the public), and the Iraqi geographical signs and Indicators Act also made the criminal result harmful (mislead of the public).

- Causal relationship: that the criminal result occurred as an effect of the criminal behavior of the perpetrator, and in the crime of imitation of the trademark, the damage caused to the owner of the imitation trademark must be the result of the perpetrator doing the imitating.

- Moral pillar of the crime: the second pillar of the crime of imitating the trademark registered is the moral pillar, and by reference to the comparative laws, it was noted that the crime of imitating the trademark is an intentional crime, in which the general criminal intent is achieved, because the will of the perpetrator is directed to the tradition of the original trademark, knowing that it is a criminal act, and this crime cannot occur in the form of unintentional error, because every trader has to resort to the trademark registry before creating a trademark to ensure that the trademark does not resemble another trademark to distinguish the same type of goods or merchandise on the one hand, and it is rare that the similarity between the two signs is a coincidence without inadvertently (Thomas: 2018, pp. 1-13).

## **DISCUSSION**

The private (presumed) pillar of the crime of imitating the registered trademark: in addition to the general pillars, there is an assumed private pillar that must exist in the crime of imitating the trademark, which is the object of the crime (registered trademark).

The subject of the crime is a trademark: the subject of the crime must be a trademark that meets all the substantive conditions necessary for its validity, namely that the trademark be distinctive to distinguish goods and products similar to other's goods and that the trademark is new.

The seriousness of the trademark means that the trademark is not used by a dealer or other product on similar goods or products to prevent confusion among consumers, as novelty does not mean the novelty related to innovation or the creation of the trademark.

And that the trademark is legal; that is, it does not violate the provisions of the law or public order, public morals, and public interest.

The last condition is that the trademark is written in the official language.

And the loss of the trademark (the subject of the crime) to one of the above conditions leads to the invalidity of the trademark, its inability to own property, and therefore its lack of legal protection, which makes the trademark crime unfulfilled (Bone: 2019, pp.1187-1196).

The subject of the crime must be a registered trademark: after the objective conditions are met, the actual existence of the trademark is met, but the legal presence of it is not achieved if it does not meet the formal requirements, which is that its owner registers the trademark by following the procedures established by law with the competent authority, this means that only the registered trademark is the subject of protection in civil and penal. If its owner does not register it or does not renew the registration of the trademark or cancellation of its registration for any reason whatsoever, then this crime does not occur, and the judiciary confirmed that, in one of its rulings, it was decided that (trademark registration is the area of protection that the law criminalized to its imitation or used it other than its owner).

The comparative laws also went on to require the registration of a trademark for its owner to benefit from the legal protection prescribed in these laws. The French legislator in the trademarks Law of 1964 stipulated registering the trademark, and he decided that the trademark right of the owner of the trademark should not be final and could not be invoked in confronting others only after the trademark has been registered and following its filing (Mashdurohatur: 2019, pp. 413-420).

Likewise, Article (113) of the Egyptian Intellectual Property Protection Law stipulated that the law register the trademark for the commission of this crime, and the Algerian legislator in Article (26) of the Ordinance Concerning Marks No. 03/06 of 2003 stipulated that (the misdemeanor of imitation is a registered trademark). The penalty for the crime of imitation of the registered trademark.

The majority of comparative laws have gone into adopting the original and sub-penalties as a penalty for the perpetrator committing the crime of imitating the trademark, but it varied of these penalties, their duration, and amount:

Original penalties: Comparative laws differed regarding the type of original penalties imposed on the perpetrators of the crime of imitating the trademark; some of them took the penalties for deprivation of Liberty and financial together, while some adopted either penalties for deprivation of Liberty or financial penalties, while other laws were limited to financial penalties only.

One of the comparative laws that allowed a judge to choose between a penalty of imprisonment and a fine is the Algerian order relating to marks, for a judge may apply imprisonment or a fine or both, as Article (32) of it decided to punish every who person committed the misdemeanor of imitation with imprisonment from (6) Six months to (2) two years, with the penalty of the fine mentioned in Article (34) of the same law, which is set with a minimum of no less than two million five hundred thousand dinars, and a maximum of no more than ten million dinars or one of the two penalties.

And it is worth noting that the matter relating to the above Algerian marks made the punishment the same whether the perpetrator was a natural person or a legal person.

As for the Egyptian legislator, he is the other one who made the penalty of imprisonment and a fine, or one of the two penalties, as the perpetrator of the crime of imitating the trademark is punished by confinement for no less than two months, with a penalty of a fine of no less than (5000) five thousand pounds and not more than (20,000) twenty thousand pounds or one of the two these penalty.

And it is worth noting that the Egyptian legislator has tightened the penalty for this crime by making it mandatory imprisonment for no less than two months with a penalty of a fine of no less than (50,000) fifty thousand pounds while giving the judge the authority to choose between the fine and imprisonment.

And the Iraqi legislator went on to make the penalty for the crime of imitating the trademark by optional imprisonment for a period of no more than (3) three years or a fine that does not exceed or both (Ertekin et al.: 2018, pp. 45-65).

Sub-penalties: Many comparative laws go to stipulating sub-penalties in addition to the original penalties (confiscation, a publication of the judgment, destruction of the objects subject to the crime or used in its commission, and temporary or final closure of the institution).

And the Egyptian Intellectual Property Protection Law has made the penalty for the crime of imitating the registered trademark in addition to the original penalties sub-penalties, namely, the closure of the facility, as it stipulates that (the court may, upon conviction, order the closure of the establishment exploited by the convict for a period not exceeding six months, and the closure is obligatory in the event of recurrence).

The above the law also allowed the court to destroy the marks, and likewise, it has the right to destroy products, goods, store addresses, covers, etc., and the court may order the publication of the ruling in one or more newspapers.

As for the Algerian trademark Law, it did not stipulate the punishment for publishing the verdict. Rather, he included other sub-penalties, as Article (32 / paragraph 4) of it stipulated (destroying the things in violation).

And it stipulated the penalty for confiscation, as the Algerian legislator indicated that the judge might order the confiscation of the seized goods that contain imitation marks.

The Algerian trademark Law also adopted the penalty of closure, as it stipulated that (temporary or final closure of the institution), The Algerian legislator has been affected by the French law that took this penalty, and the final closure of the institution for a period not exceeding (5) five years, while the temporary closure of the institution by canceling the license is the duration of the punishment.

The French intellectual property protection law went on to introduce sub-penalties in addition to the original penalties, which are the temporary or final closure of the institution for a period of (5) five years as a maximum (Lazíková: 2019, pp. 21-31).

And the French legislator took the lute, As Article (716/ Paragraph 12) of the French Law for the Protection of Intellectual Property stipulates double the penalty, and the offender bears the costs of withdrawing imitation

goods from the market. Also, Article (716 / Paragraph 13) ruled against ordering. The offender has to pay the costs of withdrawing the imitation goods or ruling to destroy the imitation goods at the expense of the offender or to publish the judgment.

In addition to the original penalties, the Trademarks and Geographical Indications Law (the amended) take sub-penalties (publication of the judgment, destruction, confiscation), as Article (thirty-eighth) of the above, the law stipulated that (the competent court should confiscate, the seizure of the items seized for sale..., and it may order the publication of the ruling at the expense of the convict. Also damaging the machinery and tools used in the crime).

## **CONCLUSION**

Based on this research, it can be concluded that the trademark crime has the advantage of having its legal nature as it is a positive behavior crime with a harmful criminal result, which is an intentional crime. It is a crime of money as a temporary crime.

For the crime of imitating the registered trademark is general pillars, which is the material pillar represented by criminal behavior in the form of positive behavior (the act of imitation), and a harmful criminal result (material harm to the owner of the trademark or its loss, misleading the consumer), as well as the un material pillar, and special pillar (registered trademark).

The penalties mentioned in the laws, including Iraqi law, are not commensurate with the seriousness of the crime of imitating the registered trademark on the one hand, and the importance of the subject of this crime on the other hand.

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