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**Licensing as a Legal Contractual Mechanism  
For Trademark Protection**

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**Abstract:**

After the trademark fulfills the formal and substantive conditions stipulated in the provisions of Order No. 03-06 relating to trademarks, it is registered with the Algerian National Institute, that is to say the competent authority for this. After that, its owner acquires the right of ownership and the right to dispose of it. The latter is thus authorized toward economic operators in the market to place it on their products, goods, and even services for the purpose of marketing them and gaining commercial profits. Its owner is guaranteed to protect it from infringement or imitation. Thus, the licensing mechanism is considered an effective contractual protection to protect the right to the trademark, which is an intangible movable asset. It is not a tool to distinguish the source of products, but rather it has become a symbol of the qualities of these goods, products, or services in order to guarantee their quality.

**Keywords:** Trademark; licensing; exploitation; mechanism; contractual; protective.

**Introduction**

Industrial property rights have witnessed remarkable technological development due to the expansion of their exploitation by giant companies in the market and after most countries became aware of the dimensions and economic effects of exploiting such rights<sup>1</sup>. Therefore, they were considered the basic pillar for companies to establish their industries and services, and at the forefront of these rights is the trademark, which is considered a technology to encourage competition in the markets<sup>2</sup>.

After the trademark has met all the formal and substantive conditions stipulated in the Trademark Law<sup>3</sup>, it is registered with the Algerian National Institute of Industrial Property, which results in the owner or proprietor having exclusive ownership rights and the right to dispose of it by granting others a license to use or exploit it and place it on their products and goods for marketing purposes<sup>4</sup>, noting that the legislator has regulated the rights granted to the trademark owner under Article 9 of the Trademark Law.

The licensing contract is closely linked to the development of technological elements, taking into account future prospects in the field of commercial transactions and by virtue of the legal relationships of individuals. It is a relatively modern contract that focuses on the exploitation of an intangible movable asset,

namely the trademark, which is nothing more than a specific symbol or sign<sup>5</sup>, whether it is a word, name, image, or something else, provided that it is distinctive so that it fulfills its function in distinguishing products and services from their counterparts<sup>6</sup> and that it is capable of being represented in writing for the purpose of registering it, as the marks related to the sense of smell do not enjoy legal protection<sup>7</sup>.

Therefore, licensing the use of a trademark is an exclusive right that entitles its owner to dispose of his trademarks commercially and industrially, with the aim of achieving financial returns, enhancing competitive positions in the market, and transferring technical and technological knowledge in the field of technology<sup>8</sup>. This is done through several mechanisms and means of protection, including licensing. This license takes the form of a contract and is one of the types of commercial licensing contracts in which the trademark owner will allow others dealing in the market to use his trademark in exchange for financial sums.

The main reason behind the spread of the licensing contract in the financial and business environment is the development of the function it performs. The trademark is no longer just a tool to distinguish the source of products, but has become a symbol of the qualities of these products or services<sup>9</sup>. This development in the function of the trademark has been reflected positively on the licensing contract, where the following question was raised : **How successful is the licensing mechanism in the field of trademark protection in the market ?**

To answer this question, we will adopt the descriptive and analytical approach according to two main topics : defining the concept of the licensing contract as a mechanism for protecting the trademark (**First topic**), and the impact of the licensing contract in the field of trademark protection (**Second topic**).

### **THE FIRST TOPIC: Defining the concept of licensing as a brand protection mechanism**

The use of licensing technology was approved under the provisions of Article 25 of the repealed Order No. 66-57<sup>10</sup>, and then within the Trademarks Law, that is to say Order No. 03-06, and in its Articles 16 and 17, but it did not give importance to the concept of a trademark license agreement, leaving that to the judiciary and legal scholars (**First requirement**), unlike what it did with its forms (**Second requirement**).

#### **First requirement: Defining the meaning of licensing as a contractual mechanism for trademark protection**

The licensing agreement is a system of cooperation between projects that provides the best opportunities for expansion based on brand reputation. Despite its widespread use, it remains unclear. Therefore, we must define the licensing agreement (**First section**), deduce its advantages and characteristics (**Second section**), and then demonstrate its economic importance (**Third section**).

### **First section: Defining trademark licensing agreement**

The trademark licensing contract is known as one of the important contracts that relate to intangible assets. This importance is highlighted by the role it plays in the economic field, as it is an important tool that new investors and owners of medium-sized projects resort to in order to expand their activities and increase confidence in their products or services by obtaining a license from one of the giant companies with a global reputation, to exploit its trademark and place it on goods and products for a certain period of time in exchange for obtaining an agreed financial amount<sup>11</sup>.

The licensing agreement is also considered one of the most important consequences of the trademark owner's ownership rights, as no one else can exploit it without a license from its owner. This license takes the form of a contract, which is an agreement between the trademark owner and the licensee, granting the latter the right to exploit and use the trademark according to agreed terms and conditions. Thus, the licensee becomes the owner of a personal right to this use<sup>12</sup>.

It should be noted that most legislations, such as the Algerian, did not give importance to defining it, as they were limited to recognizing its conclusion as one of the transactions related to trademarks<sup>13</sup>. It is nothing but a form of commercial franchise that is characterized by basic features, including the right to use the trade name of the owner of the trademark licensing system and all methods of work, systems, instructions and trademarks<sup>14</sup>. It is considered among integrated trades, as we find customers are more attached to the collective trademarks of the distribution network than to the personal activity of the trader<sup>15</sup>.

Therefore, a licensing agreement is defined as the permission or license granted by the trademark owner to a third party to use it. Without this license, this third party does not have the right to exploit the trademark according to a contract that brings together at least two parties<sup>16</sup>: the licensor, the trademark owner, and the licensee, the beneficiary, who is authorized to use it under an agreement for a specific period of time in exchange for payment<sup>17</sup>.

## **Second section: Licensing agreement characteristics in a trademark use**

A licensing agreement is a contractual mechanism that is carried out in accordance with the rules of the contract established in the Civil Code in order to protect the trademark from imitation and illegal use. It is characterized by being a contract that is: unregulated (**First**), binding on both parties (**Second**), based on personal consideration (**Third**), a business contract (**Fourth**), and characterized by the economic gap (**Fifth**).

### **First: Licensing is an unregulated contract**

Licensing is among the unregulated business contracts, as the Algerian legislator did not specify its parties, the obligations incumbent upon them, the ways in which it expires, or the method by which its disputes are settled, but rather left the matter to agreement and to commercial customs and traditions<sup>18</sup>.

### **Second: Licensing is a binding contract for both parties**

That is, it establishes a set of reciprocal obligations between its parties. For example, if the licensor is obligated to place the trademark at the disposal of the licensee in order for him to exploit it, then in return the latter is obliged to pay him the financial consideration, as each of them is a creditor and a debtor at the same time<sup>19</sup>.

### **Third: Licensing is a contract based on the principle of personal status**

This means that the licensing contract is one of the contracts based on the idea of personal consideration, on the basis that the personality of its two parties is worthy of trust and consideration. This is evident in the reputation, technical competence, credit, and trust between its two parties, as this contract does not pass to the heirs except in the case of a special condition in the contract<sup>20</sup>.

### **Fourth: Licensing is a business contract**

Since the license originated in the financial and business environment, it has a special legal nature characterized by complexity. Therefore, strong companies in the market impose restrictive conditions on the contracting party<sup>21</sup>.

## **Third section: The economic status of a licensing agreement as a brand protection mechanism in the market**

The economic importance of a licensing agreement in protecting trademarks in the market is highlighted as follows:

**First:** Licensing is considered one of the methods that were invented by the needs of trade and the business environment, before the legislator addressed it with partial legal regulation to increase commercial establishments and expand the scope of their activity<sup>22</sup>, and to invade markets by means of the license that a commercial establishment grants to another establishment or several establishments to sell products or provide services, until it became the most widespread economic commercial practice in the developed and developing countries<sup>23</sup>.

**Second:** It is an important means in the hands of its owner to obtain money by investing it outside his homeland by entering new markets that he could not enter on his own, so that he can distribute his products through other people, which increases the reputation and fame of the brand and enables him to double his profits<sup>24</sup>.

**Third:** The licensing contract works to crystallize the objectives of competition that work to achieve economic progress and development on various levels and achieve what is known as economic prosperity, improving employment and the standard of living of consumers<sup>25</sup>, in addition to achieving profits, attracting the largest number of customers and marketing the largest possible amount of goods, products and services, especially if it carries within it the brands with high renown in national and international markets<sup>26</sup>.

**Fourth:** New competitors and owners of limited enterprises resort to it with the aim of expanding their activities and increasing confidence in their products or services by obtaining licenses from one of the giant companies to exploit its brand for a certain period in exchange for a fee<sup>27</sup>, which enables the licensed institution or the licensed institution to break into the markets and introduce and promote its products<sup>28</sup>.

**Fifth:** The economic gap. This refers to the economic disparity that exists between the obligations of the contracting economic parties. In the business field, we find a strong party imposing contractual obligations and terms on the weak party, which is in dire need of technical knowledge and technology in order to enter the market and compete and crowd in it. This makes it accept those economically disparate obligations in order to put the trademark on its goods and products. Some economists consider this to be a special kind of submission, not the

submission stipulated in civil law, because that submission has its own rules (legal framework). Some refer to it as economic submission<sup>29</sup>.

## **Second requirement: Forms of licensing as a contractual mechanism for trademark protection**

The licensing agreement is considered one of the business contracts through which producers seek to improve and develop their basic products to gain consumer confidence. It can take one of the forms included in the requirements of Article 16 of the Trademarks Law, which are: the sole licensing agreement (**First section**), the exclusive licensing agreement (**Second section**), and the non-exclusive licensing agreement (**Third section**)<sup>30</sup>.

### **First section: Sole License Agreement**

It is called a single license, which means that the right to exploit the trademark is granted only to the licensee, excluding its owner, as neither the licensor nor the licensee may grant or assign any other new licenses<sup>31</sup>.

### **Second section: Exclusive licensing agreement**

It is called a monopoly or exclusive licensing contract, which is an agreement in which the exploitation of the trademark is limited to the licensee and no one else within the geographical boundaries drawn for him by the contract<sup>32</sup>. It enables the licensee to use the trademark while excluding everyone from participating in it, including its owner. Therefore, his fees are usually higher<sup>33</sup>.

### **Third section: Non-exclusive licensing agreement**

It is called an undivided licensing agreement. It is defined as an agreement in which the trademark owner has the authority to grant multiple licenses to use and exploit the trademark as he wishes<sup>34</sup>. The non-exclusive license does not prevent the licensor, the trademark owner, from granting other licenses to exploit the trademark to any number of licensed persons he wishes, as he himself has the right to exploit the trademark<sup>35</sup>.

## **THE SECOND TOPIC: The impact of the licensing agreement as a contractual mechanism in the field of trademark protection**

The trademark licensing agreement constitutes a powerful tool, a strong shield, and an incentive to acquire knowledge, expertise, and technologies. It has allowed the economic operator to be present and compete in the market<sup>36</sup>. With

the acceleration and growth of trademarks and the increase in competition, the trademark has become one of the most important and powerful intangible assets of value. Its importance in the marketing field has increased as a result of the increasing complexity of consumer behaviour and its aspiration to acquire the best products. The consumer does not always buy products according to their tangible characteristics, but may do so influenced by the image that reflects the product's trademark<sup>37</sup>. The effect of this contract is determined by defining the obligations of its parties (**First requirement**), as well as on the issue of its termination (**Second requirement**).

### **First requirement: Obligations of the parties to the contractual relationship in a trademark licensing agreement**

It was previously mentioned that the licensing contract is a bilateral contract, as it establishes mutual obligations that fall on both parties, i.e., the licensor granting the license, and the second party, the licensee. However, the distinctive thing about this contract is the issue of economic disparity, or what is known as the economic gap, because no matter how much we strive to impose protection on the weaker party in the contractual relationship in the licensing contract, there remains a weak party and another that is economically strong<sup>38</sup>. Therefore, we will list the obligations of the trademark owner (**First section**), and then we will move on to mentioning the obligations of the licensee (**Second section**).

#### **First section: Obligations of the trademark owner**

The trademark owner in a licensing agreement has a number of obligations, mainly: the obligation to transfer the right to use or exploit the trademark (**First**), the obligation to provide technical assistance (**Second**), the obligation to respect the term of the license (**Third**), and the obligation to provide a guarantee (**Fourth**).

#### **First: The obligation to transfer the right to use the trademark**

The licensor is obligated to grant permission or approval to the licensee to exploit the mark in accordance with the contractual conditions agreed upon between him and the licensee. This obligation does not mean depriving the licensor of his right to exploit the mark he owns, but rather he also remains entitled to exploit it. For example, if the licensor sells the mark to a third party during the validity of the licensing contract, the licensee's right to exploit the mark remains valid and enforceable against the new buyer of the mark<sup>39</sup>.

## **Second: Commitment to providing technical assistance**

The trademark owner is obligated to provide technical assistance and technical information to the licensee, whether in the form of special training for its workers on how to exploit the trademark or in the form of training on achieving the required quality in the goods bearing the trademark subject to the contract. The contract usually includes a determination of the product category, type, size, quantity, raw materials from which it is made, the machines used, and the human, climatic, and environmental working conditions<sup>40</sup>.

## **Third: Commitment to respecting the license period**

The licensor is obligated to respect the term of the license agreed upon in the contract, as the contract cannot be terminated before its expiry by his own will, and he is liable if he violates this obligation, but he may be exempted from this liability if there are serious reasons that prompted him to do so related to the reputation and fame of the brand<sup>41</sup>.

## **Fourth: Warranty commitment**

The guarantee intended here is the guarantee of exploitation or use, where the licensor is obligated to guarantee the licensee's exploitation of his trademark. This guarantee is subject to the general rules regarding the guarantee against interference and entitlement, whether from him personally or from a third party, throughout the term of the contract. The use of the mark by a third party is considered interference. If this interference is in the form of imitation<sup>42</sup>, the licensee must notify the licensor so that he can pursue the imitator. If he remains silent after notification, the licensee can file a claim himself in an infringement lawsuit. If the interference is material in the form of competition from a third party, the licensee has the right to claim compensation without notifying the licensor. The licensor is also obligated to guarantee against latent defects, such as the licensee's failure to pay protection fees<sup>43</sup>.

## **Second section: Obligations of the party benefiting from the license agreement**

The obligations of the second party in the contractual relationship are highlighted in the contract in the obligation to: pay the financial consideration (**First**), use the trademark (**Second**), maintain the trademark (**Third**) and respect the contractual conditions (**Fourth**).

## **First: Commitment to paying the financial compensation**

The licensee is obligated to pay the financial compensation for benefiting from the right to exploit the trademark, as the franchisee always aims to make a profit through the trademark exploitation license agreement<sup>44</sup>.

### **Second: Commitment to using the trademark subject to the license**

The licensee in the licensing contract undertakes a final and conclusive undertaking that is not subject to objection, denial, or defense to the contrary, to use and exploit the trademark in a legitimate manner and within the limits and purposes stipulated, whether in terms of the license for use, its scope, duration, and compensation. This is an essential undertaking in the licensing contract, as if the original owner were the one exploiting the trademark himself<sup>45</sup>.

### **Third: Commitment to maintaining the brand's reputation in the market**

The licensee is obligated to maintain the reputation of the trademark in the minds of the public and to refrain from any action that harms its reputation<sup>46</sup>. He must refer in his dealings to his status as a licensee. The licensee is responsible when he fails to maintain the reputation of the trademark, and this responsibility is essentially contractual. Therefore, both parties should report any infringement or violation of the rights arising from the trademark<sup>47</sup>.

### **Fourth: Commitment to respecting the agreed contractual terms**

The licensee is obligated under the licensing agreement to implement all instructions provided by the trademark owner and stipulated in the contract terms, whether commercial, financial, or technical. This obligation is essential for the licensee to understand the licensing system and serves as a means for the licensor to protect their trademark image<sup>48</sup>. Therefore, the licensee must adhere to the exclusivity terms. If they exceed these terms, they will be liable for counterfeiting, as their use of the trademark on goods and services not specifically listed in the agreement will result in their liability. Even if these products bearing the trademark cause harm to the consumer, the licensor will not be held responsible, as this constitutes both counterfeiting and a breach of contract<sup>49</sup>.

### **Second requirement: Termination of the contractual relationship in a trademark license agreement**

As a fixed-term contract, the licensing agreement is subject to the general rule governing its validity, which is that the contractual relationship between the licensor and the licensee remains in effect until the specified term expires. The contract ends with the expiry of that term, during which neither party can

independently cancel or amend it unless permitted by law or agreement<sup>50</sup>. Hence, a distinction must be made between the natural causes that terminate the contractual relationship in this contract in an original natural way (**First section**) and those that terminate it in an unnatural way, that is to say by consequence (**Second section**).

### **First section: The original termination of the contractual relationship in a trademark licensing agreement**

This termination occurs in the following cases: expiry of the contract term (**First**), termination by unilateral will (**Second**), termination by loss of personal standing (**Third**).

#### **First: Expiry of the contract's specified time period**

Since this contract is a fixed-term contract, the general rule is that it expires with the expiry of its term, and thus the obligations that arise between its parties are not eternal obligations, but rather end with the expiry of the term.

#### **Second: Termination by unilateral will**

Since the licensing contract is based on the availability of two wills, it is possible to terminate the contract by a single will, provided that there is an agreement in the terms of the contract that authorizes one of the parties to do so<sup>51</sup>.

#### **Third: Loss of personal standing**

Since both contracting parties are considered, their loss constitutes a reason for the termination of the contract, and this is achieved due to death, bankruptcy, for example<sup>52</sup>.

### **Second section: The consequential termination of the contractual relationship in a trademark licensing agreement**

Most cases of the termination of the relationship are embodied in: transfer of ownership (**First**), termination (**Second**), dissolution (**Third**).

#### **First: Trademark transfer case**

Article 14 of the Trademark Order makes this clear, so the owner has the right to assign the rights he has acquired by virtue of registering his trademark, whether the assignment is of the entire project or only part of it.

#### **Second: Termination case**

The principle that prevails in bilateral contracts is that they cannot be terminated or modified by unilateral will, because that would infringe upon the principle of the binding force of the contract. Termination means the dissolution of the contractual relationship retroactively as a penalty for the debtor's failure to perform his contractual obligations, so the other party requests the termination of the contract<sup>53</sup>.

### **Third: Dissolution case**

Dissolution means that if the performance of the contractual obligation becomes impossible due to a reason external to civil law, such as force majeure, then the obligation here is extinguished, and with it the corresponding obligation is extinguished. In this case, it is called dissolution, which is the termination of the contractual relationship as a result of the impossibility of performing the obligation, so with it the corresponding obligation is extinguished, and the contract is dissolved on its own<sup>54</sup>.

### **Conclusion**

Licensing is considered a contractual mechanism to protect the right to use a trademark; it is a mechanism established under the rules of trademark law. Therefore, the study reached the following key findings:

- The absence of specific provisions governing trademark exploitation contracts, aside from Articles 16 and 17 of the Trademark Law, necessitates that its provisions be subject to general contract law, specifically the theory of contracts as outlined in the Civil Code.
- Registering a trademark with the competent authority empowers its owner to dispose of it, with the possibility of licensing it to others for use and placement on products and goods, thereby fostering a competitive market environment.
- Licensing is an effective contractual mechanism for trademark protection, as it encourages producers to improve and develop their products, thereby gaining consumer confidence and expanding the activities of commercial enterprises.
- The use of licensing agreements at the national level among businesses enables the creation of economic entities with substantial capital and high-quality technical and administrative expertise.

In light of these findings, we offer the following suggestions, which take the form of recommendations:

- The legislator should be alerted to the necessity of establishing a legal framework specific to licensing agreements in general, particularly trademark

licensing agreements, given their prominent role in stimulating and activating market competition and raising the country's economic level.

- It is essential to apply trademark licensing agreements across all economic sectors, not limiting them to the consumer sector, to achieve multi-dimensional effectiveness.

- It is imperative to move towards creating a digital platform dedicated to licensing agreements, in line with the era of digitalization, artificial intelligence, and technology, given its connection to the fields of finance, business, and industrial property rights, especially trademarks.

## Footnotes

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<sup>50</sup>- Rachdi Saida, Op.cit. p.115.

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<sup>52</sup>- Alaa Aziz Al Djabouri, Op.cit. p. 209.

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