
The Intellectual Property Laws and the Protection of Armorial Bearings

Noel Cox*

Lecturer in Law, Faculty of Business
Auckland University of Technology

According to the usual description of the Law of Arms, coats of arms, armorial badges, flags and other similar emblems of honour may be regarded as a species of intellectual property. But the common law courts have no jurisdiction over matters of dignities and honours. Even lawfully granted coats of arms would appear to have no enforceable legal protection in New Zealand and Australia. This article looks at several possible ways to give effective legal protection to coats of arms within existing legal arrangements, and contrasts these inadequate procedures with the protection afforded by the ancient regime of the High Court of Chivalry.

Introduction

This article examines armorial bearings as a form of intellectual property. It examines their nature, and how they are created. It then proceeds to review their value, and whether they merit protection. The inadequacies of existing law to achieve any meaningful form of protection is then reviewed. This is contrasted with the position in England in former centuries. In the conclusion there is an assessment of the effectiveness of current protection, and suggestions for possible improvement.

The nature of armorial bearings

According to the usual description of the Law of Arms,¹ coats of arms, armorial badges, flags and other similar emblems of honour may only be borne by virtue of ancestral right, or of a grant made to the user by the authority of the Crown.² In England (and

Scotland) the Crown's exclusive prerogative prevailed, as it did in many, though not all, European countries.³ The Sovereign is the fountain of all honour and dignity.⁴ Because the right to bear arms depends upon the exercise of the royal prerogative, it must be regarded as a dignity, an honour of the Crown.⁵

Collins (1886) 5 LT 903. This has not always been accepted, however. The letters patent issued by Henry V to the sheriffs of three counties in 1418 required that only those men possessed of arms by ancestral right, or by grant from someone possessing the authority to grant arms cannot be taken as conclusive that the Crown yet possessed the sole authority to grant arms. This was well established by the end of the century, however, although the first known patent issued by the royal heralds only dates from 1439 (to the Drapers' Company). The Crown is, of course the fount of all dignity: *Norfolk Earldom Case* [1907] AC 10 at 17 (Lord Davey).

³ The jurisdiction of the pre-heraldic High Court of Chivalry to decide dispute to arms was based on the Law of Arms, not the royal prerogative. This was reinforced by the exclusive jurisdiction of the High Court of Chivalry to determine the right to arms: *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, Vol 3, 586.

⁴ *Norfolk Earldom Case* [1907] AC 10 at 17 (Lord Davey).

⁵ It has always been assumed that this is the prerogative of the Crown: *Strathmore Peerage Case* (1821) 6 Pat 645 at 655 (HL). The Crown's prerogative as fount of honour remains exercisable personally by the Sovereign, although in Canada, for example, it has been almost totally delegated to the Governor-General since

* LLM(Hons) PhD CertTertTchg, Barrister of the High Court of New Zealand, and of the Supreme Courts of Tasmania, New South Wales and South Australia, Lecturer in Law at the Auckland University of Technology.

¹ Cox, "The Law of Arms in New Zealand" (1998) 18 (2) *New Zealand Universities Law Review* 225.

² It is now accepted that it is illegal to assume arms: *Austen v*

This prerogative is exercised on the Queen's behalf by her heralds, members of the College of Arms. The 13 members of the Royal Household are appointed by the Sovereign to be her Officers of Arms-in-Ordinary with special responsibility for armorial, genealogical, ceremonial and other similar matters.⁶ The kings of arms and heralds were incorporated by letters patent in 1484, as the Corporation of the Kings, Herald and Pursuivants of Arms.⁷ The College itself has no authority, and the armorial prerogative is exercised by individual kings of arms and heralds, subject to the authority of the Earl Marshal, who authorises each individual grant, by warrant. The prerogative to grant arms is exercised in New Zealand by the deputy to Garter King of Arms, the New Zealand Herald of Arms Extraordinary to Her Majesty The Queen.⁸

The granting and use of such armorial insignia is subject to the Law of Arms. In England this law is regarded as a part of the laws of England, and the common law courts will take judicial notice of it as such,⁹ but it is not part of the common law.¹⁰ Since the right to bear arms is not a matter cognisable by the common law,¹¹ but only by the Law of Arms, common law courts are unable to enforce any right to arms. The armorial laws of New Zealand and Australia are derived from those of England,¹² according to the principle that settled colonies

inherited English law,¹³ and are therefore in comparable positions.

Those arms used by local authorities have statutory protection,¹⁴ as have those of the Crown.¹⁵ But others have little or no protection against misuse. Yet the Law of Arms does regulate the use of these indicia, and for many centuries the High Court of Chivalry, whose principal business was the control of armorial bearings, was active in England. The exclusive jurisdiction of deciding rights to arms, and claims of descent, was vested in the High Court of Chivalry.¹⁶ However, there is now in England no regularly constituted court in which the Law of Arms is administered, the High Court of Chivalry being obsolescent.¹⁷

The common law courts have no jurisdiction over matters of dignities and honours, such as armorial bearings¹⁸ or peerages,¹⁹ but these dignities have legal status nonetheless.²⁰ Armorial bearings are incorporeal and impartible hereditaments,²¹ inalienable, and descendable according to the Law of Arms.²² Generally speaking, this latter means they

1947.

⁶ *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, Vol 3, 586 established that the Crown had supreme control and jurisdiction over armorial bearings, and could and did grant arms. From 1467 the right of the Crown to issue patents of arms was explicitly asserted. However, until late in the 14th century at least, the English royal heralds themselves had no control over the design of arms, or who bore them, being responsible only for recording and identifying the various coats of arms.

⁷ On the death of King Richard III his Acts were declared void, and the College of Arms received a new charter in 1556. However, the existence or absence of legal authority for the collegiate government of the College did not affect the heraldic jurisdiction of the individual kings of arms and heralds.

⁸ Secretary of the Cabinet, *Cabinet Office Manual* (Cabinet Office, Wellington, 1988).

⁹ *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 (Nedham J).

¹⁰ *R v Parker* (1668) 1 Sid 352; 82 ER 1151 (Keeling CJ).

¹¹ *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] P 133; [1955] 2 WLR 440 (Lord Goddard, Surrogate) (*Manchester Corp*).

¹² Cox, op cit n 1.

¹³ Williams, "Reception of the Common Law in New Zealand" (Paper presented at the Conference on the Common Law in Asia, University of Hong Kong 15-17 December 1986).

¹⁴ *Local Government Act 1974* (NZ), s 696.

¹⁵ *Flags Emblems and Names Protection Act 1981* (NZ).

¹⁶ *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, vol 3, 586. The High Court of Chivalry is the subject of a chapter in Coke, *Coke upon Littleton* ('*First Institutes*') notes by F Hargrave and C Butler (first published 1628, Garland Publishing, New York, 1979), Vol 4, Ch 17. The Crown had supreme control and jurisdiction over arms, as part of the prerogative.

¹⁷ Although it sat in 1954, it was regarded by both Blackstone and Holdsworth as obsolete. Appeals originally lay to the sovereign, and the former right of appeal to the Court of Delegates, and after 1832 to the Judicial Committee of the Privy Council, has since been abolished. *Privy Council Appeals Act 1832* (2 & 3 Will IV c 92) (UK), s 3. For the procedure on an appeal, see *Blount's Case* (1737) 1 Atk 295; 26 ER 189.

¹⁸ *Duke of Buckingham's Case* (1514) Keil 170; 72 ER 346.

¹⁹ *Earl Cowley v Countess Cowley* [1901] AC 450 (HL).

²⁰ *Manchester Corp* [1955] P 133; [1955] 2 WLR 440 (Lord Goddard, Surrogate). As early as *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, Vol 3, 586 it was established that a man could have obtained at that time a definite right to his arms, and that this right could be enforced against another.

²¹ For a discussion of corporeal and incorporeal property in this context see Cox, "The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand" (1997) 17 (4) *New Zealand Universities Law Review* 379.

²² *Wiltes Peerage Case* (1869) LR 4 HL 126 at 153 (Lord

are inherited by the male issue of the grantee, though they can be inherited by the sons of an heraldic heiress, where there is no surviving male heir.²³

Arms are usually granted to the grantee and his or her descendants with due and proper differences according to the Law of Arms. Sometimes arms are granted with an extended limitation embracing all the descendants of the father or some more remote ancestor of the grantee.²⁴ Arms descend to males in the first instance,²⁵ but on the failure of male descendants they may be transmitted through female representatives as quarterings.²⁶

The value of armorial bearings

Although the common law courts do not regard coats of arms as either property or as being defensible by action, armorial bearings are a form of property nevertheless, generally described as *tesserae gentilitatis* or insignia of gentility. Armorial bearings are used by companies, by individuals and by government agencies. Many of these (particularly in the case of official arms) are either granted by the Crown or, in the case of the armorial bearings used by local authorities, authorised by statute.²⁷ However, the assumption of arms has always occurred. Where the arms assumed do not resemble those borne by any lawful user there is little harm, except to the income of the Officers of Arms, who rely for a living upon the fees they charge. But where the arms resemble, or are direct copies, of existing arms, there are greater issues at stake.

There is an increasing tendency towards the illegal usurpation of coats of arms, either by creating bogus arms, or by adopting so-called “family” arms, those which belong to a family with the same name as the usurper. Whether this is because of an unwillingness to obtain a grant, or some other reason, is immaterial to whether protection should be provided for legally conferred arms.

The whole of the intellectual property law is based upon several premises. One is that the author (or his or her employer) of an original work ought to be entitled to the benefit of that work.²⁸ Another is that people should be entitled to the benefit and advantage of a good name and reputation.²⁹ Though the former, as represented by the laws of copyright, does not require that the work be in a business situation, the latter (as found in passing off), does. It is therefore not readily applied to armorial bearings. Yet coats of arms may reflect a considerable commercial investment, as shown in the use of armorial bearings by major companies such as banks and insurance companies. And they are in form a grant from the Crown, which surely would be concerned to ensure that the monopoly thus granted would be effective.

Coats of arms may be regarded as a species of intellectual property. The classification of intellectual property is based not upon the physical nature of the property, but upon the means by which it is protected. Intellectual property includes designs, trade marks, and literary, artistic, and musical works, films, video productions, photographs, and designs of all types protected by the copyright and other specific laws. Yet coats of arms, as will be shown in the next part of this article, are not readily protected by any of the existing intellectual property laws. It is strange that armorial bearings, though granted pursuant to the royal prerogative, should lack effective protection.

The inadequacies of existing protection

Even lawfully granted coats of arms would appear to have no enforceable legal protection in New Zealand and Australia, a matter of some concern given that a grant of arms will cost a petitioner anything from NZ\$10,000 to \$30,000.³⁰

Chelmsford).

²³ *Ibid.*

²⁴ See *Stubs v Stubs* (1862) 1 H&C 257.

²⁵ *Wiltes Peerage Case* (1869) LR4 HL 126 at 153 (Lord Chelmsford).

²⁶ Arms borne by an heraldic heiress were traditionally shown on lozenges rather than the traditional shields, and would be inherited by any children she might have.

²⁷ *Local Government Act 1974* (NZ), s 696.

²⁸ See generally *Erven Warmink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731; [1979] 2 All ER 927.

²⁹ *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 1223 (Lord Macnaghten).

³⁰ The fees of the College of Arms, London, set 1 January 2000, were as follows: personal arms £2,925 and upwards. Impersonal arms (granted to local bodies, charities, educational institutions, societies and the like) cost upwards of £6,400. Commercial arms (granted to trading companies) cost at least £9,600.

The fees charged by Lord Lyon King of Arms, Edinburgh, are somewhat lower, starting at £1,225. Though relatively high, these fees all compare favourably with the costs of

Indeed, the situation is hardly any more satisfactory in England, where the High Court of Chivalry has the power to prevent the unlawful use of arms, but has been inactive for some centuries.³¹ In neither country may the common law courts be appealed to, as they cannot question the legality or otherwise of the use of armorial bearings.³² No court currently exists in New Zealand which has a jurisdiction to administer the Law of Arms.³³

Coats of arms are a form of artistic work. They are also akin to designs or trade marks. These existing laws afford some protection to coats of arms, though, as will be seen, not very effectively. For convenience the laws looked at in detail are those of New Zealand. The Australian situation is similar.

Trade marks, trade names, service marks, logos³⁴ and other commercial indicia are protected by the common law action for passing off.³⁵ A person is liable in the tort of passing off where in the course of a business transaction relating to his or her goods or services that person represents them as being those of the plaintiff, in a manner calculated to deceive members of the public into thinking that the goods or services are those of the plaintiff or of a group to which the plaintiff belongs.³⁶ In order to bring an action, a party must demonstrate that there is some reputation or goodwill attaching to that party's name, mark or get-up; that the defendant has used the same or a deceptively similar mark, name or get-up so as to deceive or confuse the relevant

public; and that as a result of the defendant's conduct, damage has been caused or is likely to be caused in the plaintiff's business reputation or goodwill.

Each part of this test presents difficulties for the armiger³⁷ wishing to take an action for passing off to protect his or her coat of arms. Goodwill has been described as the: "benefit and advantage of a good name, reputation and connection of a business. It is the attractive force which brings in custom."³⁸ Goodwill can not arise unless there is some actual trading. The reputation is also business reputation. Neither is relevant for personal arms, though may be sufficient to establish an action by trading corporations.

Misrepresentation is where there is a false statement of fact, not merely a broken promise. The statement must also be wilfully false, not merely negligent.³⁹ A statement may be either by words or by conduct. Innocent misrepresentation, when the statement is not known to be false, is a ground for relief against a contract if such statement furnished a material inducement to the plaintiff to enter into that contract.⁴⁰ It is this requirement of inducement which renders misrepresentation an unsuitable action for protecting armorial bearings.

A negligent though honest misrepresentation, spoken or written, may, in certain circumstances, give rise to an action in tort for damages for financial loss caused thereby, apart from any contract or fiduciary relationship.⁴¹ But little, if any, damage would occur by the purchasing of fake arms.

None of the above actions would be of the slightest use in preventing the usurpation of arms. They might be used against purveyors of fake arms (the so-called "bucket-shop" heraldists), but only by the actual purchasers of such armorial bearings, who would have to prove inducement to purchase and a misrepresentation as to legal status.

The *Fair Trading Act* 1986 (NZ) prohibits misleading or deceptive conduct in trade.⁴² This

commissioning "logos" and other commercially produced emblems.

³¹ Lord Goddard suggested that the court be placed upon a statutory basis before commencing any new period of activity. His Lordship also indicated that he thought that it would be inappropriate for the court to exercise its jurisdiction where armorial bearing were being used illegally, but merely for decoration or embellishment. Only where arms were being used in a context which implied some attempt to identify the illegal user with the true owner of the arms, as by displaying the arms on a corporate seal: *Manchester Corp* [1955] 2 WLR 440 at 449, 450-451.

³² *Duke of Buckingham's Case* (1514) Keil 170; 72 ER 346.

³³ Cox, op cit n 1.

³⁴ Logograph, a character, or combination of characters, used to represent a word. Often now used, loosely, to describe a badge.

³⁵ *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 All ER 873.

³⁶ See generally *Erven Warnink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731; [1979] 2 All ER 927.

³⁷ An individual entitled to a coat of arms.

³⁸ *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 1223 (Lord Macnaghten).

³⁹ *Derry v Peek* (1889) 14 App Cas 337.

⁴⁰ *Jolly v Palmer* [1985] 1 NZLR 658.

⁴¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; [1963] 2 All ER 575

⁴² Long title.

includes misrepresentation. Again, this will provide no protection for personal armigers against the usurpation of their arms, though it will cover some instances of “bucket shop” purveyors of arms. Arguably, even a territorial council also does not enjoy any protection under this Act either, since it is not in trade as such.⁴³

The *Trade Marks Act 1953* (NZ) gives valuable and potentially perpetual monopoly rights for names or other indicia used for trading purposes, provided they are able to pass certain tests as to registrability so that exclusivity is not conferred on words which ought fairly to be available for all to use.

A “trade mark” is defined as:

“A mark used or proposed to be use in relation to goods or services ... so as to indicate, a connection in the course of trade between the goods or services and some person having the right either as a proprietor or as a registered user to use the mark.”⁴⁴

“Mark” includes any “device, brand, heading, label, ticket, name, signature, word, letter, numeral or any combination thereof”.

The *Trade Marks Act 1953* (NZ) would provide reasonably effective protection to a coat of arms, but has two serious drawbacks. First, it is limited to use in relation to goods or services. Secondly, it requires registration. Given that a coat of arms is granted by the Crown, separate registration should be unnecessary.

By means of the *Designs Act 1953* (NZ), a “design” may be registered and protected for up to 15 years against any copying, whether or not the infringing design was independently produced. In this respect the *Designs Act* differs from the *Copyright Act 1994* (NZ) by giving the owner of a registered design a true monopoly.

The *Designs Act 1953* applies to new or original designs which can, as a result of an application of the Act, be registered in the Patent Office, which then gives the registered design holder exclusive rights over the use of any article in respect of which the design is registered.⁴⁵ The standard of novelty or

originality is however higher than the originality requirement under the *Copyright Act 1994*.

The owner of a registered design enjoys a monopoly in its use for the article or articles in respect of which it is registered. All a holder must prove is the existence of the registration and the defendant’s production or sale of an article to which the same or a similar design has been applied. The only defence available to the defendant is that the registration is invalid for some reason. The advantage of a registration is that it lessens the burden of proof on the holder if a design is copied, in comparison with the copyright situation.

Like the *Trade Marks Act 1953*, the *Designs Act 1953* is intended for commercial indicia. The additional requirement for registration also renders it unsuitable for protecting coats of armorial bearings.

In the days of the information revolution copyrights are likely to take on increasing significance. Basically, they are a negative right which is owned by the person producing an original work (whether as author, composer, artist and so on) which allows the holder to prevent others from copying the work for their own commercial advantage. As a general rule any “work” which is not itself a copy attracts a copyright.⁴⁶ It covers literary, artistic and musical works, films, video productions, photographs and designs of all types.⁴⁷ The aim of the law in this area is to protect the honest efforts of a person who produces an original work, regardless of their intention in doing so.⁴⁸

The *Copyright Act 1994* (NZ) covers literary and artistic works, dramatic and musical works, sound recordings, cinematographic films (including their soundtracks), television broadcasts and sound broadcasts. “Literary work” is broadly interpreted, for example, an original computer software program even though in source code (algebraic symbols and

⁴³ Though the scope of this limitation has been questioned, and was reduced by *Dee v Deane* (unreported, District Court, Joyce J, NP 1209/96, 26 September 1997).

⁴⁴ Section 2; see *Re Powell’s Trade Mark* [1893] 2 Ch 388 at 403-404.

⁴⁵ Under s 11.

⁴⁶ *University of London Press v University Tutorial Press* [1916] 2 Ch 601 at 608-609 (Petersen J); *Macmillan & Co v Cooper* (1923) 40 TLR 186 at 190 (Lord Atkinson); *Ladbroke Ltd v William Hill Ltd* [1964] 1 WLR 273 at 289 (Lord Devlin), 292 (Lord Pearce).

⁴⁷ For example, dress templates: *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* (unreported, High Court, Auckland, Hillier J, CL 15/87, 9 December 1988).

⁴⁸ The question of originality is a question of fact and degree in each case: *International Credit Control Ltd v Axelsen* [1974] 1 NZLR 695 at 699 (Mahon J).

technical keywords).⁴⁹

Section 14 of the *Copyright Act 1994* (NZ) provides that unpublished works attract copyright from the moment they are written provided the author is a New Zealand citizen or was living in New Zealand at the time the work was created. It goes on to provide that published⁵⁰ works enjoy New Zealand copyright if they were first published in New Zealand or if the creator was living in New Zealand at the time of first publication or immediately before his or her death whichever occurred first. Reciprocity of protection exists with most overseas countries,⁵¹ although the levels and quality of protection in overseas countries vary.

Section 21 of the *Copyright Act 1994* sets out that, subject to three stated exceptions, the author of the work is the owner, holder of the copyright.⁵² The exceptions cover persons who produce works in the course of employment (for example, for a newspaper) in which case the employer “owns” the copyright for publication in the employment context only, commission work, the copyright passing to the person commissioning the work and a person employed to make works or designs for another, the latter becoming the copyright owner.

At first glance the *Copyright Act 1994* offers several advantages over the other means of affording protection to coats of arms. First, there is no need for registration. Secondly, it is not confined to an exclusively business environment, though its purpose is to protect the honest efforts of a person who produces an original work. However, several problems remain.

Section 14 of the *Copyright Act 1994* provides that works attract copyright from the moment they are written provided the author is a New Zealand citizen or was living in New Zealand at the time the work was created. Section 21 of the *Copyright Act 1994* sets out that subject to three stated exceptions, the author of the work is the owner, the holder of the copyright. Coats of arms are granted by the kings of

arms, based in Edinburgh and London, the latter having a local representative in New Zealand.⁵³ The actual design process is a co-operative one. But the Officers of Arms have the ultimate say, and the arms are emblazoned on the grant by their heraldic artists. The illustration contained within the grant is not protected by New Zealand copyright laws. The equivalent British legislation may provide an equivalent measure of protection in the United Kingdom, but the situation is hardly ideal.⁵⁴

The exceptions cover persons who produce works in the course of employment, in which case the employer “owns” the copyright for publication in the employment context only, commission work, the copyright passing to the person commissioning the work, and a person employed to make works or designs for another, the latter becoming the copyright owner. The Officers of Arms and their heraldic artists fit in none of these categories. It is therefore difficult to see that the *Copyright Act 1994* covers their work.

Secondly, and perhaps more fundamentally important, is the term of the protection afforded by the copyright laws. As a coat of arms is conferred by letters patent, it would be a published work. Literary, musical, dramatic or artistic works (excluding photographs) published during the author’s life are protected for the life of the author plus 50 years. This is unsatisfactory given that a coat of arms is meant to be granted to the grantee and his or her heirs, ad infinitum.⁵⁵ No protection would be accorded to the legal possessor of a family coat of arms granted to a more distant ancestor than grandfather, or perhaps great-grandfather.

Thirdly, there is, in New Zealand, no copyright in regulations.⁵⁶ Since grants of arms are made by

⁴⁹ See *International Business Machines Corp v Computer Imports Ltd* (1989) 2 NZBLC 103, 679.

⁵⁰ Armorial bearings are conferred by letters patent, which are made “patent” or published for the world at large. They are addressed: “to all and singular to whom these Presents shall come”. They are thus a published work.

⁵¹ *Copyright Act 1994* (NZ), s 233.

⁵² Section 21.

⁵³ New Zealand Herald Extraordinary: Secretary of the Cabinet, *Cabinet Office Manual* (Cabinet Office, Wellington, 1988), para P.1.1.

⁵⁴ The author of the work is the copyright owner in many overseas jurisdictions.

⁵⁵ Letters patent recite that the arms assigned are “to be borne and used for ever hereafter by the said [xxx] and by his descendants with due and proper differences and according to the Law of Arms”.

⁵⁶ Which are defined as meaning the same as in the *Acts and Regulations Publication Act 1989* (NZ). Section 2 of the *Acts and Regulations Publication Act 1989* (NZ) defines regulations in terms of the *Regulations (Disallowance) Act 1989* (NZ), s 2. This includes “Rules or regulations made under any Imperial Act

regulation, there is no copyright in the letters patent, nor in the illustration contained in the grants. There are two possible conclusions to draw from this. First, there cannot be any copyright in the armorial bearings conferred by the letters patent. Thus anyone could draw a coat of arms, which might then be directly copied by another without breaking the *Copyright Act 1994*. This would mean that heraldic artists would have no protection for their work.

The second possible conclusion, and one which accords more closely with practicality, is that there is a copyright in heraldic work drawn from a blazon or the official illustration of the arms.⁵⁷ Thus a copyright is created every time someone emblazons the arms granted in a letters patent, except where it is a direct copy of the illustration in the original grant. Thus if the new artist were not the owner of the coat of arms, the latter would be liable for infringing the copyright of the artist if his or her own subsequent rendering was a copy of the artist's work.

Heraldic protection

The unsatisfactory application of general intellectual property laws to armorial bearings is a reflection of the special nature of coats of arms. As a form of Crown-licensed monopoly they should be protected by special laws. Indeed, the Law of Arms existed for this very purpose.

Although coats of arms may appear similar to other types of intellectual property, they are akin to a form of royal honour. As such, the general intellectual property law is an inappropriate means of protection. Indeed, the Officers of Arms long maintained that their permission was always needed for the reproduction of arms by anyone but the grantees and their lawful heirs. Their use cannot be licensed to anyone except by the Crown.

The proper legal avenue for the protection of arms lay in an action in the High Court of Chivalry.⁵⁸ This is not available to New Zealand

grantees (nor, indeed, is it any more active in England), but that court once provided considerable protection. We will look briefly at the actions which were fought in the High Court of Chivalry, in order to assess the extent of the loss to the armiger.

In the 17th century, at the height of its heraldic jurisdiction, there were two main types of heraldic cases in the High Court of Chivalry:

(i) Those where the plaintiff alleged the defendant was pirating his or her arms, and which proceeded by way of libel;⁵⁹ and

(ii) Where the King's Advocate⁶⁰ or a king of arms alleged that the defendant was bearing arms to which he was not entitled, thereby committing a criminal offence,⁶¹ either by using the arms of another,⁶² or by the fabrication of arms.⁶³ It could also be alleged that the defendant was using armorial insignia, such as supporters, to which the defendant was not entitled,⁶⁴ or otherwise unlawfully using arms even where the rights of others were not affected.⁶⁵

The latter type of action shows clearly that coats of arms were not then subject to the normal rules of copyright, a conclusion supported by the fact that artistic works in general were not covered by the laws of copyright until the *Fine Arts Copyright Act 1862* (UK).

It was also an offence to paint false armorial bearings for a customer.⁶⁶ A dispute raged between the Painter-Stainers' Company and the kings of arms 1578-1738,⁶⁷ in which the kings of arms prosecuted painters for painting false arms.⁶⁸ The kings of arms also sought to prevent the painting of genuine arms

Surrogate); The Court of Lord Lyon may be used for Scottish arms.

⁵⁹ The plaintiff's pleading: *Perrot v Perrocke alias Perrot* (1639) in Squibb, *Reports of Heraldic Cases in the Court of Chivalry, 1623-1732* (Harleian Society, London, 1956), Vol 107 (hereafter Her Cas) 44; *Pouncefote v Pouncefote* (1638) Her Cas 33 (cause of instance).

⁶⁰ The Leader of the Bar of the High Court of Chivalry.

⁶¹ *Duck v Woodall* (1640) Her Cas 40.

⁶² *Office of the Judge v Hurt* (1634) Her Cas 5 (cause of office).

⁶³ *Prust v Saltren* (1637) Her Cas 25.

⁶⁴ *Oldys v Tyllie* (1687) Her Cas 59.

⁶⁵ *St George v Tuckfield* (1637) Her Cas 24.

⁶⁶ *Office of the Judge v Winchell* (1634) Her Cas 6.

⁶⁷ Englefield, *History of the Painter-Stainers' Company* (Chapman & Dodd, London, 1936).

⁶⁸ *St George v Howell* (1687) Her Cas 51.

or under the prerogative rights of the Crown and having force in New Zealand".

⁵⁷ Though none in the work of the original heraldic artist whose work illustrates the patent.

⁵⁸ The Surrogate was not satisfied that it would be right for the court to be put into motion merely because arms had been displayed by way of decoration or embellishment: *Manchester Corp* [1955] P 133; [1955] 2 WLR 440 (Lord Goddard,

without their licence.⁶⁹

After *Russel's Case*⁷⁰ the High Court of Chivalry ceased to be concerned with this dispute, though the kings of arms fought on. In *Russel's Case*, the House of Lords and the Court of King's Bench held that the High Court of Chivalry had no jurisdiction to deal with painters charged with painting arms and marshalling funerals without licence from the kings of arms.⁷¹ They admitted that the court had a jurisdiction to marshal arms.⁷² As to marshalling funerals, this was not prohibited by statute,⁷³ nor had the heralds any monopoly in their original patents by which they were incorporated.⁷⁴

The House of Lord held that the proper remedy for the heralds against heraldic painters painting arms without the licence of the Officers of Arms, if any, lay in the common law courts by way of action on the case.⁷⁵ Although questions of dignity or honour cannot be tried by an ordinary court of law,⁷⁶ this was a matter of an infringement of a monopoly of office, and so could be determined by the common law courts.⁷⁷

Thereafter the High Court of Chivalry only litigated if alleged arms were displayed which did not belong to the deceased by the Law of Arms,⁷⁸ though the common law courts strictly had not decided against the Officers of Arms' right to license the painting of arms, merely the justiciability of such an action in the High Court of Chivalry. In essence, they held that it was not a matter for the Law of Arms, but of a monopoly of office. But the High Court of Chivalry has sat but once since the early years of the 18th century, and cannot

reasonably be expected to respond to the complaint of an aggrieved armiger in New Zealand or Australia. The law may be clear, but if effective means of enforcement are lacking, its effectiveness may be doubted.

The survival of the Law of Arms

Though the court is no longer active, the theoretical right of the High Court of Chivalry to control, in England, the use of arms by those not entitled to them is clear.⁷⁹ But there remain serious difficulties for an armiger in England and Wales. These difficulties are greater still in New Zealand or Australia, where the authority of the High Court of Chivalry may well be doubted.⁸⁰ Yet the possessor of a grant of arms from the Crown is possessed of a legal monopoly, though its protection may present difficulties.

The Officers of Arms, as servants of the Crown, may yet be able to take action to protect lawfully granted coats of arms. The assumption of a coat of arms to which one is not entitled is, in fact, a purported usurpation of a prerogative of the Crown. There may be no judicial avenue now available to restrain such actions, but the executive authority to do so is undoubted.⁸¹ All an armiger need do is petition the appropriate Officer of Arms for an order that the usurper desist. Refusal to obey such an order would not render the malefactor liable for any criminal sanction.⁸² But it would make publicly clear the rights of the case. Such a toothless remedy is not surprising – after all it has been the situation in England and Wales for over 250 years.⁸³ It would be surprising if armorial bearings, excepting those of an official nature,⁸⁴ were to have more effective

⁶⁹ *Oldys v Wyseman* (1691) Her Cas 74.

⁷⁰ (1692) 4 Mod 128; 87 ER 301.

⁷¹ *Oldis v Donmille* (1692) Show PC 58 (HL).

⁷² But the plaintiff had not offended against that court, for he had all his escutcheons from the heralds: (1692) 4 Mod 128; 87 ER 301.

⁷³ 13 Ric II c 2.

⁷⁴ (1692) 4 Mod 128; 87 ER 301.

⁷⁵ The origins of which are traditionally associated with the Statute in *Consimili Casu* 1285 (Eng), and which later was developed as the action in tort and contract.

⁷⁶ *Earl Cowley v Countess Cowley* [1901] AC 450. A peerage is, however, a form of real property, and the descent of a peerage is therefore in accordance with the ordinary rules of land law, modified, however, as outlined elsewhere in this article.

⁷⁷ (1692) 4 Mod 128; 87 ER 301. It was also by no means clear that any such action would have succeeded

⁷⁸ For example, *Oldys v Sweetapple* (1699) Her Cas 91.

⁷⁹ *Manchester Corp* [1955] P 133; [1955] 2 WLR 440 (Lord Goddard, Surrogate).

⁸⁰ Cox, *op cit* n 1.

⁸¹ *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, Vol 3, 586.

⁸² Even were the High Court of Chivalry to sit in New Zealand, its powers to punish would be limited to the civil law punishments, which are either ineffective or unenforceable in this county. An action for contempt of the Sovereign might be a theoretical possibility in some jurisdictions.

⁸³ For it would seem that the High Court of Chivalry has once again relapsed into sleep after hearing *Manchester Corp* [1955] P 133; [1955] 2 WLR 440.

⁸⁴ See, for example, the *Report of the Commission of Enquiry on Heraldry in Western Australia*, which resulted in the passing

protection in New Zealand than they have in England.

From 1521 to 1563 the Earl Marshal, and his deputies,⁸⁵ and Commissioners appointed to exercise the jurisdiction of the office, appear to have purported to exercise the quasi-judicial jurisdiction over the College of Arms and the heralds, while the High Court of Chivalry itself was inactive.⁸⁶ After the Civil Wars of the next century this quasi-judicial jurisdiction was again revived.⁸⁷ The court itself, revived in 1622, ceased to sit after 1641.⁸⁸

It is also probable that the claim by the Officers of Arms to the exclusive right to license the painting of arms also remains technically correct. This would still be enforceable in the common law courts,⁸⁹ though it is unclear how the cause of action would now be pleaded. Thus there are no effective limitations upon heraldic artists other than those imposed by the law of copyright.

The draft Bill of the *Flags, Emblems, and Names Protection Act* 1981 (NZ) included a clause protecting armorial bearings.⁹⁰ But this was dropped at the select committee stage. The committee considered that there was already adequate protection under misrepresentation or passing off, should a person use the coat of arms granted to another without his or her authority. They did not accept that there was any justification for protecting private interests with criminal sanctions. The committee were also opposed to what they saw as a monopoly being established for the benefit of New Zealand Herald.⁹¹

The committee were mistaken as regards existing common law protection, showing (perhaps understandable) ignorance of the Law of Arms, but they probably reflected a widespread attitude that

such matters as coats of arms needed no special legal protection because they had no real importance. Unfortunately, as has been seen, the committee held an unrealistically optimistic view of the role of misrepresentation, passing off and the other common law actions, and their relationship with the Law of Arms.

Conclusion

A grant of a coat of arms is the grant of a monopoly. It is conferred upon the grantee and his or her heirs for ever more by an exercise of the royal prerogative. The armiger and his or her heirs may make whatever use they like of the arms, subject to the Law of Arms.

There are a number of possible legal procedures for the protection of armorial bearings, but difficulties are found with each. A common law action for passing off requires that the armiger be in trade, and that there has been some damage. This will be impossible to prove for a non-trading armiger. Misrepresentation is confined to misuse for commercial gain, or where a contract has been induced by misstatement of fact – such as that arms were lawful.

In New Zealand, the *Fair Trading Act* 1986 (NZ) prohibits misleading or deceptive conduct, but again only in trade. The *Trade Marks Act* 1953 (NZ) is limited to use in relation to goods or services. It also requires registration. Like the *Trade Marks Act* 1953 (NZ), the *Designs Act* 1953 (NZ) is designed for commercial indicia.

The best protection is afforded by the *Copyright Act* 1994 (NZ). But the Act only covers a coat of arms if it can be argued that the grantee is the author of the work, something which is either an impossibility or a distortion of the reality of the situation. The protection is also only for the life of the author plus 50 years.

Both the *Trade Marks Act* 1953 and the *Designs Act* 1953 are in need of replacement, and this is anticipated in the not too distant future. Although armorial protection would have fitted more conveniently in the recently revised *Copyright Act*, and might be best in the *Flags, Emblems, and Names Protection Act* 1981 (NZ), it would be appropriate to consider including armorial bearings in any new enactments. For, although of relatively minor importance, they are a form of property,

of the *Arms Protection Act* (No 108 of 1979) (WA).

⁸⁵ The Deputy Earl Marshal, not the Officers of Arms.

⁸⁶ Squibb, *The High Court of Chivalry* (Clarendon Press Oxford, 1959), pp 39-40.

⁸⁷ Royal declaration of 16 June 1673, confirmed by Order in Council 22 January 1674; College of Arms mss I 26 ff 55-56, cited in Squibb, *ibid*, pp 79-80.

⁸⁸ Letters patent, 1 August 1622, College of Arms mss, SML 3 f 228, printed in Squibb, *ibid*, appendix III, p 248.

⁸⁹ *Russel's Case* (1692) 4 Mod 128; 87 ER 301.

⁹⁰ Clause 16.

⁹¹ See New Zealand, *Parliamentary Debates* (Government Printer, Wellington, 1980), Vol 440, p 2741, Vol 441, p 3858.

granted by the Crown, and which currently has little or no effective legal protection. Reliance can no longer be placed on the protection afforded by the Law of Arms, since this law cannot be effectively enforced in Australia or New Zealand. Given that coats of arms are a royal monopoly, obtained for payment of a substantial fee to the Officers of Arms, this situation is unsatisfactory.