

# **THE INTELLECTUAL PROPERTY LAWS- A WAY OF PROTECTING ARMORIAL BEARINGS?**

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Abbreviated version of paper published in (2000) New Zealand Intellectual Property  
Journal

## **I INTRODUCTION**

According to the usual description of the Law of Arms, 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. 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, although the power to grant armorial bearings is delegated by the Crown to the kings of arms. Such arms are used by companies, by individuals and by government agencies. Those used by local councils have statutory protection, as have those of the Crown. 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 a court, whose principal business was the control of armorial bearings, was active in England.

The common law courts have no jurisdiction over matters of dignities and honours, such as armorial bearings or peerages, but these dignities have legal standing nonetheless. The exclusive jurisdiction of deciding rights to arms, and claims of descent, was vested in the High Court of Chivalry. However, unlike the ecclesiastical law, which continues to be administered by a range of ecclesiastical courts, there is now in England no regularly constituted court in which the Law of Arms is administered, the High Court of Chivalry being obsolescent. Since the right to bear arms is not a matter cognisable by the common law, but only by the Law of Arms, common law courts are unable to enforce any right to arms.

A similar position is found in New Zealand. 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 \$4,000 to \$30,000. 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 for some centuries been largely inactive. 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. No court currently exists in New Zealand which has a jurisdiction to administer the Law of Arms.

To use arms, other than the royal arms and some other official arms, without a grant or other title, is not unlawful in the sense that any penalty is attached. Arms, being in the nature of dignities and governed by similar rules both in origin and enjoyment, are not within the jurisdiction of the ordinary courts of law.

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. This paper will look at several possible ways to give effective legal protection to coats of arms within existing legal arrangements.

Coats of arms may be regarded as a species of intellectual property. This classification of 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.

Coats of arms are a form of artistic work. They are also akin to designs or trade marks. But do any of these existing laws afford proper protection to coats of arms?

## GENERAL INTELLECTUAL PROPERTY LAWS

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). There is no need for registration, and it is not confined to an exclusively business environment. 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. For a grant of arms is just that, a grant of hereditary armorial insignia by the Crown. The protection is also only for the life of the author plus 50 years. In any case, copyright does not subsist in regulations, and armorial bearings are granted by letters patent. However, subsequent drawings, paintings and carvings of the arms would attract copyright protection, provided the author met the requirements of s 14.

The difficulties with the above legal actions are that none were designed with the Law of Arms in mind. Copyright, though it does provide a measure of protection, is inadequate because coats of arms are a monopoly granted by the Crown by act of the royal prerogative, and not the product of original artistic endeavour.

## HERALDIC PROTECTION

The proper legal avenue for the protection of arms lied in an action in the High Court of Chivalry. This is not available to New Zealand grantees, but that does not mean that their arms are without protection.

In the seventeenth 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; and (ii) where the King's Advocate or a King of Arms alleged that the defendant was bearing arms to which he was not entitled, thereby committing a criminal offence.

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).

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 Laws of Arms. Although the copyright laws give additional protection, both to any drawings by the armiger, and any done by professional artists and others, this is of more limited scope and duration. The essence of a grant is that it is a perpetual monopoly. Its scope allows the drawing of arms

for the purpose of research, private study, criticism or review (as the copyright laws allow) and, apparently, also for dissemination through armorials and similar works.

The latter use is uncertain. The Officers of Arms and the High Court of Chivalry controlled the publishing of books and prints relating to matters of heraldic science until at least the seventeenth century. An 11 July 1637 decree of the Court of Star Chamber stated that all books concerning heraldry, titles of honour and arms and otherwise concerning the office of Earl Marshal should be licensed by the Earl Marshal or by his authority. Though now obsolete, a number of instances of this licensing were recorded at the time of the death of Queen Mary II.

Though the Court is no longer active, the right of the High Court of Chivalry to control the use of arms by those not entitled to them is undoubted, but there remain serious difficulties for an armiger in England and Wales, difficulties which are greater still in New Zealand or Australia. Yet the possessor of a grant of arms from the Crown, whether an individual, corporate body or governmental body, is possessed of a legal monopoly, though its protection may present difficulties.

It is probable that the claim by the Officers of Arms to the exclusive right to licence the painting of arms also remains technically valid. This would still be enforceable in the common law courts, though it is unclear how the cause of action would now be pleaded. It is probably best regarded as obsolete. Thus there are effectively no limitations upon heraldic artists other than those imposed by the general law of copyright.

## CONCLUSION

The right of the High Court of Chivalry to control the use of arms by those not entitled to them is undoubted, but difficulties in attempting to rely upon this process are obvious.

The Officers of Arms 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 to restrain such actions now available. But the executive authority to do so is undoubted. 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. But it would make publicly clear the rights of the case.

Such a toothless remedy is not a bad thing, after all it has been the situation in England and Wales for over two hundred and fifty years. It would be surprising if armorial bearings- excepting those of an official nature- were to have more effective protection in New Zealand or Australia than they are in England.