WHEN IS A TRADEMARK A COAT OF ARMS?

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I HAVE PONDERED THIS QUESTION for many years now and thought about testing the waters by trying to register a blue shield with raindrops and an open umbrella for the spurious "Golden Umbrella Company" and waiting to see what happened.

As it transpires my "Azure gouty d'eau an open umbrella Or" was not required.

Under the South African Heraldry Act of 1962, a north-Yorkshire based gentleman registered arms on the basis that it (the Act) does not prohibit foreign nationals to register arms in South Africa. As a Republic they are open to registrations from people from other countries. This has been ongoing since the establishment of the Act and the Bureau of Heraldry. As an aside the question was posed, "What the legal provision is in the UK relating to its subjects registering arms in other countries. Is there a legal bar to a foreign registration which could lead to prosecution?"

It is interesting to note that, in Canada, the Canadian Heraldic Authority will not register heraldic representations to Canadian applicants who have registered arms elsewhere unless they have those registrations deleted in that foreign country. This is strange and, in a sense, unreasonable. Why can't a person register his/her arms wherever he/she chooses? Some years ago a Canadian applicant registered arms in South Africa and then later wanted to register those arms in Canada. He was then forced to have his arms deleted from our registers – something that we found profoundly insulting –as if South Africa is not good enough to register the arms of a Canadian citizen.

It must be noted also that South Africa (the Bureau of Heraldry) do not "make money" out of registrations. It is a service in the purest sense of the word.

Any registration effected in South Africa does not offer the applicant protection in another country (even the country where he/she is a citizen) and by implication should the person want legal protection for his/her heraldic representation in his own country he/she should definitely register there as well.

In addition, South Africa merely registers heraldic representations (subject to the Moratorium). The Moratorium bars registrations which include references to titles and rank of nobility, or of orders of chivalry. It also bars pre- and post-nominal titles. Thus, no supporters, helmets of rank, coronets of rank etc. are permitted.

But I digress. Having registered these assumed arms abroad he then applied for – and was granted on the 10th July 2015 – a Registered Trade Mark under Class 4L Educational services relating to music, in the form of a shield, helm, torse, crest, mantling and a motto. To all intents and purposes a coat of arms by any other name.

The so-called Trade Mark/Coat of Arms may be seen on the Government website under UK00003103525 Class 4L Educational Services relating to music.

I am indebted to Garter King of Arms for his help in this matter. The section in italics quoted above is gleaned from the response he obtained from the South African Heraldic Authority. I wrote the following letter to the Intellectual Property Office, in Cardiff asking when, since the Granting of Armorial bearings was the prerogative of the Crown, via the Earl Marshall and thence to the Kings of Arms at the College of Arms, did they usurp this role?

"It was my understanding that a Grant of Armorial Bearings derived from HM the Queen via the Earl Marshall who devolved such matters to the Kings of Arms at the College of Arms.

Such an Achievement consists of a shield, helm (denoting rank) a torse, crest, and mantling (with or without supporters), and a motto.

The Trade Mark quoted above has a shield, helm, torse, crest, mantling, and motto and is, to all intents and purposes, a Coat of Arms.

When did the Intellectual Property Office usurp the role of the College of Arms?"

I received this reply from The Trademark Registry;

"I would like to reassure you that the office did not usurp the role of the Garter King or indeed the Lord Lyon during the examination process, as the applicant was provided with details to contact both for guidance in relation to the elements of the mark which contained a coat of arms. This is a requirement under the Trade Mark Directive Article 3(2)(c) and Section 4(4) of the Trade Marks Act 1994.

Trade Marks are examined within the boundaries set out in the Trade Marks Act 1994. Every mark is robustly examined within these confines and as an office we consider if the mark is acceptable and can be registered. A coat of arms would not automatically attract an objection, although as detailed above, a warning letter is issued relating to marks which resemble or bear elements of coats of arms or are heraldic in nature. Ultimately, the office are only accepting the simple registration of a trade mark and not the use of one.

If anyone already has this coat of arms or one similar granted by the Crown, they can apply for this mark to be invalidated."

Needless to say, that I wrote back:

"It was my understanding that the Intellectual Property Office, when dealing with quasi-heraldic matters, always referred such items to the appropriate heraldic authority for comment before accepting same for registration.

To say that "the applicant was provided with details to contact both for guidance in relation to the elements of the mark which contained a coat of arms" is a weak excuse since there is no guarantee that the applicant will do any such thing and, indeed, may be trying to bypass the usual heraldic channels by this means.

The fact remains that, to all intents and purposes, your Office has allowed/granted a coat of arms to an individual and in that sense has usurped the function of the Earl Marshall (via Garter) or the Lord Lyon"

This elicited the following;

"You say we have usurped the roles of the Garter King and Lord Lyon by 'allowing/granting' a coat of arms. The Trade Marks Act is about the registration of trade marks and any rights conferred by registration are, in essence, negative in nature. That is to say the registration of a trade mark confers no positive right to use that mark. Given the clear distinction between 'use' of a coat of arms and registration as a trade mark we are uncertain as to how exactly we may have usurped the heraldic authorities. For some while now we have felt that whatever may have been the practice in the past, any duty (legal or otherwise) to the Garter King or Lord Lyon is discharged by referring the applicant to those heraldic authorities in relation to any use the applicant may wish to make of the mark. Of course, it is no guarantee the applicant will refer to the heraldic authorities, but, in any event, no such guarantee would exist if no trade mark was being sought to be registered.

"Another factor in our approach has been the more recent change we have made in relation to relative rights objections. In the past we used to raise objections where marks were applied for and in our opinion, they were likely to be confused with others' earlier rights, which include earlier filed trade marks. Following consultation with our users, we no longer do this and it is for the holders of those earlier rights to oppose such registrations themselves. In light of this it would be odd, to say the least, if we afforded greater 'protection' to the holders of arms granted by the Crown by refusing later similar arms than we do to the holders of earlier trade mark rights.

"The holders of granted arms (along with the heraldic authorities, assuming they have locus) are still, of course, at liberty to submit observations, oppose or apply to invalidate marks.

I appreciate you may not agree with the line we take but I hope it has been explained fully and properly. I would add that I am sure the current approach we take will come as no surprise either, to the heraldic authorities (including incidentally the Lord Chamberlain's Office) with whom we have had many years' contact."

I replied that perhaps The Lord Chamberlain and The Earl Marshall should sort this out between them?

So, we would appear to be left with the fact that anyone can assume a coat of arms, have it registered as a Trade Mark and thus bypass the College of Arms (as well as its fees).

Is it not time for the Heralds to have an up-to-date Visitation and publish these assumed arms in their Disclaimers?