

Poppy trade-mark argument reveals unique amalgam of rights

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On Nov. 4, 2005, a representative of the Royal Canadian Legion contacted Pierre Bourque, author of the widely-read Canadian news website www.bourque.com, and demanded the removal of a digital image of a poppy posted on the site. The Legion asserted a right to prohibit unauthorized use of the poppy image arising from the Legion's registered trade-mark of the image. Bourque had included the image on his website to mark Remembrance Day. When Bourque made note of the Legion's demand on his website (under the caption "*Legion Declares War on Bourque*"), the reaction was swift and furious: dozens of online pundits condemned the Legion's perceived heavy-handedness and, according to Bourque, "hundreds and hundreds of emails poured into the Legion". News coverage rapidly spread to radio, the CBC and the Sun chain of newspapers. Many of the negative responses expressed surprise that the poppy could be the subject of a trade-mark registration at all, coupled with anger that well-intentioned activities on the part of a person wishing to join the Legion in remembering the sacrifices of previous generations of Canadians were giving rise to potential legal action.

Many Canadians would regard the poppy as virtually a cultural artifact: since 1921 artificial poppies have been annually worn in Canada as a symbol of remembrance. After World War I, inspired in particular by John McCrae's 1915 poem "*In Flanders Fields*", the poppy became a widespread token for commemorating war dead. Judging by the online reaction, many Canadians would be surprised to learn that the poppy image can be treated as an item of commerce, no different from a logo for a vacuum manufacturer. Troubling issues about the commodification of cultural items are raised, as well as concerns relating to the pitfall-laden nature of trade-mark enforcement. Do we really want the poppy to be subject to potential dilution, the vagaries of trade-mark law and potentially ineffectual enforcement of their mark by the Legion? Do we want to force the Legion to be in the position of having to devote time and resources to the policing of its marks?

The nature of the Legion's right to the poppy image is complex. The poppy is the subject of seven separate CIPO registrations, including the poppy image alone, various Legion logos incorporating it and even the word "poppy". Most interesting is Application Number 0980289, which displays the image of a poppy and bears the appellation "Mark Protected by *An Act Respecting the Royal Canadian Legion*" – this is a separate registration from the mark found under Registration Number TMA586995, which is the identical image but in the more traditional format for trade-mark registrations.

The Legion's rights in the poppy image arise from two distinct sources: the *Trade-Marks Act* (the "TMA") and *An Act Respecting the Royal Canadian Legion* (the "*Legion Act*"). The latter is a private statute, not available in consolidations or even online at the Department of Justice's database. Enacted in 1948, the *Legion Act*

incorporated the Legion; a 1981 amendment made three important additions to the statute: (1) the poppy image (together with certain other visual insignia) was made a mark of the Legion; (2) it became prohibited for any person to, without the authorization of the Legion, adopt or use, *in any circumstances*, any mark of the Legion or any mark that is “confusing” or “likely to be mistaken” for such a mark; and (3) the poppy image was made a “registered trade-mark” for purposes of the *TMA*.

The cultural niche occupied by the poppy is not entirely unique: the *TMA* recognizes that there are certain marks of a national, international, civic or public nature such that they are not properly the subject of use as a mark to designate a product or service. Section 9 of the *TMA* lists these prohibited marks, which include various Crown and state symbols (such as armorial crests, flags and the letters “RCMP”), as well as the national flags of foreign states, United Nations symbols and the emblems of the Red Cross, Red Crescent and Red Lion. Section 11 of the *TMA* prohibits the use “in connection with a business” (which makes this protection less comprehensive than that found in the *Legion Act*) of a mark identified in section 9. This gives rise to yet a third facet of the Legion’s interest in the poppy: section 11 of the *TMA* also extends its prohibition on use to the marks listed in sections 13 and 14 of the *Unfair Competition Act*, which include the “emblem of any fraternal society, the legal existence of which is recognized under any law in force in Canada” – such as the *Legion Act*.

A confusing amalgam of rights results: the poppy is treated as a registered trademark for certain purposes; though not quite a prohibited mark (under section 9), it is treated similarly (following a race through some old statutes, under section 11); and, in some respects, is almost a *sui generis* IP right with extremely broad reach (under the *Legion Act*, the tracking down of which even briefly stumped a law library). Some form of protection for the poppy symbol is appropriate: to discourage use by unscrupulous individuals or prevent it being associated with endeavours which reflect poorly on the memory of the veterans it is meant to honour. Would it not be better if the poppy were protected in some fashion, such that its use in commercial activities was prohibited, but that non-commercial use by people of goodwill wishing to take part in a Canadian tradition be allowed (even encouraged)? If the mark is sufficiently important to our culture, it should be added to the list of prohibited marks rather than being buried in a partly-forgotten statute, possibly susceptible to loss due to ineffective enforcement by the Legion. The answer lies with whether we want to allow an intellectual property regime designed to protect *commercial* interests to be used to protect *cultural* interests.

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