

# Protect Your Livestock Brand with Trademarks

By Cari B. Rincker, Esq.

Brand recognition can be a valuable asset for livestock operations. Obtaining a registered trademark gives the owner enforcement rights against others who use confusingly similar marks in a particular class of goods or services. Farms should consider taking this step towards protecting its intellectual property, which can oftentimes be an invaluable asset to a livestock operation.

Put simply, a trademark is the identifying mark of a livestock operation for consumers or other members of the agriculture community in connection with particular *goods* (e.g., beef, wool) or *services* (e.g., consulting services, livestock photography). A trademark can take place in many forms including words (i.e., a standard character or stylized wordmark) (“Blackacre Beef”) or a symbol/logo (i.e., a design mark).

A trademark can only be registered with the U.S. Patent and Trademark Office (“USPTO”) if the goods or services are used in *interstate commerce* (i.e., across state lines). If the livestock good or service is only used with *intrastate commerce* (i.e., within a state boundary) then a trademark may be sought for at the state level. For example, if you an Illinois cattle producer and out-of-state buyers have purchased calves at your annual production sale, then your beef operation has entered interstate commerce. Alternatively, if you are a livestock blogger in Nebraska and sell advertisements on your blog to vendors throughout the country, then you are doing business in interstate commerce. If a livestock operation is not currently using the mark in interstate commerce but plans to use it in the future, then an “intent to use” trademark application can be filed.

Additionally, a trademark must be *distinctive* in order to be registered. The best trademarks are *arbitrary* or *fanciful* – such as Kraft® cheese, Aunt Jemima® or Nike® -- and don't have a separate meaning other than the brand of goods it represents. Suggestive marks include language regarding the goods or services provides, such as Agvance® or eSaleBarn®. Marks that are considered “merely descriptive” are not typically registered unless distinctiveness can be gained over time. “Red Tomatoes” or “Juicy Beef” would be considered descriptive brand names. Last names (surnames) are also considered descriptive. Descriptive brands (“Rincker Cattle Co.”) can be put on the USPTO’s *secondary registry* until the necessary distinctiveness is achieved; then, the mark will be put on the USPTO’s *principal registry* so long as the mark has been used exclusively, and continuously for 5 years. In such cases, the applicant can still use the ® mark and have certain trademark enforcement rights. Generic marks can never be trademarked (“Farm” or “agriculture”).

Importantly, a trademark or servicemark offers protection against “confusingly similar” marks within a certain class of goods or services. For example, if a livestock farm obtained a servicemark for “the breeding and sale of seedstock cattle” it would not have trademark protection if someone decided to use the mark for an agricultural magazine or a t-shirt. That said, each trademark class of goods and services has a separate filing fee. Livestock farms should choose the number of classes that properly cover the goods and services offered to the public.

Although registration is not essential to trademark protection in the United States, if eligible, trademark registration with the USPTO greatly enhances legal protections to the trademark owner within a class of services or goods. Before registering a mark with the USPTO, a livestock farm

can usually use the small □ (servicemark) or ™ (trademark) symbol to help protect the brand. Before doing so, the livestock farm should consult with an attorney. Once a farm has a registered trademark, it can use the ® symbol.

Once trademark registration is obtained, the work is not over. The livestock farm must renew the mark at 6 years, 10 years, and every decade thereafter showing the USPTO that the owner is still actively using the mark in interstate commerce. If these deadlines are not timely met, the applicant will need to reapply for the trademark. A good trademark lawyer will help calendar these deadlines to ensure that the client does not miss these important renewals; however, livestock operations should also pay attention to these deadlines. To help manage deadlines for multiple trademarks, livestock operations are encouraged to work with their lawyer and maintain a trademark spreadsheet to help organize important information relating to the trademarks, including renewal deadlines.

Once a farm has obtained a trademark on the *principal registry*, it may license use of the trademark to other persons for a monthly or annual fee. For example, Farmer Jane may come up with a great slogan or logo for agri-tourism and wish to license it out to those farms who wish to use that mark. The owner of the trademark may also sell or assign its trademark rights to another owner. A trademark assignment is an important (and sometimes forgotten step) with the sale of an agri-business.

Finally, before starting a business, it is prudent to run a search on the USPTO's website to ensure that another person or entity has not already registered a confusingly similar mark. In certain cases, it is wise to hire a professional searcher to give a thorough report of similar trademarks filed at the state and federal level and other public records. Even if someone has not filed a trademark does not mean that they do not have trademark rights to protect their brand. Trademark registration gives the owner a rebuttable presumption in court that they were "first in time, first in right" to the use of the mark.

Before filing a trademark with the USPTO, farms are advised to consult an attorney licensed in any U.S. jurisdiction. To file a trademark at the state level, a farm should work with an attorney licensed in that state.

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For more information contact:

Cari B. Rincker  
Rincker Law, PLLC  
Licensed in New York, New Jersey, Connecticut and the District of Columbia  
535 Fifth Avenue, 4<sup>th</sup> Floor  
New York, NY 10017  
(212) 427-2049  
[cari@rinckerlaw.com](mailto:cari@rinckerlaw.com)  
[www.rinckerlaw.com](http://www.rinckerlaw.com)