

## Picking a Trademark for Your New Food Product

*Written by Deirdre A. Fox and Theodore L. Banks*

Do you have an idea for a new food product? Great! But what are you going to call it? One of the hardest things to do with a new food product (or any product for that matter) is to give it a name. You want the name to be distinctive, catchy, and, perhaps most importantly, legally protected as a trademark. You'll also want a federal registration of your trademark if you are using it to sell your product in interstate commerce.

There are several reasons why you may not acquire trademark rights for the name you are using and why a federal registration might not be obtained. The main purpose of a trademark is to identify the source of the product. So, even if you think your product name is distinctive, if the U.S. Patent & Trademark Office decides that your trademark is confusing as to the source of the product, a federal registration won't be granted.

This was part of the problem that a company named Early Bird Foods faced when it decided to sell a product called “Haulin’ Oats.” It was hit by a lawsuit from rock musicians Daryl Hall and John Oates. Their spokesman stated that the “name and mark Haulin’ Oats is an obvious play upon Plaintiff’s well-known Hall & Oates mark . . . and was selected by defendant in an effort to trade off of the fame and notoriety associated with the artist's [sic] and plaintiff’s well-known marks.”

That may sound like a stretch, but it turned out that Hall and Oates (the musicians) own a registered trademark “Haulin’ Oats.” When the musicians had discovered another company was using the ‘Haulin’ Oats” trademark in its food delivery and oatmeal business, the rockers apparently negotiated a license with that firm.

The lesson for Early Bird Foods, and any company that comes up with a name for a product or company, is do your homework first. Don't fall in love with a name until you are sure that nobody else is already using it. Before you settle on the name you want to use, before you spend a lot of money marketing and promoting the name, and before you apply for a federally registered trademark, the first step is to check the United States Patent and Trademark Office database of trademarks to see if the name, or a similar name that could be confused with it, is already taken. Next, do an internet search and telephone directory search of proposed names to see if, and how, others are using the name. Next, check with states to see if there are state registrations. If your searches come up clear, it's a good idea to have a lawyer do a comprehensive search. If you find the same or similar names registered as trademarks or being used in only one state or part of the country, you still may be able to use your mark, but you need to get legal advice so that you know what you can and cannot do.