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For the Birds: Trademark and Brand Management Considerations for the Rebranded Digital Town Square

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FOR THE BIRDS: TRADEMARK AND BRAND MANAGEMENT CONSIDERATIONS FOR THE REBRANDED DIGITAL TOWN SQUARE

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INTRODUCTION

There was once a town in the heart of America where all life seemed to live in harmony with its surroundings. . . . Then a strange blight crept over the area and everything began to change. Some evil spell had settled on the community . . . The birds, for example—where had they gone? Many people spoke of them, puzzled and disturbed. The feeding stations in the back yards were deserted. The few birds to be seen anywhere were moribund; they trembled violently and could not fly. It was a spring without voices.¹

Rachel Carson, *Silent Spring*

In 1962, environmental conservationist Rachel Carson shocked the American public with a tale of an idyllic town, unchecked corporate actions, and the resulting devastating ecological consequences, most notably the total loss of the town's birds.² *Silent Spring* awakened a collective consciousness that eventually resulted in the development of the corporate environmental, social, and governance ("ESG") framework.³ Sixty years later, Carson's *Silent Spring* warning is relevant again as a different species of "birds" face a digital mass extinction at the hands of an unpredictable and unaccountable corporation, X Corp.

Twitter revolutionized modern communication. Introduced in 2006, the platform's iconic brand and unique short-form messaging style quickly made Twitter one of the most used social media sites.⁴ By providing a digital meeting space for public figures, celebrities, and common folk users, Twitter created a new paradigm for real-time information sharing.⁵ Twitter empowered grassroots social movements like Arab Spring and Black Lives Matter.⁶ With the adoption

¹ RACHEL CARSON, *SILENT SPRING* 1-2 (1962).

² See Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement*, N.Y. TIMES (Sept. 21, 2012), <https://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html> ("No one, . . . had ever thought that humans could create something that could create harm all over the globe and come back and get in our bodies.").

³ See *ESG – A Brief History of Its Development – Part 1*, CARBONVIEW (Dec. 8, 2021), <https://carbon-view.com/esg-a-brief-history-of-its-development-part-1/> (attributing the "genesis of ESG" to Rachel Carson's *Silent Spring*).

⁴ Jessica DeMilt, *The Origins of Twitter*, PENNINGTON CREATIVE: SOC. MEDIA (Sept. 11, 2017), <https://penningtoncreative.com/the-origins-of-twitter/>.

⁵ See *id.*

⁶ Catherine Thorbecke, *Twitter Turns 15: A Look Back at How the Platform Changed Our Lives*, ABC NEWS (Mar. 21, 2021, 11:06 AM), <https://abcnews.go.com/Business/twitter-turns-15-back-platform-changed-lives/story?id=75804702>.

of words like “tweet” and “retweet” into everyday speech, the Twitter brand was the marketing “Holy Grail.”⁷

In October 2022, Elon Musk bought Twitter, Inc. in a drawn-out and newsworthy transaction.⁸ In March 2023, Twitter, Inc. quietly merged with X Corp., resulting in X Corp. becoming the successor in interest to Twitter, Inc., which “no longer exists.”⁹ Under Musk, the company and platform have undergone many changes, including drastic staff cuts, the reversal of the permanent ban on former President Donald Trump, and the complete overhaul of the blue check account verification system.¹⁰ However, the most significant change to the platform occurred nine months after Musk’s acquisition.

On July 23, 2023, Elon Musk abruptly announced the rebranding of the platform under a new name, X.¹¹ Four minutes after midnight, Musk shot the bird with a tweet: “And soon we shall bid adieu to the [T]witter brand and, gradually, all the birds.”¹² While the abrupt rebranding announcement ruffled commentators’ feathers,¹³ the corporate rebranding also raises important issues regarding brand management and corporate social responsibility—especially when considered in the context of the digital town square.

This Comment first discusses the marketing scholarship behind corporate rebranding. Next, this Comment examines the trademark abandonment doctrine, as developed by common law and the Lanham Act, to determine the impact of the rebranding on X Corp.’s rights to the trademarks associated with the Twitter brand. On this issue, this Comment concludes that, in spite of the overwhelming evidence of X Corp.’s intention to abandon these trademarks, X Corp. will likely be able to maintain the exclusive right to use these marks. Finally, this Comment

⁷ Mark Gollom, *Twitter Was the Holy Grail of Branding. Then Elon Musk Ditched It. Experts Question Why*, CBC NEWS (July 26, 2023, 4:00 AM), <https://www.cbc.ca/news/business/twitter-elon-musk-branding-x-1.6917161>.

⁸ Kate Conger & Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html>.

⁹ Defendant Twitter, Inc.’s Corp. Disclosure Statement and Certification of Interested Entities or Persons at 2, *Loomer v. Meta Platforms, Inc.*, No. 3:22-cv-2646-LB (N.D. Cal. Apr. 4, 2023).

¹⁰ Brian Fung & Clare Duffy, *How a Single Year of Elon Musk Turned Twitter into a Husk of Its Former Self*, CNN (Oct. 27, 2023, 6:41 AM), <https://www.cnn.com/2023/10/27/tech/elon-musk-twitter-x-one-year-changes/index.html>.

¹¹ Elon Musk (@elonmusk), X (July 23, 2023, 12:04 AM), <https://twitter.com/elonmusk/status/1682964919325724673>.

¹² *Id.*

¹³ See, e.g., Casey Newton, *Twitter Becomes X*, PLATFORMER (July 24, 2023), <https://www.platformer.news/twitter-becomes-x/> (calling the rebranding an “act of cultural vandalism”); Emily Bell (@emilybell), X (July 24, 2023, 8:42 PM), <https://twitter.com/emilybell/status/1683638854820016129> (“[I]t’s the destruction of civic infrastructure.”).

examines the rebranding under a corporate social responsibility framework to investigate whether X Corp. should abandon its rights to use the marks associated with the Twitter brand. Ultimately, this Comment concludes that X Corp. has an obligation to allow a new user to take control of the trademarks that it no longer uses.

I. CORPORATE REBRANDING

The corporate brand is many companies' most valuable asset.¹⁴ The corporate brand is the synthesis of tangible and intangible elements comprising the corporation's identity.¹⁵ The tangible elements include the brand name, logo, symbol, product packaging, and color, while the intangible elements include the values and emotional connections the brand conjures in the minds of the public.¹⁶ Corporations invest substantial resources into developing and maintaining their brands to maximize profits and market share.¹⁷ Sonia Katyal and Leah Grinvald have explored the essential role that corporate branding plays in the success or failure of platforms.¹⁸ They argue that by enabling customers to identify clusters of associated individuals or organizations, the branding of the platform ecosystem fosters a "community of likeminded purchasers" by informing customers about others using the product or service.¹⁹ This is especially true in the context of social media platforms where corporate branding has a direct influence on the makeup and identity of users.²⁰

¹⁴ Jack G. Kaikati & Andrew M. Kaikati, *A Rose by Any Other Name: Rebranding Campaigns That Work*, 24 J. BUS. STRATEGY 17, 17 (2003).

¹⁵ See *Branding*, AM. MKTG. ASS'N, <https://www.ama.org/topics/branding/> (last visited May 7, 2024) ("A brand is any distinctive feature . . . that identifies goods or services."); *Guide to Intellectual Property: What Is a Brand?*, NAT'L INVS. HALL OF FAME, <https://www.invent.org/blog/intellectual-property/brand-definition> (last visited May 7, 2024) (identifying the tangible and intangible elements of brands).

¹⁶ *Id.*

¹⁷ See *How Much Does Branding Cost?*, RAMOTION (Jan. 21, 2024), <https://www.ramotion.com/blog/how-much-does-branding-cost> (stating that corporations spend anywhere between \$5,000 to \$1.2 million per year on branding).

¹⁸ Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 BERKELEY TECH. L.J. 1135, 1139 (2017).

¹⁹ *Id.* at 1144.

²⁰ See Ryan Kor-Sins, *The Alt-Right Digital Migration: A Heterogeneous Engineering Approach to Social Media Platform Branding*, 25 NEW MEDIA & SOC'Y 2321, 2327 (2021) (examining the branding of alt-right social media platform Gab to argue that platform branding plays central role in fostering a platform's desired community of users).

A. *What Is a Corporate Rebranding?*

This Comment primarily focuses on corporate rebranding. In *Corporate Rebranding*, Laurent Muzellec and Mary Lambkin identify two factors that distinguish the corporate brand from other brand types, such as product brands.²¹ First, corporate brands are uniquely tied to the corporate identity, as perceived by internal and external stakeholders.²² Corporate brands thus define the innate character of the company, or who the corporation is.²³ Second, related to the corporate identity, corporate brands also represent the corporation's reputation, which is shaped by the actions of the corporation and the values attributed to the corporate image.²⁴

Corporate rebrands that alter the corporate name also have a distinct and profound effect. A corporation's name is the brand's core indicator because of the role the name plays in brand awareness and brand communications.²⁵ Similarly, the corporate name represents the corporate identity as the "medium by which a corporation sends signals to consumers, and the brand image results from the decoding of those signals by the receiver."²⁶ The brand image, in turn, is shaped by how these stakeholders interpret these signals.²⁷ Corporate rebranding can also entail the redesign of logos and other visual brand elements.²⁸

B. *Motivations Behind Corporate Rebrandings*

Corporate rebrandings are typically motivated by three types of activities: reputational management, market signaling, and mergers and acquisitions.²⁹ Corporations may rebrand in response to negative consumer perception.³⁰ For example, in 2001, Philip Morris, then the largest cigarette manufacturer,

²¹ Laurent Muzellec et al., *Corporate Rebranding – An Exploratory Review*, 16 IRISH MKTG. REV. 31, 33 (2003).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 34.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 35.

²⁹ Goutam Challagalla, *What's in a Name? Why Companies Decide to Rebrand and When It Makes Sense to Do So*, I BY IMD (Aug. 1, 2023), <https://www.imd.org/ibyimd/strategy/whats-in-a-name-why-companies-decide-to-rebrand-and-when-it-makes-sense-to-do-so>.

³⁰ *Id.*

announced that it would be rebranding under the name “Altria.”³¹ Facing growing public resentment for the tobacco industry, Philip Morris announced Altria Group as its new parent company in an attempt to emphasize the other products the holding company offers, including Kraft Foods and Miller Brewing.³² More recently, in 2020, many companies facing growing public pressure, announced rebranding initiatives to distance themselves from racist imagery.³³

Corporations also rebrand to signal changes in the company’s strategic focus or direction.³⁴ For example, in 2016, Snapchat, Inc., the corporation behind the popular multimedia instant messaging application, Snapchat, rebranded under the name “Snap, Inc.”³⁵ Snap, Inc. CEO and co-founder, Evan Spiegel, stated that the rebrand, which coincided with the launch of its line of video-enabled sunglasses called Spectacles, was intended to reflect the corporation’s growth “beyond [offering] just one product.”³⁶ Spiegel also emphasized that the rebrand intentionally retained the “Snap” component of the former corporate name to maintain the “familiarity and fun” associated with the corporation’s identity.³⁷ In 2021, CEO Mark Zuckerberg announced Facebook’s new parent company, Meta.³⁸ Possibly taking a cue from Spiegel, Zuckerberg argued that the rebrand was necessary to signal the company’s evolution beyond a social media platform to an alternate reality.³⁹ Rebranding under the “Meta” name reflects the company’s new focus: “bring[ing] the metaverse to life and help[ing] people connect, find communities and grow businesses.”⁴⁰

³¹ Philip Morris Rebrands to Shrug Off Tobacco Associations, WARC (Nov. 16, 2001), <https://www.warc.com/newsandopinion/news/philip-morris-rebrands-to-shrug-off-tobacco-associations/en-gb/10134>.

³² Paul Cordasco, *Philip Morris Completes Its Rebranding to Altria Group*, PR WEEK (Feb. 3, 2003), <https://www.prweek.com/article/1249231/philip-morris-completes-its-rebranding-altria-group>.

³³ See Jemima McEvoy, *Eskimo Pie Becomes Edy’s Pie: Here Are All the Brands That Are Changing Racist Names and Packaging*, FORBES (Oct. 6, 2020, 4:51 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/10/06/eskimo-pie-becomes-edys-pie-here-are-all-the-brands-that-are-changing-racist-names-and-packaging> (discussing the rebranding initiatives of companies to shed racist brands).

³⁴ Cordasco, *supra* note 32.

³⁵ Emma Stefansky, *Snapchat Has Rebranded to Snap Inc., Is Now Selling Sunglasses*, VANITY FAIR (Sept. 24, 2016), <https://www.vanityfair.com/culture/2016/09/snapchat-is-now-snap-inc>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Klaus Wertenbroch, *Why Facebook Is Rebranding Itself as Meta*, INSEAD KNOWLEDGE (Jan. 24, 2022), <https://knowledge.insead.edu/marketing/why-facebook-rebranding-itself-meta>.

³⁹ *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/>.

⁴⁰ *Id.*

The most common reason for corporate rebranding is mergers and acquisitions.⁴¹ For example, in 2000, online service provider AOL merged with mass media and entertainment conglomerate Time Warner and rebranded under the name “AOL Time Warner.”⁴² In 2001, information technology giant Hewlett-Packard acquired computer manufacturer Compaq and rebranded under the name “HP Compaq.”⁴³ In 2019, banking institutions BB&T and SunTrust Banks merged and rebranded under the name “Truist.”⁴⁴

C. Corporate Rebrandings Are Inherently Risky

Corporate rebranding is a delicate undertaking. Even seemingly minimal logo refreshes can unleash the public’s wrath. In 2010, international clothing retailer, The Gap Inc., unwittingly triggered such a response.⁴⁵ The Gap’s attempt to replace its then-current logo, which consisted of “GAP” written in a white serif font and inscribed in a dark blue square, with a modernized redesign, consisting of “Gap” written in a black sanserif font with a small dark blue square offset over the “p,” was an undeniable failure.⁴⁶ Using social media, the public waged an unrelenting attack against the proposed rebranding.⁴⁷ Only six days after announcing the intended rebrand, Gap reversed course.⁴⁸ The rebrand cost Gap millions of dollars and caused significant damage to its brand reputation.⁴⁹ The ill-fated Gap rebranding fiasco is one of the earliest examples of how the Internet has altered the role of brand meaning and creation.⁵⁰

Before social media, corporate marketing departments made branding decisions without considering external parties’ responses to change.⁵¹ Now, however, social media gives customers a platform to participate in the creation

⁴¹ See Laurent Muzellec & Mary Lambkin, *Corporate Rebranding: Destroying, Transferring or Creating Brand Equity?*, 40 EUR. J. OF MKTG. 803, 810 (reviewing the rebranding initiatives of 166 corporations to identify mergers and acquisitions as the most frequent impetus of corporate rebranding).

⁴² *How the AOL-Time Warner Merger Went So Wrong*, CNET (Jan. 18, 2010, 12:00 AM), <https://www.cnet.com/culture/how-the-aol-time-warner-merger-went-so-wrong/>.

⁴³ Rob Wright, *The HP-Compaq Merger: Partners Reflect 10 Years Later*, CRN (Sept. 8, 2011, 1:30 PM), <https://www.crn.com/news/mobility/231601009/the-hp-compaq-merger-partners-reflect-10-years-later>.

⁴⁴ Dan Ennis, *Truist Spent \$125M on Rebrand, Court Document Shows*, BANKING DIVE (May 19, 2020), <https://www.bankingdive.com/news/truist-spent-125m-on-rebrand-court-document-shows/578232/>.

⁴⁵ Abigail Williams, *Learning from the Gap Logo Redesign Fail*, BRANDING J. (Apr. 22, 2021), <https://www.thebrandingjournal.com/2021/04/learnings-gap-logo-redesign-fail/>.

⁴⁶ *Id.*

⁴⁷ Veronika Tarnovskaya & Galina Biedenbach, *Corporate Rebranding Failure and Brand Meanings in the Digital Environment*, 36 MKTG. INTEL. & PLAN. 455, 458-59 (2018).

⁴⁸ Williams, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Tarnovskaya & Biedenbach, *supra* note 47, at 459.

⁵¹ *Id.* at 458.

of brand meaning.⁵² Significantly, the GAP rebrand disaster demonstrates that customers determine the success or failure of a corporate rebrand.⁵³

D. *Where X Corp. Ran A-Fowl*

X Corp.'s rebranding of the Twitter social media platform under the name X ran afoul of conventional marketing practices. Generally, rebranding initiatives should, at minimum, include three steps: (1) developing a unique brand essence to differentiate from competitors, (2) communicating the new brand to internal and external stakeholders, and (3) staying consistent with that delivery.⁵⁴ Whether the rebrand to X constitutes a unique brand essence is debatable. On the one hand, Elon Musk has a very well-known affinity for the letter "X." X is incorporated into his other business ventures, such as SpaceX, Tesla's Model X, and his first business, X.com.⁵⁵ He even incorporated the letter into the name of his son.⁵⁶ On the other hand, many other companies, especially technology companies, use X as part of their branding.⁵⁷

The most striking issue with X Corp.'s rebranding of Twitter as X arises from the failure of X Corp. to successfully communicate the new brand to internal and external stakeholders. Merely announcing the new brand is not sufficient to successfully communicate a rebranding to stakeholders.⁵⁸ Successful communication requires that internal and external stakeholders understand the reasoning behind the rebrand.⁵⁹ Since purchasing Twitter in 2022, Elon Musk has repeatedly indicated his desire to use the platform in furtherance of his goal of "creating X, the everything app."⁶⁰

⁵² *Id.* at 458-59.

⁵³ *See id.* at 459.

⁵⁴ Ronald J. Burke, *Corporate Reputations: Development, Maintenance, Change and Repair*, in *CORPORATE REPUTATION: MANAGING OPPORTUNITIES AND THREATS* 1, 18 (Ronald J. Burke et al. eds., 2016).

⁵⁵ Mary Yang, *A Brief Biography of 'X,' the Letter that Elon Musk Has Plastered Everywhere*, NPR (July 24, 2023, 10:51 AM), <https://www.npr.org/2023/05/12/1175797797/elon-musk-x-twitter>.

⁵⁶ *See id.* ("In 2020, Musk and his then-partner, Grimes, welcomed a son via surrogate, naming him X Æ A-12 Musk.").

⁵⁷ Emma Roth, *Can Elon Musk Really Use That X Logo for Twitter?*, THE VERGE (July 26, 2023, 5:11 PM), <https://www.theverge.com/2023/7/26/23809087/elon-musk-x-logo-twitter-trademark>.

⁵⁸ *See* Burke, *supra* note 54, at 18 (noting that one of the principles in the rebranding process is using promotions to alert stakeholders).

⁵⁹ *Id.*

⁶⁰ Elon Musk (@elonmusk), X (Oct. 4, 2022, 6:39 PM), <https://x.com/elonmusk/status/1577428272056389633>; *See also* Elon Musk (@elonmusk), X (Oct. 4, 2022, 6:41 PM) ("Twitter probably accelerates X by 3 to 5 years.").

However, in the days and weeks following the July 2023 rebranding announcement, much of the Twitter branding remained on the platform.⁶¹ Announcing such a dramatic brand overhaul while the legacy brand indicia remained visible throughout the platform introduced unnecessary user confusion.⁶² Furthermore, it gave the appearance of a lack of organizational alignment regarding the rebranding, which jeopardized eroding user trust in the platform.⁶³ This erosion also threatens X Corp.'s stated goal of turning the platform into a WeChat-style everything app that would provide users with banking and payment services in addition to other functionalities.⁶⁴ For the public to actually want to use the app, consumers must trust the platform, which has been complicated by the nature of the rebranding.⁶⁵

Most damning, however, in X Corp.'s communication failure is that the rebranding was announced *before* making any steps to transform the platform into an everything app.⁶⁶ Even as of the publication of this Comment, almost a year after the rebranding announcement, there have been no non-cosmetic changes to the platform apart from completing the transition to the X.com domain.⁶⁷

II. REBRANDING AND TRADEMARK RIGHTS

Brands are valuable assets that corporations devote substantial resources to developing and maintaining.⁶⁸ The law protects this investment by granting trademark owners the exclusive right to use a particular mark.⁶⁹ A trademark is “any word, name, symbol, or device” that functions to “identify and distinguish” the source of goods or services.⁷⁰ Unlike other intellectual property rights,

⁶¹ Rachel Rhodes, *Twitter Is Now X . . . But at What Cost?*, BRAINDO (last visited May 29, 2023), <https://brain.do/blog/twitter-is-now-x-but-at-what-cost/>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Aisha Counts & Jesse Levine, *By Turning Twitter Into X, Elon Musk Risks Killing Billions in Brand Value*, TIME (July 24, 2023, 11:59 PM), <https://time.com/6297303/twitter-x-rebrand-cost/>.

⁶⁵ *Id.*

⁶⁶ Marion Andrivet, *Twitter's Extreme Rebrand to X: A Calculated Risk or Pure Chaos?*, THE BRANDING J., <https://www.thebrandingjournal.com/2023/08/twitter-rebrand-x/> (last updated Aug. 7, 2023).

⁶⁷ Aidin Vaziri, *Twitter's Domain Is Now Officially X.com, Elon Musk 'Tweets'*, THE ECON. TIMES (May 17, 2024, 11:55 AM), <https://economictimes.indiatimes.com/news/international/business/twitters-domain-is-now-officially-x-com-elon-musk-tweets/articleshow/110198217.cms?from=mdr>.

⁶⁸ See *supra* notes 12-15 and accompanying text.

⁶⁹ See *Why Register Your Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/why-register-your-trademark> (last visited May 8, 2024).

⁷⁰ 15 U.S.C.A. § 1127 (West).

trademark law affords perpetual protection so long as a mark continues to serve this source-identifying function.⁷¹

Trademark rights operate on a “use it or lose it” basis.⁷² As the Supreme Court explained in *In re Trade-Mark Cases*, “the exclusive right to [a mark] grows out of its *use*, and not its mere adoption.”⁷³ Actual use of a trademark is what enables consumers to associate a mark with a particular source of goods or services.⁷⁴ Therefore, to maintain the right to the exclusive use of a mark, the owner must continue using the mark.⁷⁵ Corporate rebranding may result in the loss of trademark rights if the corporate owner stops using the former name or logo.⁷⁶ However, whether rebranding actually leads to the legal forfeiture of trademark rights depends on the subsequent actions of the mark owner.⁷⁷

A. *Trademark Rights Arise from Use*

Trademark protection serves a dual goal of protecting the interests of both the mark owners and the consuming public.⁷⁸ The value of trademarks, as understood by courts and commentators, is “a function of [both] economic efficiency and communication.”⁷⁹ Trademarks are thus informational devices, and the informational value of trademarks is traditionally understood as a function of the “Search-Costs” theory.⁸⁰ Under the “Search-Costs” theory, consumers rely on trademarks as indicators of the source or quality of goods and services.⁸¹

⁷¹ Jake Linford, *Valuing Residual Goodwill After Trademark Forfeiture*, 93 NOTRE DAME L. REV. 811, 816-19 (2017).

⁷² See 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:9 (5th ed. 2023) (“It is actual usage of a symbol as a ‘trademark’ in the sale of goods which creates and builds up rights in a mark.”); *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 503 (7th Cir. 1992) (“‘Use’ is neither a glitch in the Lanham Act nor a historical relic.”).

⁷³ *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

⁷⁴ See *Zazu Designs*, 979 F.2d at 503 (“Only active use allows consumers to associate a mark with particular goods and notifies other firms that the mark is so associated.”).

⁷⁵ See *Exxon Corp. v. Humble Expl. Co.*, 695 F.2d 96, 101 (5th Cir. 1983) (“The Act does not allow the preservation of a mark solely to prevent its use by others.”).

⁷⁶ Alec Allen Ross, *What Happens to My Previous Trademarks If I Rebrand?*, TRADEMARK PLACE (Aug. 16, 2023), <https://thetrademarkplace.com/what-happens-to-my-previous-trademarks-if-i-rebrand/>.

⁷⁷ See Nicole Berkowitz Riccio, *Twitter’s Recent Rebrand: A Guide to Keeping Your Trademark Rights Alive*, JDSUPRA (Aug. 16, 2023), <https://www.jdsupra.com/legalnews/twitter-s-recent-rebrand-a-guide-to-2757072/>.

⁷⁸ See MCCARTHY, *supra* note 72, at § 2:2.

⁷⁹ Deven R. Desai, *Response: An Information Approach to Trademarks*, 100 GEO. L.J. 2119, 2121 (2012).

⁸⁰ Robert G. Bone, *Of Trolls, Orphans, and Abandoned Marks: What’s Wrong with Not Using Intellectual Property*, 42 COLUM. J.L. & ARTS 1, 29-30 (2018).

⁸¹ *Id.*

Trademark law achieves this informational goal by conditioning the trademark right on the use of the mark in commerce. As the Supreme Court explained in its first major opinion on trademark law, “the exclusive right to [a mark] grows out of its *use*, and not its mere adoption.”⁸² For a mark to be worthy of protection, it must achieve a certain level of informational utility.⁸³ Trademark law maintains this goal by requiring mark owners to continue using the mark in commerce after registration.⁸⁴ Unlike other intellectual property rights, trademark law affords perpetual protection to mark owners so long as a mark continues to serve this source-identifying function.⁸⁵

B. Trademark Rights Are Forfeited from Non-Use

Abandonment is the loss of the right to the exclusive use of a trademark.⁸⁶ Under the Lanham Act, a mark can be abandoned as a result of the owner’s non-use or misuse of the mark.⁸⁷ The focus of this Comment is abandonment by non-use, which occurs when an owner’s use of a mark “has been discontinued with intent not to resume such use.”⁸⁸ Non-use abandonment polices the trademark right by ensuring that mark owners continue to use their marks in commerce to maintain protection.⁸⁹ This goal is achieved by preventing owners from “warehousing” unused marks and by returning unused marks to the public domain.⁹⁰ In trademark law, a mark is in the public domain if a newcomer can adopt the mark without liability.⁹¹

Abandoned marks return to the public domain and can be used by anyone.⁹² Trademarks that have been previously abandoned and subsequently revived “are referred to as ‘zombie trademarks’ because they have been ‘brought back from the dead.’”⁹³ When a new user adopts an abandoned mark, it acquires the

⁸² *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (emphasis in original).

⁸³ See Bone, *supra* note 80, at 40-43.

⁸⁴ See *Zazu Designs v. L’Oreal, S.A.*, 979 F.2d 499, 503 (7th Cir. 1992) (“Only active use allows consumers to associate a mark with particular goods and notifies other firms that the mark is so associated.”).

⁸⁵ Linford, *supra* note 71, at 818-19.

⁸⁶ 15 U.S.C.A. § 1127 (West).

⁸⁷ MCCARTHY, *supra* note 72, at § 17:1.

⁸⁸ 15 U.S.C.A. § 1127 (West).

⁸⁹ See *Cumulus Media, Inc. v. Clear Channel Commc’ns, Inc.*, 304 F.3d 1167, 1173 (11th Cir. 2002); *Yellowbook, Inc. v. Brandeberry*, 708 F.3d 837, 847 (6th Cir. 2013) (“[A]bandonment is definitional in nature, setting limits on the scope of the trademark right.”).

⁹⁰ Linford, *supra* note 71, at 825-26.

⁹¹ See MCCARTHY, *supra* note 72, at § 1:26 (stating that a mark is in the public domain “only if no intellectual property right protects it,” emphasizing that this includes the former owner’s right to protection from unfair competition).

⁹² Riccio, *supra* note 77.

⁹³ *Id.*

goodwill, if any, associated with that mark.⁹⁴ For example, in 2015, Innovative Technology, seeking to take advantage of the goodwill associated with the abandoned VICTROLA mark, launched its own Victrola brand of record players and audio equipment.⁹⁵ After a brief legal battle with the mark's previous owner, Radio Corporation of America, the companies reached an agreement permitting Innovative Technology to use the mark.⁹⁶

Abandonment results in the previous owner's immediate loss of all rights to the exclusive use of the mark.⁹⁷ In *Specht v. Google, Inc.*, the Seventh Circuit affirmed that a plaintiff who had abandoned a mark could not make an infringement claim against a subsequent user.⁹⁸ After a mark has been abandoned, the first party to secure priority of use gains ownership of the mark.⁹⁹ Sometimes, however, courts may require the new user of an abandoned mark to take "curative steps" to prevent confusion by making it clear to the public that the new owner is not associated with the mark's previous owner.¹⁰⁰

Corporations may voluntarily abandon a mark for business purposes.¹⁰¹ For example, after deciding to withdraw from the artificial fire log market, Kings-Ford Clorox formally abandoned its DURAFLAME mark so the company could write off the goodwill associated with the mark for accounting purposes.¹⁰² The corporation published a notice in the Wall Street Journal announcing the release of its rights in the mark and had its attorney file documents with the USPTO stating the same.¹⁰³

The following sections consider whether X Corp., by rebranding Twitter to X, has abandoned its right to the exclusive use of the trademarks associated with the Twitter brand. According to U.S. Patent and Trademark Office records, X Corp. currently owns a multitude of Twitter-formative trademarks (collectively, the "TWITTER Marks").¹⁰⁴ Immediately after the rebranding announcement,

⁹⁴ *Id.*; Linford, *supra* note 71, at 816-18.

⁹⁵ Riccio, *supra* note 77.

⁹⁶ *Id.*

⁹⁷ See MCCARTHY, *supra* note 72, at § 17:1.

⁹⁸ *Specht v. Google, Inc.*, 747 F.3d 929, 935-36 (7th Cir. 2014).

⁹⁹ See *id.* at 934 ("But the Lanham Act transfers standing to assignees, even if that party is not the registrant, to ensure that only the current owner of the mark can claim infringement.").

¹⁰⁰ See *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1179 (11th Cir. 2002).

¹⁰¹ MCCARTHY, *supra* note 72, at § 17:1 (noting that sometimes businesses voluntarily formally abandon a mark for tax write-off purposes).

¹⁰² *Cal. Cedar Prods. Co. v. Pine Mountain Corp.*, 724 F.2d 827, 829 (9th Cir. 1984).

¹⁰³ *Id.*

¹⁰⁴ *Twitter Trademarks*, GERBEN TRADEMARK LIBR., <https://www.gerbenlaw.com/trademarks/major-corporations/twitter/> (last visited May 7, 2024).

multiple applications were filed by individuals seeking to capitalize off of X Corp.'s apparent fumble.¹⁰⁵

III. HAS X CORP. ABANDONED ITS RIGHT TO PROTECT THE TWITTER BRAND?

The court's non-use abandonment analysis is a two-step inquiry.¹⁰⁶ Statutorily, abandonment requires both (1) that the owner stop using the mark and (2) that the owner does not intend to resume using the mark.¹⁰⁷ As one commentator recently noted, the abandonment doctrine is both "murky and underdeveloped."¹⁰⁸ This issue is compounded by a lack of scholarship¹⁰⁹ and inconsistent application by the courts.¹¹⁰ This Section discusses (1) the effect of X Corp.'s rebranding announcement and (2) the effect of X Corp.'s limited continued use of the TWITTER Marks to investigate whether X Corp. has abandoned these marks.

A. *Effect of Rebranding Announcement*

Marketing scholarship on corporate rebranding emphasizes the need for clear communication between the organization and various stakeholders.¹¹¹ Changing the corporate brand, absent any accompanying communication, would unnecessarily harm the corporation's reputation and relationships.¹¹² Public rebranding announcements may, but do not always, trigger the abandonment of a mark.¹¹³

In his authoritative treatise on trademark law, J. Thomas McCarthy compares the effect of a "public statement of an intent not to use," which is a statement of present intent, with a "statement of intent to stop use in the future," which is a statement of prospective intent.¹¹⁴ Despite their apparent semantic similarity, the

¹⁰⁵ See Riccio, *supra* note 77 (listing the new trademark applications).

¹⁰⁶ Linford, *supra* note 71, at 825-26; see *Equitable Nat'l Life Ins. Co. v. AXA Equitable Life Ins. Co.*, 434 F. Supp. 3d 1227, 1241 (D. Utah 2020) (explaining the two-step inquiry).

¹⁰⁷ See *Equitable National Life Ins. Co.*, 434 F. Supp. 3d at 1241 (explaining the two-step inquiry).

¹⁰⁸ Jon J. Lee, *Racism and Trademark Abandonment*, 91 GEO. WASH. L. REV. 932, 955 (2023).

¹⁰⁹ *Id.*

¹¹⁰ See Stanley A. Bowker, Jr., *The Song Is Over but the Melody Lingers On: Persistence of Goodwill and the Intent Factor in Trademark Abandonment*, 56 FORDHAM L. REV. 1003, 1004-07 (1988) (discussing the conflicting decisions of the courts regarding various aspects of the statutory abandonment inquiry).

¹¹¹ See Dale Miller & Bill Merrilees, *Corporate Rebranding*, in *CORPORATE REPUTATION: MANAGING OPPORTUNITIES AND THREATS* 281, 283 (Ronald M. Burke et al. eds., 2016) (discussing the need for businesses to have open and transparent conversations with stakeholders regarding rebranding initiatives).

¹¹² *Id.*

¹¹³ See generally MCCARTHY, *supra* note 72, at § 17:11 (discussing the different types of public statements and their effect on the abandonment analysis).

¹¹⁴ *Id.*

distinction between the two has a determinative impact on the court's analysis of the intent factor of the abandonment inquiry.¹¹⁵

Statements of present intent result in the immediate abandonment of trademark rights.¹¹⁶ A public rebranding announcement that conveys both (1) that the mark owner will stop using its former mark and (2) that the public should no longer associate the former mark with the mark owner constitutes a statement of present intent.¹¹⁷ Statements of prospective intent, however, do not automatically trigger abandonment.¹¹⁸ Rather, statements of prospective intent convey the mark owner's intent to stop using the mark in the future.¹¹⁹ For example, an announcement that a brand *will* be discontinued constitutes a statement of prospective intent.¹²⁰ The following cases demonstrate the difference between rebranding announcements that convey a present intent to abandon versus rebranding announcements that merely convey prospective intent.

I. Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.

In *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, the plaintiff, a local potato chip manufacturer, sued the defendant, a national potato chip manufacturer for infringing on the plaintiff's right to use the KITTY CLOVER mark for potato chips sold in the Kansas City area.¹²¹ In 1956, the defendant, who owned a valid federal trademark registration for the KITTY CLOVER mark for potato chips, agreed to assign to the plaintiff the right to use the mark for potato chips sold in the Kansas City trade area, consisting of Kansas, Arkansas, and most of Missouri.¹²²

On November 10, 1980, the plaintiff's sales manager sent a letter informing customers that the "Kitty Clover [brand] . . . will be eliminated from Missouri and Arkansas. This decision to introduce a new brand to most of you will make us part of one of the largest regional brands in the United States. (All items will be [sold] under the Hiland Label.)"¹²³ Relying on this communication, the

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.* ("We Are Changing Our Name from ALPHA to ZETA. Don't Call Us ALPHA any more.")

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *See Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 937 (9th Cir. 2006) (finding that mark owner's statements of intent to stop selling bags under the mark once inventory was fully depleted to be a statement of prospective intent).

¹²¹ *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981, 982 (8th Cir. 1983).

¹²² *Id.*

¹²³ *Id.*

defendant immediately began selling its own version of Kitty Clover brand potato chips in the Kansas City area.¹²⁴ Nine days later, on November 19, the plaintiff sent a cease-and-desist letter to the defendant alleging infringement of the plaintiff's geographically limited right to use the KITTY CLOVER mark.¹²⁵

The plaintiff filed suit for trademark infringement and unfair competition.¹²⁶ The district court held that the plaintiff had abandoned its right to use the KITTY CLOVER mark and was equitably estopped from denying its intent to abandon the mark.¹²⁷ The district court considered the Lanham Act's statutory language permitting intent to be "inferred from circumstances" and noted that the plaintiff's public announcement of its intent to discontinue the Kitty Clover brand was such a circumstance.¹²⁸ Notably, the plaintiff submitted testimony attempting to prove that it had not intended to discontinue its use of the Kitty Clover brand.¹²⁹ The district court rejected this assertion, stating that the plaintiff's letter was objective evidence that conclusively outweighed the plaintiff's contrary testimony.¹³⁰ Furthermore, the district court held that the plaintiff was equitably estopped from denying such intent because the defendant detrimentally relied on the plaintiff's letter when the defendant began selling its Kitty Clover brand potato chips in the contested Kansas City area.¹³¹

On appeal, the Eighth Circuit affirmed the district court's abandonment finding.¹³² The court noted that the plaintiff's November 10th letter, stating both that "the Kitty Clover brand name 'will be eliminated'" and that "[a]ll items *will* be [sold] under the Hiland label," unequivocally communicated the plaintiff's present intent to abandon the KITTY CLOVER mark.¹³³ The Eighth Circuit also affirmed the district court's holding that Plaintiff was equitably estopped from denying its intent.¹³⁴ A company that unequivocally announces its intent to discontinue its use of a mark forfeits the right to prevent a newcomer from using a mark when the newcomer detrimentally relied on such statements in good faith when choosing to adopt the mark.¹³⁵

¹²⁴ *Id.* at 983.

¹²⁵ *Id.*

¹²⁶ *Id.* at 982.

¹²⁷ *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 585 F. Supp. 17, 22-23 (S.D. Iowa 1982).

¹²⁸ *Id.* at 22.

¹²⁹ *Id.* at 22-23.

¹³⁰ *Id.* at 22.

¹³¹ *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981, 984 (8th Cir. 1983).

¹³² *Id.* at 983.

¹³³ *Id.* (emphasis added) (citation omitted).

¹³⁴ *Id.* at 984.

¹³⁵ *Id.*

2. Emergency One, Inc. v. American FireEagle, Ltd.

In *Emergency One, Inc. v. American FireEagle, Ltd.*, the plaintiff, a firetruck manufacturer, sued the defendant, a competitor, for infringing on the plaintiff's right to use the AMERICAN EAGLE mark for firetrucks.¹³⁶ The plaintiff acquired the rights to the AMERICAN EAGLE mark in 1989 when it acquired American Eagle Fire Apparatus Co.¹³⁷ Following the acquisition, the plaintiff's president told American Eagle employees that while the company intended to satisfy existing orders, it "wouldn't be building American Eagle branded products forever out of Gainesville."¹³⁸ Between 1989 and 1992, the plaintiff fulfilled existing orders and then stopped manufacturing American Eagle branded firetrucks.¹³⁹ In 1991, the plaintiff began manufacturing and selling E-One branded fire trucks.¹⁴⁰ However, the plaintiff continued using the AMERICAN EAGLE mark in other ways, including using the logo on merchandise, on security badges, and on various promotional items.¹⁴¹

The defendant company was founded in 1994 by a former American Eagle employee.¹⁴² Defendant adopted the AMERICAN FIREEAGLE mark for its fire trucks, believing that Plaintiff had abandoned its rights to the AMERICAN EAGLE mark.¹⁴³ The plaintiff sent a cease-and-desist letter to the defendant, urging the defendant to stop using a mark that was confusingly similar to its AMERICAN EAGLE mark.¹⁴⁴ The defendant refused, stating that the plaintiff had abandoned its right to use the contested mark.¹⁴⁵ Shortly thereafter, in 1997, the plaintiff announced that it would resume selling firetrucks with the AMERICAN EAGLE mark.¹⁴⁶ The plaintiff filed a trademark infringement suit against the defendant.¹⁴⁷ The district court issued an injunction ordering the defendant to stop using the AMERICAN FIREEAGLE mark because it was confusingly similar to the plaintiff's AMERICAN EAGLE mark.¹⁴⁸ On appeal, the Fourth Circuit vacated and remanded the district court's decision.¹⁴⁹

¹³⁶ *Emergency One, Inc. v. American FireEagle, Ltd.*, 228 F.3d 531, 533 (4th Cir. 2000).

¹³⁷ *Id.*

¹³⁸ *Id.* at 540.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 535.

¹⁴⁴ *Id.* at 534.

¹⁴⁵ *Id.* at 535.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* The Fourth Circuit found that the district court's jury instructions were improper.

The Fourth Circuit first examined the discontinued use requirement, emphasizing that the “use” necessary to avoid abandonment means “the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in the mark.”¹⁵⁰ The court considered the plaintiff’s evidence that it had continued using the AMERICAN EAGLE mark on clothing and other merchandise and by recycling and repairing old American Eagle brand firetrucks.¹⁵¹ The court found that the plaintiff had discontinued its use of the AMERICAN EAGLE mark for firetrucks, holding that “promotional use of this type or incidental use in recycling and repair is not the ‘use’ required to preserve trademark rights under the Lanham Act.”¹⁵² The court then evaluated the intent requirement.¹⁵³ The court found the plaintiff’s continued promotional uses of the AMERICAN EAGLE mark as evidence of the plaintiff’s intent to resume use of the mark.¹⁵⁴ The plaintiff also presented testimony from company executives corroborating that it planned to resume manufacturing American Eagle brand firetrucks.¹⁵⁵

The court distinguished the plaintiff’s rebranding announcement from the announcement considered by the *Hiland Potato Chip* court.¹⁵⁶ Unlike in *Hiland Potato Chip*, the plaintiff’s statement that it “wouldn’t be building American Eagle branded products forever” conveyed its prospective intent to discontinue using the AMERICAN EAGLE mark sometime in the future.¹⁵⁷ A corporation that publicly announces its prospective intent to discontinue its use of a mark does not immediately abandon its right to the mark.¹⁵⁸ Additionally, a corporation that makes such a statement of prospective intent is not estopped from preventing a competitor from using the contested mark.¹⁵⁹

3. *X Corp.’s Rebranding Statements*

This Part considers whether X Corp.’s statements regarding the rebranding of its platform from Twitter to X constitute unequivocal statements that immediately trigger the abandonment of the TWITTER Marks or prospective statements that merely infer X Corp.’s intent not to resume use. Two notable gaps

¹⁵⁰ *Id.* at 536.

¹⁵¹ *Id.* at 535.

¹⁵² *Id.*

¹⁵³ *Id.* at 535-37.

¹⁵⁴ *Id.* at 537.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 540.

¹⁵⁷ *Id.* at 534.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 537.

in the case law mystify how a court may determine if X Corp. has abandoned the TWITTER marks. First, current case law does not anticipate the current level of social connectivity that allows corporations to make large-scale communications regarding rebranding rather informally (e.g., in a tweet rather than a press conference or formal statement).¹⁶⁰ Furthermore, this development enables corporations, like X Corp., to make a higher volume of statements regarding their rebrand than ever before. In the face of more rebranding statements to consider, courts may not engage in the same principled evaluation of rebranding announcements as prescribed by McCarthy and demonstrated in *Hiland Potato Chip*, *Emergency One*, and similar cases.¹⁶¹ Conversely, courts may be more likely to determine that X Corp.’s statements were unequivocal because there were so many of them.

For example, on July 23, 2023, Elon Musk tweeted “[a]nd soon we shall bid adieu to the [T]witter brand and, gradually, all the birds.”¹⁶² This statement, like the rebranding statement made in *Emergency One*, is a statement of prospective intent to abandon the TWITTER Marks because it communicates future intent.¹⁶³ However, less than twenty-four hours later, on July 24, 2023, Musk tweeted the following:

Twitter was acquired by X Corp both to ensure freedom of speech and as an accelerant for X, the everything app. This is not simply a company renaming itself, but doing the same thing.

The Twitter name made sense when it was just 140 character [sic] messages going back and forth – like birds tweeting – but now you can post almost anything, including several hours of video.

In the months to come, we will add comprehensive communications and the ability to conduct your entire financial world. The Twitter

¹⁶⁰ See *infra* Section III.A. For example, in *Hiland Potato Chip*, the sales manager announced the rebrand in a letter mailed to all Clary House customers, which announced the elimination of the Hiland Brand name in two states. *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981, 982 (1983). In *Emergency One*, the president of Hiland Potato announced its intent to stop using the American Eagle brand in person to his employees. *Emergency One, Inc. v. Am. FireEagle, Ltd.*, 228 F.3d 531, 534 (4th Cir. 2000). Notably, these communications vary drastically from Musk’s statements regarding the rebrand of Twitter to X.

¹⁶¹ See *Hiland Potato Chip*, 720 F.2d at 982-84 (considering a single rebranding statement); *Emergency One*, 228 F.3d at 534 (considering a single rebranding statement).

¹⁶² See Musk, *supra* note 11.

¹⁶³ Compare *id.* (using words like “soon” and “gradually”), with *Emergency One*, 228 F.3d at 534 (stating that the company “ultimately intended” to produce other items and that production of American Eagle branded products would not be “forever”). See generally MCCARTHY, *supra* note 72, at § 17:11 (discussing what constitutes a communication of prospective intent to abandon a mark).

name does not make sense in that context, so we must bid adieu to the bird.¹⁶⁴

This statement, unlike Musk's previous tweet, is an unequivocal statement of present intent. The change from "soon we shall bid adieu" (a prospective statement of future intent to discontinue use) to "we must bid adieu" (an unequivocal statement of present intent) can be interpreted in multiple ways.¹⁶⁵

Musk could have intentionally used the word "soon" to indicate that within the next day, the platform would rebrand.¹⁶⁶ The change could also reflect what appeared to be the rushed nature of the rebrand.¹⁶⁷ Within twenty-four hours, Musk went from considering to initiating a rebrand.¹⁶⁸ Notwithstanding this distinction, the fact that Musk did bid adieu to the bird by removing the bird from the platform, likely conveys X Corp.'s unequivocal intent not to resume use.¹⁶⁹ Therefore, this could be a circumstance that implies intent not to resume use under the Lanham Act.¹⁷⁰

The second hurdle to understanding the effect of the X rebrand is the limited scope in which courts evaluate trademark abandonment. Whereas the rebranding announcements in *Hiland* and *Emergency One* related to a specific good,¹⁷¹ X Corp. owns multiple trademark registrations for the TWITTER Marks, which includes a wide variety of goods and services ranging from software to eyeglasses.¹⁷² Therefore, the scope of X Corporation's abandonment—if any—is unclear. A court could narrowly construe X Corp.'s statements as implicating only its social media-related offerings, especially given that they were announced via tweets, or a court could broadly construe X Corp.'s statements to implicate all of X Corp.'s rights to use the TWITTER Marks, regardless of the product market.

¹⁶⁴ Elon Musk (@elonmusk), X (July 24, 2023, 9:52 PM), <https://twitter.com/elonmusk/status/1683656350046232578>.

¹⁶⁵ See *id.*; Musk, *supra* note 11.

¹⁶⁶ See Musk, *supra* note 11.

¹⁶⁷ See *id.*; Gollom, *supra* note 7.

¹⁶⁸ See *supra* text accompanying notes 162-165.

¹⁶⁹ See Musk, *supra* note 164. See generally *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981, 983 (1983) (stating that the actions of the plaintiff's representative were also the actions of the plaintiff under agency theory).

¹⁷⁰ See generally 15 U.S.C.A. § 1127 (West).

¹⁷¹ See *Hiland Potato Chip Co. v. Culbro Snack Foods, Inc.*, 720 F.2d 981 (1983) (analyzing abandonment of a mark that was only used for potato chips); *Emergency One, Inc. v. Am. FireEagle, Ltd.*, 228 F.3d 531 (4th Cir. 2000) (explaining that the plaintiff's marks were primarily used for firetrucks).

¹⁷² GERBEN TRADEMARK LIBR., *supra* note 104.

Given Musk's public statements and actions regarding the rebrand, "it is not surprising that a number of persons have already filed intent-to-use applications for the mark TWITTER in connection with a wide range of goods and services, eager to trade on the goodwill of the TWITTER mark in the event X Corp. fully abandons it."¹⁷³ For example, on February 25, 2024, Howard Smukler, one of the individuals who filed a trademark application for the TWITTER mark and numerous other Twitter-based marks immediately after the rebranding announcements, submitted an office action in response to the USPTO's initial refusal of his application.¹⁷⁴ The application was initially refused because his intended TWITTER mark was confusingly similar to X Corp.'s existing TWITTER Marks.¹⁷⁵ Smukler's response to the office action asserted that X Corp. had abandoned its rights because of the overwhelming evidence of intent, noting the various communications on behalf of X Corp. insisted that X is the new platform name.¹⁷⁶ The USPTO, however, suspended the application because this was not the appropriate venue to assert abandonment.¹⁷⁷ Instead, "evidence and arguments that constitute a collateral attack on a cited registration, such as information or statements regarding a registrant's nonuse of its mark" can only be asserted in formal proceedings in front of the Trademark Trial and Appeal Board.¹⁷⁸

While X Corp.'s right to the TWITTER Marks has not yet been challenged in the appropriate venue,¹⁷⁹ this Comment argues that it is likely that a court would find that X Corp.'s statements regarding the rebranding are sufficient to satisfy the intent element of the abandonment analysis. Since announcing the rebranding on July 23, 2023, Musk's intent not to use the Twitter brand has been made abundantly clear.¹⁸⁰ At one point in the chaotic night, Musk joined a

¹⁷³ Riccio, *supra* note 77.

¹⁷⁴ See Letter from Howard Smukler, Atty. for Applicant, to Matt Einstein, Trademark Specialist, U.S. Pat. & Trademark Off. (Feb. 25, 2024) [hereinafter Smukler's Office Action Response].

¹⁷⁵ Non-Final Office Action Dated Sept. 14, 2023, U.S. Trademark App. No. 98099294, at 3.

¹⁷⁶ Smukler's Office Action Response, at 2. Smukler cited Musk's public campaign to rebrand, which he launched on Twitter, as blatant evidence of intent to abandon the all Twitter-based marks. *Id.*

¹⁷⁷ U.S. PAT. & TRADEMARK OFF., SUSPENSION NOTICE FOR APPLICATION SERIAL NO. 98099294 1-2 (2024).

¹⁷⁸ See *id.* at 2-3 ("Thus, evidence and arguments that constitute a collateral attack on a cited registration, such as information or statements regarding a registrant's nonuse of its mark, are not relevant during ex parte prosecution . . . Such evidence and arguments may, however, be pertinent to a formal proceeding before the Trademark Trial and Appeal Board to cancel the cited registration.").

¹⁷⁹ U.S. PAT. & TRADEMARK OFF., *supra* note 177.

¹⁸⁰ See, e.g., Musk, *supra* note 11; Jonathan Vanian, *Musk Risks Even More Damage to Twitter's Business as the Messaging App Changes Name to X*, CNBC (July 24, 2023, 4:27 PM), <https://www.cnbc.com/2023/07/24/elon-musk-risks-more-damage-to-twitter-business-after-name-change-to-x.html> (describing how Musk has replaced the app's "prominent blue bird logo with the letter X," "converted Twitter's corporate name to X Corp.," and attempted to change the app's identity by providing new services,

Twitter Spaces¹⁸¹ session titled “No one talk until we summon Elon Musk,” where he sat silently for an hour before unmuting himself and telling the users present, “We’re cutting the Twitter logo from the building with blowtorches.”¹⁸² He also crowdsourced the platform’s new logo stating, “If a good enough X logo is posted tonight, we’ll make go live [sic] worldwide tomorrow.”¹⁸³

Indeed, many references to the former brand were immediately purged from the platform.¹⁸⁴ The night of the rebranding, Musk sent an email to the company’s employees stating that this would be the last time he would be using a @twitter.com email.¹⁸⁵ While not all references to the brand were taken down from the platform overnight,¹⁸⁶ by now most have been dismantled.¹⁸⁷ For example, the X symbol has also replaced the Twitter sign on the company’s San Francisco headquarters.¹⁸⁸ According to Musk, the Twitter name was no longer consistent with his goals for the platform.¹⁸⁹

experiences, and products). Outside of changing physical signals associated with the social media platform, Musk’s intent to abandon the Twitter brand is evident from his “no business as usual” approach to changing Twitter to a different brand and company: X. See Rachel Lerman, *Musk Says Twitter Will Get Rid of Blue Check Marks Unless Users Pay Up*, WASH. POST (Mar. 24, 2023, 3:04 PM), <https://www.washingtonpost.com/technology/2023/03/24/twitter-legacy-blue-checkmarks/> (describing how Elon Musk says that users must now pay for a blue check mark by their name); *Evaluating Twitter’s Policies Six Months After Elon Musk’s Purchase*, CTR. FOR TECH. & SOC’Y, ANTI-DEFAMATION LEAGUE (May 9, 2023), <https://www.adl.org/resources/blog/evaluating-twitters-policies-six-months-after-elon-musks-purchase> (discussing how Musk has reinstated de-platformed users and changed the brand’s policies regarding hate speech and misinformation).

¹⁸¹ Twitter Spaces, now X Spaces, is the platform’s audio-conferencing feature. See generally *About X Spaces*, X HELP CTR., <https://help.twitter.com/en/using-x/spaces> (last visited May 4, 2024).

¹⁸² Wes Davis, *Twitter Is Being Rebranded as X*, THE VERGE (July 24, 2023, 6:27 AM), <https://www.theverge.com/2023/7/23/23804629/twitters-rebrand-to-x-may-actually-be-happening-soon>.

¹⁸³ Elon Musk (@elonmusk), X (July 23, 2023, 12:06 AM), <https://twitter.com/elonmusk/status/1682965462886535168>.

¹⁸⁴ Lindsey Sadler, *X Rebrand of Twitter Will Keep USPTO Busy*, LAW360 (Oct. 16, 2023, 4:02 PM), <https://www.law360.com/articles/1729974/x-rebrand-of-twitter-will-keep-uspto-busy>; see sources cited *supra* note 180.

¹⁸⁵ Davis, *supra* note 182.

¹⁸⁶ See, e.g., Happy Toast (@IamHappyToast), X (July 24, 2023, 5:41 AM), <https://twitter.com/IamHappyToast/status/1683412069264023554> (highlighting the visible remnants of the Twitter brand following Musk’s sudden rebrand to X).

¹⁸⁷ See generally sources cited *supra* note 180.

¹⁸⁸ Rebecca Carballo, *‘X’ on Twitter’s Headquarters Faces Investigation Over Permit Violations*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/07/30/technology/x-logo-twitter-san-francisco.html>.

¹⁸⁹ See Elon Musk (@elonmusk), X (July 24, 2023, 9:52 PM), <https://twitter.com/elonmusk/status/1683656350046232578>.

B. *Effect of Continued Use After Rebranding Statement*

The second element of the abandonment analysis is that the mark owner's use of the mark is discontinued.¹⁹⁰ The case law demonstrates that the evaluation of the discontinued use requirement is a complex and fact-intensive endeavor.¹⁹¹ Additionally, the nature and amount of use that courts consider to be in the "ordinary course of trade" is industry-dependent.¹⁹² Even limited commercial use can sometimes be sufficient to avoid a finding of abandonment if the use is "part of an ongoing program to exploit the mark commercially."¹⁹³

The discontinued use requirement involves the assessment of two related issues: (1) whether the use is "bona fide" and (2) whether the use is "not made merely to reserve a right in the mark."¹⁹⁴ Use of a mark is "bona fide" when the owner uses the mark commercially or "in the ordinary course of trade."¹⁹⁵ Under the Lanham Act, a mark for goods is used in commerce when "it is placed in any manner on the goods" and "the goods are sold or transported in commerce."¹⁹⁶ Similarly, a mark for services is used in commerce when "it is used or displayed in the sale or advertising of those services and the services are rendered in commerce"¹⁹⁷

The owner's commercial exploitation of the mark is at the heart of the bona fide use inquiry.¹⁹⁸ Bona fide commercial use of a mark maintains the public's association of the mark and its owner, while non-commercial uses fail to "sufficiently rekindle" that connection.¹⁹⁹ Whether a contested mark continues to serve a source-identifying function explains the disparate outcomes in cases where the mark owner's quantitative use of the mark is the same. For example, in *Silverman v. CBS* and *Marshak v. Treadwell*, the Second and Third Circuits

¹⁹⁰ 15 U.S.C.A. § 1127 (West).

¹⁹¹ Christopher T. Micheletti, *Preventing Loss of Trademark Rights: Quantitative and Qualitative Assessments of "Use" and Their Impact on Abandonment Determinations*, 94 TRADEMARK REP. 634, 638 (2004) (discussing the qualitative and quantitative factors courts consider when "assessing whether a trademark owner has continued or discontinued "use" of a mark within the meaning of the Lanham Act).

¹⁹² MCCARTHY, *supra* note 72, at § 17:9.

¹⁹³ *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1272 (2d Cir. 1974).

¹⁹⁴ 15 U.S.C.A. § 1127 (West).

¹⁹⁵ *Id.*; see also *Silverman v. CBS Inc.*, 870 F.2d 40, 48 (2d Cir. 1989) (quoting *Exxon Corp. v. Humble Exploration Co.*, 695 F.2d 96, 102 (5th Cir. 1983)) (stating that "use must be 'commercial use' to avoid abandonment").

¹⁹⁶ 15 U.S.C.A. § 1127 (West).

¹⁹⁷ *Id.*

¹⁹⁸ See Micheletti, *supra* note 191, at 653-54.

¹⁹⁹ *Silverman*, 870 F.2d at 47-48.

reached differing but compatible outcomes when considering the value of the incumbent mark holder's "minor activities" over years of nonuse.²⁰⁰

In *Silverman*, the contested mark related to the popular but controversial "Amos 'n' Andy Show," which had been off-air for over twenty-one years.²⁰¹ Despite the "worthy motives for non-use," the Second Circuit found that the defendant's uses of the mark, which consisted of challenging infringing uses and licensing the mark for limited use in educational and documentary programs, were "essentially non-commercial uses" and thus insufficient to avoid a finding of abandonment.²⁰² In *Marshak*, the Third Circuit considered whether a mark holder had abandoned the rights to the "THE DRIFTERS" mark for a band that had broken up two decades prior.²⁰³ While the original band was no longer performing together, the band's music was still played and sold in the U.S.; consequently, the mark holder continued to receive royalties.²⁰⁴ The Third Circuit held that the plaintiff had not abandoned the mark because selling and re-releasing music and receiving royalties were evidence that the plaintiff was continuing the commercially exploit the mark.²⁰⁵

The second component of the discontinued use analysis is the Lanham Act's anti-warehousing provision.²⁰⁶ Bona fide use means that the owner cannot simply warehouse the mark until it becomes valuable again.²⁰⁷ A mark is "warehoused" by its owner when the "use" of the mark is comprised of minor, noncommercial activities that fail to "sufficiently rekindle" the public's association of the mark with its owner.²⁰⁸ Additionally, use that avoids abandonment cannot be merely promotional or token use.²⁰⁹ Therefore, substantive and meaningful use are crucial to a corporation's ability to maintain trademark rights.²¹⁰ The following cases demonstrate the level of use that courts consider to be sufficient to avoid a finding of discontinued use.

²⁰⁰ See generally *id.* at 48; *Marshak v. Treadwell*, 240 F.3d 184 (3d Cir. 2001).

²⁰¹ *Silverman*, 870 F.2d at 45; Micheletti, *supra* note 191, at 652.

²⁰² *Silverman*, 870 F.2d at 47, 48; see also Lee, *supra* note 108, at 965-66 (discussing the wildly racist and offensive nature of the broadcast program).

²⁰³ *Marshak*, 240 F.3d at 187-88 (noting that the original band broke up in 1959, but a replacement group of singers continued to perform until the 1970s).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 199-200.

²⁰⁶ See 15 U.S.C.A. § 1127 (West) (stating that, to qualify as a bona fide use, the use may "not be made merely to reserve a right in a mark").

²⁰⁷ See *Emmpresa Cubana Del Tabaco v. Culbro Corp.*, 213 F. Supp. 2d 247, 270 (S.D.N.Y. 2002).

²⁰⁸ See *Silverman v. CBS Inc.*, 870 F.2d 40, 48 (2d Cir. 1989).

²⁰⁹ *Id.*

²¹⁰ *Id.*

I. Wells Fargo & Co. v. ABD Insurance & Financial Services, Inc.

In *Wells Fargo & Co. v. ABD Insurance & Financial Services, Inc.*, the plaintiff, a large national banking and financial services institution, sued the defendant, a local banking and financial services firm for infringing on the plaintiff's right to use the ABD mark in connection with its provision of banking and financial services.²¹¹ The plaintiff acquired ABD Insurance and Financial Services ("former ABD") in 2007 and 2008, and then, the plaintiff rebranded to "Wells Fargo Insurance Services."²¹² The defendant bank was established in 2009 by members of former ABD that left Wells Fargo.²¹³ In 2012, the defendant adopted the ABD mark using it as the name for its banking and financial services after the plaintiff failed to renew the ABD registration with the USPTO.²¹⁴

In *Wells Fargo*, the plaintiff sued "asserting trademark, false affiliation and advertisement, and unfair competition claims."²¹⁵ The plaintiff provided evidence of its continued use of the ABD mark on "customer presentations and solicitations," the original abdi.com domain, and receipts from customer payments made to ABD.²¹⁶ The district court, however, found that, given the plaintiff's rebranding efforts, these uses were "residual . . . or in the context of a historical background."²¹⁷ In other words, the plaintiff abandoned the ABD mark because its uses were not "bona fide and in the ordinary course of trade."²¹⁸

On appeal, the Ninth Circuit reversed and remanded the decision, stating that courts must consider the "totality of the circumstances surrounding the use."²¹⁹ The district court assigned too much weight to the intent requirement and failed to accurately evaluate the discontinued use requirement.²²⁰ Considering the totality of the circumstances, the Ninth Circuit found that the plaintiff's continued use of the ABD mark was representative of the plaintiff's "business calculation that it could continue to benefit from the goodwill and mark recognition associated with ABD."²²¹ Therefore, the plaintiff's uses were bona

²¹¹ *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 1072.

²¹⁶ *Id.* at 1071.

²¹⁷ *Id.* at 1072 (internal citation omitted).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See id.*

²²¹ *Id.*

fide and in the ordinary course of business, and the plaintiff had not abandoned the mark.²²²

2. *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*

In *Cumulus Media, Inc. v. Clear Channel Communications, Inc.*, the plaintiff, a Tallahassee-based radio station sued the defendant, another Tallahassee-based radio station, to stop the defendant from using the name “The Breeze” for radio programming.²²³ The plaintiff named its radio station “The Breeze” in 1994.²²⁴ Six years later, the plaintiff circulated on-air announcements stating that the station’s new name was “Star 98,” not “The Breeze.”²²⁵ The plaintiff changed the name of its station to reflect its new target audience: younger adults.²²⁶ Despite the rebranding announcement, the plaintiff continued to use “The Breeze” on a large sign outside the plaintiff’s headquarters, business cards, and promotional materials.²²⁷ Additionally, third-party businesses continued to refer to the station as “The Breeze,” maintaining the “continuing association” of THE BREEZE mark with the plaintiff.²²⁸

Thirteen months after the plaintiff’s rebranding announcement, the defendant, another radio station, adopted the name “The Breeze” for its on-air programming.²²⁹ Notably, the defendant also circulated on-air advertisements suggesting that its programming was associated with the plaintiff’s.²³⁰ Four days after learning of the defendant’s use of “The Breeze,” the plaintiff filed suit claiming trademark infringement and unfair competition.²³¹ The Eleventh Circuit emphasized that the burden of proof for abandonment is high because abandonment results in the involuntary forfeiture of the mark holder’s rights.²³² The Eleventh Circuit then considered the rebranding announcement, emphasizing that “[w]hile such an announcement is the type of circumstance from which intent not to resume use may be inferred . . . , it does not alone serve to make a prima facie showing of abandonment. A defendant must also introduce

²²² *Id.* at 193.

²²³ *Cumulus Media, Inc. v. Clear Channel Commc’ns, Inc.*, 304 F.3d 1167, 1168-71 (11th Cir. 2002).

²²⁴ *Id.* at 1169.

²²⁵ *Id.*

²²⁶ *Id.* at 1171.

²²⁷ *Id.* at 1169.

²²⁸ *Id.* (“[T]he Arbitron rating agency, which measures radio audience market share, continued to credit WBZE if a listener reported listening to ‘The Breeze’ in Tallahassee.”).

²²⁹ *Id.*

²³⁰ *See id.*

²³¹ *Id.* at 1169-70.

²³² *Id.* at 1175.

evidence of nonuse.”²³³ The Eleventh Circuit held that the plaintiff’s evidence of continued use, which consisted of the sign at its headquarters and uses on promotional items, was sufficient to avoid a finding of abandonment.²³⁴

3. *X Corp.’s Continued Use of the Twitter Marks After the Rebranding Announcement*

There is a tension between how trademark law and brand management practices treat the continued use of a former mark following revolutionary rebranding. While marketing scholarship emphasizes that carefully planned and fully executed implementation is vital to success, trademark law rewards mark owners who continue to use a mark even after announcing and promoting a rebrand.²³⁵ In the footnotes to its decision in *Cumulus*, the Eleventh Circuit noted that the plaintiff’s continued uses of THE BREEZE mark were “simply vestigial holdovers” that were merely evidence of the “haphazard transition to the use of the ‘Star 98’ name rather than [evidence of its] an intent to continue using ‘The Breeze’.”²³⁶

Similarly, in the months following Twitter’s rebrand, many users commented on X Corp.’s continued use of the Twitter brand indicia as evidence of X Corp.’s ill-managed rebranding efforts.²³⁷ Others blamed the inconsistencies on the significantly fewer employees working for the platform.²³⁸ X Corp.’s most significant continued use of the TWITTER marks is its use of the twitter.com domain.²³⁹ However, there are other examples of

²³³ *Id.* 1178 n.17.

²³⁴ *Id.* at 1177.

²³⁵ *See generally id.* (holding that a radio station did not abandon its mark even after rebranding the station by renaming the show, changing the programming to cater to a different audience, and paying for advertisements promoting the rebrand).

²³⁶ *Id.* at 1175 n.10.

²³⁷ *See, e.g.,* Aman Kidwai & Leah Carrol, *Why Twitter’s Rebrand to X Feels “Shocking” to Users*, BBC (Aug. 1, 2023), <https://www.bbc.com/worklife/article/20230731-why-twitters-rebrand-to-x-feels-shocking-to-users>; *The Impacts of Twitter’s Rebrand*, ANCHOR (Oct. 12, 2023), <https://anchordigital.com.au/articles/the-impacts-of-twitters-rebrand>; Todd Spangler, *Musk’s Twitter Rebranding as X Is Off to a Confusing, Haphazard Start*, VARIETY (July 24, 2023, 7:55 AM), <https://variety.com/2023/digital/news/twitter-rebranding-x-logo-1235678381/>.

²³⁸ *See generally* Danny D’Cruze, *Elon Musk Confirms He Has Fired Over 80% of Twitter Employees So Far*, BUS. TODAY (Apr. 12, 2023, 11:35 AM), <https://www.businesstoday.in/technology/news/story/elon-musk-confirms-he-has-fired-over-80-of-twitter-employees-so-far-377045-2023-04-12> (stating that since Musk’s 2022 acquisition, Musk has reduced the number of Twitter employees from 8,000 to 1,500).

²³⁹ *See* Marcus Collins, *Twitter’s Rebrand Is a Cautionary Lesson for Marketers. Here’s Why*, FORBES (July 30, 2023, 8:00 AM), <https://www.forbes.com/sites/marcuscollins/2023/07/30/the-real-lesson-to-be-learned-from-twitters-rebrand>.

continued usage littered throughout the platform's interface.²⁴⁰ For example, the "New user FAQ" page includes a "Twitter policies and reporting" hyperlink²⁴¹ and the intellectual property issues reporting form still refers to the platform as Twitter.²⁴²

However, bona fide use of a mark on a webpage must be openly perceivable to consumers.²⁴³ In other words, it must be prominently displayed.²⁴⁴ Merely including some reference to a mark hidden on a webpage is insufficient to establish bona fide use.²⁴⁵ On one hand, the remnants of the TWITTER Marks are minor and thus insufficient to prove X Corp.'s continued use of the TWITTER Marks. On the other hand, as the courts in *Wells Fargo* and *Cumulus* demonstrate, courts are wary to find that a trademark owner has discontinued its use of a mark in such a short time frame after rebranding.

C. Conclusion: The Song Is Over but the Tweets Go On?

Answering the question of whether a court is likely to hold that X Corp. has abandoned its right to the exclusive use of the TWITTER Marks is tenuous. While X Corp.'s rebranding statements are most likely sufficient to satisfy the intent element of the abandonment analysis, it is unclear whether a court is likely to find that X Corp.'s use of the TWITTER Marks has been discontinued.

Perhaps the rebranding of Twitter will follow a similar pattern as what will happen to companies who rebranded in the wake of mass consumer disapproval of racist imagery used in branding. Jon Lee speculates that when, or if, a court analyzes the rebranding of now-defunct brands like Aunt Jemima and Uncle Ben's, the analysis will be controlled by the overwhelming evidence of the company's intent to stop using racist imagery.²⁴⁶ In other areas of property law, the court gives more weight to evidence of strong intent than to other factors.²⁴⁷ For example, this is true for many courts when evaluating evidence of a donor's

²⁴⁰ *Id.*

²⁴¹ *New User FAQ: Posting*, X HELP CENTER, <https://help.x.com/en/resources/new-user-faq> (last visited May 7, 2024).

²⁴² *See Help with Intellectual Property Issues*, X HELP CENTER, <https://help.twitter.com/en/forms/ipi/trademark/trademark-owner> (last visited May 7, 2024).

²⁴³ *See In re Osterberg*, 83 U.S.P.Q.2d 1220, at *3 (T.T.A.B. 2007).

²⁴⁴ *Id.* (finding that use was insufficient where "viewers of the webpage will have to search through the descriptive text even to find the purported mark"); *see also id.* (noting that use was sufficient "where the mark at issue was set out from the surrounding text as the first word in a bullet list").

²⁴⁵ *Id.*

²⁴⁶ *See Lee, supra* note 108, at 943, 972-74.

²⁴⁷ *Id.* at 978 ("But the reality in other areas of property law is that strong evidence of intent often influences a court's evaluation of other requirements.").

intent to give a gift.²⁴⁸ If a court were to assign more weight to X Corp.'s intent, then X Corp. will likely lose the ability to protect its exclusive use of the TWITTER Marks. However, even if X Corp. has abandoned the TWITTER Marks, a subsequent user of the marks will almost certainly be required to adequately distinguish themselves as a separate entity from X Corp.²⁴⁹ Courts may find it sufficient that the new user includes a simple disclaimer, like "not affiliated with X," or the USPTO may allow the registration of new but similar marks, such as "NEW TWITTER," "NOT TWITTER," "OLD TWITTER," or "BETTER TWITTER."

Despite the abandonment issue, X Corp., since its rebranding, has continued to take protective actions to defend the TWITTER Marks against other users. For example, X Corp. has filed two oppositions with the USPTO to protest the registration of marks that infringe on the TWITTER Marks.²⁵⁰ X Corp. has also renewed various registrations for the TWITTER marks.²⁵¹ Considering both the uncertain nature of the abandonment question and the fact X Corp. continues to take protective actions defending the TWITTER Marks, the next section discusses whether X Corp. should voluntarily abandon the TWITTER Marks.

IV. IS A BIRD IN THE HAND *REALLY* WORTH TWO IN THE BUSH?

Many commentators have noted the failure of trademark law to adequately balance the interests of trademark owners and the public.²⁵² The expansion of trademark rights is emblematic of this imbalance. Furthermore, this imbalance is in opposition to the language of the Senate Report of the Lanham Act, which stated that the first policy goal of the bill is the protection of the public.²⁵³ The congressional intent is mirrored throughout trademark law. For example, the likelihood of confusion test requirement, which requires a finding of infringement where the use of a mark by another is likely to confuse or deceive

²⁴⁸ *Id.* at 978.

²⁴⁹ *See generally* Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167 (11th Cir. 2002).

²⁵⁰ *See* Notice of Opposition, U.S. Pat. & Trademark Off. (Mar. 27, 2024), U.S. Trademark App. No. 97403780 (opposing the registration of BUT HIS TWEETS for various goods including bumper stickers, mugs, and hats); Notice of Opposition, U.S. Pat. & Trademark Off. (May 15, 2024), U.S. Trademark App. No. 97675002 (opposing the registration of TWITTER HELLSCAPE for magazines, books, e-books, audio books, music, and illustrations).

²⁵¹ *See, e.g.*, Combined Declaration of Use and/or Excusable Nonuse/Application for Renewal of Registration of a Mark under Sections 8 & 9, U.S. Pat. & Trademark Off. (Oct. 23, 2023), U.S. Trademark Reg. No. 4422235 (renewing X Corp.'s registration for TWITTER for use for various Internet services and advertising).

²⁵² *See, e.g.*, Joel R. Feldman, Note, *Reverse Confusion in Trademarks: Balancing the Interests of the Public, the Trademark Owner, and the Infringer*, 8 J. TECH. L. & POL'Y 163 (2003).

²⁵³ *See* S. Rep. No. 1333, 79th Cong., 2d Sess. (1946), *reprinted in* 1946 U.S. Code Cong. Serv. 1274.

the public, demonstrates how trademark law aims to protect the corporation and the consumer.²⁵⁴ The value of a trademark, known as goodwill, does not have an exact definition.²⁵⁵ Trademark owners have a valid interest in protecting the goodwill amassed by trademarks.²⁵⁶ However, this protection should not subsume the public's interest.²⁵⁷

A. *Tensions in the Court of Public Opinion*

Social media platforms have played a crucial role in amplifying the public's voice and, in turn, shaping corporate trademark policies.²⁵⁸ Contrary to the policy goals of the Lanham Act, case law demonstrates that the courts are permissive of trademark warehousing. The court of public opinion, however, is far less forgiving of corporate trademark warehousing, especially when it comes to popular brands. For example, this past summer, fast-food restaurant Taco John's formally abandoned its TACO TUESDAY mark in response to a viral social media campaign demanding the surrender of the mark.²⁵⁹ Since 1989, Taco John's had the exclusive ability to use the TACO TUESDAY mark in connection to restaurant services almost everywhere in the U.S.²⁶⁰ After filing a cancellation petition against the mark with the USPTO, Taco Bell, a fast-food rival of Taco John's, launched a viral social media campaign stating that Taco Bell's customers could only "Live Más" if they could "freely say 'Taco Tuesday.'"²⁶¹ To win over the public, Taco Bell launched an advertising campaign featuring celebrities like LeBron James saying, "Everyone should be able to say and celebrate Taco Tuesday," but "[t]he ad bleeped out the word Tuesday, with James explaining that there was a trademark on the phrase."²⁶² Facing mounting public pressure, Taco John's CEO announced that instead of

²⁵⁴ See Bowker, *supra* note 110, at 1013 ("Congress's adoption of the likelihood of confusion standard in this context manifests the policy of protecting the public interest.").

²⁵⁵ See *id.* at 1011.

²⁵⁶ *Id.* at 1011-12.

²⁵⁷ *Id.*

²⁵⁸ See generally Deborah R. Gerhardt, *Social Media Amplify Consumer Investment in Trademarks*, 90 N.C. L. REV. 1491 (2012) (discussing the role of social media in giving the public a voice in shaping brand narratives and corporate brand and trademark decisions).

²⁵⁹ Ayana Archie, *Taco John's Has Given Up Its 'Taco Tuesday' Trademark After a Battle with Taco Bell*, NPR (July 19, 2023, 5:09 PM), <https://www.npr.org/taco-tuesday-trademark-taco-johns-taco-bell>.

²⁶⁰ *Id.* ("Taco John's has held the trademark since 1989, in all U.S. states except New Jersey.").

²⁶¹ Noah Goldberg, *Taco Bell and Taco John's Settle Trademark Dispute. 'Taco Tuesday' Is Now Free for Everyone to Use*, L.A. TIMES (July 18, 2023, 10:58 AM), <https://www.latimes.com/california/story/2023-07-18/taco-bell-and-taco-johns-settle-trademark-debate-taco-tuesdays-is-now-free-for-everyone-to-use>.

²⁶² *Id.*

spending “millions of dollars on lawyers” defending the mark, the chain would “take that money and put it toward a good cause.”²⁶³

While not related to rebranding on its face, the Taco John’s case highlights some key takeaways for corporations. First, the public is easily swayed by grandiose rhetoric.²⁶⁴ Contrary to Taco Bell’s social media campaign, Taco John’s ownership of the TACO TUESDAY mark for restaurant services does not give Taco John’s the ability to stop the lay person from saying or using the phrase “Taco Tuesday” so long as they were not using “the expression to promote their tortilla-wrapped offerings.”²⁶⁵ Second, Taco John’s strategically abandoned their mark. Instead of simply admitting defeat, Taco John’s CEO Jim Creel used the situation to publicly announce the company’s commitment to charity.²⁶⁶ In a letter to the public, Creel announced that because wasting money defending the mark “doesn’t feel like the right thing to do,” the corporation would instead contribute \$40,000 to a nonprofit group that supports restaurant workers with children.²⁶⁷ Taco John’s has provided an example of how X Corp. can kill two birds with one stone. They can abandon their trademarks, avoid uncertain litigation, and achieve public approval.

B. Corporate Social Responsibility and Corporate Trademark Rights

In *Brand Loyalty & Loyalty of Brands*, Amir H. Khoury posits just as customers have loyalty to brands, brands owe a duty of loyalty to their customers to maintain the standards of goods and services that the public has come to associate with a particular mark.²⁶⁸ Khoury’s “Loyalty of the Brand” theory is a response to the asymmetrical nature of the rights of trademark owners and consumers in trademark law.²⁶⁹ Corporations exploit this imbalance when they

²⁶³ *Id.*

²⁶⁴ See generally Joel Feldman, *The 10 Commandments of Trademark Commentary: Community Resource*, WORLD TRADEMARK REV. (Mar. 26, 2022), <https://www.worldtrademarkreview.com/article/the-10-commandments-of-trademark-commentary-community-resource> (describing how to make trademark law accessible to the general public while avoiding mistakes that negatively impact public opinion of companies holding trademarks).

²⁶⁵ Emily Heil, *‘Taco Tuesday’ Belongs to Us All, Taco John’s Gives Up Trademark*, WASH. POST (July 18, 2023, 4:59 PM), <https://www.washingtonpost.com/food/2023/07/18/taco-tuesday-trademark-taco-johns-taco-bell/>.

²⁶⁶ Jonathan Maze, *Taco John’s Gives Up Its Taco Tuesday*, REST. BUS. ONLINE (July 18, 2023), <https://www.restaurantbusinessonline.com/marketing/taco-johns-gives-its-taco-tuesday-trademark>.

²⁶⁷ *Id.*

²⁶⁸ See Amir H. Khoury, *Brand Loyalty & Loyalty of Brands: A Symbolic Relationship*, 32 J.L. & COM. 173, 195 (2014) (discussing the mechanics of the “Loyalty of Brands”).

²⁶⁹ *Id.* at 190 (“The ownership right that is vested in the trademark owner should be continuously subjected to obligations of said owner towards the consumers and the market at large because of their vested rights therein. The brand is a by-product of the collaboration between the mark’s owner and the consumers.”).

use cost-cutting measures to deliver inferior goods and services under the same brand names that consumers associate with higher quality.²⁷⁰ While Khoury does not explicitly discuss rebranding, it logically follows that a brand owner who deviates from the public's expectations regarding the quality of goods or services should stop using that brand and use a different brand. In Khoury's view, X Corp. may have had an obligation, in a sense, to rebrand given the radical changes made to the platform under Musk.²⁷¹

Khoury argues that quality assurance should be a binding obligation for trademark owners to continue using marks and proposes that "Loyalty of the Brand" should be an independent cause of action against trademark owners who fail to uphold that obligation.²⁷² While this Comment does not suggest that "Loyalty of the Brand" should be a stand-alone consumer right, this Comment does argue that Khoury's "Loyalty of the Brand" theory implicates corporate social responsibility issues that arise when a corporation continues to protect the right the exclusive use of a mark that it no longer uses. Under social obligation theory, every individual inherently owes a duty to "promote the capabilities that are essential to human flourishing."²⁷³ Social obligation theory is at the heart of the corporate social responsibility ("CSR") framework.²⁷⁴ Reflecting on the impact of social obligation theory on the development of U.S. property law, scholars argue that property owners have an obligation to share surplus resources for the public good.²⁷⁵ Warehoused marks constitute surplus resources, thus corporations that warehouse marks are not acting in accordance with the principles of CSR. Such a violation of CSR principles puts companies at risk for shareholder actions and public scrutiny.

C. Conclusion: Warehousing the TWITTER Marks Is a Cardinal Sin

The Taco John's/TACO TUESDAY issue is an example of the public's general disfavor of corporations that appear to be hoarding marks at the expense of the public good. The public is similarly questioning X Corp.'s continued protection of its rights to the TWITTER Marks given X Corp.'s perceived

²⁷⁰ *Id.* at 193.

²⁷¹ See Peter Suci, *How Elon Musk Changed Twitter A Year And \$44 Billion Later*, FORBES (Nov. 8, 2023, 1:49 PM), <https://www.forbes.com/sites/petersuci/2023/11/08/twitter-has-changed-a-lot-since-elon-musk-bought-it-a-year-ago/?sh=45926f36502d>.

²⁷² Khoury, *supra* note 268, at 195.

²⁷³ Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 745 (2009).

²⁷⁴ See Mislav Ante Omazic & Dejan Miljenovic, *Social Obligations (CSR)*, ENCYC. OF SUSTAINABLE MGMT. 1, 1-2 (2023).

²⁷⁵ Alexander, *supra* note 272, at 746.

intention not to use the TWITTER Marks.²⁷⁶ To many, the rebranding of Twitter to X represents Musk's decision not to revive Twitter,²⁷⁷ contrary to Musk's initial statements made after acquiring the social media platform.²⁷⁸ One Internet user even wrote an impassioned letter imploring Musk to sell the TWITTER Marks to someone who would "use them to rebuild the old version of Twitter."²⁷⁹ The letter continues, noting that this would be a "win-win" for both X Corp. and users who loved the Twitter brand.²⁸⁰ Instead of warehousing the TWITTER Marks by not using them while simultaneously preventing a subsequent user from using them, the letter argues that X Corp. should sell the marks and "use the money to help further accelerate X,"²⁸¹ fulfilling the asserted purpose behind acquiring and rebranding the platform.²⁸²

The CSR implications of X Corp. actually warehousing the TWITTER Marks or even the *perception* that X Corp. is warehousing the TWITTER Marks are grave. Corporate reputation is a function of public perception.²⁸³ The public views the rebrand, and the warehousing of the TWITTER Marks, as both careless and wasteful.²⁸⁴ This implication is heightened by the value that the Twitter brand holds to the public, as shown by the incorporation of the Twitter brand into daily life with the use of words like "tweet" and "retweet."²⁸⁵ Where brands are adopted into popular culture, trademark law affords corporations the right to control not only the formal aspect of marks as informational devices but also the symbolic meaning and cultural importance of the brand itself.²⁸⁶ With great power, comes great responsibility. X Corp.'s power to control the use of

²⁷⁶ See Justin Bariso, *An Open Letter to Elon Musk: Let's Talk About Twitter*, INC. (Aug. 18, 2023), <https://www.inc.com/justin-bariso/letter-to-elon-musk-twitter-x-trademark-logo.html>.

²⁷⁷ *Id.*

²⁷⁸ See Elon Musk (@elonmusk), X (Oct. 27, 2022, 9:08 AM), <https://x.com/elonmusk/status/1585619322239561728/photo/1> ("The reason I acquired Twitter is because it is important to the future of civilization to have a common digital town square . . . I did it to try to help humanity, whom I love.").

²⁷⁹ Bariso, *supra* note 276.

²⁸⁰ *Id.* ("[X Corp.] move[s] on with X, the blue bird can fly once again, and people use the app that they want, X or Twitter.").

²⁸¹ *Id.*

²⁸² See Elon Musk (@elonmusk), X (Oct. 4, 2022, 6:41 PM), <https://x.com/elonmusk/status/1577428673971777536> ("Twitter probably accelerates X by 3 to 5 years[.]").

²⁸³ Burke, *supra* note 54., at 1.

²⁸⁴ Bariso, *supra* note 276.

²⁸⁵ Saira Mueller, *Why Is X Still Called Twitter?*, CNN (Feb. 23, 2023, 4:00 PM), <https://www.cnn.com/2024/02/23/tech/twitter-x-rebrand-cec/index.html>.

²⁸⁶ See Rosemary Coombe & Andrew Herman, *Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web*, 50 DEPAUL L. REV. 597, 598-99 (2000) (discussing the mechanisms by which trademark law allows corporate brand owners to control marks and their use in the public social domain).

the TWITTER Marks entails X Corp.'s responsibility not to deprive the public of the Twitter brand.

Even after rebranding, X Corp. continues to assert its right to protect the TWITTER Marks. At the same time, X Corp. has demonstrated to the public that it does not intend to return to the Twitter brand, even taunting users that want to continue calling the platform Twitter.²⁸⁷ To take a cue from social obligation theory and advance corporate social responsibility, X Corp. should abandon its TWITTER trademark because (1) of the significant value the brand holds to the public and (2) the apparent lack of value the TWITTER Marks hold to X Corp. The Twitter brand holds significant value to the public that was amassed over seventeen years, but that alone does not require X Corp. to abandon its trademark rights. However, good CSR policy along with X Corp. users implore X Corp. to voluntarily abandon its rights to the TWITTER Marks.

CONCLUSION

To be clear, this Comment does not suggest that all corporate rebrandings should implicate, whether legally under trademark law or ethically under CSR principles, corporate trademark rights. Nor does this Comment suggest that there is some inherent public right to a social media platform replete with Twitter brand indicia. Rather, this Comment argues that, given the nature of the rebranding, the perceived lack of value that the TWITTER Marks hold to X Corp., and the cultural value that the Twitter brand holds with the public, X Corp. should abandon the TWITTER Marks.

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²⁸⁷ Elon Musk (@elonmusk), X (Feb. 14, 2024), <https://x.com/elonmusk/status/1757820290015637821> (responding to author Stephen King's refusal to call the platform X: "Stop deadnaming X[.] Respect our transition[.]").