

Flipping the Bird: Trademark Considerations from Elon Musk's Twitter Rebrand

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Since purchasing the social media stalwart in October 2022, Elon Musk has spared no expenses putting his impression on Twitter.⁹¹ From staff changes to (short-lived) adjustments to the company's DMCA-compliance policies⁹² to removal of celebrity verified account statuses⁹³ to (briefly) limiting the number of tweets users could see a day,⁹⁴ Musk has quite literally uprooted everything *and* the kitchen sink.⁹⁵ But his most recent managerial maneuver has left many in the trademark law community perplexed: rebranding the platform to X.⁹⁶

⁹¹ See Clare Duffy & Donie O'Sullivan, *Twitter confirms completion of Elon Musk's \$44 billion acquisition deal*, CNN (Oct. 28, 2022), www.cnn.com/2022/10/28/tech/elon-musk-twitter-deal-close/index.html.

⁹² See Jyoti Mann, *Users are uploading entire movies to Twitter – and many aren't being blocked*, Business Insider (Nov. 20, 2022), www.businessinsider.com/users-uploading-movies-twitter-many-arent-being-blocked-2022-11; Paul Tassi, *Twitter's Broken Its Copyright Strike System, Users Are Uploading Full Movies*, Forbes (Nov. 21, 2022), www.forbes.com/sites/paultassi/2022/11/21/twitters-broken-its-copyright-strike-system-users-are-uploading-full-movies/?sh=45e04c727cc4; see also 17 U.S. Code § 512.

⁹³ Barbara Ortutay, *Twitter begins removing blue checks from users who don't pay*, Associated Press (Apr. 21, 2023), apnews.com/article/twitter-blue-check-marks-elon-musk-pay-celebrities-c8bc4520e7e739ca3c5376817ab82b25.

⁹⁴ Tamia Fowlkes & Julian Mark, *Elon Musk sets new daily Twitter limits for users*, Washington Post (July 1, 2023), www.washingtonpost.com/technology/2023/07/01/elon-musk-new-twitter-user-limits/.

⁹⁵ See Lauren Feiner, *Elon Musk carried a sink into Twitter on Wednesday as deal nears close*, CNBC (Oct. 26, 2022), www.cnbc.com/2022/10/26/elon-musk-carried-a-sink-into-twitter-on-wednesday-as-deal-nears-close.html.

⁹⁶ See Clare Duffy, *Twitter's rebrand is the next stage in Elon Musk's vision for the company. But does anyone want it?*, CNN (July 25, 2023), www.cnn.com/2023/07/25/tech/twitter-x-elon-musk-rebrand-strategy/index.html.

Founded in 2006, Twitter has matured from a modest, friend-updating status service to the preeminent platform for discourse, commentary, or immediate reaction to anything happening anywhere in the world.⁹⁷ Truly a digital town square, Twitter has become a resource as a public forum through which meaningful discussions can be had—internet detectives can solve crimes, and stranded families can receive natural disaster relief information.⁹⁸

As a consequence of the social utility that Twitter has amassed over the years, the platform *had* developed into one of the most recognizable brands in cyberspace. But then suddenly, the goodwill that had accrued in the Twitter name, logos, terminology (“tweets” and “retweets”), and interface design has vanished with Musk’s decision to rebrand. Analysts estimate that the company has abandoned somewhere between \$4 billion and \$20 billion in value by switching its brand name to X.⁹⁹

⁹⁷ See Jean Burgess & Nancy K. Baym, *Twitter: A Biography* (NYU Press 2022), at 5 (“Twitter was officially launched in July 2006. In its earliest incarnation, it was a very lightweight service for updating your friends about your whereabouts, thoughts, or everyday activities. . . . Its original intent, in other words, was to be of importance on an interpersonal rather than a geopolitical scale.”).

⁹⁸ *How many people come to Twitter for news? As it turns out, a LOT*, Twitter News (Sep. 12, 2022), blog.twitter.com/en_us/topics/insights/2022/how-many-people-come-twitter-for-news; *When natural disasters happen, Twitter can be used to help. Here’s how*, Twitter Blog (Oct. 13, 2022), blog.twitter.com/en_us/topics/company/2022/when-natural-disasters-happen-twitter-can-help-heres-how; Dana Gerber, *The Marathon bombing changed Boston. It also changed Twitter.*, Boston Globe (Apr. 12, 2023), www.bostonglobe.com/2023/04/12/business/one-stop-shop-process-social-trauma-how-boston-marathon-bombing-changed-twitter/; Emily Olson, *How the Boston Marathon bombings changed Twitter, media and how we process tragedy*, NPR (Apr. 15, 2023), www.npr.org/2023/04/15/1170082886/marathon-bombings-twitter-media-boston-strong.

⁹⁹ Aisha Counts & Jesse Levine, *By Turning Twitter Into X, Elon Musk Risks Killing Billions in Brand Value*, Time (July 24, 2023), time.com/6297303/twitter-x-rebrand-cost/ (“Elon Musk decreed that Twitter’s product name would be changed to ‘X,’ and that he is getting rid of the bird logo and all the associated words, including ‘tweet.’ Musk’s move wiped out anywhere between \$4 billion and \$20 billion in value, according to analysts and brand agencies.”).

There are numerous trademark implications of this decision. Let's discuss a few of them:

(Trade)marked with an X

Elon Musk has long had an obsession with the letter X, and he hopes to parlay that fascination into a one-stop-shop, all-in-one online social media, entertainment, and ecommerce platform.¹⁰⁰ However, obtaining trademark rights for the name "X" will be an uphill battle.

The company owns – and up to this point, maintains – trademarks in Twitter,¹⁰¹ Tweet,¹⁰² and Retweet,¹⁰³ as well as in its bird-silhouette logo mark.¹⁰⁴ If Musk intends to leave these trademarks dormant in favor of X, that is a decision that is within his right to make as owner of the company. But he cannot simply tack these former registrations to carry the same trademark protections to X; instead, the company will need to reapply if it wishes to own federal registrations in the X mark.

And it's not like Musk's desired mark is simply for the taking. Numerous X marks in the social media services industry are already registered with the USPTO, including trademarks owned by Meta and Microsoft.¹⁰⁵

¹⁰⁰ See Duffy, *supra* note __94??? (“[Musk] laid out a vision for an “everything” app called X, where users could communicate, shop, consume entertainment and more. . . . The vision for the rebrand may go all the way back to Musk’s creation of the original X.com in 1999;” “The rebrand also seems to be a continuation of a sort of obsession with the letter ‘X,’ which also features in the name of one of Tesla’s cars, the Model X; the name of his rocket company, SpaceX; the name of his new artificial intelligence firm, xAI; and the name of two of his children, X Æ A-Xii and Exa Dark Sideræl.”).

¹⁰¹ See, e.g., US Registration No. 3619911.

¹⁰² US Registration No. 4338963.

¹⁰³ US Registration No. 5176563.

¹⁰⁴ US Registration No. 4552274.

¹⁰⁵ Cameron Shackell, *Do Rebrands Really Work? An Expert Delves into Musk’s Twitter Pivot*, *The Fashion Law* (July 27, 2023), www.thefashionlaw.com/do-rebrands-really-work-an-expert-delves-into-musks-twitter-pivot/ (“Both Microsoft and Meta (and many others) have laid claims to X in the past for various goods and services, which means that lawsuits over Twitter’s X mark very well may be filed.”).

Musk's website therefore not only has major obstacles to trademark registration ahead—it is likely to face trademark infringement lawsuits from these existing X mark owners.¹⁰⁶ In order to obtain the rights necessary to operate under the X mark, former-Twitter will likely face tens of millions in litigation, settlement, and acquisition costs.¹⁰⁷

Further, because of the succinctness of the new name (only one letter), whatever trademark rights Musk does gain in X, as a name and as a logo, will be limited. For example, Musk will not have the ability to stop every other tech company from using an 'X' in its branding; rather, any protection in the X mark will be limited to, say, certain stylization elements unique to the new logo.¹⁰⁸ After all, the primary purpose of trademark law is to protect and uphold consumer expectations;¹⁰⁹ it does

¹⁰⁶ See *Id.*; Kyle Jahner, *Musk's Twitter Rebrand Invites 'X' Trademark Fallout: Explained*, Bloomberg Law (July 26, 2023), [news.bloomberglaw.com/ip-law/musks-twitter-rebrand-invites-x-trademark-fallout-explained](https://www.bloomberglaw.com/ip-law/musks-twitter-rebrand-invites-x-trademark-fallout-explained) ("X Corp., the website's corporate parent, is sure to be sued, and defending and building the new brand could cost tens of millions or more. . . A search for 'X' as the full mark in the US Patent and Trademark Office database returns nearly 1,000 active registered trademarks, including hundreds in classes involving software. That includes an X for Microsoft's Xbox and Comcast's lightly-stylized X for Xfinity merchandise.").

¹⁰⁷ See Jahner, *supra id.*

¹⁰⁸ See Elizabeth Napolitano, *Why Twitter's rebrand to X could be legally challenging*, CBS News (July 25, 2023), www.cbsnews.com/news/twitter-trademark-x-com-rebrand/.

¹⁰⁹ See *Jack Daniel's Properties*, 599 U.S. ___, at 3 ("every trademark's "primary" function: "to identify the origin or ownership of the article to which it is affixed." *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 412 (1916). Trademarks can of course do other things: catch a consumer's eye, appeal to his fancies, and convey every manner of message. But whatever else it may do, a trademark is not a trademark unless it identifies a product's source (this is a Nike) and distinguishes that source from others (not any other sneaker brand). See generally 1 J. McCarthy, *Trademarks and Unfair Competition* §3:1 (5th ed. 2023). In other words, a mark tells the public who is responsible for a product.

In serving that function, trademarks benefit consumers and producers alike. A source-identifying mark enables customers to select "the goods and services that they wish to purchase, as well as those they want to avoid." *Matal v. Tam*, 582 U. S. 218, 224 (2017). The mark "quickly and easily assures a potential customer that this item—the item with this mark—is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past." *Qualitex Co. v. Jacobson Products Co.*, 514 U. S. 159, 164 (1995). And because that is so, the producer of a

not function to provide a trademark owner the right to bar others in an industry from using words (or in this case, a letter) common to that industry. Musk's social media site is not the first technology company to utilize an "X" in a trademark way, nor will a federal registration in the mark allow Musk to be the last to do so.

This leaves a lot of legal work ahead for the social media platform—work that had already been done for the strong, established TWITTER marks that Musk has so capriciously set aside.¹¹⁰

Opportunistic Twitter Trademark Filings

Following Musk's announced brand name change, several individuals filed for federal trademark protection in Twitter-related marks.¹¹¹ Unfortunately for these applicants, they will have to experience the hard way that that is not how the United States trademark system works.

For these new applications to be successful, the existing registered marks mentioned above would have to first be abandoned or canceled under a theory of abandonment. If applicants go forth without either of these first occurring, the USPTO will refuse to register these applications for being confusingly similar to existing marks. Suspending use of a mark, like Musk appears to be moving toward, does not automatically constitute abandonment. Rather, the mark must be expressly abandoned by way of a filing submitted by the

quality product may derive significant value from its marks. They ensure that the producer itself—and not some "imitating competitor"—will reap the financial rewards associated with the product's good reputation. *Ibid.*").

¹¹⁰ See Shackell, *supra* note ___103 ("To non-moguls, Elon Musk's (perhaps temporary) rebrand of Twitter to "X" may seem high risk, amateurish, or even capricious.").

¹¹¹ See Trademarks Are Magic, @TimberlakeLaw, Tweet/X Post (Jul 28, 2023), twitter.com/TimberlakeLaw/status/1684882464236523520?s=20 ("On July 24th, 6 applications were filed to register Twitter-related #trademarks. 4 were filed by lawyers. None were filed by Twitter / X Corp. These applicants may be thinking they can get rich by snapping up unattended 'property' but that's not how trademark law works.").

registrant to the USPTO. It is unlikely Musk decides to do so.

These new applicants, then, will need to cancel the mark, claiming that the company's nonuse of the mark constitutes abandonment. However, for such claims, the USPTO requires a showing of three years of nonuse as well as that the registrant, Musk's X Corp, does not intend to resume use.¹¹² (A showing of the former creates an inference that the registrant does not intend to resume use, but Musk would then have to opportunity to present evidence to the contrary).¹¹³

Intent to resume use does not require a showing of specific, definitive plans to resume, so long as some definable resumed-use is planned within the reasonably foreseeable future.¹¹⁴ What is reasonably foreseeable varies depending on the industry and other particular circumstances of a use; for example, it is not unreasonable for a fire truck manufacturer to go twenty to thirty years between producing vehicles because fire trucks typically last that long, and branding on the vehicles remains apparent for that length of time.¹¹⁵ It is

¹¹² See *Vans Inc v Branded LLC*, 2022 USPQ2d 742, available at [ttabvue.uspto.gov/ttabvue/ttabvue-92066859-CAN-93.pdf#page=20](https://tabvue.uspto.gov/ttabvue/ttabvue-92066859-CAN-93.pdf#page=20) (TTAB 2022 [precedential]) (“If plaintiff can show three consecutive years of nonuse, it has established a prima facie showing of abandonment, creating a rebuttable presumption that the registrant has abandoned the mark without intent to resume use. The burden of production (i.e., going forward) then shifts to the respondent to produce evidence that it has either used the mark or that it has intended to resume use (e.g., a convincing demonstration of “excusable non-use” that would negate any intent not to resume use of the mark). The burden of persuasion remains with the plaintiff to prove abandonment by a preponderance of the evidence.”) (citation omitted).

¹¹³ *Id.*

¹¹⁴ See *Emerg. One, Inc. v. Am. FireEagle, Ltd.*, 228 F.3d 531, 537 (4th Cir. 2000)

¹¹⁵ See, e.g., *Id.* (“AFE contends, however, that E-One's own representatives admitted that their plans to resume use of the mark were indeterminate. At the time of acquisition and at all times up until 1995, E-One had no specific plan to use the AMERICAN EAGLE mark. It is true that the owner of a trademark cannot defeat an abandonment claim, as well as the purposes of the Lanham Act, by simply asserting a vague, subjective intent to resume use of a mark at some unspecified future date. See *Silverman*, 870 F.2d at 46–47. Once the challenger shows discontinued use, the owner must produce evidence of intent to resume use ‘within the reasonably foreseeable future.’ *Id.* at 46. See also *Roulo*, 886 F.2d at 938.

unclear what a ‘reasonably foreseeable’ time may be for a social media provider, but it is certain that these opportunistic filers will need to wait at least three years before they can demonstrate that Musk legally abandoned the TWITTER trademark.

It will be interesting to watch how this X saga unfolds. This unprecedented rebranding effort has already cost the social media platform billions of dollars in brand recognition and value, and that bill will only continue to climb amid anticipated trademark infringement lawsuits and intellectual property licensing efforts. How Musk is able to manage this blundering trademark situation will certainly be the X-factor as to whether his intended rebrand is successful or whether the now-iced Twitter bird may come home to roost.

Requiring the owner to have an intent to use the mark in the reasonably foreseeable future ensures that valuable trademarks are in fact used in commerce as the Lanham Act intends, rather than simply hoarded or warehoused. See *Roulo*, 886 F.2d at 938; *Silverman*, 870 F.2d at 46; *Humble Exploration*, 695 F.2d at 102–03.

Of course, what is meant by the ‘reasonably foreseeable future’ will vary depending on the industry and the particular circumstances of the case. Cf. *Defiance Button Mach. Co. v. C & C Metal Prods. Corp.*, 759 F.2d 1053, 1060–61 (2d Cir.1985). Because fire trucks have very long lives (often twenty to thirty years), the mark stays visible, and the good will value of the mark persists long after production of trucks with that mark has ceased. Thus, it might be reasonable for a fire truck manufacturer to spend five or six years considering the reintroduction of a brand, even though the same passage of time would be unreasonable for a maker of a more ephemeral product, say potato chips. E-One produced evidence that because American Eagle had made a product very similar to E-One’s, it was necessary for E-One to develop a new product line to avoid duplication. E-One also produced evidence that its delay in reintroducing the mark was attributable to its skittishness after an embarrassing experience introducing another brand. Finally, E-One produced evidence that it had paid a substantial sum of money for the AMERICAN EAGLE mark only a few years earlier. Under these circumstances, we cannot say as a matter of law that E-One had no intent to reintroduce the mark within the reasonably foreseeable future. That question was a proper one for the jury.”)