

# Publications

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## A Lapsed Trademark Registration Doesn't Always Mean the Brand is Up for Grabs

### Key Takeaways

- A recent Nike decision underscores that a lapsed federal trademark registration does not automatically free a mark for others to use. Trademark rights may survive if the owner continues using the mark and can show plans to resume use. Although not addressed in this decision, trademark rights may also continue with residual goodwill.
- The decision reinforces that abandonment requires both non-use and intent not to resume use. For brand owners, even limited use can help preserve rights and create risk for later adopters.
- Later filers should not assume an expired registration makes a mark available. Clearance should assess USPTO records, common law use, prior owner activity and evidence of intent to resume use.

A common misconception in trademark law is that once a federal registration lapses, the trademark is automatically available for someone else to adopt.

A recent court decision involving Nike's TOTAL 90 brand is a good reminder that the analysis is not that simple.

On June 22, 2026, the U.S. District Court for the Eastern District of Louisiana denied Total90 LLC's request for a preliminary injunction against Nike's renewed use of the TOTAL 90 branding. Nike had allowed its federal registration for TOTAL 90 to lapse in 2019. Several years later, Total90 LLC obtained registrations and challenged Nike's renewed use of the branding, arguing that Nike had abandoned the mark through non-use.

Under U.S. trademark law, abandonment requires more than just non-use. It requires both:

- Non-use of the mark; and
- An intent not to resume use.

In the TOTAL 90 dispute, that second element was key. The court found evidence that

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Nike had continued using the mark on a limited basis after its registration lapsed. The use was not extensive, but it was enough to undermine Total90 LLC's argument that Nike had abandoned its rights.

### **What this Means for Brand Owners and Later Filers**

For companies managing trademark portfolios, this case offers a practical reminder: if a mark may have future value, preserve the evidence before a dispute arises, and, where appropriate, preserve use itself. A lapsed registration may create vulnerability, but the greater risk is often an incomplete record of post-lapse use, the continuity and scope of that use, and the owner's intent to resume use if use had paused.

Brand owners should maintain registrations where possible, preserve records of even limited trademark use, document plans to resume use if a product line is temporarily discontinued, and retain evidence such as sales records, marketing materials, licensing activity, product listings, packaging, website captures, consumer engagement, press coverage, and internal relaunch plans.

For later filers, the case is a warning that obtaining a registration is only part of the battle. The harder task may be proving abandonment: not merely that use of the mark slowed, narrowed, or became harder to find, but that the prior owner discontinued use with no intent to resume.

Federal registrations are important, but they rarely tell the whole story. In many cases, the outcome depends on whether use truly ceased, whether the owner intended to resume use, and, in some cases, whether consumers continued to associate the mark with its original source.

If your company is evaluating whether to retire a brand, revive an older mark, or adopt a name that appears available, careful trademark diligence can help avoid a costly dispute down the road.

For questions about trademark portfolio strategy, brand protection, or non-use risk, please contact Polsinelli's Trademark, Copyright, and Branding team.