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Ethnicity and the Recognition of Asian Surnames Through Trademark Filings

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Cover Page Footnote

Law Faculty, University of Washington, General Counsel and Chief Legal Affairs Officer, National CASA/ GAL Association for Children. The author thanks his former colleagues at Starbucks Corporation who provided encouragement and support to him when he wrote this article during his tenure there as Director, Corporate Counsel, Intellectual Property. Special gratitude goes to Starbucks partners Sarah Beggs, Jody Chafee, Anna Kakos, and Yihong Ying. Professor Jennifer Koh provided helpful guidance on the Article as well.

Ethnicity and the Recognition of Asian Surnames Through Trademark Filings

Russell W. Jacobs*

This Article presents the results of a study using U.S. Patent and Trademark Office (“USPTO”) trademark application records to determine the rates of recognition of surnames held by people belonging to six Asian ethnic groups—Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese. This study follows upon an earlier study that examined a broader dataset of ethnic designations set forth in the 2000 U.S. Census, looking at not just Asian or Pacific Islander names, but also Black, Hispanic, Native American or Alaska Native, and White names. That study looked at the intersection of two sources of data—surnames recorded in the 2000 U.S. Census and trademark applications for those names recorded at the USPTO. Since the Lanham Act prohibits trademark registration of a term regarded as “primarily merely a surname,” a refusal to register one of these names under the relevant statutory provision would indicate that the USPTO examining attorney recognized the term as a surname, while an omission of that refusal would indicate that the USPTO examining attorney did not recognize the term as a surname.

This Article looks more deeply into the Asian names included in the original study. To categorize those names into ethnic groups this follow-up study incorporates a data file prepared by Diane Lauderdale and Bert Kestenbaum which identifies the ethnicity for Asian names. The original study disclosed high variation of surname

* Law Faculty, University of Washington, General Counsel and Chief Legal Affairs Officer, National CASA/GAL Association for Children. The author thanks his former colleagues at Starbucks Corporation who provided encouragement and support to him when he wrote this article during his tenure there as Director, Corporate Counsel, Intellectual Property. Special gratitude goes to Starbucks partners Sarah Beggs, Jody Chafee, Anna Kakos, and Yihong Ying. Professor Jennifer Koh provided helpful guidance on the Article as well.

non-recognition across racial and Hispanic origin groups, with White names having the lowest levels of surname non-recognition, followed by Latino, Asian or Pacific Islander, Black, and Native American or Alaska Native names. This study likewise found a high degree of variation of surname non-recognition across the six Asian ethnic groups. Chinese names have the highest levels of non-recognition, followed by Filipino, then Korean, Indian, Japanese, and finally, Vietnamese. The study found no correlation between the names associated with the ethnic groups and the number of trademark filings, percentage of names with a trademark filing, length of surnames, or population of surnames that would explain these differences across ethnic groups.

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INTRODUCTION

This Article presents a study examining surname recognition for names held by six Asian ethnicities—Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese—through the intersection of three data sources, namely, the 2000 U.S. Census, the United States Patent and Trademark Office trademark applications, and a file produced by Diane S. Lauderdale and Bert Kestenbaum which identifies the ethnicities of people bearing certain Asian surnames.¹ It builds on a previous study that considered surname recognition for not just Asian surnames, but tens of thousands of surnames reported in the 2000 U.S. Census and representing all racial groups.² In that study I compared surnames in the 2000 U.S. Census to USPTO records to check if USPTO examining attorneys recognized the terms as surnames and refused to register them as trademarks.³ The present study adds an additional filter, namely, a data file prepared by Diane Lauderdale and Bert Kestenbaum that records the ethnicity associated with surnames they identified as Asian American to the original study’s dataset produced from the intersection of the two sources from the USPTO and the U.S. Census Bureau.⁴ This study discloses that the rates of surname non-recognition for the six Asian ethnicities ranged from highest for Chinese, followed by Filipino, Korean, Indian, Japanese, to lowest for Vietnamese.⁵

¹ Russell W. Jacobs, *The Impact of Race, Orthography, and Population on Trademark Registration of Surnames*, 22 J. GENDER, RACE & JUST. 185 (2019). See also *File B: Surnames Occurring 100 or More Times*, U.S. CENSUS BUREAU (Sept. 15, 2014), <http://www2.census.gov/topics/genealogy/2000surnames/names.zip?#> [<https://perma.cc/9UAZ-2LCD>] [hereinafter *File B*] (showing percentage of those with name who identified as Asian/Pacific Islander); Diane S. Lauderdale & Bert Kestenbaum, *Asian American Ethnic Identification by Surname*, 19 POPULATION RES. & POL’Y REV. 283 (2000) (showing ethnic association with name). The author recognizes the imprecision of the words “Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese” when discussing ethnicity since they refer to national origin and the referent countries have multiple ethnicities. This Article uses the terms in the same way as Lauderdale and Kestenbaum’s article, namely, to refer to individuals in the United States with a heritage from the country associated with that word.

² Jacobs, *supra* note 1, at 196-97.

³ *Id.*

⁴ Lauderdale & Kestenbaum, *supra* note 1, at 283 (discussing ethnic association with names).

⁵ See *infra* Table 4.

Section I sets out the legal framework for the trademark law principles underlying the analysis in the study. Section II describes the data sources and the criteria and processes for the study. Section III sets forth the filing rates for the names included in the study. Section IV sets forth the respective surname non-recognition rates. Section V considers, and then dismisses, possible alternate explanations for the varying non-recognition rates. The Conclusion summarizes the article's findings and proposes some tentative solutions to the problem of ethnically disparate non-recognition, the full development of which would require further research into the problem's causes.

I. HAVING THE "LOOK AND FEEL" OF A SURNAME WEIGHS AGAINST TRADEMARK REGISTRATION OF THE TERM AS "PRIMARILY MERELY A SURNAME"

Any word, even a surname, can function as a trademark, a type of intellectual property and a source identifier that distinguishes goods or services offered by one entity from those offered by a competitor.⁶ The Lanham Act allows registration of surnames as trademarks, except that Section 2(e)(4) prohibits trademark registration of any word deemed "primarily merely a surname."⁷ The prohibition against surname trademark registration in Section 2(e)(4) reads as follows: "[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (e) [c]onsists of a mark which . . . (4) is primarily merely a surname"⁸ The U.S. Court of Appeals for the Federal Circuit has stated that "[a] mark is primarily merely a surname if the

⁶ See Lanham Act § 45, 15 U.S.C. § 1127 (2012); see also 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.3 (5th ed. 2017) ("A trademark is a compact symbol that conveys information about products or services to potential buyers.").

⁷ 15 U.S.C. § 1052(e)(4) (2012).

⁸ *Id.* Even a term considered "primarily merely a surname" can become eligible for trademark registration once it has acquired distinctiveness under Section 2(f). See 15 U.S.C. § 1052(f) (2012). In the alternative, a trademark owner may still register the surname trademark on the Supplemental Register, a register reserved for terms or designs capable of serving as source indicators, but not yet having enough distinctiveness to merit the exclusive rights afforded by the Principal Register. See 15 U.S.C. § 1091 (2012).

surname “is the primary significance of the mark as a whole to the purchasing public.”⁹ The Trademark Trial and Appeal Board in *In re Benthin Management GmbH* set forth the following five factors relevant to Section 2(e)(4) assessments:

- (1) the rarity of the surname;
- (2) any connections between people with the surname and the trademark applicant;
- (3) any non-surname uses of the term that consumers would recognize;
- (4) anything about the term that gives it the “structure and pronunciation” or “look and sound” or “look and feel” of a surname; and
- (5) distinctive stylizations or designs that would overcome the surname significance.¹⁰

This Article digs into the application of the fourth factor—the “look and feel” of a surname—for surnames associated with the six Asian ethnicities. The Trademark Trial and Appeal Board itself has noted the difficulty in applying this factor and that it often leads to subjective assessments.¹¹ Nonetheless, Section 2(e)(4) decisions by the Board provide some guidance on the contours of this factor. For example, the Board has accepted ethnic surname structures as evidence that the public would understand a term following those norms as a surname.¹² Further, the Board has found shorter length

⁹ *Earnhardt v. Kerry Earnhardt, Inc.*, 864 F.3d 1374, 1377 (Fed. Cir. 2017) (quoting *In re Hutchinson Tech.*, 852 F.2d 552, 554 (Fed. Cir. 1988)).

¹⁰ *In re Olin Corp.*, 124 U.S.P.Q.2d (BNA) 1327, 1330 n.4 (T.T.A.B. 2017) (citable as precedent) (listing the factors laid out in *In re Benthin Mgmt. GmbH*, 37 U.S.P.Q.2d (BNA) 1332, 1333–34 (T.T.A.B. 1995), which reversed the refusal to register the mark BENTHIN as primarily merely a surname) (affirming refusal to register the mark OLIN as primarily merely a surname).

¹¹ *In re Adlon Brand GmbH & Co.*, 120 U.S.P.Q.2d (BNA) 1717, 1728 (T.T.A.B. 2016) (not citable as precedent) (affirming refusal to register the mark ADLON as primarily merely a surname); see also Michael Adams & Jennifer Westerhaus Adams, *Surnames and American Trademark Law*, 53 NAMES 259, 266 (2005) (characterizing these adjudications as “fairly arbitrary distinctions”).

¹² See, e.g., *In re Locman S.P.A.*, No. 79006905, 2007 WL 411953, at *4 (T.T.A.B. Feb. 1, 2007) (not citable as precedent) (affirming refusal to register the mark MANTOVANI as primarily merely a surname, since the term “Mantovani” has the structure of an Italian surname); *In re Esposito and Esposito*, No. 78336150, 2007 WL 3336389, at *3 (T.T.A.B. Oct. 11, 2007) (not citable as precedent) (affirming refusal to register the mark NUCCI’S ITALIAN ICE AND GELATO as primarily merely a surname, since the term “Nucci” has

the structure of an Italian surname); *In re Offshore Sailing School Ltd., Inc.*, No. 76604329, 2006 WL 2066576, at *3 (T.T.A.B. July 13, 2006) (not citable as precedent) (affirming refusal to register the mark COLGATE SAILING SCHOOL as primarily merely a surname, since the term “Colgate” had the “unmistakable structure of an English habitational name,” but neglecting to define that “unmistakable structure”); *In re Binda Int’l S.A.*, No. 78313893, 2006 WL 1404232, at *3 (T.T.A.B. May 11, 2006) (not citable as precedent) (affirming refusal to register the mark BREIL as “primarily merely a surname”) (“The term BREIL has a similar structure and pronunciation to related Germanic surnames such as BRULE, BRIEL and BREILING.”) (not citable as precedent); *In re Phoenix Intangibles Holding Co.*, Nos. 76562080, 76587659, 2006 WL 1404226, at *4 (T.T.A.B. May 11, 2006) (not citable as precedent) (affirming refusals to register the mark LAURENTI as primarily merely a surname) (“Laurenti . . . is a three-syllable Italian surname ending in the letter ‘i’ . . . [and] has a similar structure and pronunciation to related surnames such as Laurent, DeLaurentis and Laurente.”); *In re Allstar Mktg. Grp., Inc.*, No. 76457320, 2005 WL 548048, at *6 (T.T.A.B. Mar. 1, 2005) (not citable as precedent) (affirming refusal to register the mark BELLORA as primarily merely a surname, since the mark had the “look and feel” of an Italian heritage surname); *In re Indian Indus., Inc.*, No. 76481665, 2004 WL 2368460, at *3 (T.T.A.B. Sept. 22, 2004) (not citable as precedent) (reversing refusal to register the mark MOSCONI as “primarily merely a surname”) (“MOSCONI indeed does have the look and feel of an Italian heritage surname.”); *In re Manhattan Sci., Inc.*, No. 75/580055, 2001 WL 1474206, at *3–4 (T.T.A.B. Nov. 14, 2001) (not citable as precedent) (affirming refusal to register the mark HOCKADAY FUEL CELL as “primarily merely a surname”) (“HOCKADAY seems to fit the archetype of British surnames, such as Holliday, Holladay, Canaday, Faraday, Doubleday, *et al.*”); *In re Baratti Cosmetics GmbH*, No. 75/360949, 2001 WL 1345037, at *3–4 (T.T.A.B. Oct. 29, 2001) (not citable as precedent) (affirming refusal to register the mark BARATTI as “primarily merely a surname”) (“Furthermore . . . the term ‘BARATTI’ has the clear look and sound of a surname . . . given the well known fact that Italian surnames often end with a vowel.”); *In re Anheuser-Busch, Inc.*, No. 75/670355, 2001 WL 817795, at *3, 5 (T.T.A.B. July 18, 2001) (not citable as precedent) (affirming refusal to register the mark HARRINGTON’S as “primarily merely a surname,” noting the term has a similar spelling to the American surname Herrington) (“‘HARRINGTON’ seems to fit the archetype of a Scottish or British surnames.”); *In re Reynolds*, No. 75/540216, 2001 WL 505213, at *2–3 (T.T.A.B. May 11, 2001) (not citable as precedent) (affirming refusal to register the mark OAKLEY as “primarily merely a surname”) (“OAKLEY seems to fit the archetype of British surnames having an ‘-ley’ suffix, such as OWSLEY and OXLEY.”); *In re Quadrillion Publ’g Ltd.*, No. 75/217892, 2000 WL 1195470, at *3 (T.T.A.B. Aug. 9, 2000) (not citable as precedent) (affirming refusal to register the mark BRAMLEY as “primarily merely a surname,” noting that it has a similar spelling to the American surnames Bromley, Brumley and Brimley) (“‘BRAMLEY’ seems to fit the archetype of British surnames having an ‘-ley’ suffix, such as Bailey, Bradley, Buckley, Brantley or Barkley.”). *But see In re Parsons Xtreme Golf, LLC*, Nos. 86666031, 86700421, 86701458, 86701787, 86702680, 86706223, at *13–14 (T.T.A.B. Dec. 17, 2018) (not citable as precedent) (affirming the refusals to register) (“[t]he other examples of English occupational surnames are not structurally or phonetically similar to PARSONS.”); *In re Okamoto Corp.*, No. 85739429, 2015 WL 910208, at *5 (T.T.A.B. Feb. 6, 2015) (not citable as precedent) (“While ‘Okamoto’ looks like a Japanese word, on this record, we cannot determine

(four or fewer letters) consistent with the structure and pronunciation of a surname.¹³

II. THE STUDY REVIEWED USPTO APPLICATIONS TO REGISTER MARKS COMPRISING SURNAMES REPORTED BY THE U.S. CENSUS BUREAU AND ASSOCIATED WITH SIX ASIAN ETHNICITIES

This study looks at the surname recognition for surnames associated with the six Asian ethnicities and builds on an original study that examined surname recognition for tens of thousands of surnames included in the 2000 U.S. Census. In that study, I checked the Census names against the records of the USPTO.¹⁴ Section 2(e)(4) of the Lanham Act requires the USPTO to consider if a trademark has the “look and feel” of a surname and issue a refusal to register the term if deemed “primarily merely a surname.”¹⁵ Therefore, if the USPTO examining attorney issued a refusal to register the mark as a trademark under Section 2(e)(4) because the attorney regarded the term as “primarily merely a surname,” that refusal indicated that the term had the “look and feel” of a surname. If the examining attorney neglected to issue a refusal under Section 2(e)(4) then the term did not have the “look and feel” of a surname. The lack of a Section 2(e)(4) refusal could have reflected that the term had a non-surname meaning which the examining attorney regarded as more well-known than the surname usage, so I recorded whether the word had a non-surname, non-obscure usage as a word

whether ‘Okamoto’ has a clear ‘look and feel’ as either that of a surname, or an arbitrary term.”).

¹³ See *In re Olin Corp.*, 124 U.S.P.Q.2d (BNA) at 1332 (T.T.A.B. 2017) (citable as precedent) (affirming refusal to register the mark OLIN as primarily merely a surname). *But see In re Rebo High Definition Studio Inc.*, 15 U.S.P.Q.2d (BNA) 1314 (T.T.A.B. 1990) (Hanak, J., dissenting) (noting that “the structure of the short four letter word REBO” made the mark more akin to a coined term than a surname).

¹⁴ Jacobs, *supra* note 1, at 196.

¹⁵ 15 U.S.C. § 1052(e)(4) (2012).

with a non-proper dictionary entry,¹⁶ a place name,¹⁷ a first name,¹⁸ a foreign-language meaning,¹⁹ or a non-proper/non-trademark acronym or abbreviation.²⁰

I drew the body of surnames in the study from the 2000 U.S. Census, in which the Census Bureau gathered surnames for all people in the United States.²¹ The Census Bureau released data on all 151,671 names held by at least 100 people, representing 242,121,073 individuals.²² For each of these names, the report calculated the percentage of individuals who identified as belonging to each of the following six exclusive racial and Hispanic origin groups: (1) White only; (2) Black only; (3) American Indian and Alaskan Native only; (4) Asian and Pacific Islander only; (5) Two or More Races; and (6) Hispanic (regardless of race).²³ For 6,555 names, a plurality of individuals identified as Asian or Pacific Islander; for 8,211 names, a plurality identified as Hispanic (regardless of race); for 5,869 names, a plurality identified as Black; for 547 names, a plurality identified as American Indian or Alaskan

¹⁶ See MERRIAM-WEBSTER, <http://www.merriam-webster.com> [<https://perma.cc/SU6G-PN83>] (showing dictionary entries). For further detail on the criteria used to determine whether the term had a non-surname meaning, see Jacobs, *supra* note 1, at 203-04.

¹⁷ See WIKIPEDIA, <http://www.wikipedia.org> [<https://perma.cc/5XCY-KQYB>] (showing place names). For further detail on the criteria used to determine whether the term had a non-surname meaning, see Jacobs, *supra* note 1, at 204.

¹⁸ See PATRICK HANKS ET AL., *A DICTIONARY OF FIRST NAMES* (2d ed. 2012), <http://www.oxfordreference.com/view/10.1093/acref/9780198610601.001.0001/acref-9780198610601> [<https://perma.cc/N3P5-K7UD>] (showing first names). For further detail on the criteria used to determine whether the term had a non-surname meaning, see Jacobs, *supra* note 1, at 205.

¹⁹ See GOOGLE TRANSLATE, <http://translate.google.com> [<https://perma.cc/W6XT-QKVP>]; see also ACRONYM FINDER, <http://www.acronymfinder.com> [<https://perma.cc/8UKT-H3WV>] (showing foreign language meanings). For further detail on the criteria used to determine whether the term had a non-surname meaning, see Jacobs, *supra* note 1, at 205.

²⁰ See ACRONYM FINDER, *supra* note 19 (showing acronyms and abbreviations). For further detail on the criteria used to determine whether the term had a non-surname meaning, see Jacobs, *supra* note 1, at 206.

²¹ David L. Word et al., *Technical Documentation: Demographic Aspects of Surnames from Census 2000*, U.S. CENSUS BUREAU (Sept. 15, 2014), <http://www2.census.gov/topics/genealogy/2000surnames/surnames.pdf?#> [<https://perma.cc/DR3Z-KQYQ>].

²² *Id.* at 4.

²³ *Id.* at 16.

Native.²⁴ I reviewed all of those names in the original study, as well as 12,446 names sampled from the entire 151,671 names released.²⁵ That sample included 10,643 names where a plurality of the bearers reported themselves as non-Hispanic White only.²⁶

I checked USPTO records for applications to register those surnames as trademarks between January 1, 2003 and December 31, 2016, using the search string “(Name)[BI] and ‘FD > 20030000 < 20160000” in the Trademark Electronic Search System.²⁷ Those searches yielded some results that contained the surname plus additional material. If the USPTO would consider the additional material non-distinctive, I included the mark in the study.²⁸ However, I excluded the mark from the study if the USPTO would consider it distinctive, because consumers would not read the mark as “primarily merely a surname.”²⁹ I recorded the serial number for

²⁴ *Id.*

²⁵ *Id.* at 197.

²⁶ *Id.*

²⁷ *Trademark Electronic Search System (TESS)*, U.S. PATENT & TRADEMARK OFFICE, <http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4804:jgzv11.1.1> [<https://perma.cc/N4GT-PC9C>] (follow “Word and/or Design Mark Search (Free Form)”; then search “(Name)[BI] AND ‘FD > 20030000 < 20160000” for “Search Term”; then follow “Submit Query” hyperlink). In the preceding search, (Name) indicates that each unique surname was individually inputted by the Author and searched in TESS; “[BI]” signifies the Basic Index, which “contains the wordmark and pseudo mark information indexed for optimal searching efficiency”; and “FD” is the U.S. Trademark Field Code for Filing Date, with dates stored in the format YYYYMMDD, hence the Author entering “FD > 20030000 < 20160000” to search for all marks with a filing date from January 2003 through December 2016. *Trademark Electronic Search System (TESS) Help*, U.S. PATENT & TRADEMARK OFFICE, http://tmsearch.uspto.gov/bin/gate.exe?f=help&state=4806:9t2k0w.1.1#Filing_Date [<https://perma.cc/HZN5-C3ZJ>].

²⁸ *See* U.S. PATENT AND TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE (“TMPEP”) § 1211.01(b)(iv) (11th ed. Oct. 2018) (personal titles like “Mrs.,” “Mr.,” or “Dr.” do not negate the surname reading of the term); *see also* TMPEP § 1211.01(b)(v) (possessives and plurals do not negate the surname reading of the term); TMPEP § 1211.01(b)(vi) (well-known geographic terms do not negate the surname reading of the term); TMPEP § 1211.01(b)(vii) (top-level domain names like “.com” do not negate the surname reading of the term); TMPEP § 1211.01(b)(viii) (familial-business designations like “& sons” and legal entity designations like “corporation” do not negate the surname reading of the term).

²⁹ *See* TMPEP § 1211.01(b) (addition of inherently distinctive wording (fanciful, arbitrary, or suggestive) renders the mark not primarily merely a surname); *see also* TMPEP § 1211.01(b)(i) (addition of a second surname renders the mark not primarily merely a

each trademark that met these criteria and how the USPTO treated it. The USPTO treated each mark in one of the following ways: recognizing the surname meaning by issuing a refusal to register the mark as primarily merely a surname under Section 2(e)(4); omitting that refusal, or not needing to reach the Section 2(e)(4) surname question because the trademark owner conceded the lack of distinctiveness by asserting acquired distinctiveness under Section 2(f); filing the application on the Supplemental Register; or claiming ownership of a prior registration for the same mark.³⁰

Based on those treatments of the applications each of the names fit into one of five categories:

“No need to decide” None of the filings had a determination of the surname nature of the mark because they all claimed acquired distinctiveness under Section 2(f), appeared on applications for registration on the Supplemental Register, and/or sought to claim ownership of at least one prior registration.

“If forced to decide, looks and feels like a surname” The Examining Attorney refused to register some of the marks as primarily merely surnames under Section 2(e)(4), while other filings claimed acquired distinctiveness under Section 2(f), appeared on applications for registration on the Supplemental Register, and/or sought to claim ownership of at least one prior registration.

“Looks and feels like a surname” The Examining Attorneys refused to register all of the marks as primarily merely surnames under Section 2(e)(4).

“Does not look and feel like a surname (to at least one)” The Examining Attorneys did not refuse to register some of the marks as primarily merely surnames under Section 2(e)(4), while other filings had other treatments.

surname); TMEP § 1211.01(b)(iii) (addition of initials renders the mark no primarily merely a surname).

³⁰ See TMEP § 1212.

“Never looks and feels like a surname” The Examining Attorneys did not refuse to register any of the marks as primarily merely surnamed under Section 2(e)(4).

I previously reported the results of the original study using the criteria discussed above.³¹ This Article applies Lauderdale and Kestenbaum’s identification of Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese ethnic surnames to the surname dataset from the original study.³² I lay that data file over the dataset of Asian/Pacific Islander names from the original study and isolated the names from the original study that the Lauderdale and Kestenbaum file identified as Chinese, Filipino, Indian, Japanese, Korean, and Vietnamese. Of the 6,555 Asian or Pacific Islander names in the 2000 U.S. Census, 1,771 matched as Filipino according to the Lauderdale and Kestenbaum file, 1,143 as Japanese, 1,139 Indian, 560 Chinese, 157 Korean, and 146 Vietnamese.³³ The remaining 1,639 Asian or Pacific Islander names did not belong to any of these six ethnicities, representing 25% of the total.³⁴ Many of the names in the Lauderdale and Kestenbaum file did not appear in the list of Asian or Pacific Islander names included in the 2000 U.S. Census, most likely due to populations of less than 100 people for those names.³⁵

³¹ Jacobs, *supra* note 1, at 213-17.

³² Lauderdale & Kestenbaum, *supra* note 1 (showing ethnic association with names). Professor Lauderdale provided me with the data file that listed the names and associated ethnicities [hereinafter Lauderdale & Kestenbaum Data File] (on file with author).

³³ *See id.*; *see also infra* Table 1.

³⁴ *See infra* Table 1.

³⁵ *See* Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

TABLE 1
*Frequency of Trademark Filings by Racial
 or Hispanic Origin Group*

	Surnames in study in U.S. census	Surnames in study with trademark filing	Percentage with trademark filing
All sampled	12,446	2,885	23.18%
Asian/Pacific Islander	6,555	2,078	31.70%
Chinese	560	398	71.07%
Korean	157	106	67.52%
Vietnamese	146	73	50.00%
Japanese	1,143	425	37.18%
Indian	1,139	277	24.32%
Filipino	1,771	359	20.27%

III. THE FREQUENCY OF TRADEMARK FILINGS FOR SURNAMES DIFFERS BY RACE AND ETHNICITY

The original study disclosed that the rate of filings to register surname trademarks varied across each racial and ethnic group, and the present follow-on study also showed variability across the six Asian ethnicities under consideration.³⁶ The original study sampled 12,446 surnames of all races and of those, 2,885 (23.18%) had at least one qualifying trademark filing.³⁷ Of the 6,555 Asian or Pacific Islander in the 2000 U.S. Census, 2,322 (31.70%) had a qualifying trademark filing.³⁸ The frequency of trademark filings for the six Asian/Pacific Islander groups under consideration ranged from 20.27% for Filipino surnames, to 24.32% for Indian surnames, 37.18% for Japanese surnames, 50.00% for Vietnamese surnames, 67.52% for Korean surnames, and 71.07% for Chinese surnames.³⁹

³⁶ Lauderdale & Kesterbaum, *supra* note 1 at 283.

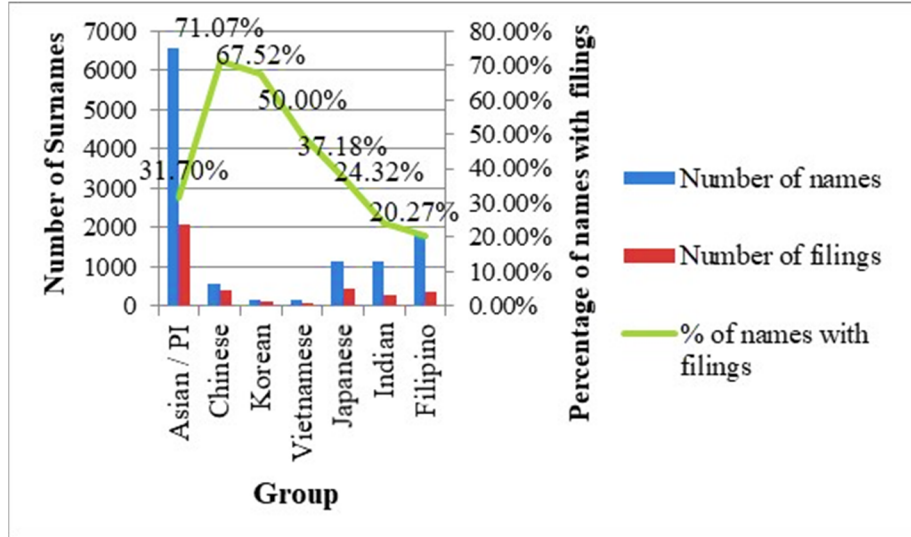
³⁷ See *supra* Table 1; see also *infra* Figure 1.

³⁸ See *supra* Table 1; see also *infra* Figure 1.

³⁹ See *supra* Table 1; see also *infra* Figure 1.

FIGURE 1

Frequency of Trademark Filings by Surname Category



IV. THE STUDY REVEALED HIGH SURNAME NON-RECOGNITION AND GREAT VARIATION OF RATES ACROSS THE SIX ASIAN ETHNIC GROUPS

Both the original and the present follow-on study showed a high level of surname non-recognition. Looking at all of the sampled names in the original study with no filters applied (the “unfiltered dataset”), the non-recognition rate reached 76.98%.⁴⁰ Looking at the sampled names in the original study with two filters applied so as only to consider marks without design elements and words that only have surname interpretations (the “two-filters-applied dataset”), the non-recognition rate hit 49.19%.⁴¹ Going forward, this Article will set forth the unfiltered dataset as the higher limit of the rate of non-recognition and the two-filters-applied dataset as the lower limit of the range. The unfiltered dataset likely includes many marks that reasonable consumers would never regard as surnames due to a very common non-surname meaning for the term or a very distinctive

⁴⁰ See *infra* Table 2.

⁴¹ See *infra* Table 2.

design element.⁴² Yet, it also likely includes many marks comprising weak design elements or obscure non-surname meanings.⁴³ Consumers would arguably disregard the design elements and non-surname meanings when processing these marks and only recognize the mark as incorporating a surname.⁴⁴

The original study revealed variations in surname recognition across racial and Hispanic origin groups.⁴⁵ Surnames held by a plurality of individuals who identified as White had the lowest levels of non-recognition at 46.34% (for those terms with no non-surname interpretation and no design element in the mark) followed by 64.21% for Hispanic names, 66.93% for all non-White names, 67.17% for Asian or Pacific Islander names, 69.11% for Black names, and 80.65% for Native American or Alaska Native names.⁴⁶

TABLE 2

*USPTO Did Not Recognize Look and Feel of Surname
by Racial or Hispanic Origin Group*

	All marks		No non-surname interpretation and no design element in mark	
	Number	Percent of total	Number	Percent of total
Sampled White	1,764	74.49%	431	46.34%
All sampled	2,221	76.98%	518	49.19%
Hispanic	2,010	86.56%	348	64.21%
All Non-White	5,369	88.13%	941	66.93%
Asian / Pacific Islander	1,869	89.94%	266	67.17%
Black	1,282	86.92%	302	69.11%
Native American / Alaska Native	208	95.85%	25	80.65%

⁴² Jacobs, *supra* note 1, at 210-12.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 217-30.

⁴⁶ *See infra* Table 2.

The original study comprised all 6,555 surnames held by at least 100 people for which a plurality of bearers identified as Asian or Pacific Islander for the 2000 U.S. Census, corresponding to 7,100,793 people.⁴⁷ The original study found qualifying trademark filings for 2,078 (31.70%) of those names, corresponding to 5,130,194 people, and, applying no filters to those names, 1,869 (89.94%) did not look and feel like a surname.⁴⁸ Applying filters to exclude terms with non-surname interpretations and marks with design elements yielded 396 Asian or Pacific Islander surnames, corresponding to 1,177,266 people, of which 266 names (67.17%) did not look and feel like a surname.⁴⁹

TABLE 3

USPTO Treatment of Asian / Pacific Islander Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	41		1.97%		13		3.28%	
If pressed, yes, a surname	16		.77%		9		2.27%	
Looks like a surname	152		7.31%		108		27.27%	
Not a surname (to 1+)	764	1,869	36.77%	89.94%	66	266	16.67%	67.17%
Never a surname	1,105		53.18%		200		50.51%	

⁴⁷ See *supra* Table 1.

⁴⁸ See *infra* Table 3; see also *File B*, *supra* note 1 (showing populations bearing names).

⁴⁹ See *infra* Table 3; see also *File B*, *supra* note 1 (showing populations bearing names).

For the six Asian ethnic groups included in this study, non-recognition rates for terms with no non-surname interpretation and no design element in the mark ranged from 80.00% for Chinese surnames, to 75.31% for Filipino surnames, 69.23% for Korean surnames, 64.20% for Indian surnames, 56.03% for Japanese surnames, and finally to 55.56% for Vietnamese surnames.⁵⁰ Applying both filters resulted in small numbers of qualifying Chinese, Korean, and Vietnamese names, which limits the value of the information disclosed about these names. All six Asian ethnic groups had higher rates of non-recognition than the White names in the original study.

TABLE 4

USPTO Did Not Recognize Look and Feel of Surname by Asian Ethnic Group

	All marks		No non-surname interpretation and no design element in mark	
	Number	Percent of total	Number	Percent of total
All Asian/ Pacific Islander	1,869	89.94%	266	67.17%
Chinese	382	95.98%	20	80.00%
Filipino	326	90.81%	61	75.31%
Korean	104	98.11%	9	69.23%
Indian	236	85.20%	52	64.20%
Japanese	345	81.18%	65	56.03%
Vietnamese	69	94.52%	5	55.56%

⁵⁰ See *infra* Table 4.

Chinese Surnames

Surnames identified as Chinese had the highest level of surname non-recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 560 Chinese surnames held by at least 100 people.⁵¹ Overall 2,220,918 people bore names in this group.⁵² Three hundred ninety-eight of those names (71.07%, and representing 2,005,192 people) had a qualifying trademark filing.⁵³ Of those 398 Chinese surnames with a trademark filing, 382 (95.98%) did not look and feel like a surname.⁵⁴ The study included 284,280 people with one of the twenty-five Chinese surnames that had only a surname interpretation and no design elements in the mark; twenty of these names (80.00%) did not look and feel like a surname.⁵⁵ Examples of Chinese names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Chau,”⁵⁶ “Yuen,”⁵⁷ “Yung,”⁵⁸ and

⁵¹ See *supra* Table 1.

⁵² See *File B, supra* note 1 (showing populations bearing names).

⁵³ See *File B, supra* note 1 (showing populations bearing names).

⁵⁴ See *infra* Table 5; see also *File B, supra* note 1 (showing populations bearing names).

⁵⁵ See *infra* Table 5; see also *File B, supra* note 1 (showing populations bearing names).

⁵⁶ CHAU’S, Registration No. 3,097,556; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁵⁷ YUEN, Registration No. 3,026,602; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁵⁸ U.S. Trademark Application Serial No. 86/743,501 (filed Sept. 1, 2015) (application to register the mark YUNG HARP for “musical recordings” and other goods in International Class 9); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

“Situ,”⁵⁹ while “Chiu,”⁶⁰ “Tseng,”⁶¹ and “Tsay”⁶² looked and felt like surnames, with the result that the USPTO issued refusals under Section 2(e)(4).

⁵⁹ SITU, Registration No. 4,174,562; *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁶⁰ U.S. Trademark Application Serial No. 86/495,753 (filed Jan. 5, 2015) (application to register the mark CHIU); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁶¹ U.S. Trademark Application Serial No. 77/216,854 (filed June 27, 2007) (application to register the mark TSENG); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁶² U.S. Trademark Application Serial No. 86/537,687 (filed Feb. 17, 2015) (application to register the mark TSAY); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

TABLE 5

USPTO Treatment of Chinese Surnames

	All marks		No non-surname interpretation and no design element in mark	
	Number	Percent of total	Number	Percent of total
No need to decide	5	1.26%	1	4.00%
If pressed, yes, a surname	0	0.00%	1	4.00%
Looks like a surname	11	2.76%	3	12.00%
Not a surname (to 1+)	196	49.25%	6	24.00%
Never a surname	186	46.73%	14	56.00%
Total	398	100.00%	25	100.00%

Filipino Surnames

Surnames identified as Filipino had the next highest level of surname non-recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 1,771 Filipino surnames held by at least 100 people, which names represent 543,094 people.⁶³ Three hundred fifty-nine of those names (20.27%, and representing 176,543 people) had a qualifying trademark filing.⁶⁴ Of those 359 Filipino surnames with a trademark filing, 326 (90.81%) did not look and feel like a surname.⁶⁵ Of the eighty-one Filipino surnames with only a surname interpretation and no design elements in the mark, which correspond to 30,754 people, sixty-one names (75.31%) did not look and feel like a surname.⁶⁶ Examples of Filipino names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Borromeo,”⁶⁷ “Leano,”⁶⁸ “Jayme,”⁶⁹ and “Belisario,”⁷⁰ while “Del Rosario,”⁷¹ “De Castro,”⁷² “Dimaano,”⁷³ and “Viray”⁷⁴ looked and felt like surnames, with the result that the USPTO issued refusals under Section 2(e)(4).

⁶³ See *supra* Table 1.

⁶⁴ See *infra* Table 6; see also *File B, supra* note 1 (showing populations bearing names); *supra* Table 1.

⁶⁵ See *infra* Table 6; see also *File B, supra* note 1 (showing populations bearing names).

⁶⁶ See *infra* Table 6; see also *File B, supra* note 1 (showing populations bearing names).

⁶⁷ BORROMEO’S PIZZA & ITALIAN, Registration No. 3,760,830 (registered in connection with “restaurant services” in International Class 43, with a disclaimer of the words “pizza & Italian”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁶⁸ LEANO CAPPUCINO, Registration No. 4,242,776 (registered in connection with “powdered nutritional drink mixes containing coffee used for meal replacement” in International Class 5, with a disclaimer of the word “cappuccino”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁶⁹ JAYME HAIR COLLECTION, Registration No. 3,588,164 (registered in connection with “hair extensions” in International Class 26, with a disclaimer of the words “hair collection”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁷⁰ DON BELISARIO, Registration No. 4,358,910 (registered with a statement of translation of the word “don” as “mister” in English); see *File B, supra* note 1 (showing

TABLE 6
USPTO Treatment of Filipino Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	6		1.67%		4		4.94%	
If pressed, yes, a surname	2		0.56%		1		1.23%	
Looks like a surname	25		6.96%		15		18.52%	
Not a surname (to 1+)	102	326	28.41%	90.81%	10	61	12.35%	75.31%
Never a surname	224		62.40%		51		62.96%	
Total	359		100.00%		81		100.00%	

percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁷¹ DEL ROSARIO, Registration No. 3,833,203 (overcame § 2(e)(4) refusal with amendment to the Supplemental Register); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁷² U.S. Trademark Application Serial No. 86/333,915 (filed July 10, 2014) (application to register the mark DECASTRO LANDSCAPING AND CONSTRUCTION); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁷³ U.S. Trademark Application Serial No. 78/964,378 (filed Aug. 30, 2006) (application to register the mark DIMAANO RECORDS for “vinyl phonograph records” and other goods in International Class 9 and services in International Class 41, with a disclaimer of the word “records”); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁷⁴ U.S. Trademark Application Serial No. 85/501,569 (filed Dec. 21, 2011) (application to register the mark VIRAY); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

Korean Surnames

Surnames identified as Korean had the third highest level of surname non-recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 157 Korean surnames held by at least 100 people, which names represent 761,761 people.⁷⁵ One hundred and six of those names (67.52%, and representing 680,691 people) had a qualifying trademark filing.⁷⁶ Of those Korean surnames with a trademark filing, 104 (98.11%) did not look and feel like a surname.⁷⁷ Of the thirteen Korean surnames with only a surname interpretation and no design elements in the mark, corresponding to 52,877 people, nine names (69.23%) did not look and feel like a surname.⁷⁸ Examples of Korean names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Yim,”⁷⁹ “Ryu,”⁸⁰ “Joh,”⁸¹ and “Synn,”⁸² while “Kwak”⁸³ and “Joo”⁸⁴ looked and felt like surnames, with the result that the USPTO issued refusals under Section 2(e)(4).

⁷⁵ See *supra* Table 1.

⁷⁶ See *infra* Table 7; see also *File B, supra* note 1 (showing populations bearing names).

⁷⁷ See *infra* Table 7; see also *File B, supra* note 1 (showing populations bearing names).

⁷⁸ See *infra* Table 7; see also *File B, supra* note 1 (showing populations bearing names).

⁷⁹ YIM, Registration No. 3,294,325; *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁸⁰ U.S. Trademark Application Serial No. 85/579,000 (filed Mar. 23, 2012) (application to register the mark RYU); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁸¹ JOH, Registration No. 3,993,118; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁸² U.S. Trademark Application Serial No. 85/734,836 (filed Sept. 23, 2012) (application to register the mark SYNNE filed); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁸³ U.S. Trademark Application Serial No. 86/225,109 (filed Mar. 18, 2004) (application to register the mark KWAK); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁸⁴ MISS JOO, Registration No. 5,152,094 (overcame § 2(e)(4) refusal to register with arguments); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

TABLE 7
USPTO Treatment of Korean Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	0		0.00%		1		7.69%	
If pressed, yes, a surname	0		0.00%		0		0.00%	
Looks like a surname	2		1.89%		3		23.08%	
Not a surname (to 1+)	60	104	56.60%	98.11%	1	9	7.69%	69.23%
Never a surname	44		41.51%		8		61.54%	
Total	106		100.00%		13		100.00%	

Indian Surnames

Surnames identified as Indian had the third lowest level of non-surname recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 1,139 Indian surnames held by at least 100 people, which names represent 1,114,914 people.⁸⁵ Two hundred and seventy-seven of those names (24.32% and representing 697,308 people) had a qualifying trademark filing.⁸⁶ Of those 277 Indian surnames with a trademark filing,

⁸⁵ See *supra* Table 1.

⁸⁶ See *infra* Table 8; see also *File B*, *supra* note 1 (showing populations bearing names).

236 (85.20%) did not look and feel like a surname.⁸⁷ Of the eighty-one Indian surnames with only a surname interpretation and no design elements in the mark, corresponding to 324,801 people, fifty-two names (64.20%) did not look and feel like a surname.⁸⁸ Examples of Indian names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Chawla,”⁸⁹ “Hussain,”⁹⁰ “Parikh,”⁹¹ and “Verma,”⁹² while “Malhotra,”⁹³ “Agarwal,”⁹⁴ “Sinha,”⁹⁵ and “Trivedi”⁹⁶ looked and felt like surnames, with the result that the USPTO issued refusals under Section 2(e)(4).

⁸⁷ See *infra* Table 8; see also *File B, supra* note 1 (showing populations bearing names).

⁸⁸ See *infra* Table 8; see also *File B, supra* note 1 (showing populations bearing names).

⁸⁹ U.S. Trademark Application Serial No. 85/436,494 (filed Sept. 18, 2011) (application to register the mark CHAWLA); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹⁰ U.S. Trademark Application Serial No. 85/312,856 (filed May 18, 2011) (application to register the mark HUSSAIN); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹¹ PARIKH, Registration No. 3,917,722; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹² U.S. Trademark Application Serial No. 86/453,705 (filed Nov. 13, 2014) (application to register the mark DESIGNS BY VERMA); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹³ U.S. Trademark Application Serial No. 79/177,787 (filed Oct. 13, 2015) (application to register the mark MALHOTRA PLATINUM SEGMENT for “medical apparatus” and other goods in International Class 10 and services in International Class 44); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹⁴ AGARWAL PACKERS & MOVERS, Registration No. 4,119,850 (registered for “moving and storage of goods” and other services in International Class 39, with a disclaimer of the words “packers & movers” overcame § 2(e)(4) refusal with amendment to the Supplemental Register); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹⁵ SINHÁ, Registration No. 2,938,985 (overcame § 2(e)(4) refusal by amendment to the Supplemental Register); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

⁹⁶ U.S. Trademark Application Serial No. 85/507,042 (filed Jan. 1, 2012) (application to register the mark TRIVEDI WINE for “online wine sales” and other services in

TABLE 8
USPTO Treatment of Indian Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	5		1.81%		1		1.23%	
If pressed, yes, a surname	2		0.72%		1		1.23%	
Looks like a surname	34		12.27%		27		33.33%	
Not a surname (to 1+)	79	236	28.52%	85.20%	12	52	14.81%	64.20%
Never a surname	157		56.68%		40		49.38%	
Total	277		100.00%		81		100.00%	

International Class 35); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

Japanese Surnames

Surnames identified as Japanese had the second lowest level of surname non-recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 1,143 Japanese surnames held by at least 100 people, which names represent 557,341 people.⁹⁷ Four hundred and twenty-five of those names (37.18% and representing 336,693 people) had a qualifying trademark filing.⁹⁸ Of those 425 Japanese surnames with a trademark filing, 345 (81.18%) did not look and feel like a surname.⁹⁹ Of the 116 Japanese surnames with only a surname interpretation and no design elements in the mark, which corresponds to 115,363 people, sixty-five (56.03%) did not look and feel like a surname.¹⁰⁰ Examples of Japanese names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Fujimoto,”¹⁰¹ “Maeda,”¹⁰² “Okada,”¹⁰³ and “Wada,”¹⁰⁴ while “Takahashi,”¹⁰⁵ “Sasaki,”¹⁰⁶ “Takeuchi,”¹⁰⁷ and “Fujii”¹⁰⁸ looked and felt like surnames (meaning that the USPTO issued refusals under Section 2(e)(4)).

⁹⁷ See *supra* Table 1.

⁹⁸ See *infra* Table 9; see also *File B, supra* note 1 (showing populations bearing names).

⁹⁹ See *infra* Table 9; see also *File B, supra* note 1 (showing populations bearing names).

¹⁰⁰ See *infra* Table 9; see also *File B, supra* note 1 (showing populations bearing names).

¹⁰¹ FUJIMOTO GIKOH, Registration No. 5,101,085 (containing statement of translation of “gikoh” as having the meaning of “master craftsman” and with a disclaimer entered for the word “gikoh”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰² MAEDA, Registration No. 4,553,270 & MAEDA MINI CRANES, Registration No. 4,378,253 (showing registration for “cranes” in International Class 7, with a disclaimer of the words “mini cranes”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰³ OKADA, Registration. No. 3,015,976; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰⁴ WADA WASH, Registration. No. 3,402,788 (registered for “automobile cleaning and car washing” in International Class 37, with a disclaimer of the word “wash”); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰⁵ U.S. Trademark Application Serial No. 86/716,728 (filed Aug. 6, 2015) (application to register the mark TAKAHASHI); see *File B, supra* note 1 (showing percentage of those

TABLE 9
USPTO Treatment of Japanese Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	15		3.53%		2		1.72%	
If pressed, yes, a surname	9		2.12%		4		3.45%	
Looks like a surname	56		13.18%		45		38.79%	
Not a surname (to 1+)	145	345	34.12%	81.18%	28	65	24.14%	56.03%
Never a surname	200		47.06%		37		31.90%	
Total	425		100.00%		116		100.00%	

with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰⁶ SASAKI, Registration No. 3,862,838 (overcame § 2(e)(4) refusal with arguments); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰⁷ TAKEUCHI, Registration No. 3,444,158 (overcame § 2(e)(4) refusal with amendment to allege acquired distinctiveness under § 2(f) and submission of claim of ownership of prior registration); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹⁰⁸ FUJII PRODUCE, Registration No. 4,266,546 (registered in connection with “distributorship services provided to wholesalers, distributors and retailers in the field of fresh fruits and vegetables” in International Class 35, with a disclaimer of the word “produce,” and overcame § 2(e)(4) refusal with amendment to allege acquired distinctiveness under § 2(f)); *see File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

Vietnamese Surnames

Surnames identified as Vietnamese had the lowest level of surname non-recognition of any of the six Asian or Pacific Islander ethnic groups. The 2000 U.S. Census recorded 146 Vietnamese surnames held by at least 100 people, which names represent 1,089,219 people.¹⁰⁹ Seventy-three of those names (50.00%, and representing 857,844 people) had a qualifying trademark filing.¹¹⁰ Of those seventy-three Vietnamese surnames with a trademark filing, sixty-nine (94.52%) did not look and feel like a surname.¹¹¹ Of the nine Vietnamese surnames with only a surname interpretation and no design elements in the mark, which corresponds to 339,898 people, five names (55.56%) did not look and feel like a surname.¹¹² Examples of Vietnamese names that did not look and feel like a surname (meaning that the USPTO did not issue refusals under Section 2(e)(4)) include “Vuu,”¹¹³ “Tiet,”¹¹⁴ “Tchang,”¹¹⁵ and “Eban,”¹¹⁶ while “Kieu”¹¹⁷ and “Luu”¹¹⁸ looked and felt like

¹⁰⁹ See *supra* Table 1.

¹¹⁰ See *infra* Table 10; see also *File B, supra* note 1 (showing populations bearing names).

¹¹¹ See *infra* Table 10; see also *File B, supra* note 1 (showing populations bearing names).

¹¹² See *infra* Table 10; see also *File B, supra* note 1 (showing populations bearing names).

¹¹³ U.S. Trademark Application Serial No. 85/155,658 (filed Oct. 6, 2010) (application to register the mark VUU); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹¹⁴ U.S. Trademark Application Serial No. 85/135,052 (filed Sept. 21, 2010) (application to register the mark TIET); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹¹⁵ U.S. Trademark Application Serial No. 86/358,943 (filed Aug. 6, 2014) (application to register the mark TCHANG); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹¹⁶ EBAN, Registration No. 3,714,891; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹¹⁷ U.S. Trademark Application Serial No. 85/435,945 (filed Sept. 29, 2011) (application to register the mark KIEU’S INC.); see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

¹¹⁸ LUU, Registration No. 3,881,861 (overcame § 2(e)(4) refusal with amendment to the Supplemental Register; see *File B, supra* note 1 (showing percentage of those with name who identified as Asian/Pacific Islander); Lauderdale & Kestenbaum Data File, *supra* note 32 (showing ethnic association with name).

surnames (meaning that the USPTO issued refusals under Section 2(e)(4)).

TABLE 2
USPTO Treatment of Vietnamese Surnames

	All marks				No non-surname interpretation and no design element in mark			
	Number		Percent of total		Number		Percent of total	
No need to decide	1		1.37%		1		11.11%	
If pressed, yes, a surname	1		1.37%		0		0.00%	
Looks like a surname	2		2.74%		3		33.33%	
Not a surname (to 1+)	35	69	47.95%	94.52%	1	5	11.11%	55.56%
Never a surname	34		46.58%		4		44.44%	
Total	73		100.00%		9		100.00%	

V. THE NUMBER OF NAMES, FILING RATES, WORD LENGTH, AND POPULATION DO NOT EXPLAIN THE RECOGNITION DIFFERENCES ACROSS ASIAN ETHNICITIES

The data show different levels of surname recognition across the six Asian ethnic groups, suggesting a correlation between the ethnicity associated with the name and the level of surname recognition, but a factor other than ethnic identity might explain the different levels. Namely, each ethnic group's names may happen to share some independent characteristic that produces the relatively low or high level of surname recognition. To assess whether another

factor might explain the differences, I reviewed the data to consider if the number of names for each ethnic group, filing rates, word length, or population could account for the differences across the ethnic groups.

Starting with the number of names in the Census for each ethnic group, the data did not show any correlation between the number of names and the rates of non-recognition.¹¹⁹ For example, Japanese names occupied the second spot in the Census, but the fifth spot in the rate of non-recognition.¹²⁰ Meanwhile, the Census contained more Filipino names than any other group, but those names had the second highest levels of non-recognition.

With respect to filing rates, higher levels of seeking trademark registration for names had no impact on the non-recognition rates.¹²¹ For example, Filipino names had the lowest filing rates, but the second highest levels of non-recognition.¹²² On the other hand Chinese names had the highest levels of both filing rates and non-recognition.¹²³

Looking at word length, surname non-recognition across all Asian/Pacific Islander surnames decreased with word length, with the highest levels of non-recognition for shorter names (three- to five-letter), then medium-length (six- and seven-letter), and finally longer (eight- to twelve-letter).¹²⁴ If word length could explain the different levels of surname recognition across the six Asian ethnic groups, then the data should show shorter word lengths for the ethnic groups with the highest levels of non-recognition.¹²⁵ In other words,

¹¹⁹ See *supra* Table 1; *supra* Table 4.

¹²⁰ See *supra* Table 1; *supra* Table 4.

¹²¹ See *supra* Table 1; *supra* Table 4.

¹²² See *supra* Table 1; *supra* Table 4.

¹²³ See *supra* Table 1; *supra* Table 4.

¹²⁴ See *infra* Table 11.

¹²⁵ The earlier study that looked at all surnames, not just Asian and Pacific Islander names, examined surname recognition by word length. See Jacobs, *supra* note 1 at 230-38. That study found that shorter names have higher levels of surname non-recognition. *Id.* at 231. Two trends explain this relationship between word length and surname recognition levels. First, as word length increases, the frequency of trademark filings decreases. *Id.* at 259-60. Second, as word length increases, the frequency of filings with no non-surname use increases. *Id.* Considered together, these trends “indicate the greater likelihood of encountering longer terms that only have surname usages, but shorter terms with surname as well as other functions. People thus assume that shorter terms, viewed in isolation and

I would expect the ethnic groups with higher non-recognition rates to have more qualifying trademarks with no non-surname interpretation and no design element in the mark with three- to five-letters and a lower average surname length and the ethnic groups with lower non-recognition rates to have more qualifying trademarks with eight- to twelve-letters and a higher average surname length. The data did not show this correlation.¹²⁶

TABLE 3

USPTO Did Not Recognize Look and Feel of Asian/Pacific Islander Surnames, by Word Length

	All marks		No non-surname interpretation and no design element in mark	
	Number	Percent of total	Number	Percent of total
All	1,869	89.94%	396	67.17%
3–5 letters	1,315	94.06%	196	81.12%
6 and 7 letters	312	79.80%	140	59.29%
8–12 letters	108	69.68%	60	40.00%

Table 12 sets out the percentages of qualifying names in each of the shorter (three- to five-letter), medium-length (six- and seven-letter), and longer (eight- to twelve-letter) groupings and the average surname length for the six Asian ethnic groups in order of non-recognition, with Chinese at the top as the ethnic group with the highest level of non-recognition, and Vietnamese at the bottom as the group with the lowest level of non-recognition.¹²⁷ The Filipino names have the second-highest level of non-recognition, which would suggest that they should have relatively short lengths, but

without context, can have multiple functions—as a common word, a surname, a trademark, or something else. Shorter surnames also have the highest absolute and relative number of trademark filings in the sample.” *Id.* at 260.

¹²⁶ See *infra* Table 12.

¹²⁷ See *infra* Table 12.

they actually have the highest average surname length and the second-highest percentage of names in the longer names (eight- to twelve-letter) grouping.¹²⁸ Meanwhile, the Vietnamese names have the lowest level of non-recognition, which would suggest that they should have the longest lengths, but they actually have the third-shortest average length, no names in the longer names (eight- to twelve-letter) grouping, and the third-highest percentage of names in the shorter (three- to five-letter) grouping.¹²⁹ Accordingly, word length does not explain the difference in surname recognition across these six Asian ethnic groups, although some other factor might account for the variation.

TABLE 4

Surname Length by Asian Ethnic Group

	% of Qualifying names with no non-surname interpretation and no design element in the mark			Average surname length
	3–5 letters	6 or 7 letters	8–12 letters	
All Asian/ Pacific Islander	49.49%	35.35%	15.15%	4.89
Chinese	100.00%	0.00%	0.00%	4.00
Filipino	44.44%	37.04%	18.52%	5.16
Korean	100.00%	0.00%	0.00%	3.62
Indian	51.85%	40.74%	7.41%	4.95
Japanese	22.41%	47.41%	30.17%	4.91
Vietnamese	77.78%	22.22%	0.00%	4.33

Looking at population, surname non-recognition across all Asian/Pacific Islander surnames decreased with population, with the highest levels of non-recognition for extremely rare names (held by fewer than 250 people), then rare (250 to 1,000 people), and finally more common (more than 1,000 people).¹³⁰ If population could explain the different levels of surname recognition across the six

¹²⁸ See *infra* Table 12.

¹²⁹ See *infra* Table 12.

¹³⁰ See *infra* Table 13.

Asian ethnic groups, then the data should show smaller populations for the ethnic groups with the highest levels of non-recognition. Specifically, I would expect the ethnic groups with higher non-recognition rates to have more qualifying trademarks with no non-surname interpretation and no design element in the mark in the extremely rare grouping, and to have a lower average population per surname. I would also expect the ethnic groups with lower non-recognition rates to have more qualifying trademarks in the more common grouping, and to have a higher average population per surname. As demonstrated below, the data did not show this correlation.¹³¹

TABLE 5

USPTO Did Not Recognize Look and Feel of Asian/Pacific Islander Surnames, by Population

	All marks		No non-surname interpretation and no design element in mark	
	Number	Percent of total	Number	Percent of total
All	1,869	89.94%	396	67.17%
<250 population	716	90.63%	144	78.26%
250 to 1,000 population	651	89.42%	70	59.83%
>1,000 population	502	89.64%	52	54.74%

Table 14 sets out the percentages of qualifying names in each of the extremely rare (held by fewer than 250 people), rare (250 to 1,000 people), and more common (more than 1,000 people) groupings. Table 14 also presents the average population per surname for the six Asian ethnic groups in order of non-recognition. Chinese appears at the top, as the ethnic group with the highest level

¹³¹ See *infra* Table 14.

of non-recognition, while Vietnamese appears at the bottom, as the group with the lowest level of non-recognition.¹³² The Chinese names have the highest level of non-recognition, which would suggest that they should have relatively small populations for each name. However, they actually have the second-highest average population per surname and the second-highest percentage of names in the more common (more than 1,000 people) grouping.¹³³ Meanwhile, the Japanese names have the second-lowest level of non-recognition, which would suggest that they should have larger populations for each name. Yet they actually have the second smallest average population per surname and the fourth-highest percentages of names in the more common (more than 1,000 people) grouping.¹³⁴ Accordingly, neither word length nor population explains the difference in surname recognition across these six Asian ethnic groups, although some other factor might. Perhaps the frequency of use of the surname in publications or societal attitudes to the ethnic group would influence the surname recognition rates.

TABLE 6

Population of Surnames by Asian Ethnic Group

	% of qualifying names with no non-surname interpretation and no design element in the mark			Average population per surname
	<250 people	250–1000 people	>1000 people	
All Asian/Pacific Islander	46.46%	29.55%	23.99%	2,501.88
Chinese	16.00%	32.00%	52.00%	10,236.80
Filipino	70.37%	24.69%	4.94%	186.58
Korean	23.08%	7.69%	69.23%	2,876.15
Indian	34.57%	48.15%	17.28%	3,532.41
Japanese	32.76%	34.48%	32.76%	590.75
Vietnamese	33.33%	33.33%	33.33%	34,558.22

¹³² See *infra* Table 14.

¹³³ See *infra* Table 14.

¹³⁴ See *infra* Table 14.

CONCLUSION

USPTO examining attorneys refuse to register Asian and Pacific Islander surnames as trademarks under Section 2(e)(4) at a much lower rate than the general population. Based on the reasonable assumption that an examining attorney's refusal to register a name as a trademark reflects that attorney's recognition of the surname's significance, the data reviewed in this article indicate that Asian and Pacific Islander surnames as a category show high levels of surname non-recognition. Within the broad racial group of Asian or Pacific Islander, rates of surname non-recognition varied considerably across ethnic groups. Chinese names had the highest rates of non-recognition, followed by Filipino, then Korean, Indian, Japanese, and finally Vietnamese.

Non-recognition means that the USPTO does not refuse to register the surname trademark as primarily being merely a surname under Section 2(e)(4). Consequentially, when an application matures to registration, the trademark applicant, who does not need to bear the name, captures use of the name even against those who actually do bear the name.¹³⁵ Higher rates of non-recognition mean that more people face the peculiar and unfair situation that human error in the administration of the trademark system has turned something as personal as their surname into someone else's legally protected, source-identifying mark. While disparate levels of non-recognition have a negative impact on Asian Americans and Pacific Islanders generally, the disparities affect Chinese and Filipino communities with particular severity.

Business owners can turn this unequal treatment into commercial advantages. Brand owners might mine this data to inform their choice of trademarks. First, they can anticipate that the USPTO will more likely refuse to register Japanese and Vietnamese names under Section 2(e)(4) than Chinese and Filipino names. Brand owners will prefer names with a higher probability of registration and therefore choose names from ethnic groups with high rates of non-recognition, and therefore a lower likelihood of refusal to register a particular name. Second, this data will help brand owners know when consumers will perceive a mark as associated with a person.

¹³⁵ Jacobs, *supra* note 1, at 250.

If brand owners want to build a brand that consumers will associate with a person or a family (like MARIE CALLENDER'S or AUNT JEMINA or UNCLE BEN or WENDY'S), rather than an arbitrary concept (like GOOGLE), they might want to select a more recognized surname. The data in this study suggest that consumers would more likely recognize Japanese and Vietnamese surnames. Selecting one of those names and presenting it with an image of a person establishes a persona associated with that brand. This persona anthropomorphizes the brand and suggests that a person or family makes the products. This strategy would likely not work as well with less recognized surnames.

While the study yields practical applications, it does not explain the reason for the disparate non-recognition rates. The number of names, the percentage of names with a trademark filing, the population bearing the names, and the length of the names do not explain the different rates of non-recognition. Further research could examine the differences in recognition among the ethnic groups by considering the frequency of usage of the surname—not the number of people with the surname, but the number of times that the people use the surname in publications or conversation. Internet search engines can scan printed sources and report out the number of uses of a word on a yearly basis. This search might show a correlation between frequency of usage and word length. Pursuing a different line of inquiry to this question, social science research on the history and perceptions of the six different Asian ethnic groups might reveal attitudes about ethnic groups that would make the associated names seem more or less like surnames. Finally, formal characteristics of the orthography, such as the number of syllables or particular letter combinations or vowel to consonant ratio, might correlate to surname recognition.

This study also leaves open for further research questions about whether consumers in those ethnic groups consider that surnames used as trademarks refer to specific individuals who own the associated business and the concept of ownership of name across different cultures. An experiment could show product packaging (*e.g.*, a condiment bottle) and signage for a business (*e.g.*, a retail location) in four versions. The first would show a surname drawn from one of the six Asian ethnic groups as the trademark, the second

a non-Asian name, the third a non-surname word with a dictionary definition, and the fourth a fanciful word. Test subjects would consist of people from each of the ethnicities and each group would have an Asian name from their own ethnicity in the first version. The Asian name, the non-Asian name, and the non-surname would vary little by frequency, orthography, and length. Researchers would start by asking the test subjects open-ended and unaided questions to determine the first impressions of the significance of the word (*i.e.*, whether it functioned as a trademark, whether they recognized it as a surname, or whether they thought that someone with that name owned the business using that name). Differences in perspectives on these questions might point to cultural variation in the understanding of trademarks and business ownership. Knowing if members of some ethnic groups have a greater tendency to associate a mark they recognize as a surname with the owner of the business would usefully inform branding strategy. For instance, businesses could craft their trademarks with greater sensitivity to the potentially different source-identifying messages that the marks would convey to different audiences.

Whatever the reason for the disparity—perhaps orthographic or socio-cultural—such disparity undermines the purpose of Section 2(e)(4) of the Lanham Act. The drafters likely believed that this provision would apply equally across the population to protect the ability of Americans to operate businesses under their own names. Congress did not take into account that the layered racial history of America and the complexities of linguistic processing would defeat this purpose, leaving some names, and some groups of peoples, more protected than others. Scholarship on social justice in intellectual property often focuses on promoting a culture of innovation that provides benefits broadly across the country.¹³⁶ This study presents a new way of looking at equity in intellectual

¹³⁶ See, e.g., Steven D. Jamar & Lateef Mtima, *A Social Justice Perspective on Intellectual Property, Innovation, and Entrepreneurship*, in *ENTREPRENEURSHIP AND INNOVATION IN EVOLVING ECONOMIES: THE ROLE OF LAW* 78, 80 (Megan Carpenter ed., 2015) (The social justice and intellectual property approach “focuses on how copyright and to a more limited extent how other forms of intellectual property can either foster or inhibit access to, creation of, dissemination of, and use of works to empower marginalized individuals and groups and to advance societal development collectively.”).

property by using data to examine the disparate impact of intellectual property policies on particular groups. Considering data in this way could lead to better intellectual property policies that foster broad-based economic development.