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## The Anonymity Heuristic: How Surnames Stop Identifying People When They Become Trademarks

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# The Anonymity Heuristic: How Surnames Stop Identifying People When They Become Trademarks

Russell Jacobs

## ABSTRACT

This Article explores the following question central to trademark law: if a homograph has both a surname and a trademark interpretation will consumers consider those interpretations as intrinsically overlapping or the surname and trademark as completely separate and unrelated words? While trademark jurisprudence typically has approached this question from a legal perspective or with assumptions about consumer behavior, this Article builds on the Law and Behavioral Science approach to legal scholarship by drawing from the fields of psychology, linguistics, economics, anthropology, sociology, and marketing.

The Article concludes that consumers will regard the two interpretations as separate and unrelated, processing surname trademarks through an anonymity heuristic comprised of two elements. First, consumers understand that the trademark signals the unknown source of the goods or services bearing the trademark. Second, consumers do not equate the trademark with a particular individual bearing that name or believe that someone with that name offers the goods or services. Contrary to the traditional characterization of surname trademarks as merely descriptive marks, the research into human behavior suggests that they fit better in the category of arbitrary marks.

Five key findings support the anonymity heuristic and the characterization of surname trademarks as arbitrary marks: (1) people process words to resolve ambiguity; (2) people process surnames differently than other words; (3) people process trademarks differently than other words; (4) consumers understand trademarks within a cultural framework; and (5) people process surnames and trademarks through separate nodes.

Frequency and uniqueness will impact the anonymity heuristic in two ways. First, for infrequently purchased goods, consumers will develop a weaker trademark node and the surname node for the related homograph may compete with that the trademark

node. Second, if a famous person or a personally known service provider with an uncommon surname uses that surname as a trademark, consumers may associate that trademark directly with that person, interrupting the anonymity heuristic.

Based on the learnings from the multi-disciplinary literature, the Article recommends removing the statutory bar to trademark registration of terms deemed primarily merely surnames. Instead, a new own-name defense can supplement the existing prohibitions against deceptive trademarks to promote honest use of surnames as trademarks.

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## INTRODUCTION

We constantly decipher the role of words even though we rarely, if ever, notice when and how we process language. For example, we do not give up in frustration when we have to disambiguate various functions of homographs in order to figure out which usage of the word makes sense in the particular context. Multi-disciplinary scholarship continues to uncover greater understanding into the way we process language, and in particular how we identify the correct function of a homograph. This literature may disrupt assumptions underlying trademark law, an area of law that focuses on how consumers interpret words. The way consumers treat homographs raises interesting lines of inquiry across multiple topics in trademark law, but this Article focuses on a single question relating to surname trademarks: if a homograph has both a surname and a trademark interpretation, will consumers consider those interpretations as intrinsically overlapping or the surname and trademark as completely separate and unrelated words?

Real-world applications of this question come up in the decisions of the United States Patent and Trademark Office (“USPTO”) on whether to register trademarks. For example, the agency’s trademark administrative review body—the Trademark Trial and Appeal Board (“TTAB”)—recently affirmed refusals to register the marks PARSONS for golf equipment under § 2(e)(4) of the Lanham Act as primarily merely a surname.<sup>1</sup> The TTAB rejected the trademark applicant’s argument that consumers would find the non-surname significance of the word “parsons” (i.e., Protestant clergy) more familiar than the surname significance because the goods and services did not relate to the clergy.<sup>2</sup> The mark in question comprised a homograph that could signal, *inter alia*, a town in southeast Kansas,<sup>3</sup> an actor from the popular sitcom *The Big Bang Theory*,<sup>4</sup> the design school in Greenwich Village,<sup>5</sup> a Protestant minister,<sup>6</sup> or that trademark.<sup>7</sup> One string of seven letters

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1. *In re Parsons Xtreme Golf, LLC*, Ser. Nos. 86666031, 86700421, 86701458, 86701787, 86702680, and 86706223, 2018 TTAB LEXIS 471 (T.T.A.B. Dec. 17, 2018) (non-precedential).

2. *Id.* at \*11-12

3. PARSONS KANSAS. <https://bit.ly/2nfYY8n> [<https://perma.cc/PD8Q-GWAN>] (last visited Jan. 31, 2019).

4. *Jim Parsons*, WIKIPEDIA, <https://bit.ly/28STtF4> [<https://perma.cc/D7ZV-QDXT>] (last visited Jan. 31, 2019).

5. *Parsons*, THE NEW SCHOOL, <https://bit.ly/2wMaRqg> [<https://perma.cc/4T53-ML2P>] (last visited Jan. 31, 2019).

6. Parson, Merriam-Webster, <https://bit.ly/2nfJTDP> [<https://perma.cc/VP96-VVHV>] (last visited Jan. 31, 2019) (defining word as “rector” or “clergyman; especially: a Protestant pastor”); Winter Wonderland, Lyrics, <https://bit.ly/2NF0ivN>

yields at least five different interpretations—geographic name, school name, surname, common noun, trademark for golfing goods. This set of appeals illustrates but one example of surname trademarks; the same issues arise with the words “baker”<sup>8</sup> and “bush,”<sup>9</sup> and countless others.

This Article explores the ambiguity inherent in these homographs, asking how consumers will process a homograph that has, *inter alia*, a surname interpretation, when consumers encounter the word presented as a trademark. Will consumers interpret a homograph that has both a surname and a trademark interpretation (i.e., a surname trademark) as a surname, trademark, both, or neither? Will they believe that the goods or services offered under the surname trademark come from a person bearing that surname? These inquiries point to bigger questions about how consumers make decisions, how people process language, and what it means to own a name.

This Article answers the inquiries about homograph processing by proposing that consumers assess surname trademarks through the *anonymity heuristic*. The framework of the *anonymity heuristic* incorporates two elements. First, consumers understand that the trademark signals the unknown source of the goods or services bearing the trademark. Second, consumers do not equate the trademark with a particular individual bearing that name or believe that someone with that name offers (some associated) goods or services. Under this heuristic, then, consumers read the PARSONS,

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[<https://perma.cc/F9R4-TT95>] (last visited January 18, 2020) (“In the meadow we can build a snowman; Then pretend he is Parson Brown; He’ll say: ‘Are you married’; ‘We’ll say no man.’”).

7. PXG, <https://bit.ly/2nZiGpp> [<https://perma.cc/U73U-8DAE>] (last visited Jan. 31, 2019).

8. The homograph “baker” could refer, *inter alia*, to a person who bakes person, a person with that surname, or a trademark used in connection with bicycles. *Baker*, MERRIAM-WEBSTER, <https://bit.ly/2lPmbOw> [<https://perma.cc/K75R-AFC2>] (last visited Jan. 31, 2019) (defining word as “a person who bakes and sells bread, cakes, or pastry”); *Baker (surname)*, WIKIPEDIA, <https://bit.ly/2lGdW78> [<https://perma.cc/X3YB-MPCR>] (last visited Jan. 31, 2019) (listing hundreds of people with the surname “Baker”); BAKER, Registration No. 4,902,411 (registration for the mark BAKER in connection with “bicycles” held by Brandplug Corp.).

9. The homograph “bush” could refer, *inter alia*, to a shrub, one of two former U.S. Presidents with that surname, or a trademark used in connection with cabinets. *Bush*, MERRIAM-WEBSTER, <https://bit.ly/2nmK1RQ> [<https://perma.cc/X3YZ-3YSK>] (last visited Jan. 31, 2019) (defining word as “shrub; *especially*: a low densely branched shrub”); *George Bush*, WIKIPEDIA, <https://bit.ly/2nhX9rG> [<https://perma.cc/Q78H-8RNQ>] (last visited Jan. 31, 2019) (listing two U.S. Presidents and others with the name “Bush”); *see also* BUSH, Registration No. 1,082,564 (registration for the mark BUSH in connection with “cabinet and shelving units” held by Bush Industries, Inc.).

BAKER, and BUSH trademarks as signals that the same unknown entity has made or authorized all of the goods offered under the respective marks (the first element), but the trademarks do not identify someone named “Parsons,” “Baker,” or “Bush” as that source (the second element). Consumers may not know that the PARSONS golf clubs all originate from an entity named Parsons Xtreme Golf, LLC, but they believe that all of the PARSONS golf clubs come from the same entity.<sup>10</sup> They do not think to ask if a Ms. or Mr. Parsons runs or founded that company because they recognize that the homograph functions as a trademark, not a surname, in this context. The *anonymity heuristic* rests on research showing that consumers can disambiguate the surname and trademark interpretations of homographs. They do not see a surname trademark and believe that it functions simultaneously as an identifier of a person and of an anonymous source of the goods, but rather only the latter. Consumers process “Parsons” the surname as a word unrelated to PARSONS the trademark.

Narrow circumstances may disrupt the *anonymity heuristic*. Consumers will associate the surname trademark with a particular individual bearing that surname where the consumer personally knows that individual (such as local accountant) or where the person behind the trademark has both a high degree of fame and a unique surname. Further, consumers will have lower trademark awareness of surname trademarks for goods that they purchase infrequently.

Rather than examining this topic within the confines of legal theory, this Article takes a multi-disciplinary approach to consider consumer behavior and linguistic processing through the fields of psychology, linguistics, economics, anthropology, sociology, and marketing. By taking this approach, the Article seeks to take “due regard for the relevant decision-making capabilities of the actors in that specific setting” and contribute to the Law and Behavioral Science approach to legal scholarship.<sup>11</sup> The multi-disciplinary scholarship supports the *anonymity heuristic* as it indicates that consumers process surnames and trademarks differently and separately from each other, that consumers easily resolve ambiguity among the multiple possible interpretations of homographs, and that consumers create separate nodes with unique associations for

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10. See, e.g., U.S. Trademark Application Ser. No. 86/666,031 (filed June 17, 2015) (abandoned).

11. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1057–58 (2000).

each interpretation. These findings challenge the traditional assumption in trademark theory that surname trademarks constitute a species of descriptive terms that identify the particular source of goods or services and instead support a view of surname trademarks as arbitrary marks that have no connection to the non-trademark uses of the homograph.

Section II of this Article provides an overview of the law regarding registration of surnames as trademarks. Section III looks at the distinctiveness of surname trademarks. Section IV explores the multi-disciplinary research on how consumers process surnames and trademarks. Section V discusses the impact of familiarity and frequency on recognition of surname trademarks. Section VI recommends changes to the law so that it aligns with the realities of consumer behavior. Section VII concludes the Article.

## I. LEGAL FRAMEWORK FOR TRADEMARK REGISTRATION OF SURNAMES

The Lanham Act<sup>12</sup> sets forth the United States statutory framework for registration of trademarks, which are defined as a type of intellectual property that identifies the particular source of goods or services offered under the mark.<sup>13</sup> Section 2(e)(4) addresses surname trademarks, prohibiting trademark registration of any term deemed “primarily merely a surname”:

No 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 . . . .<sup>14</sup>

The Lanham Act does not prohibit trademark registration for all surnames, but rather only for terms which the purchasing public will regard as *primarily merely* surnames.<sup>15</sup> Congress did not want

12. 15 U.S.C. § 1051 *et seq.* (2018).

13. See 1 THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2.3 (2017) (“A trademark is a compact symbol that conveys information about products or services to potential buyers.”).

14. Trademark Act of 1946 (Lanham Act) § 2(e)(4), 15 U.S.C. § 1052(e)(4) (2018).

15. U.S. PATENT & TRADEMARK OFFICE, U.S. DEP’T OF COMMERCE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1211 (Oct. 2017) [hereinafter TRADEMARK MANUAL] (“The question of whether a mark is primarily merely a surname depends on the mark’s *primary* significance to the purchasing public. Each case must be decided on its own facts, based upon the evidence in the record.”) (citing *Ex parte Rivera Watch Corp.*, 106 U.S.P.Q. (BNA) 145, 149 (Dec.

to prohibit trademark registration of a term solely because “[a] surname was found in a directory to be the name of somebody somewhere.”<sup>16</sup> A blanket prohibition against trademark registration of any homograph that happens to have a surname function would ignore the reality that consumers would recognize a non-surname interpretation for some surname trademarks at least as much as the surname function (for example, the term “hill”), or that they would not recognize the term as a surname and thus consider it a coined term.<sup>17</sup> In passing the Lanham Act, Congress considered testimony that an absolute prohibition “merely limits the field of choice” and chose instead to prohibit registration only of terms consumers would consider primarily merely surnames.<sup>18</sup>

The statutory prohibition in § 2(e)(4) derives from the common-law tradition that all people have the right to use their own names in connection with their businesses.<sup>19</sup> Recent decisions of the TTAB have affirmed that this policy reason remains the basis for § 2(e)(4), noting that “the purpose behind Section 2(e)(4) is to keep surnames available for people who wish to use their own surnames in their businesses.”<sup>20</sup> This common-law tradition rests on assumptions that allowing business owners to identify companies by

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Comm’r Pat. 1955)); *accord id.* § 1211.01(a)(v) (“Regardless of the rarity of the surname, the test is whether the primary significance of the term to the purchasing public is that of a surname.”).

16. *Rivera*, 106 U.S.P.Q. (BNA) at 149; *see also id.* at 149 n.3 (discussing the pertinent legislative history).

17. *See, e.g., In re United Distillers, PLC*, 56 U.S.P.Q.2d (BNA) 1220, 1222 (T.T.A.B. 2000) (non-precedential) (“While the term HACKLER certainly can be a surname, nonetheless, the word has another significance or meaning.”). *Hill*, MERRIAM-WEBSTER, <https://bit.ly/2nRDfDZ> [<https://perma.cc/38NH-3UPM>] (last visited Jan. 31, 2019) (defining word as “a usually rounded natural elevation of land lower than a mountain”); *Hill (surname)*, WIKIPEDIA, <https://bit.ly/2muxICW> [<https://perma.cc/J79Q-29BM>] (last visited Jan. 31, 2019) (listing hundreds of individuals with the name “Hill”).

18. *Hearings on H.R. 4744 Before the Subcomm. On Trade-Marks of the H. Comm. on Patents*, 76th Cong. 40 (1939) (statement of Edward S. Rogers, attorney).

19. *See Kimberly Clark Corp. v. Marzall*, 94 F. Supp. 254, 257 (D.D.C. 1950). The Court noted:

The spirit and the intent of the entire Act indicate that Congress intended to codify the law of unfair competition in regard to the use of personal names as it has been developed by the courts. . . . At common law it was held that every man had an absolute right to use his own name.

*Id.*

20. *In re Hall Wines, L.L.C.*, 2009 WL 625580, at \*6 (T.T.A.B. 2009) (non-precedential) (quoting with approval *In re Joint-Stock Co. “Baik,”* 84 U.S.P.Q.2d (BNA) 1921, 1924 (T.T.A.B. 2007) (non-precedential) (Seeherman, J., concurring)); *accord* TRADEMARK MANUAL, *supra* note 15, § 1211 (“The common law also recognizes that surnames are shared by more than one individual, each of whom may have an interest in using his surname in business.”).



their surnames benefits the proprietors and the purchasing public alike.<sup>21</sup> The proprietor's surname comes to reflect both the personal and the commercial reputation arising from the quality of the services offered by the business.<sup>22</sup> The proprietor benefits when consumers choose to give their business to the enterprise identified by the surname as a result of the reputation of the proprietor.<sup>23</sup> Consumers benefit from the direct information conveyed by the business name when it identifies an individual proprietor whom consumers know and can judge.<sup>24</sup>

The Lanham Act recognizes that despite the descriptive nature of surname trademarks, consumers may come to recognize surname trademarks as unique source identifiers in some instances. Section 2(f) permits registration of surname trademarks (and other terms that lack inherent distinctiveness) once they have acquired distinctiveness.<sup>25</sup> Guidance from the Trademark Office explains that the Lanham Act

reflects the common law that exclusive rights in a surname *per se* cannot be established without evidence of long and exclusive use that changes its significance to the public from that of a surname to that of a mark for particular goods or services. . . . [B]y the requirement for evidence of distinctiveness, the law, in effect, delays appropriation of exclusive rights in the name.<sup>26</sup>

Under this theory, a surname trademark starts identifying one anonymous source “that unequivocally denotes a particular economic activity” once it has acquired distinctiveness.<sup>27</sup>

## II. THE NATURE OF SURNAME TRADEMARKS

### A. *Surnames and Trademarks Do Not Define Categories, But Rather Refer to Particular People or Sources*

Before going further, it will help to discuss relevant similarities between trademarks and surnames, particularly in contrast to other types of words. Starting definitionally, both surnames and trademarks lack *sense*—a term defined by the philosopher Gottlob Frege

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21. Russell W. Jacobs, *Recapturing Rariness: The Significance of Surname Rariness in Trademark Registration Determinations*, 50 IDEA 395, 400 (2010).

22. *Id.* at 395.

23. *Id.* at 400.

24. *Id.*

25. Trademark Act of 1946 (Lanham Act) § 2(f), 15 U.S.C. § 1052(f) (2018).

26. TRADEMARK MANUAL, *supra* note 15, § 1211 (emphasis in original).

27. Giovanni B. Ramello & Francesco Silva, *Appropriating Signs and Meaning: The Elusive Economics of Trademark*, 15 INDUS. & CORP. CHANGE 937, 945–46 (2006) [hereinafter Ramello & Silva].

in *On Sense and Reference* and used in the fields of linguistics and psychology.<sup>28</sup> What does it mean for a word to have, or lack, *sense*? For an answer to that question, consider the common noun “parsons.” In its usage as a common noun the word has *sense* in that it means “Protestant clergy.”<sup>29</sup> The word defines a category of people all of whom share the same characteristics, from which the word derives its *sense*. In this case, all parsons share the same characteristic of having the occupation of “Protestant clergy.”

On the other hand, surnames and trademarks lack *sense* as they do not define a category of people or things that all share meaningful characteristics unique to them as opposed to the general population.<sup>30</sup> With respect to surnames, while some people with the surname Parsons may happen to have characteristics in common (e.g., a hobby or a favorite food) those commonalities do not arise as a result of the surname. One cannot predict with accuracy any traits common to two people who happen to share the same surname.<sup>31</sup> Knowing of the actor Jim Parsons does not provide any useful information about someone named Antwon Parsons. Looking at the word “baker” as another example, consider that meeting two people and learning that one works as a “baker” and another has the name “Baker,” the first use of the word

28. Gottlob Frege, *Über Sinn und Bedeutung*, in *FUNKTION, BEGRIFF, BEDEUTUNG*. (Patzig G. ed. 1892).

29. *Parson*, MERRIAM-WEBSTER, <https://bit.ly/2nfJTDP> [<https://perma.cc/5VDQ-E2HT>] (last visited Jan. 31, 2019) (defining word as “rector” or “clergyman; especially: a Protestant pastor”).

30. Stefan Oltean, *On the Semantics of Proper Names*, in *ONOMASTICS IN CONTEMPORARY PUBLIC SPACE* 50, 56 (Alina Bughesiu & Oliviu Felecan eds., 2013) (stating proper names “denote a single individual with respect to a given possible world ‘a class as many as of one object [ . . . ] identical with that object’, where ‘there is no empty class as many’. In other words, they introduce a *constant* – *a*, *b*, *c*, the entity associated with the name – at the level of logical form.”); see also Richard Coates, *Properhood*, 82 *LANGUAGE* 356, 358 (2006). Coates notes:

[S]ome words are applicable in principle to individuals and others to classes of individuals, in virtue of the very properties of individuality or classhood; and because of such individualizing, proper names apply discretely in semantic space ([l]e *proprium* du nom proper est de ne pas admettre un champ d’indétermination’: ‘what is *proprium* about proper names is that they do not allow any scope for indeterminacy’, and properhood involves divided (= discrete—RC) reference.

*Id.* (quoting Pierre Swiggers, *La Nature du Nom Propre: un Point de Vue Guillaumein*, 26 *ONOMA* 45 (1982)) (citing Willy van Langendonck, *On the Theory of Proper Names*, in *PROCEEDINGS OF THE 13TH INTERNATIONAL CONGRESS OF ONOMASTIC SCIENCE*, CRACOW 63 (Kazimierz Rymut ed. 1978)).

31. TIM VALENTINE ET AL., *THE COGNITIVE PSYCHOL. OF PROPER NAMES: THE IMPORTANCE OF BEING ERNEST* 107–08 (1996) [hereinafter *BEING ERNEST*] (noting that the name “Baker” does not categorize people with that name because they share certain traits).

“baker”—the common noun—reveals more about the person since the term categorizes and conveys consistent traits shared by all those with that profession, while the second “Baker”—the proper name—has only an arbitrary connection to the person and those bearing the name do not share any meaningful, distinguishable traits.<sup>32</sup> A surname may *refer* to a specific person or family, but it does not *define* a group of people. Likewise, trademarks lack *sense* as they do not define a generic category of things defined by shared characteristics. The trademark PARSONS *refers* to particular goods (e.g., golf clubs) associated with one source (Parsons Xtreme Golf, LLC), but PARSONS does not define either the goods or the source.<sup>33</sup> A word has *sense* when it *defines* and lacks *sense* when it *refers*.

Lacking *sense* means that both surnames and trademarks have a *denotative* function, i.e., they *refer* to a particular person or a product coming from an anonymous source.<sup>34</sup> While common words have multiple *referents* within a category (e.g., many “bakers”), each surname and each trademark has only one *referent*—either a person with the name (a Dr. Baker) or a particular product coming from an anonymous source (the BAKER bicycle coming from one company).<sup>35</sup> Barton Beebe has looked at this referential

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32. *Id.* (citing Gillian Cohen, *Recognition and Retrieval of Proper Names: Age Differences in the Fan Effect*, 2 EUR. J. OF COGNITIVE PSYCHOL. 193 (1990); then citing Gillian Cohen, *Why Is It Difficult to Put Names to Faces?*, 81 BRIT. J. OF PSYCHOL., 287 (1990); then citing Kathryn H. McWeeny et al., *Putting Names to Faces*, 78 BRIT. J. OF DEVELOPMENTAL PSYCHOL. 143 (1987); then citing Carlo Semenza & Marina Zettin, *Generating Proper Names: A Case of Selective Inability*, 5 COGNITIVE NEUROPSYCHOLOGY 711 (1988); and then citing Carlo Semenza & Marina Zettin, *Evidence from Aphasia for the Role of Proper Names as Pure Referring Expressions*, 342 NATURE 678 (1989)).

33. *See, e.g.*, U.S. Trademark Application Ser. No. 86/666,031 (filed June 17, 2015) (abandoned).

34. *See* Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 INDIANA L.J. 381, 391–92 (2011).

35. Carlo Semenza, *The Neuropsychology of Proper Names*, 24 MIND & LANGUAGE 347, 348 (2009) [hereinafter *Neuropsychology of Proper Names*] (“In sum, proper names essentially refer to individuals (or individual groups) while common names refer to categories. Another useful way of expressing this distinction is that proper names have only ‘token’ reference while common names carry ‘type reference.’” (quoting RAY JACKENDOFF, *SEMANTICS AND COGNITION* (1983))); Carlo Semenza, *Retrieval Pathways for Common and Proper Names*, 42 CORTEX 884, 884 (2006) [hereinafter *Retrieval Pathways*] (“Proper names are thought to relate to their reference in a ‘token’ (individual) as opposed to ‘type’ (categorical) fashion, which is the case for common nouns. In other words, while proper names refer to individual entities, common nouns refer to categories of items.”). While many people may have the name “Baker” or products from different purveyors may bear the trademark BAKER, in each particular usage the surname or trademark refers to only one person or source of goods.

function of trademarks through the field of semiotics—the study of signs and symbols. He sets out a semiological view of a trademark as consisting of a word—the *signifier*—which points to particular goods or services—the *referent*—that comes from a *signified*—a specific source and its associated goodwill.<sup>36</sup> “When [the word ‘trademark’] is used to describe the whole, the term ‘trademark’ refers to the *relational system* consisting of the tangible signifier(s), the source or goodwill signified, and their connection to a referent or a set of referents.”<sup>37</sup> This *denotative* function of identifying a particular product by its source defines the function of a trademark.<sup>38</sup>

People process both trademarks and surnames “almost entirely free of meaning” because both types of words directly identify specific sources or people.<sup>39</sup> As explained by linguist Richard Coates, these types of words “apply/denote/refer directly, therefore, and they do so in virtue of nothing but their arbitrary link with what they apply to (their denotata/referents).”<sup>40</sup> Per cognitive psychologist Carlo Semenza

the main theoretical idea which has its origins in philosophy is that, unlike common names, proper names possess *reference*, but not (except perhaps in minor role) *sense*, i.e., they may be considered ‘pure referring expressions’ . . . or, as some prefer . . . as loci of identifying ‘descriptions’.<sup>41</sup>

Semenza also notes that “[c]hanging basic features and properties over time does not change the proper name of a given single entity.”<sup>42</sup> Linguist Stefan Oltean agrees, observing that “[p]roper names of individuals emerge as non-descriptive, rigid designators, whose meaning lies exclusively in their denotation. As such, their contribution to the semantic content of the sentence lies in the indi-

36. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 646 (2004) (citations omitted).

37. *Id.* at 649.

38. Nicholas S. Economides, *The Economics of Trademarks*, 78 TRADEMARK REP. 523, 537 (1988) (“Most of the value of any trademark will be created with its identification with the product.”); Heymann, *supra* note 34, at 393–94; Ramello & Silva, *supra* note 27, at 946 (“the ‘source distinctiveness’ serves to identify the maker of a good . . .”).

39. Tim Brennan, *On the Meaning of Personal Names: A View from Cognitive Psychol.*, 48 NAMES 139, 143 (2000) [hereinafter *Meaning of Personal Names*].

40. Coates, *supra* note 30, at 363 (citing JOHN S. MILL, SYSTEM OF LOGIC § 1.2.1ff (1843)).

41. *Neuropsychology of Proper Names*, *supra* note 35, at 347.

42. *Retrieval Pathways*, *supra* note 35, at 884 (citing Gottlob Frege, *Über Sinn und Bedeutung*, in FUNKTION, BEGRIFF, BEDEUTUNG (Patzig G ed. 1892); and then citing SAUL KRIPKE, NAMING AND NECESSITY (1980)).

viduals they denote, and not in descriptive contents.”<sup>43</sup> Cognitive psychologists Tim Valentine, Tim Brennan, and Serge Brédart likewise observe that since “proper names cannot consist of a definite description, or a cluster of definite descriptions . . . proper names have no meaning.”<sup>44</sup>

While neither surnames nor trademarks carry any *sense*, they convey information through *prior associations* and *developing associations*. First, by *prior associations*, I mean that people will rely on their prior experience with the same string of letters or similar letter strings to try to understand the function of the word in the new context.<sup>45</sup> As Coates explains, “[w]e can distinguish two modes of referring, one SEMANTIC, where the entailments accruing from the words used in particular structures are preserved intact, and one ONYMIC, where they are not.”<sup>46</sup> In trademark language, a “semantic” term remains descriptive since the entailments persist as the principal way the consumer understands the term. On the other hand, an “onymic” term has acquired distinctiveness because any *prior associations* with the homograph have faded and the term comes to identify, solely or principally, the new referent.<sup>47</sup>

Second, by *developing associations*, I mean that people form personal opinions and memories about the surname or trademark over time. In this way, these types of words “*connote*: they communicate, either directly or by suggestion, certain characteristics about a person or good, whether actual or aspirational.”<sup>48</sup> Coates explains that personal names “may set up cultural expectations and carry a great deal of social information.”<sup>49</sup> Cognitive psychologist Carlo Semenza observes that such social information will combine uniquely to identify a particular individual: “The set of attributes labelled by a proper name, instead, combine together incidentally, being related to each other only by virtue of belonging to entities that are unique.”<sup>50</sup> Fellow cognitive psychologists Tim Valentine, Tim Brennan, and Serge Brédart provide the following illustration

43. Oltean, *supra* note 30, at 63.

44. BEING ERNEST, *supra* note 31, at 14.

45. Coates, *supra* note 30, at 368 (discussing prior entailments of words).

46. *Id.*

47. See Trademark Act of 1946 (Lanham Act) § 2(f), 15 U.S.C. § 1052(f) (2018); TRADEMARK MANUAL, *supra* note 15, § 1209.01(b) (discussing descriptiveness).

48. Heymann, *supra* note 34, at 391–92.

49. Coates, *supra* note 30, at 364.

50. *Neuropsychology of Proper Names*, *supra* note 35, at 348. Accord BEING ERNEST, *supra* note 31, at 13 (citing OTTO JESPERSEN, THE PHILOSOPHY OF GRAMMAR 67 (1965) (“Similarly, Jespersen (1965) suggested that the meaning of a

of the connotative function: “the meaning of Mikhail Gorbachev would be something like ‘the man who introduced perestroika to the USSR’, ‘the man with a birthmark on his forehead’, ‘the man who received the Nobel prize for peace in 1990’.”<sup>51</sup>

Likewise, trademarks *connote* brand identity or brand characteristics, for example, in prior years, the intimate association of the trademark KODAK with photographic equipment.<sup>52</sup> Law professor Barton Beebe provides current examples: “The trademark IBM may stand for technological achievement, COKE and PEPSI for youth, WAL-MART for affordability.”<sup>53</sup> Justice Frankfurter noted the importance of these associations in 1942:

The protection of trademarks is the law’s recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them. . . . The owner of a mark exploits this human propensity by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol.<sup>54</sup>

In the vocabulary of trademarks, the phrase “secondary meaning” reflects these *developing associations*, which develop over time as consumers interact more and more with the trademarks and create an association between the *signifier* trademark and a *signified* single, anonymous source.<sup>55</sup>

### B. *The Distinctiveness of Surname Trademarks*

The linguistic and psychological observations that neither trademarks nor surnames have any *sense* prompt an important question about whether to characterize surname trademarks as descriptive or distinctive. As discussed *supra* in Section II, the rationale for § 2(e)(4) of the Lanham Act comes not only from a desire to allow individuals to operate businesses under their names, but also from a belief that consumers will regard surnames as descriptive terms that identify the source of the goods. The TTAB has classified surnames as descriptive terms, arguing that locking up ex-

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proper name is ‘the complex of qualities characteristic of the bearer of the name.’”)).

51. BEING ERNEST, *supra* note 31, at 13 (citing GENNARO CHERCHIA & SALLY MCCONNELL-GINET, *MEANING AND GRAMMAR: AN INTRODUCTION TO SEMANTICS* (1990)).

52. BEING ERNEST, *supra* note 31, at 22.

53. *Id.*

54. *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 205 (1942).

55. *Carter-Wallace, Inc. v. Procter & Gamble Co.*, 434 F.2d 794, 802 (9th Cir. 1970) (“Secondary meaning has been defined as association, nothing more.”).

clusive trademark rights in a surname would keep competitors from using “a descriptive term to describe their own goods or services.”<sup>56</sup> What does the Board mean with it calls surname trademarks “descriptive”? Trademark law assesses descriptiveness through a scale of distinctiveness that goes from generic terms at the low end, through descriptive, suggestive, and arbitrary terms, to fanciful terms at the high end of the scale.<sup>57</sup> A “merely descriptive” term immediately conveys a “quality, feature, function, or characteristic” of the goods or services offered under that term.<sup>58</sup> While trademark law traditionally fits surname trademarks in the category of merely descriptive terms, I propose that the multi-disciplinary scholarship supports conceiving of these not as merely descriptive terms but instead as arbitrary marks, i.e., marks that have no apparent inherent connection to the goods and services offered under the mark.<sup>59</sup> The other categories on the scale of distinctiveness do not have relevance to surname trademarks: generic terms directly identify the goods or services by their common name used by all traders in space (such as “golf clubs” for the sporting equipment or “apples” for the fruit), suggestive marks require imagination to link the mark to the goods and services, and coined terms have no function other than as a trademark (such as KODAK).<sup>60</sup>

The assessment of whether the term falls into the descriptive or arbitrary classification depends on the entailments that come from other uses of the homograph and the extent to which they remain with the homograph when adopted as a trademark. For example, cognitive psychologist Brennen observed that when we encounter a name (for him, this includes both surnames and trademarks), we may associate those entailments with the trademark “the first few times we encounter them, but in the long run, as suggested by the cognitive literature, we process names almost entirely free of meaning.”<sup>61</sup> From this perspective, descriptive terms do not become

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56. *In re Hall Wines, L.L.C.*, No. 78926151, 2009 WL 625580, at \*6 (T.T.A.B. 2009) (non-precedential) (quoting with approval *In re Joint-Stock Co. “Baik”* 84 U.S.P.Q.2d (BNA) 1921, 1924 (T.T.A.B. 2007) (non-precedential) (Seeherman, J., concurring)); see also TRADEMARK MANUAL, *supra* note 15, § 1211 (“The common law also recognizes that surnames are shared by more than one individual, each of whom may have an interest in using his surname in business.”).

57. TRADEMARK MANUAL, *supra* note 15, § 1209.01.

58. TRADEMARK MANUAL, *supra* note 15, § 1209.01(b).

59. William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 289 (1987); see also *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9, 11 (2d Cir. 1976) (discussing different classifications of trademarks).

60. Landes & Posner, *supra* note 59, at 279 (1987).

61. *Meaning of Personal Names*, *supra* note 39, at 143.

trademarks because they retain the entailments of a pre-existing alternate use of the homograph. On the other hand, arbitrary terms shed those entailments (or at least the trademark associations dominate) so that consumers link the trademark with a particular *referent*, i.e., a particular source of goods or services, and not whatever sense the homograph had or has in its non-trademark function(s). This Section sets out the arguments for considering surname trademarks as descriptive and then, in the alternative, as arbitrary. Section IV will explore these alternatives from multi-disciplinary perspectives.

### 1. *Surname Trademarks as Descriptive Terms That Identify the Source of the Goods*

The argument for treating a surname trademark as descriptive unfolds in the following way. The surname trademark directly identifies the source of the goods or services as the surname trademark identifies the person or family that created or sold them. Since surnames do not categorize but rather refer to a specific bearer,<sup>62</sup> a surname trademark also refers to that same specific bearer as the source of the goods. Trademarks, historically, emerged as direct identifications of the merchants or craftspeople who purveyed or created the goods.<sup>63</sup> In mercantile capitalism, the tradesperson applied his or her surname as a trademark to goods as a signal of personal reputation and craftsmanship (with the surname sometimes even deriving from their trade).<sup>64</sup> Economists Giovanni Ramello and Francesco Silva noted:

[W]ith the advent of organized trade, the economic virtues of signs became more widely apparent as the informational effect of the sign—having become at least implicitly a trademark—resolved the problem of how to identify the provenance of a good (i.e., its maker), as the distance between the points of production and consumption increased.<sup>65</sup>

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62. *Neuropsychology of Proper Names*, *supra* note 35, at 348 (“In sum, proper names essentially refer to individuals (or individual groups) while common names refer to categories. Another useful way of expressing this distinction is that proper names have only ‘token’ reference while common names carry ‘type reference.’”); *accord Retrieval Pathways*, *supra* note 35, at 884; BEING ERNEST, *supra* note 31, at 16 (“a name should *identify* the bearer”) (citing CLAUDE LÉVI-STRAUSS, *C. LA PENSÉE SAUVAGE* (1962)).

63. Paul Manning, *The Semiotics of Brand*, 39 ANN. REV. OF ANTHROPOLOGY 33, 37 (2010).

64. Sergey Goryaev & Olga Olshvang, *Anthroponyms in Commercial Name Models: Surname Imitation*, 2 PROCEEDINGS OF ICONN 148, 155 (2013) [hereinafter *Surname Imitation*]; Manning, *supra* note 63, at 37.

65. Ramello & Silva, *supra* note 27, at 943 (citations omitted).



Thus, consumers would expect that the PARSONS golf club comes from someone bearing the surname “Parsons” or that someone named “Baker” sells the BAKER bikes. In this way the surname trademark fulfills its *denotative* function by identifying the source of the goods—one known person or family bearing that surname.<sup>66</sup>

If, however, the surname trademark does not fulfill its *denotative* function then it does not meet the definition of a descriptive term. A surname trademark may fail to fulfill its *denotative* function in one of two ways: (1) the goods might not come from anyone bearing the surname, or (2) the goods might come from someone bearing the surname but consumers do not know which particular person with the surname offers the goods. First, any business could adopt a surname trademark for their products even if no one at the business bears that surname. While the business might adopt the surname trademark out of a desire to create a false association with someone bearing that name, deceptive intent may not have driven the choice. For example, the term might have other functions than as a surname—consider the name “Baker” which also has a meaning of someone who makes breads, pastries, or desserts. Or, the business might adopt the surname trademark out of an affinity for the look and sound of the term without any intention of claiming any association with someone bearing that name. Alternatively, the business might not recognize the surname function of an obscure surname.

Second, a surname trademark may fail its *denotative* function when consumers do not make the connection between the surname trademark and a *particular* person or family. Cognitive psychologists Valentine, Brennen, and Brédart observed that the surname “Bush” corresponds to multiple individuals bearing that name (George Bush, Kate Bush, etc.) and readers only access the lexical node Bush via the nodes for each of those individuals.<sup>67</sup> Likewise, many people share the surname “Moore” (Roger Moore, Dudley, Demi Moore, Vivienne Moore, etc.).<sup>68</sup> Experiments have shown that even children think that a name “can have a plurality of bearers”.<sup>69</sup> In the terminology of semiotics, the surname has multiple potential *signifieds*—it could refer to multiple potential individuals or fami-

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66. Heymann, *supra* note 34, at 391–92.

67. BEING ERNEST, *supra* note 31, at 105.

68. *Id.* at 5.

69. Gabriel Segal, *Two Theories of Names*, 16 MIND & LANGUAGE 547, 558–59 (2001).

lies.<sup>70</sup> “At the very least, unique denotation must be replaced with a context-based notion like saliency to the individual user such that s/he is aware of only one denotatum.”<sup>71</sup> This scholarship highlights a feature inherent in surnames: multiple people share each surname, so use of a name without context might not identify a particular *referent*. Thus, surname trademarks create ambiguity about the source since they could come from any of those multiple individuals bearing that name or from a business with no association to the name. This failure of the *denotative* function points to the second element of the *anonymity heuristic*: consumers do not believe a surname trademark identifies a particular person or family.

If a surname trademark does not identify a particular source because it refers to multiple unrelated people who happen to bear the name, then consumers cannot tell which particular individual or family offers the goods or services bearing the surname trademark, and it does not describe the source.<sup>72</sup> Failing to meet the definition of descriptive marks, surname trademarks would then belong to one of the categories of deceptively misdescriptive or arbitrary marks. Deceptive misdescriptiveness refers to a situation where the mark falsely conveys a connection between the goods and the source or its characteristics.<sup>73</sup> A business that distributes marketing materials referencing an individual bearing a surname with an intention to create the false impression of sponsorship or affiliation between the business and that individual has adopted a misdescriptive (or deceptive) trademark. Otherwise, the surname trademark belongs in the category of arbitrary marks.

## 2. *Surname Trademarks as Arbitrary Marks That Have No Connection to the Characteristics of the Goods*

The argument for treating a surname trademark as an arbitrary mark goes as follows. The surname trademark does not convey any information about a characteristic or quality of the goods or services. Nor does a surname trademark describe the source of the goods since consumers do not expect that a trademark points di-

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70. Beebe, *supra* note 36, at 646.

71. Coates, *supra* note 30, at 362 (stylization normalized).

72. Ramello & Silva, *supra* note 27, at 945–46 (2006).

73. TRADEMARK MANUAL, *supra* note 15, § 1209.04. The manual states: A term that conveys an immediate idea of an ingredient, quality, characteristic, function, or feature of the goods or services with which it is used is merely descriptive. If a term immediately conveys such an idea but the idea is false, although plausible, then the term is deceptively misdescriptive and is unregistrable under § [2(e)](1).

rectly to the name of the company or individual that manufactured or supplied the goods. As times have changed since mercantile capitalism, in modern commerce people do not limit their working prospects to the field identified by their surname, so a Baker need not bake and a Miller need not work at the mill. The realm of trademarks has likewise expanded beyond personal trademarks that identify a craftsperson by name.

People now organize economic activities through corporations more so than direct person-to-person sales.<sup>74</sup> Consumers understand that goods come from anonymous or fictive sources in the form of these corporations.<sup>75</sup> Even as early as 1904, the Seventh Circuit Court of Appeals acknowledged this consumer understanding in a case involving a surname trademark: “We may safely take it for granted that not one in a thousand knowing of or desiring to purchase ‘Baker’s Cocoa’ . . . know of Walter Baker & Co., Limited.”<sup>76</sup> Consumers do not expect that the *denotative* function of trademarks operates in a one-to-one correspondence between the trademark and the name of the source—BAKER’S cocoa might or might not come from someone named “Baker.” These observations about modern commerce lend credence to the first component of the *anonymity heuristic*, namely that consumers view a trademark as identifying an unknown, anonymous source.

The incorporation of the fictive source as a fundamental feature of trademark law has shifted the concept of descriptiveness to refer to a term that immediately conveys qualities, characteristics, functions, features, purposes, or uses of the goods or services, rather than the source of those goods or services.<sup>77</sup> But a surname trademark does not identify any qualities or characteristics of the goods—PARSONS does not identify the weight or materials or

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74. Manning, *supra* note 63, at 37 (“However, the producer or source indexed is, in fact, usually a fictive person such as a corporation and therefore does not correspond precisely to either of these earlier figures of mercantile capitalism, although as imagined figures they both continue to haunt the modern imaginary of brand . . .”).

75. Economides, *supra* note 38, at 527 (“The consumer of NABISCO WHEAT THINS knows and cares little about source (manufacturer). Rather the consumer identifies the trademark with the features of the commodity, including crispness, sweetness or lack thereof, color, and the like.”); *see also* Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 816 (1927).

76. *Walter Baker & Co. v. Slack*, 130 F. 514, 518 (7th Cir. 1904).

77. *E.g.*, *Kimberly-Clark Worldwide, Inc. v. JustGoGirl, LLC*, 2018 WL 5307159, at \*3 (T.T.A.B. 2018) (non-precedential) (granting cancellation and opposition to registration of the marks ATHLETIC LEAKS, FITNESS LEAKS, WORKOUT LEAKS, and RUN LEAKS in connection with feminine hygiene pads and related goods as merely descriptive).

other attribute of the golf clubs. A consumer will not learn anything about the function or features of a product by the surname associated with it, recalling that a surname has no *sense* and therefore cannot convey any such information. Accordingly, the surname trademark does not fall in the category of descriptive terms.

Instead, the surname trademark has a function other than referring to someone bearing that name. This process of taking an existing term and giving it a non-descriptive trademark function defines the category of arbitrary trademarks. Law professor Jake Linford explains this process:

When establishing an arbitrary mark, the trademark owner applies an existing word to a product for which the word has not been commonly used and which neither suggests nor describes any ingredient, quality, or characteristic of the product. Establishing an arbitrary trademark is thus a process of creating a new homonym: a new meaning for a pre-existing word that is unrelated to that word's established meanings.<sup>78</sup>

Law professor Laura Heymann elaborates on a common example to explain the concept of arbitrary marks:

The word “apple” as a common noun denotes a red fruit of the genus *Malus* and connotes the color red, a sweet, crunchy taste, and the concept of healthful food. Applied to consumer electronics, however, the word “Apple” both denotes and connotes something entirely different. The word, of course, is identical (save for the capital letter, which cannot be indicated in oral communication); it is the combination of functions that allows it to serve, in a particular context, as a trademark.<sup>79</sup>

While the arbitrary trademark (e.g., APPLE) and the common noun (e.g., “apple”) have the same spelling and sound, the mind stores and accesses each of the different functions of the homograph separately.<sup>80</sup> As discussed further *infra* in Section IV.B., the consumer will consider the context in which s/he encounters the term and regard it as a surname or a trademark, but not both. In this way, semantic shift occurs by which the word gains a new homographic function of distinguishing the source of goods or ser-

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78. Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1407 (2015).

79. Heymann, *supra* note 34, at 394.

80. Linford, *supra* note 78, at 1399–1400 (“Homonymous words are thus stored as different entries and accessed separately in the mental lexicon.”).

vices,<sup>81</sup> shifting the *referent* of the homograph from the known person in the original function to particular goods that come from an anonymous *signified*, and “the semiotic device/information acquires a specific economic value that is independent of its associated product.”<sup>82</sup> Through semantic shift the homograph gains a new interpretation—as an arbitrary trademark.

### III. CONSUMERS PROCESS A SURNAME TRADEMARK AS HAVING A UNIQUE TRADEMARK FUNCTION

The question of whether surname trademarks belong to the category of descriptive terms or the category of arbitrary trademarks depends on whether consumers regard the word as having multiple *referents* or only one. If consumers understand the term not as a homograph with both surname and trademark interpretations but rather as a word that always refers to one particular person or family then they will believe that the goods come from that same, known *referent* bearing the surname. In that case the surname trademark falls in the category of descriptive terms. But if the surname used as a trademark has two *referents*—one to identify an individual bearing that name and another to identify particular goods—then the consumer distinguishes between the surname and trademark interpretations and the term belongs to the category of arbitrary marks.

To explore this question of consumer perception, this Section looks beyond trademark jurisprudence to scholarship in the fields of cognitive psychology, linguistics, anthropology, sociology, marketing, and economics. The multi-disciplinary literature supports the hypothesis that surname trademarks belong to the category of arbitrary trademarks because the trademark roles of these terms overcome their surnames origins and become new and separate homograph entries for the terms. Further, the literature supports the *anonymity heuristic* since consumers understand the trademark as representing the fictive source of goods but not directly identifying an individual or family as the purveyor of those goods.

#### A. Readers Process Words to Resolve Ambiguity

Consumers may find a surname trademark ambiguous when they first encounter it since they have no prior engagements with

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81. Andreas Blank, *Why Do New Meanings Occur? A Cognitive Typology of Motivations for Lexical Semantic Change*, in *HISTORICAL SEMANTICS AND COGNITION* 61, 82–83 (Andreas Blank & Peter Koch eds., 1999).

82. Ramello & Silva, *supra* note 27, at 947–48.

the word. Linguists Ekaterini Klepousniotou and Shari R. Baum highlight that

[h]omonymous words are assumed to have a single phonological/orthographic representation in the mental lexicon which is associated with multiple semantic representations. Thus, they have their different meanings represented separately in the lexicon, and are, therefore, understood by selecting their intended meaning from a (presumably exhaustive) list of potential meanings. Thus, homonymy requires the process of sense selection. In homonymy, the ambiguity is already established and the different meanings (i.e., the semantic representations) of the word pre-exist and are stored separately in the mental lexicon from where they are selected when required. Thus, when a homonymous word is encountered, its multiple unrelated meanings are competing for activation, slowing down the word recognition process.<sup>83</sup>

Despite any initial confusion, the multi-disciplinary literature points to a *non-ambiguity heuristic* through which people quickly reconcile ambiguities in language. Cognitive psychology research has found that when people encounter lexical ambiguity in homographs they can simultaneously access multiple functions of that term (e.g., Baker the surname and baker the occupation), but will resolve the ambiguity in favor of one appropriate interpretation, keeping the *prior associations* segregated.<sup>84</sup> The different interpretations “remain representationally distinct in our minds, despite their linguistic adjacency.”<sup>85</sup> Linguist Andreas Blank emphasizes efficiency and relevance in discourse as drivers to resolve ambiguity, noting that speakers “want to communicate successfully and that they produce innovations any time they judge it to be the most successful strategy.”<sup>86</sup>

People often use an *inherency heuristic* to find an appropriate interpretation for an unfamiliar word. While the context in which the word appears matters, linguists Klepousniotou and Baum found that “[a]mbiguous words can also be recognized in isolation. Upon presentation of an ambiguous word in isolation, we are normally

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83. Ekaterini Klepousniotou & Shari R. Baum, *Disambiguating the Ambiguity Advantage Effect in Word Recognition: An Advantage for Polysemous but Not Homonymous Words*, 20 J. OF NEUROLINGUISTICS 1, 17 (2007).

84. See BEING ERNEST, *supra* note 31, at 71.

85. Timothy Greene, *Trademark Hybridity and Brand Protection*, 46 LOY. U. CHI. L.J. 75, 90 (2014).

86. Andreas Blank, *Why Do New Meanings Occur? A Cognitive Typology of the Motivations for Lexical Semantic Change*, in HISTORICAL SEMANTICS AND COGNITION 61, 63 (2013).

able to identify an appropriate meaning and we are often unaware of alternate meanings.”<sup>87</sup> Cognitive psychologists Mark Seidenberg, Michael Tanenhaus, James Leiman, and Marie Bienkowski summarized remarkable research finding that the brain automatically accesses lexical information like meanings, sounds, and spelling for each word irrespective of “[t]he nature of the context and the listener’s knowledge.”<sup>88</sup> Anthropologist Andrew Wong has detailed studies showing that consumers may resolve the ambiguity arising from their lack of knowledge of the *signified* of an unfamiliar trademark by finding value through sound symbolism.<sup>89</sup> “This and other studies . . . show that, since the vowels and consonants in unfamiliar brand names trigger powerful associations in consumers’ minds, they serve as an effective means for transmitting brand- and product-related information.”<sup>90</sup>

While sound symbolism remains a nascent field with limited predictive capacity, scholars have long recognized the importance of the *contextual heuristic*—i.e., using context to determine the appropriate interpretation of a word. According to linguists Klepousniou and Baum, when people encounter lexical ambiguity (where one string of letters can have multiple interpretations) they usually select the appropriate interpretation “based on the context in which the ambiguous word occurs.”<sup>91</sup> Psychologists Lin Wang, Rinus Verdonshot, and Yufang Yang concur: “It has been well established that context can facilitate the lexical retrieval of words and that people immediately integrate all available information into the context . . . .”<sup>92</sup> Legal scholar Laura Heymann agrees: “All that is required is that the speaker and the listener (or the company and the consumer) understand what is meant by a particular reference

87. Klepousniou & Baum, *supra* note 83, at 2.

88. Mark Seidenberg et al., *Automatic Access of the Meanings of Ambiguous Words in Context: Some Limitations of Knowledge-Based Processing*, 14 COGNITIVE PSYCHOL. 489, 532 (1982).

89. Andrew Wong, *Branding and Linguistic Anthropology: Brand Names, Indexical Fields, and Sound Symbolism*, 36 PRACTICING ANTHROPOLOGY 38, 39 (2014) (citing Tina Lowrey & L. J. Shrum, *Phonetic Symbolism and Brand Name Preference*, 34 J. OF CONSUMER RES. 406 (2007); and then citing Eric Yorkston & Geeta Menon, *A Sound Idea: Phonetic Effects of Brand Names on Consumer Judgments*, 31 J. OF CONSUMER RES. 43 (2004)).

90. *Id.*

91. Klepousniou & Baum, *supra* note 83, at 2.

92. Lin Wang et al., *The Processing Difference between Person Names and Common Nouns in Sentence Contexts: an ERP Study*, 80 PSYCHOL. RES. 94, 95 (2016) (citing Daniëlle van den Brink, *Empathy Matters: ERP Evidence for Inter-individual Differences in Social Language Processing*, 7 SOC. SCI. & AFFECTIVE NEUROSCIENCE 173 (2012); and then citing Lin Wang, *Semantic Illusion Depends on Information Structure: ERP Evidence*, 1282 BRAIN RES. 50 (2009)).

in a particular context.”<sup>93</sup> Even when encountering an unfamiliar usage for a familiar string of letters people can accurately decipher the new interpretation based on context.<sup>94</sup> Context allows people to segregate the new interpretation from alternative, competing interpretations and associations for that homograph. As Timothy Greene puts it: “Whether one sense (or meaning) or another is intended in a sentence depends on the context in which the term is used.”<sup>95</sup> So, for example, people understand APPLE and MACINTOSH in context to function as trademarks in connection with computers rather than to identify pieces of fruit.<sup>96</sup> Further, people can encounter words used in unfamiliar ways as names of dishes at restaurants but still come to understand the correct interpretation in context because the menu frames the words as identifiers for meal options despite them never having seen the words this way before.<sup>97</sup>

Cognitive psychology research highlights the particular effectiveness of using context to decipher terms that lack *sense*. “[P]roper names and words in restrictive phrases are read more accurately because there are fewer semantic associates activated by the stimulus. . . . The semantics of a word may be suppressed by presenting the item in the context of a proper name.”<sup>98</sup> Those contextual presentations include certain formal cues that identify a surname or trademark function. First, both surnames and trademarks lack articles.<sup>99</sup> Second, surnames and trademarks have initial capital letters.<sup>100</sup> A third cue applies to surnames, but not trademarks. Namely, titles (Ms., Mr., Dr., etc.) identify a term as a surname.<sup>101</sup> Since trademarks come from a nearly unbounded universe of combinations of words and letters, trademarks may contain such a ti-

93. Heymann, *supra* note 34, at 392.

94. *Id.* at 438.

95. Greene, *supra* note 85, at 90.

96. BEING ERNEST, *supra* note 31, at 31–32 (questioning whether the name “Apple Macintosh” has meaning).

97. *Id.* at 23 (citing JOHN M. CARROLL, WHAT’S IN A NAME? AN ESSAY IN THE PSYCHOL. OF REFERENCE (1985)).

98. *Id.* at 77 (citing Eleanor M. Saffran et al., *Does Deep Dyslexia Reflect Right Hemisphere Reading?*, in DEEP DYSLEXIA (Max Coltheart et al. eds., 1980)).

99. Coates, *supra* note 30, at 367 (“It betrays its namehood by the lack of an article (although, as we see below, properness is a prerequisite for the loss of the article, but the absence of an article is not definitional for properhood.”)).

100. Francesca Peressotti et al., *On Recognizing Proper Names: The Orthographic Cue Hypothesis*, 47 COGNITIVE PSYCHOL. 87, 107 (2003) (“The initial capital letter is associated with a categorical distinction between proper names and common nouns.”).

101. See BEING ERNEST, *supra* note 31, at 111 (People would understand that “Mr. Dreaner” referred to a man even if they had not heard the word “dreaner” before).



tle—consider MRS. MEYER’S or MR. CLEAN—but the title does not make the phrase into a trademark.<sup>102</sup> People will understand homographs displaying those cues as “onymic” (i.e., a name such as a surname or a trademark) and homographs without those cues as “semantic” (i.e., common terms).<sup>103</sup> While the cues will identify the function of the homograph, they may not suffice to identify the particular *referent*. Common surnames or trademarks may refer to multiple *referents* and partial words or misspellings can render identification particularly difficult, forcing heavy reliance on context.<sup>104</sup>

Marketing and consumer psychology research underscore the importance of the *contextual heuristic* in processing trademarks. In a study presenting a mixture of descriptive and arbitrary terms on boxes in the place where consumers would expect to find a trademark, consumers regarded both types of terms (descriptive and arbitrary) as source indicators, i.e., trademarks:

Perceptual schema theory gives reason to wonder whether and to what extent non-linguistic signs may overwhelm the linguistic signs credited by the law. If a descriptive word mark is presented in a spatial placement, size, and style that matches the consumer’s schematic mental model of what a product package and brand look like, the word may be perceived as a source indicator even if its semantic meaning is “merely descriptive.”<sup>105</sup>

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102. MRS. MEYER’S, Registration No. 3,895,933 (registration for the mark MRS. MEYER’S in connection with, *inter alia*, “household cleaning products” held by The Caldrea Company); MR. CLEAN, Registration No. 5,424,339 (registration for the mark MR. CLEAN in connection with “[p]reparations for cleaning, removing stains, and removing mold and mildew from external household surfaces” held by The Proctor & Gamble Company).

103. See Coates, *supra* note 30, at 368.

104. See BEING ERNEST, *supra* note 31, at 81. The authors observed: [C]ommon surnames or first names alone will be insufficient to uniquely specify a familiar individual’s name. Although several NRUs might be partially activated by a name (e.g., David), no one unit will be able to become more strongly activated than its competitors and therefore identity-specific information cannot be accessed.

*Id.* Moreover, the authors postulated:

The fact that the range of plausible phonologies is much wider for people’s names than for common nouns has another implication: it should be easier to guess the complete phonology of a target word from incomplete phonology if that word is a common noun than if it is a person’s name. In other words, partial phonology accessed during recall of a person’s name is less specifying of the target than is partial phonology during recall of a common noun.

*Id.* at 111.

105. Thomas R. Lee et al., *An Empirical and Consumer Psychol. Analysis of Trademark Distinctiveness*, 41 ARIZ. ST. L.J. 1033, 1099 (2009); accord Heymann, *supra* note 34, at 398. Heymann agrees that context creates a fundamental frame for how consumers process words:

“Surface” cues like product packaging color and linguistic characteristics of the trademarks will trigger consumers to process the term as a trademark.<sup>106</sup> Consistent use in these contexts can make the trademark memorable.<sup>107</sup> Unlike surface cues, “deep” cues include “abstract, underlying functional properties of a brand such as product and category similarity, and common or complementary usage.”<sup>108</sup> When making purchasing decisions, consumers rely on both surface and deep cues depending on the purchasing environment.<sup>109</sup> Research on trademark processing in context has focused principally on product packaging, but since consumers will encounter many trademarks on-line, via text message, or in conversation, further research could explore the strength of trademark associations developed outside of the frame of a product package. Nonetheless, the research still suggests that whether or not consumers recognize the surname interpretation of the terms “Toyota” and “Ford,” when consumers see the terms applied to cars, they understand these words as trademarks based on the context.

The role of context in deciphering homograph interpretation provides further evidence for the first element of the *anonymity heuristic*. Consumers evaluate the homograph in context and therefore understand its function as a trademark that identifies an unknown source of goods or services, and not as having another function. As the homograph has a trademark-specific function in this context, it belongs to the category of arbitrary marks since it moves away from the entailments inherent in the non-trademark interpretation(s) of the homograph.

### B. People Process Surnames Differently than Other Words

Trademarks and surnames share many characteristics—e.g., lacking an article, starting with an initial capital letter, carrying no *sense*, and referring rather than describing—which has led some

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More generally, it is context that indicates whether an unknown term is functioning as a trademark or name in some other way. A consumer who has never before encountered the word “Zazy” will likely assume, when she sees it on the front of a box of cereal in stylized script, that the word is functioning as a trademark.

*Id.*

106. See Jing Lei & Niraj Dawar, *The Impact of Semantic vs. Lexical Relations on the Strength of Inter-brand Linkages*, 36 *ADVANCES IN CONSUMER RES.* 992, 993 (2009).

107. See Heymann, *supra* note 34, at 398.

108. Lei & Dawar, *supra* note 106, at 993.

109. See *id.*

cognitive psychologists to classify both as proper names.<sup>110</sup> Cognitive psychology research finds differences in processing these two word domains versus common nouns.<sup>111</sup> According to cognitive psychologist Carlo Semenza, “The evidence reported so far, on both functional and anatomical grounds, favours the idea that processing proper and common names follows at least partially independent pathways in the cognitive system and in the brain.”<sup>112</sup>

Despite the similarities between trademarks and surnames as opposed to common nouns, the differences between them have prompted some cognitive psychologists and linguists to put surnames in a separate category of proper names from trademarks. Cognitive psychologists Valentine, Brennen, and Brédart observe that “the use of brand names, and the entities to which they refer, is extremely diverse. Therefore, it is difficult to place the category of ‘brand names’ definitively within any taxonomy of proper names.”<sup>113</sup>

Linguists Sergey Goryaev and Olga Olshvang concur, noting that

we generally share this viewpoint, which claims that the names related to the human economic activities (this category is referred to as ‘commercial names’ and includes notably company and product names) are a pronounced peripheral category in which the qualities of personal names are not fully expressed. Thus, anthroponyms (personal names) and business names prove to be opposites, to a large extent, in their onomastic status.<sup>114</sup>

Multiple cognitive psychological studies have shown that the brain processes people names as a class unto themselves. In a recent study, Lin Wang, Rinus Verdonschot, and Yufang Yang concluded that “[a] ‘good enough’ processing occurred for common nouns due to their low level of specificity and thus rich semantic associations, supporting the notion that common nouns are represented differently from person names in the brain.”<sup>115</sup> Tim Valentine, Jarrod Hollis, and Viv Moore found “that processing of people names is carried out by a cognitive architecture that has a signifi-

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110. BEING ERNEST, *supra* note 31, at 5 (citing Gillian Cohen & Dorothy Faulkner, *Memory for Proper Names: Age Differences in Retrieval*, 4 BRIT. J. OF DEVELOPMENTAL PSYCHOL. 187 (1986)); *see* discussion *supra* in Sections III.A. and IV.A.

111. *Retrieval Pathways*, *supra* note 35, at 889.

112. *Neuropsychology of Proper Names*, *supra* note 35, at 363.

113. BEING ERNEST, *supra* note 31, at 5.

114. *Surname Imitation*, *supra* note 64, at 148.

115. Wang, *supra* note 92, at 106 (citation omitted).

cantly different organization from processing of common names.”<sup>116</sup> In the study prompting that conclusion, subjects shown a picture of a person’s face had better recall of the person’s name, but no such benefit happened with naming objects.<sup>117</sup> In other studies Valentine, Moore, and Brédart found that priming test subjects with a homograph of a surname had no effect on recalling the name of a famous person with that surname when shown that person’s face.<sup>118</sup> Thus, seeing the word “bush” had no impact on recall of the name “Bush” when shown the face of George Bush compared to the control group that did not see the word “bush.”<sup>119</sup> The researchers concluded that “forcing subjects to process the stimulus word to a semantic level did not induce repetition priming.”<sup>120</sup> Valentine, Brennen, and Brédart determined that people access the lexical node for a surname only through nodes for individuals bearing that surname.<sup>121</sup> This research supports the second element of the *anonymity heuristic* as people process surnames through different neural pathways than other uses of homographs sharing spelling with the surnames, which suggests that people will process the surname and trademark interpretations separately and as unconnected.

While people can disambiguate common noun and surname functions, people will more easily recall the non-surname interpretation of a homograph.<sup>122</sup> For example, people will more easily learn that a face belongs to a baker (the profession) than to a Mr. Baker (the person).<sup>123</sup> In fact, “[p]roper names are *the* linguistic category most likely to provoke retrieval difficulties in normal healthy adults, and for some brain-injured patients proper name recall is their only linguistic problem.”<sup>124</sup> Cognitive psychologists at-

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116. Tim Valentine et al., *On the Relationship between Reading, Listening and Speaking: It’s Different for People’s Names*, 26 *MEMORY & COGNITION* 740, 751 (1998) [hereinafter “*Different for People’s Names*”]. *Accord* BEING ERNEST, *supra* note 31, at 157 (“The finding that production of a common name does not prime production of a proper name with the same phonology is consistent with separate representations in the output lexicon(s).”).

117. *Different for People’s Names*, *supra* note 116, at 750–51.

118. See generally Tim Valentine et al., *Priming Production of People’s Names*, 48A *Q.J. OF EXPERIMENTAL PSYCHOL.* 513 (1995).

119. BEING ERNEST, *supra* note 31, at 153.

120. *Id.*

121. *Id.* at 107 (“So, in the case of lexical access to the common noun ‘bush’, a large number of connections linking the propositional nodes to the lexical node ‘bush’ provide summation of priming that will make activation of the lexical node and its connected phonological nodes likely.”).

122. *Neuropsychology of Proper Names*, *supra* note 35, at 364.

123. *Id.*

124. BEING ERNEST, *supra* note 31, at xi (emphasis in original).

tribute this difference to the relatively higher familiarity with common nouns compared with proper names.<sup>125</sup> Tim Brennen explains that

one direct consequence of this fact is that people's names may be less well-learned than the best-learned semantic facts associated to that same person, because the phonology associated to the name may have been less frequently encountered than the phonology of the common names describing facts about the person.<sup>126</sup>

On the question of identification, rather than recall, some cognitive psychology research has shown that when matched for frequency, people could more quickly identify words as names than they could identify words as nouns.<sup>127</sup>

The research further suggests a biological difference to explain the relative difficulty in retrieval. Semenza posits "that retrieving proper names is a much more source-demanding task in terms of brain metabolism than retrieving common names. . . . [T]he main difference between a proper name and a common name lies in the nature of the link the name has with its reference."<sup>128</sup> Cognitive psychology research has identified a distinct location in the brain for storing names (different from the location for non-names).<sup>129</sup> People store names in separate nodes from the biographical information associated with those names.<sup>130</sup> Cognitive psychologists posit that the different storage locations for the name and the biographical information make it harder to retrieve proper names: "quite independently by its following a separate pathway, the retrieval of proper names is simply more difficult than the retrieval of

125. See Tim Brennen, *The Difficulty with Recalling People's Names: The Plausible Phonology Hypothesis*, 7 *MEMORY* 409, 413 (1993) [hereinafter *Plausible Phonology*].

126. *Id.*

127. HUEI-LING YEN, *PROCESSING OF PROPER NAMES IN MANDARIN CHINESE: A BEHAVIORAL AND NEUROIMAGING STUDY* (2006); Alice M. Proverbio et al., *ERP Indexes of Functional Differences in Brain Activation During Proper and Common Names Retrieval*, 39 *NEUROPSYCHOLOGIA* 815 (2001); Wang, *supra* note 92, at 94–95 (citing Horst M. Müller, *Neurolinguistic Findings on the Language Lexicon: The Special Role of Proper Names*, 53 *CHINESE J. OF PHYSIOLOGY* 351 (2010)).

128. *Neuropsychology of Proper Names*, *supra* note 35, at 364 (citing Carlo Semenza et al., *The Primacy Effect in the Recall of Lists of Common and Proper Names: A Study on Young, Elderly, and Alzheimer Disease Subjects* 5 *BRAIN & LANGUAGE* 45 (1996); and then citing Giovanna Pelamatti et al., *Verbal Free Recall in High Altitude: Proper Names vs Common Names*, 39 *CORTEX* 97 (2003)).

129. See *Retrieval Pathways*, *supra* note 35, at 890.

130. BEING ERNEST, *supra* note 31, at 48.

common nouns.”<sup>131</sup> Yet, “even though the activation of a name’s meaning is mediated by a single connection between identity-specific information and person identity node,” people can “rapidly retrieve” the surname interpretation of the homograph and use it in context.<sup>132</sup>

Recall speed depends on the familiarity of the orthography: “It is a trivial psycholinguistic finding that those expressions that everyone accepts as being names are recovered or otherwise processed in shorter times than descriptive referring expressions.”<sup>133</sup> When learning a new name with an unfamiliar spelling, a person will first need to learn the spelling and then associate that name with the individual.<sup>134</sup> However, if someone already recognizes the spelling from an existing homograph, she does not need to learn the orthography and will only need to associate a known homograph with the individual.<sup>135</sup> People therefore find it easier to recall names with already familiar spelling since they do not need to undertake the intermediate step of learning the spelling necessary for an unfamiliar word.<sup>136</sup> Cognitive psychologists have also found that unfamiliar phonologies for surnames make them harder and slower to process and identify as surnames without seeing the full word, while people can more easily process frequently occurring names even without complete phonology.<sup>137</sup> These findings seem to point to a frequency effect where people will, unsurprisingly, have higher recognition of names they encounter more often, but also to the difference between recognition and recall, as people apparently have an easier time recognizing a word as a surname than recalling someone’s name.

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131. *Retrieval Pathways*, *supra* note 35, at 890 (citing Gillian Cohen & Deborah M. Burke, *Memory for Proper Names: A Review*, 1 *MEMORY* 249 (1993)).

132. Wang, *supra* note 92, at 106 (citation omitted).

133. Coates, *supra* note 30, at 372.

134. *Cf. Plausible Phonology*, *supra* note 125, at 412.

135. *Cf. id.*

136. *Id.* at 411 (noting the relative ease of recalling the name “Baker” as compared to “Ryman”).

137. *Id.* at 416. Brennen notes:

Even if the partial phonology that has been recalled is consistent with only one name that is stored in a particular lexicon, the nature of the phonology of people’s names is such that neighbouring, unfamiliar phonologies are also plausible candidates. For this reason, the accelerated completion process cannot be so relied on for people’s names, and the standard unaccelerated lexical process has to be relied on, in order that the intended phonology will be sure to be produced.

*Id.*

### 1. Surnames Can Have a Wide Range of Phonologies

The differences in the relative ease between recalling versus recognizing surnames derives, at least in part, from the lexical expectations we have for surnames as opposed to other types of words. In other words, the lexical inconsistency for names makes them harder to recall but easier to recognize.<sup>138</sup> “The observation that we encounter many more new people’s names than new common names means that there is a wider range of phonologies that are *plausible* and *acceptable* for the former.”<sup>139</sup> Indeed, cognitive psychology literature considers all phonotactically legal terms plausible for a person’s name and the domain of plausible surnames expands based on new exemplars.<sup>140</sup> For example, if we meet someone named “Mr. Dreaner” we would not find that name impermissible, even if we had never heard it before, and probably would not think much of the name since the title “mister” clearly identified it as a name.<sup>141</sup> On the other hand, we would find it confusing to hear that someone worked as a “drearner” because we have never heard of that profession.<sup>142</sup> While we accept most surnames even if we find the phonology strange, the universe of acceptable names does have some limits; for example, we would not consider the names “Mr. Biotechnologist” or “Miss Brontosaurus” as plausible surnames.<sup>143</sup>

As a consequence of the nearly unbounded universe of surname phonologies, people will have difficulty remembering exact surname spellings and, more generally, retrieving surnames. Common words generally have only one spelling and slight changes will yield a different word with a different meaning, but “[t]he nature of the phonology of people’s names is such that neighboring, unfamiliar phonologies are also plausible candidates.”<sup>144</sup> For example, changing the common noun “parsons” to “persons” yields a completely different *sense* that would not work in context. On the other hand, someone unsure of a surname might consider each of the names “Parsons,” “Persons,” and “Parcons” a viable option and mistakenly choose “Parcons” instead of “Parsons” when trying to remember the right name. These observations further support the second element of the *anonymity heuristic* since consumers will

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138. See BEING ERNEST, *supra* note 31, at 29, 111.

139. *Plausible Phonology*, *supra* note 125, at 413.

140. *Id.* at 415, 422.

141. BEING ERNEST, *supra* note 31, at 29, 111.

142. See *id.* at 111.

143. *Id.* at 112.

144. *Plausible Phonology*, *supra* note 125, at 416.

have low confidence in attributing any particular string of letters to one particular individual. If that letter string does not refer to any particular person then, when used as a trademark, it cannot convey the entailments associated with any individual. The trademark will necessarily belong to the category of arbitrary marks as it has no connections with a person bearing the homograph as a surname.

## 2. Surname Phonologies Have Low Predictive Value

While the surname universe has almost no bounds, certain letter strings commonly appear in surnames and might signal the surname function of these words. For example, many Norwegian surnames end in the morpheme “-dahl,” many Bulgarian surnames end in the syllable “-ov,” and Icelandic surnames end in the suffix “-dóttir” (for females) or “-son” (for males), while Flemish and Dutch surnames often begin with the syllable “van” and Scottish surnames with the syllable “Mac-.”<sup>145</sup> These cues, though, do not point to some broader set of regularities in the word domain of surnames by which people can categorize or predict that a term has a surname interpretation based on certain surface forms.<sup>146</sup> Many personal names have no “meaningful part” that would signal a surname function.<sup>147</sup>

Attempting to establish a set of rules that define the word domain of surnames quickly reveals two complications: (1) words expected to function as surnames have a different interpretation, and (2) people sharing a surname do not have anything in common other than sharing the surname. On the first point, the morphemes that signal a surname function might also appear in non-surname words. Consider the suffix “-ic,” which signals the patronymic function of Eastern European surnames like Tomic (anglicized as Tomic) or Coric (Coric) but also appears in English language adjectives like “choric” and common nouns like “cholic.”<sup>148</sup> This also

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145. Coates, *supra* note 30, at 365–66; BEING ERNEST, *supra* note 31, at 27 (citing *Plausible Phonology*, *supra* note 125, at 30).

146. BEING ERNEST, *supra* note 31, at 27; *Plausible Phonology*, *supra* note 125, at 415.

147. BEING ERNEST, *supra* note 31, at 30 (“However, for other people’s names, no such meaningful part can be discerned.”).

148. See, e.g., *Tomic*, WIKIPEDIA, <https://bit.ly/2m16nb4> [<https://perma.cc/YX2E-ARHP>] (last visited Jan. 31, 2019); *Coric*, WIKIPEDIA, <https://bit.ly/2msyK2a> [<https://perma.cc/9AYM-WLX6>] (last visited Jan. 31, 2019); *Colic*, MERRIAM-WEBSTER, <https://bit.ly/2kYbcl8> [<https://perma.cc/6853-XRVZ>] (last visited Jan. 31, 2019) (defining “colic” as “an attack of acute abdominal pain localized in a hollow organ and often caused by spasm, obstruction, or twisting”); *Choric*, MERRIAM-WEBSTER, <https://bit.ly/2kVTWx3> [<https://perma.cc/647L-KUPY>] (last visited Jan. 31, 2019).



happens with toponyms. Many people have surnames ending in the suffix “-ham” (e.g., Whittingham), but that suffix can also indicate a place name (e.g., Bellingham).<sup>149</sup> Likewise, the suffix “-burg” could indicate a surname like “Oldenburg” or a city like “Hamburg.”<sup>150</sup> Or the suffix “-ton” could indicate a surname “Ashton” or a location like “Hampton.”<sup>151</sup> Or the prefix “mc-” could start the surname “McClintock” or the city “McLean.”<sup>152</sup> These word pairs expose the difficulty of finding any strong surname predictive power for morphemes.

Fanciful trademarks may also incorporate typical onomastic morphemes even if no one actually bears that term as a surname, such as with the marks VON DUTCH, FITZALL, and KRAMSTEIN.<sup>153</sup> In mimicking a surname structure, these terms might conjure an image of a proprietor with that name even when no such person exists. As alternative possible derivations, the mark FITZALL might suggest the wording “fits all” instead of an Irish surname beginning with the morpheme “fitz.” The word “von” might point to the German word for “from” and the morpheme “stein” to the German word for a drinking vessel.<sup>154</sup> Like the toponyms that share morphemes with surnames these trademarks ex-

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149. See, e.g., *In re Berthold Types Ltd.*, 2004 WL 624564, at \*3–4 (T.T.A.B. 2004) (non-precedential) (affirming refusal to register the mark WHITTINGHAM as primarily merely a surname); *Bellingham, Washington*, WIKIPEDIA, <https://bit.ly/2m6qSD4> [<https://perma.cc/QPV2-AR74>] (last visited Jan. 31, 2019).

150. See *Oldenburg (surname)*, WIKIPEDIA, <https://bit.ly/2ksM2Lh> [<https://perma.cc/LCX4-S6PM>] (last visited Jan. 31, 2019); *Hamburg*, WIKIPEDIA, <https://bit.ly/1HB20UK> [<https://perma.cc/Y2WE-NYQD>] (last visited Jan. 31, 2019).

151. See, e.g., *Ashton (surname)*, WIKIPEDIA, <https://bit.ly/2ky7UVM> [<https://perma.cc/LF3J-CUCM>] (last visited Jan. 31, 2019); *Hampton, Virginia*, WIKIPEDIA, <https://bit.ly/2GHjrw6> [<https://perma.cc/YH3P-V74Z>] (last visited Jan. 31, 2019).

152. See, e.g., *McClintock*, WIKIPEDIA, <https://bit.ly/2kYcYCO> [<https://perma.cc/EG78-242A>] (last visited Jan. 31, 2019); *McLean, Virginia*, WIKIPEDIA, <https://bit.ly/2m2IeRo> [<https://perma.cc/3PUK-AZZ8>] (last visited Sept. 28, 2019).

153. VON DUTCH, Registration No. 2,380,173 (registration of the mark VON DUTCH for “jackets, . . . T-shirts” by Royer Brands International S.A.R.L.); FITZALL, Registration No. 2,979,231 (registration of the mark FITZALL for “Meters for electrical utilities for revenues and related software” by General Electric Company); KRAMSTEIN, Registration No. 5,366,255 (registration of the mark KRAMSTEIN for “Coffee cups; Drinking steins; Shot glasses” by Daniel Cram); Search Results for “Fitzall,” WHITEPAGES, <https://bit.ly/2v4oO3a> (enter “Fitzall” in “people” field) (last visited Jan. 31, 2019) (no listing in U.S. for surname “Fitzall”); Search Results for “Kramstein,” WHITEPAGES, <https://bit.ly/2v4oO3a> (enter “Kramstein” in “people” field) (last visited Jan. 31, 2019) (no listing in U.S. for surname “Kramstein”); Search Results for “Von Dutch,” WHITEPAGES, <https://bit.ly/2v4oO3a> (enter “Von Dutch” in the “people” field) (last visited Jan. 31, 2019) (no listing in U.S. for surname “Von Dutch”).

154. Translation of “Von,” GOOGLE TRANSLATE, <https://bit.ly/19mznbv> [<https://perma.cc/A22N-7BTB>] (enter “Von” in “detect language” field) (last visited Jan. 31, 2019); Translation of “Stein,” GOOGLE TRANSLATE, <https://bit.ly/>

pose the failure of a proposed rule that these letter strings would predict a surname function for the terms.

On the second point, the assumptions that we may draw from surnames do not always bear out as expected. Certain morphemes might signal not only that a word has a surname function, but also that the name derives from a particular heritage. For example, we might predict that someone comes from a particular culture based on his or her name, as “Yamato,” “Todorova,” and “Bergström” will suggest, respectively, Japanese, Slavic, and Swedish ethnic origins.<sup>155</sup> Not only does the suffix “-dahl” signal that a term functions as a surname, but that the person bearing the name has Norwegian heritage, while “-ov” indicates Bulgarian heritage, “van” indicates Flemish or Dutch, and “Mac-” Scottish.<sup>156</sup> In addition to cultural background, surnames can indicate a person’s gender as Russian women typically have surnames ending in the letter “a,” while Icelandic men have names ending with the suffix “-son” and Icelandic women with the suffix “-dóttir.”<sup>157</sup> But these predictions often fail. For example, some surnames appear in multiple cultures, as you could find people with the “Sinclair” surname in both France and Britain.<sup>158</sup> Further, names may come from a parent or a spouse who has a different cultural background.<sup>159</sup> At marriage, one spouse takes the surname of the other and thereon takes on the assumptions borne by that name even if the new name bearer does not have a story that aligns with the expectations inherent in the name (for example, an Asian spouse taking on the name “Hampton”). Parents may give their children surnames made of part of one parent’s name with another part from the other parent’s name.<sup>160</sup>

Other than the imperfect associations with cultural background or gender, surnames do not classify individuals or convey information about those individuals. Research has found isolated instances where surnames convey information about class, birth area, religion, or birth circumstances. For example, linguists and anthropolo-

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19mznvb [<https://perma.cc/A22N-7BTB>] (enter “Stein” in “detect language” field) (last visited Jan. 31, 2019).

155. BEING ERNEST, *supra* note 31, at 29.

156. BEING ERNEST, *supra* note 31, at 27 (citing *Plausible Phonology*, *supra* note 125); Coates, *supra* note 30, at 365–66.

157. Coates, *supra* note 30, at 365–66; *Surname Imitation*, *supra* note 64, at 148.

158. BEING ERNEST, *supra* note 31, at 29.

159. *Id.* at 6–7 (citing Pascale Boucaud, *La Nomination Dans le droit compare*, in *LE NORA ET LA NOMINATION: SOURCE, SENS ET POUVOIR* (Joël Clerget ed., 1990)).

160. *Id.* at 7.

gists found that surnames in parts of Scotland could identify the birth village and Christian faith heritage of bearers of particular surnames, while surnames in Karpathos, Greece identified the bearers' socio-economic category, and Yuman Indians give unique names to each individual based on their birth circumstances.<sup>161</sup> But these examples stand out for their rarity. While names may convey some social information and we can make educated guesses about people based on their names, those guesses will often turn out wrong.<sup>162</sup> Linguist Gabriel Segal observes "that you can infer rather little about a person's properties from their name. Sometimes one can have a decent shot at sex, religion, age or class. But the reliability of such inferences can be low, and varies considerably across cultures."<sup>163</sup> A surname does not identify someone's marital status, employment, personality, or anything else specific.<sup>164</sup>

Even though some people might derive a sense of self from their names and comport themselves in line with the image they think the name conveys, this does not provide evidence that surnames categorize people, but only that some people care about their names.<sup>165</sup> Others with the same name will regard the name as merely a label and feel little to no attachment in or emotion about the name.<sup>166</sup> As Tim Brennan observes:

In cognitive psychology there is an empirical database and several theoretical strands which suggest that one's name plays no (or very little) role in constructing, developing, and maintaining one's identity. This is in stark contrast to the less structured and often unstated—but nevertheless widespread—belief that exists

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161. BEING ERNEST, *supra* note 31, at 17 (citing Martha B. Kendall, *Exegesis and Translation: Northern Yuman Names as Texts*, 36 J. ANTHROPOLOGICAL RES. 261 (1980)).

162. BEING ERNEST, *supra* note 31, at 29; Coates, *supra* note 30, at 364 (citing, *inter alia*, WOLFGANG LAUR, DER NAME: BEITRÄGE ZUR ALLGEMEINEN NAMENKUNDE UND IHRER GRUNDLEGUNG (BEITRÄGE ZUR NAMENFORSCHUNG NEUE FOLGE 28) (1989)).

163. Segal, *supra* note 69, at 556.

164. BEING ERNEST, *supra* note 31, at 29. The authors observe:

That is, knowing that he is Mr Baker does not tell us whether the person is married, what his job is, or indeed whether he has a job. In this sense, people's names might be arbitrary and the information given by the name redundant, because we would already know that the person with whom we were communicating was English-speaking.

*Id.*

165. *Meaning of Personal Names*, *supra* note 39, at 144–45 ("It is of course possible for people to act as a function of their names, but this does not mean that the name is necessarily such an important element.").

166. *Id.* at 144 ("For others, however, their names are simply labels, in which very little emotion or meaning is invested.").

regarding the central importance of one's name for one's identity.<sup>167</sup>

Even if people conduct themselves based on a belief that their surnames create expectations about their personality, character, or station in life, nothing inherent in the name requires that they live in accordance with those expectations. As linguist Richard Coates explains, "There is no necessary connection between a name including *Tunnel* and a thing that is a tunnel, even if there is a strong expectation that such a relationship will prove to be valid."<sup>168</sup> Recall the core function of a surname—to *identify* the bearer and distinguish him or her from others.<sup>169</sup>

This research provides further support for the second element of the anonymity heuristic because surnames have little predictive power and therefore will not aid consumers in identifying a particular person as the source of goods. A consumer will have low confidence that certain features in the orthography of a surname convey or predict any meaningful information about the bearer of that name. A surname with an unknown referent will not convey anything about the integrity or skill of bearers of the name. The surname thus carries no reputation and would have no brand image to carry over if the homograph comes into use as a trademark. Starting with no meaningful and predictive *prior associations* from the surname usage, the trademark usage thus fits in the category of arbitrary marks, free to take on its own *developing associations*.

### C. Consumers Process Trademarks Differently than Other Words

As research has shown how surnames follow their own ways of word processing, trademarks likewise get processed in ways unique to the trademark domain of language. While scholarship shows that consumers will successfully navigate ambiguous homographs so that they identify and process trademarks as trademarks,<sup>170</sup> this conclusion might seem odd since trademarks do not display any consistent traits in their spelling, length, language of origin, creation, or semantic shift from an existing function of a homograph. In fact, from a linguistic perspective, "there are virtually no restrictions in terms of language" on the selection or creation of a trademark.<sup>171</sup> And each trademark can function quite differently from

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167. *Id.* at 139.

168. Coates, *supra* note 30, at 365.

169. BEING ERNEST, *supra* note 31, at 16 (citing CLAUDE LÉVI-STRAUSS, *LA PENSÉE SAUVAGE* (1962)).

170. *See supra* Section IV.A.

171. *Surname Imitation*, *supra* note 64, at 149.

others. Some trademarks signify only perfect clone products—every product bearing that mark has the exact same components, finished goods, and packaging.<sup>172</sup> Yet others function as house marks and signify multiple products within a family, as multiple car models bearing the trademark VOLKSWAGEN differ in size, design, color, features, and price.<sup>173</sup>

Despite these variations across trademarks, consumer behavior scholarship indicates that consumers recognize trademarks as trademarks and distinguish among trademarks using trademark-specific heuristics.<sup>174</sup> Research shows that trademarks create distinctive impressions on consumers. For example, economist Nicolas Economides has pointed out that some trademarks have an intrinsic connection between the word used as a trademark and the goods offered under it: “For each product there may be a most appropriate symbol which ex ante, before use on the product, will most effectively remind the consumer of the essential features of the particular product. Efficient first-comers will use and register the symbol.”<sup>175</sup> Neural research has also found that some trademarks convey a brand message that activates a particular path in the brain; functional magnetic resonance imaging has shown that each brand produces a unique neural signature.<sup>176</sup> Researchers can read fMRI scans and accurately tell whether the consumer had a particular trademark in mind.<sup>177</sup> Brain scans reveal predictable brain activation for different trademarks (finding common neural activation across study participants for Campbell’s Soup as ‘sincere,’ Ford as

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172. BEING ERNEST, *supra* note 31, at 5 (citing Gillian Cohen & Dorothy Faulkner, *Memory for Proper Names: Age Differences in Retrieval* 4 BRIT. J. DEVELOPMENTAL PSYCHOL. 187 (1986)).

173. *Id.*

174. Yu-Ping Chen et al., *From “Where” to “What”: Distributed Representations of Brand Associations in the Human Brain*, 52 J. MKTG RES. 453, 455 (2015) (reporting results of functional magnetic resonance imaging study that revealed that each brand showed to participants produced a different neural signature); Economides, *supra* note 38, at 537–38.

175. Economides, *supra* note 38, at 537.

176. Chen et al., *supra* note 174, at 456–61 (2015) (reporting results of functional magnetic resonance imaging study that revealed that each brand showed to participants produced a different neural signature).

177. Mark Bartholomew, *Neuromarks*, 103 MINN. L. REV. 521, 524–25 (citing Chen et al., *supra* note 174, at 455–58 (testing neural signatures for the COCA-COLA, GOOGLE, IBM, and LOUIS-VUITTON trademarks)); Colin Camerer & Carolyn Yoon, *Introduction to the Journal of Marketing Research Special Issue on Neuroscience and Marketing*, 52 J. MKTG. RES. 423, 424 (2015) (“[T]he brands a consumer is thinking about can be reliably predicted from patterns of neural activations.”)).

‘rugged,’ and Mercedes-Benz as ‘sophisticated’).<sup>178</sup> Neuroscience research has also found that brands “with reputations for style or creativity cause consumers to behave more impulsively.”<sup>179</sup>

Other research points to *semantic* and *lexical heuristics*, under which consumers link *developing associations* and create connections across different brands through meaning, spelling, and other orthographic characteristics.<sup>180</sup> The associative network theory posits that “consumers organize information in networks that represent both semantic (e.g., Maid-Servant) and lexical (phonemic and orthographic similarities) relationships (e.g., Maid-Made).”<sup>181</sup> Consumers use a *semantic heuristic* to make *semantic* connections when they have a higher level of task involvement (i.e., thoughtful and intentional) in learning about the trademark.<sup>182</sup> Conversely, consumers use a *lexical heuristic* to make *lexical* connection when they have had a lower level of task involvement.<sup>183</sup> Accordingly, one study found that consumers semantically linked the hypothetical trademark NESTELLO to the existing trademark KIT KAT in high involvement conditions, but lexically linked NESTELLO to NESCAFE in low involvement conditions.<sup>184</sup> Another study found that presenting two words—the target (e.g., “rod”) and the homonym of a synonym (“poll”)—forced the participants to think of the synonym (“pole”), suggesting a strategy for creating brand associations (perhaps by launching the trademark CARES to create an association with the homonym of the synonym LUVS).<sup>185</sup> In another study, consumers noted structural regularities of trademarks within a category, for example, a study showed that consumers identified common spellings, number of syllables, and roots for trademarks

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178. *Id.* (citing Chen, *supra* note 176, at 455–58). Other studies complement these neuroscientific assessments of brand personality by looking for response latencies arising from pairing brands with positive and negative words. See, e.g., Claudiu V. Dimofte, *Implicit Measures of Consumer Cognition: A Review*, 27 *PSYCHOL. & MKTG.* 921, 925–28 (2010).

179. Bartholomew, *supra* note 177, at 538.

180. See Judith Hennessey et al., *Lexical Interference in Semantic Processing of Simple Words: Implications for Brand Names*, 22 *PSYCHOL. & MKTG.* 51, 64 (2005).

181. Lei & Dawar, *supra* note 106, at 992 (citing Allan Collins & Elizabeth Loftus, *A Spreading-Activation Theory of Semantic Processing*, 82 *PSYCHOL. BULL.* 407, 411–13 (1975); Hennessey et al., *supra* note 180, at 55).

182. *Id.* at 993.

183. *Id.*

184. *Id.*

185. Hennessey et al., *supra* note 180, at 63. Of course, adopting a trademark with a similar meaning to an existing, a famous mark used in connection with the same products would likely amount to infringement.

used in connection with pain killers and laundry detergents, respectively.<sup>186</sup>

While these studies demonstrate that consumers make connections between brands, the defining heuristic of trademarks—the *differentiation heuristic*—focuses on differences rather than similarities. Cognitive psychology highlights differentiation as a hallmark of trademarks.<sup>187</sup> Using the vocabulary of semiotics, differentiation enables consumers to select one specific product out of multiple options in the category because each trademark identifies one *referent* (the particular product) and one *signified* (the source).<sup>188</sup> Law professor Barton Beebe explains further how the semiological concept of differentiation applies to trademarks:

In [Jean] Baudrillard's social-semiotic theory, sign value describes a commodity's *differential* value as against all other commodities, and thus the commodity's capacity to differentiate its consumer. Sign value does not necessarily involve the conspicuous display of prestige or wealth or of scarce 'positional goods.' Rather, it involves something more essential: the conspicuous display of distinctions, of 'marginal differences,' of which there would appear to be an inexhaustible and easily renewable supply.<sup>189</sup>

From an economic perspective, “‘differential distinctiveness’ is used to alter how the consumer perceives a particular trademark compared with others and thus produces differentiation in the economic sense.”<sup>190</sup>

The degree of differentiation builds strength in the mark. Beebe observes that no matter the message,

each [mark] conveys its message, its signification, by means of its distinctiveness as against other marks. It is marketing orthodoxy that a trademark's most important quality is not the “esteem” in which it is held by consumers or its “relevance” to the lives of consumers, nor is it the “knowledge” consumers have of what the

186. BEING ERNEST, *supra* note 31, at 27.

187. *Id.* at 22 (“Apple Macintosh . . . does not categorise itself as a computer company[ ] but does differentiate itself from other computer companies.”).

188. *Cf.* Economides, *supra* note 38, at 526 (“[T]rademarks permit consumers to distinguish between goods which look identical in all features that are observable before purchase.”).

189. Beebe, *supra* note 36, at 643 (citing FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27 (1976); and then citing JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES 90 (Chris Turner trans., Sage Publ'ns 1998)).

190. Ramello & Silva, *supra* note 27, at 946 (“The signal created by trademark facilitates the emergence of a complementary economic phenomenon, differentiation, which must also be included in the welfare evaluation.”).

marks stands for. Rather, strong brands are characterized above all by “differentiation.”<sup>191</sup>

Nearly a century ago, Frank Schechter observed that a trademark derives its value from its selling power, which depends “upon its uniqueness and singularity,” and that the strength of the brand depends on standing out as “actually unique and different from other marks.”<sup>192</sup> In marketing language, the terms “salience” and “brand awareness” equate to this trademark concept of strength, or the “ability to take on a character of uniqueness in the eyes of consumers.”<sup>193</sup> These heuristics also ladder up to the first element of the *anonymity heuristic*. By focusing on the differentiating role of trademarks, this scholarship illustrates how consumers look to *differentiation* of source, rather than *knowledge* or *identification* of source, to make their purchasing decisions.

Since consumers focus on differentiation, they will discount any perceived connection between a pseudo-surname trademark and an actual person. For instance, in a linguistic study of Russian company names that included a borrowed European etiquette word (such as “Herr, Frau, Madame, Monsieur, Mister, Mrs, Miss”) and a term mimicking a surname, most of the company names had no relation with the surnames of the owners.<sup>194</sup> The use of the etiquette word made the consumer perceive of the company name as a proper name (though not necessarily a personal name).<sup>195</sup> But because the term following the etiquette word could come from multiple different sources, including “real proper names, neologisms, borrowings and native words (both proper and common nouns) . . . the nuclear category of proper names becomes ‘blurred’ and loses its boundaries.”<sup>196</sup>

This study provides evidence for the second element of the *anonymity heuristic* as it shows that consumers ignore any surname interpretations when they process trademarks. Consistent with the categorization of surname trademarks as arbitrary marks, consumers thus evaluate surname trademarks through the differentiating

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191. Beebe, *supra* note 36, at 644 (citing DAVID A. AAKER, BUILDING STRONG BRANDS 304 (1996)).

192. Schechter, *supra* note 75, at 831.

193. Ramello & Silva, *supra* note 27, at 946.

194. Sergey Goryaev & Olga Olshvang, *Company Names as Imitations of Personal Names: Models with a Borrowed Etiquette Word*, in ONOMASTICS IN CONTEMPORARY PUBLIC SPACE 131, 135–46 (Oliviu Felecan & Alina Bughesiu, eds., 2013).

195. *Id.* at 146.

196. *Id.*



ability of the trademarks rather than through any other interpretations of the homograph.

*D. Consumers Understand Trademarks Within a Cultural Framework*

While a trademark has only one *signified*—one particular source and the attendant goodwill—consumers will engage with that *signified* in a multiplicity of personal ways based on their backgrounds and their own diverse and individual experiences with that trademark. Consumers examine trademarks through heuristics that reflect their cultural background deriving from shared language and experiences.<sup>197</sup> Cultural background defines how people process words (as well as images and sounds).<sup>198</sup> Neural research indicates that people from a shared cultural background exhibit the same brain activity when they see culturally familiar logos under a heuristic I name the *sight and sound value heuristic*.<sup>199</sup> “For example, when German test subjects were presented with different luxury car logos (e.g., BMW vs. Acura), a particular region of the prefrontal cortex was activated only by the culturally familiar logos.”<sup>200</sup> Anthropologists have found that each culture also develops its own set of sound symbolism for particular combinations of vowels, consonants, pitch, rhythm, and intonation even when heard outside the context of particular words.<sup>201</sup> As these sound associations develop in and through discourse, distinct sound symbolisms will arise in each cultural setting.<sup>202</sup>

Under the *availability heuristic* as described by economist Richard Thaler, people will interpret a word based on homographs or similar words that they have encountered within their cultural background.<sup>203</sup> As Ferdinand de Saussure, a founder of the field of semiotics, observed in a seminal work, “the value of any given word is determined by what other words there are in that particular area of the vocabulary. . . . No word has a value that can be identified

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197. Wong, *supra* note 89, at 39 (2014) (citing Penelope Eckert, *Variation and the Indexical Field*, 12 J. OF SOCIOLINGUISTICS 453 (2008)).

198. *Id.*

199. *Id.*

200. Bartholomew, *supra* note 177, at 538 (citing Michael Schaefer et al., *Neural Correlates of Culturally Familiar Brands of Car Manufacturers*, 31 NEUROIMAGE 861, 863–64 (2006)).

201. Wong, *supra* note 89, at 39.

202. *Id.*

203. RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* 22–23 (2015) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974)).

independently of what else there is in the vicinity.”<sup>204</sup> And the value of one word can change solely because of a change to a neighboring term in the same area of vocabulary.<sup>205</sup> People may not know what to make of a term that is familiar in a foreign cultural setting but obscure or unknown in their normal discourse. For example, Thaler notes that Indians would recognize the term “Dhruv” as a common surname, but its infrequency outside of India would make it less likely for non-Indians to recognize the surname function of the term (or regard the term as anything other than a coined term).<sup>206</sup>

Academics across multiple fields argue that trademarks take on new lives as consumers engage with them more, forming *developing associations* for the trademarks, a concept I name the *consumer engagement heuristic*. Cultural anthropology scholarship points out that while culture and the shared experiences of consumers shape how they will first encounter a trademark, that trademark becomes part of the shared experience, feeding back into the common cultural backdrop through which consumers experience the world.<sup>207</sup> Economists Giovanni Ramello and Francesco Silva observe that once a trademark becomes established consumers cannot describe or access its significance:

Through some straightforward procedure like looking up a telephone number. Rather, it is only decipherable within the context of a language, meaning a system of social belonging—it is a thread in the cultural tapestry. Each sign has a meaning that belongs to a system of meanings, and this implies the possibility of detecting and judging differences between brands, which is the source of the strength of brands.<sup>208</sup>

Anthropologist Adam Arvidsson describes brands as “mechanisms that enable a direct valorization (in the form of share prices, for example) of people’s ability to create trust, affect and shared meanings: their ability to create something in common.”<sup>209</sup> Arvidsson continues to argue that “consumer goods function as ‘linking devices’ that enable the crystallization of however transitory (or

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204. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 114 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., Open Court 1983) (1916).

205. *Id.* at 120.

206. THALER, *supra* note 203, at 22.

207. *Cf.* Adam Arvidsson, *Brands: A Critical Perspective*, 5 *J. OF CONSUMER CULTURE* 235, 235–36 (2005).

208. Ramello & Silva, *supra* note 27, at 952 (citations omitted).

209. Arvidsson, *supra* note 207, at 235–36.

even ‘neo-tribal’) forms of community. In short, consumption produces a common in the form of a community, a shared identity or even a short lived ‘experience’ that adds dimensions of use-value to the object.”<sup>210</sup>

Additionally, contemporary consumers “produce a social relation . . . within which goods can make sense; they produce a context of consumption that a post-modern, highly mediated lifeworld no longer self-evidently provides . . . within which goods can acquire meaning and use-value.”<sup>211</sup>

Consumers, therefore, help to define the interpretation of trademarks based on how they use the *referent* goods or services and otherwise interact with the brand. Arvidsson argues that “modern consumers should not be understood as the passive victims of producer interests, but that they have actively engaged in the social construction of the value of consumer goods.”<sup>212</sup> Fellow anthropologist Robert Foster likewise argues that

in its ideal form, then, the economy of qualities entails a fit between qualifications on the supply side and qualifications on the demand side—a fit that needs constant monitoring and adjustment, but nonetheless a more or less stable fit. Such stable fits allow consumers, much like Marx’s figure of homofaber, to contemplate themselves in a product that reflects their own singular qualities.<sup>213</sup>

Foster continues, “the creativity and agency of consumers is always productive of new meanings, relations and affect . . . .”<sup>214</sup> Law professor Laura Heymann concurs that “to ignore the fact that each consumer will engage with a trademark in his or her own way—regardless of what trademark law deems legally cognizable—is to ignore the realities of the market with which trademark law is supposed to engage.”<sup>215</sup>

This scholarship suggests that consumers evaluate trademarks within a culturally specific context and based on the values that they come to associate with the marks as a result of their experiences with the mark, and not based on some known source of the goods or services bearing the marks. These observations about the

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210. *Id.* at 242 (citations omitted).

211. *Id.* at 241–42 (citations omitted).

212. *Id.* at 242.

213. Robert J. Foster, *The Work of the New Economy: Consumers, Brands, and Value Creation*, 22 *CULTURAL ANTHROPOLOGY* 707, 714 (2007).

214. *Id.* at 719.

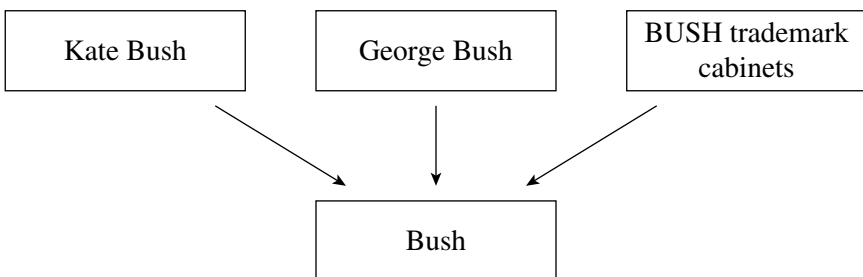
215. Laura A. Heymann, *The Reasonable Person in Trademark Law*, 52 *ST. LOUIS U. L.J.* 781, 782 (2008).

cultural framework for processing trademarks give evidence to the first component of the *anonymity heuristic* in that consumers view trademarks as identifiers of an unknown, anonymous source that comes to have its own identity and values within a cultural conversation. These observations also support categorization of surname trademarks as arbitrary marks since the cultural conversation surrounding these marks imparts them with new values apart from any *sense* or function that the homographs had in their pre- or extra-trademark lives.

#### *E. People Process Surnames and Trademarks Through Separate Nodes*

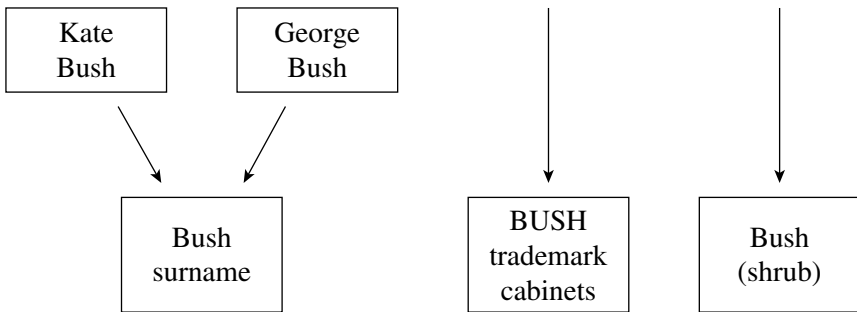
The literature supports two possible alternative models for the processing of surname trademarks. First, assuming *arguendo* that the trademark node connects to a central node that routes to all interpretations of the homograph, the consumer still processes the trademark through its own node. Taking the word “Bush” as an example under this model, the consumer would process “George Bush” in one node, “Kate Bush” in a second node, and the BUSH trademark for cabinets in a third node (See Fig. 1.). The consumer does not process the BUSH trademark through a node associated with a particular person, but instead mediated through a general “Bush” node. Accordingly, while the consumer might understand the surname trademark as having some connection to a surname due to the shared homograph, she would not believe that the trademark identified any of the known people with the surname as the source of the goods. The consumer could distinguish the personal from the trademark *referents* and would not treat them as one and the same. In other words, the consumer would not think that Kate Bush or George Bush had any involvement with the BUSH trademark.

FIGURE 1 MODEL OF PROCESSING OF SURNAMES THROUGH INDIVIDUAL NODES



But the research on surname processing does not mandate a model where a central homograph node mediates processing of a surname trademark. Under a second alternative model of processing, the BUSH trademark would occupy its own node unconnected to the node for the “Bush” surname node or otherwise for the “Bush” homograph. People process the names of each individual with the surname “Bush” through their own separate nodes connected to the central “Bush” surname node, but the word “bush” as a shrub directly through its own unconnected node, and the BUSH cabinets trademark directly through its own node (See Fig. 2.).

FIGURE 2 MODEL OF PROCESSING OF HOMOGRAPHS THROUGH INDIVIDUAL NODES



In this model people do not have a central node into which every interpretation of the word “bush” gets collected and then routed to the node triggered by the particular usage. Instead, each interpretation of the word “bush” (e.g., common name, trademark) runs through its own neural pathway.

The multi-disciplinary research supports the model of processing illustrated in Figure 2, with the studies showing that people disambiguate the various interpretations of homographs with each interpretation occupying a separate node and accessed through its own pathway.<sup>216</sup> The existence of multiple interpretations of the homograph does not cause confusion as people can simultaneously access multiple interpretations of a homograph—including a surname and a common-noun interpretation.<sup>217</sup> “Homonymous words

216. See discussion *supra* in Sections VI.A.

217. BEING ERNEST, *supra* note 31, at 71 (citing Michael K. Tanehaus et al., *Evidence for Multiple Stages in the Processing of Ambiguous Words in Syntactic Contexts*, 18 J. OF VERBAL LEARNING & VERBAL BEHAV. 427, 435–36 (1979); then citing William Onifer, W. & David A. Swinney, *Accessing Lexical Ambiguities During Sentence Comprehension: Effects of Frequency of Meaning and Contextual Bias*, 9 MEMORY & COGNITION 225, 226–27 (1981); then citing Seidenberg et al.,

are thus stored as different entries and accessed separately in the mental lexicon.”<sup>218</sup> Access to each node follows a different time-course and depends on the context and frequency specific to that interpretation.<sup>219</sup> Yet both “operate at the lexical level, rather than only at that of central encyclopaedic knowledge . . . . [T]hese mechanisms may be better understood as types of information-collecting nodes and pointers of different sorts.”<sup>220</sup> The trademark node will trigger processing through a cultural conversation, context, sound symbolism, lexical and semantic associations, and differentiation from other trademarks, not through connections to a person bearing the surname.<sup>221</sup> The different associations for the *referent* of the BUSH trademark and the *referent* of a Bush surname would make it jarring for consumers to try to force connections between these unrelated functions of the homograph merely because they share orthography.

Even with their differences, both models illustrate neural processing consistent with the *anonymity heuristic*, as the trademark interpretation occupies its own node representing the unknown source of the goods and the attendant goodwill. The node identifies a particular, but anonymous *signified* source of goods, unconnected to any neural pathways that would link that *signified* with a particular person who bears the homograph as a surname. Accordingly, consumers will process surname trademarks as arbitrary marks with none of the entailments of the surname interpretation of the homograph.

#### IV. IMPACTS OF FREQUENCY AND UNIQUENESS

Under the *anonymity heuristic*, consumers will view most surname trademarks as source indicators, but not as identifying a person with the respective surname as the source. While this heuristic applies most of the time, the familiarity of the surname trademark homograph may interfere with or alter the heuristic. Familiarity has an impact in surname trademark processing in two contexts: (1) familiarity with the goods and (2) familiarity with the surname. In the first context, purchasing frequency impacts the strength of the

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*supra* note 88, at 494; and then citing Greg B. Simpson and Merilee A. Krueger, *Selective Access of Homograph Meanings in Sentence Context*, 30 J. OF MEMORY & LANGUAGE 627, 628 (1991)).

218. Jake Linford, *The False Dichotomy Between Suggestive and Descriptive Trademarks*, 76 OHIO ST. L.J. 1367, 1399–1400 (2015).

219. BEING ERNEST, *supra* note 31, at 71.

220. *Neuropsychology of Proper Names*, *supra* note 35, at 348 (citing WILLEM J.M. LEVELT, *SPEAKING: FROM INTENTION TO ARTICULATION* 6 (1989)).

221. See discussion *supra* in Sections VI.C. and D.

*developing associations* that consumers form with the mark, which, as the purchases multiply, may result in a weaker distinction between the surname and trademark functions. In the second context, consumers may infer or recognize connections between a known (particularly a unique known) surname and the goods and services offered under that homograph as a trademark, such as when the consumers personally know the person providing those services (as with an accountant or landscaper).

The first context—familiarity with the goods—arises when a consumer’s purchasing patterns make it less likely for them to encounter certain goods. Consumers will treat trademarks for commonly used (“experience”) goods differently from trademarks for infrequently used goods.<sup>222</sup> For experience goods, the consumer can draw from a deeper well of personal experience with products in a category.<sup>223</sup> But for infrequently used goods, “because of differences of interpretation as well as differences of opinion and preference across consumers, the information on which the choice will be based is most likely to be much more vague than in the case of experience goods.”<sup>224</sup> Accordingly, for these goods, “trademarks work in an indirect way. To be able to associate the trademark with the features of the product he has to rely on information diffused informally through friends or from evaluations disseminated centrally through magazines, radio or television.”<sup>225</sup> A consumer of rarely purchased goods will have less information about the trademark and the brand values it conveys.<sup>226</sup> As economist Richard Thaler observed, “Because learning takes practice, we are more likely to get things right at small stakes than at large stakes.”<sup>227</sup>

All trademarks, including surname trademarks, take on their *developing associations* through the familiarity that accrues as consumers purchase the associated goods or services or hear about the marks.<sup>228</sup> Having limited interactions with trademarks used for

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222. See Economides, *supra* note 38, at 531.

223. See *id.* at 529–30.

224. *Id.* at 531.

225. *Id.*

226. See *id.* The level of information will depend on other factors as well. Consumers tend to make more sophisticated purchasing decisions for higher priced goods or those that will make a larger impact in life. *Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 U.S.P.Q.2d (BNA) 1030, 1038–39 (T.T.A.B. 2016) (finding that, “even in the case of the least sophisticated purchaser, a decision as important as choosing a senior living community will be made with some thought and research, even when made hastily”).

227. Thaler, *supra* note 203, at 50.

228. BEING ERNEST, *supra* note 31, at 21 (citing S.A. Tarkhov, *From Karlo-Libknekhovsk and New York to Propoyk and Rastyapino? How Place Names Are*

rarely purchased goods will lead consumers to form only weak *developing associations*, which might allow *prior associations*, including surname functions, to linger. Nonetheless, any such associations will likely have little impact on consumer purchasing decisions, since consumers rarely purchase these goods and thus will not form any lasting set of associations for the trademark. Further, as discussed *supra* in Section IV.A., the context of presentation of the word will define its function as a trademark, so that consumers will not believe that the term functions as a surname or has a one-to-one relationship with a person bearing that name as the source.<sup>229</sup> The impact of purchasing frequency remains limited to the strength of the *developing associations* and does not replace the *anonymity heuristic*.

The second context—familiarity with the surname—arises when consumers recognize a connection between an individual bearing the surname and the goods or services offered under the trademark. This plays out in two ways—a proprietor known personally by the consumer or a famous person with a unique name who stands behind the product. In the first scenario, the proprietor opens an eponymous business and has direct contact with customers, such as with a dentist office, a law firm, or a landscaping business. The customers know the proprietor by name, know that the business bears the proprietor’s name, and, accordingly, draw the connection between the business name and the surname. These situations would most likely happen with small, hyper-local service businesses since they require a direct relationship between the proprietor and the customers. This model traces back to the roots of trademarks in mercantile capitalism when the tradesperson’s name signaled the origin and quality of the goods bearing that name as a trademark.<sup>230</sup> Perhaps in this situation the trademark interpretation maintains some of the *prior associations* of the surname function. The strength of the *prior associations* may depend on how well consumers know the proprietor and whether they interact directly with him or her. If the proprietor remains an anonymous

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*Changing in the Former USSR*, 33 POST-SOVIET GEOGRAPHY 454, 454–55 (1992); and then citing David C. Rubin et al., *The Abstraction of Form in Semantic Categories*, 19 MEMORY & COGNITION 1, 5–6 (1991)).

229. Accord Heymann, *supra* note 34, at 398 (“More generally, it is context that indicates whether an unknown term is functioning as a trademark or name in some other way. A consumer who has never before encountered the word ‘Zazy’ will likely assume, when she sees it on the front of a box of cereal in stylized script, that the word is functioning as a trademark.”); see also Lee et al., *supra* note 104, at 1098–99 (2009).

230. Manning, *supra* note 63, at 37; see also *Surname Imitation*, *supra* note 64, at 155.



figure in a closed office, then the consumers would process the surname trademark free of *prior associations*.

The second scenario involving familiarity with the surname arises within the context of surname uniqueness in population and prominence through famous individuals. Consumers will recognize certain terms as surnames because of either a famous individual with that surname or because of a high volume of individuals with the surname. Cognitive psychology scholarship has observed the “ubiquitous effects of word frequency reported in the word recognition literature.”<sup>231</sup> “The number of times a name is encountered will depend on the frequency of the name and the degree of familiarity of known people who have that name.”<sup>232</sup> Studies show that people will more quickly recall familiar surnames whether the familiarity derives from one highly famous individual or a common surname held by many individuals.<sup>233</sup> The word “Moore” demonstrates both high frequency and high familiarity; the large number of individuals with that name as well as the prominence of multiple celebrities with the surname (Dudley Moore, Demi Moore, Roger Moore) will make it more recognizable as a surname.<sup>234</sup>

Subjects in psychological studies could more quickly classify high frequency surnames than low frequency surnames.<sup>235</sup> Likewise, cognitive psychological research indicates that people can name common surnames faster than rare surnames and more accurately recognize them.<sup>236</sup> Thus, in general, people can more easily recall the surname “Baker” than the surname “Ryman” (assuming no famous person with the name Ryman).<sup>237</sup> Nonetheless, people

231. BEING ERNEST, *supra* note 31, at 56 (citing Tim Valentine & André Ferrara, *Typicality in Categorization, Recognition and Identification: Evidence from Face Recognition*, 82 BRIT. J. OF PSYCHOL. 87, 100 (1991); and then citing Don L. Scarborough et al., *Frequency and Repetition Effects in Lexical Memory*, 3 J. OF EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 1, 15–16 (1977)).

232. *Id.* at 58.

233. *Id.* at 62. The authors note:

The results indicate that it does not make any difference whether the source of the perceived familiarity of a surname arises because it is the name of one highly familiar individual, or because it is a common surname and has been encountered in a connection with many individuals. So long as it has been encountered frequently in the past, subjects are able to rapidly classify the name according to its national origin.

*Id.*

234. *Id.* at 58.

235. *Id.* at 62.

236. BEING ERNEST, *supra* note 31, at 74; *Neuropsychology of Proper Names*, *supra* note 35, at 360–61 (citing Clark Ohnesorge & Diana Van Lancker, *Cerebral Laterality for Famous Proper Nouns: Visual Recognition by Normal Subjects*, 77 BRAIN & LANGUAGE 135, 150–51 (2001)).

237. *Plausible Phonology*, *supra* note 125, at 411–12.

have an even easier time with unique famous names compared to common famous names. One study found that “[t]he mean [response time] to correctly accept as familiar the initial and surname of celebrities with high frequency surnames was *slower* than the mean [response time] to famous low frequency surnames.”<sup>238</sup> For example, study participants recognized “M. Jagger” more quickly than “M. Jackson,” for despite the high level of fame for both Mick Jagger and Michael Jackson, Jagger has a more unique surname.<sup>239</sup> Likewise, any recognition of the name “Kierkegaard” will likely point to the philosopher, while the name “Cooper” may trigger thoughts of multiple famous people named “Cooper” but also non-famous people named “Cooper.”<sup>240</sup> Cognitive psychologists explain this result by pointing out that each famous unique name occupies its own node, while famous common names will occupy multiple nodes—one for each individual with the name.<sup>241</sup> Accordingly, the famous unique name will activate only one node, while people will have to discern among the multiple modes activated simultaneously by the famous common name, resulting in a processing delay.<sup>242</sup>

The research on familiarity and frequency suggests that we can divide surname trademarks into three broad categories: famous unique surnames, well-known common surnames, and little-known rare surnames. Famous unique surnames, like Kierkegaard, identify one *referent*—the well-known individual. Transforming that letter string into a trademark might endow that surname trademark with the same associations the consumer already has made for that particular individual. However, this would probably only happen with the names of living individuals since endorsements from beyond the grave likely have little effect on most consumers, who would not presume that the deceased individual had personally manufactured or approved the underlying goods. Endorsements by

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238. BEING ERNEST, *supra* note 31, at 65 (emphasis in original).

239. *Id.*

240. Paul Muter, *Recognition and Recall of Words with a Single Meaning*, 10

J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY, & COGNITION 198, 202 (1984).

241. *Id.* at 201. Muter comments that

[i]n recall, a subset of all nodes is accessed and examined, and those that bear the relevant information are output. For a common name, it is possible that a nonfamous node will be accessed at the time of the recognition test and a famous node will be accessed at the time of the recall test. If this happens, recognition failure of a recallable word occurs. For a unique name, on the other hand, the number of nodes in memory would be at most one.

*Id.*; see also BEING ERNEST, *supra* note 31, at 65.

242. BEING ERNEST, *supra* note 31, at 81–82.

the celebrity would strengthen the connection between the trademark and surname uses. Consumers would not use the *anonymity heuristic* to process this narrow set of surname trademarks.

Well-known common surnames, like Cooper, do not have a unique *referent*. Each surname term occupies multiple nodes for each of the individuals bearing the surname and consumers would simply add another node for a trademark interpretation, unconnected to the nodes for each of the individuals. Any surname entailments or *prior associations* quickly fade. Consumers would process the trademark using the *anonymity heuristic*.

For the final category—little-known surnames—consumers would have had little exposure to them as surnames. Thus, when these words become a homograph with a trademark function, consumers would consider the surname trademark an arbitrary or coined term. These terms have no *prior associations*. Consumers would not have created a node for the surname interpretation of the homograph since they would have had no exposure to its use in this context. Instead, consumers would create a trademark node and any encounters with the homograph would trigger only that node, at least until they encountered someone with the surname.

## V. RECOMMENDATIONS

As discussed in this Article, a reading of the multi-disciplinary, extra-legal scholarship supports the proposition that consumers will recognize the trademark function of surname trademarks and will not regard them as surnames. Further, consumers utilizing the *anonymity heuristic* to process trademarks will rarely associate a surname trademark with any particular individual. Recognizing this about consumer behavior, what conclusions can we draw about § 2(e)(4)—does it strike the proper balance between protecting trademark rights and allowing people to use their own surnames in connection with their businesses? Perhaps trademark law could better support both these interests without § 2(e)(4) by relying instead on: (1) existing prohibitions against false associations in the Lanham Act; (2) the current requirement that registrants assert that they have exclusive rights in the trademark, yet subject to certain limitations; and (3) those limitations, namely the existing provisions for concurrent and pre-existing rights, and a new own-name defense.

Rescinding § 2(e)(4) would align the law with the realities of consumer behavior discussed in this Article. The scholarship reveals that in most scenarios, consumers who encounter trademarks classified under the law as primarily “merely surnames” do

not actually perceive them as surnames.<sup>243</sup> While consumers may initially process an unfamiliar trademark by relying on *prior associations* for the homograph, consumers need only a handful of encounters to develop a separate trademark node for the homograph.<sup>244</sup> As consumers will process the surname trademark as a trademark almost immediately, it follows that the law should allow for registration of surname trademarks upon use.<sup>245</sup> Yet, U.S. trademark law generally requires five years of substantially exclusive and continuous use of the mark to establish that the mark has acquired distinctiveness under § 2(f).<sup>246</sup> Allowing registration of surname trademarks once use commences would better align with consumer behavior as the word will become a trademark when consumers start seeing it as a trademark.<sup>247</sup>

The current requirement of waiting five years to register a surname trademark has real and negative impacts on the brand owner. During those five years, a competitor may begin using the same surname trademark, either innocently or with the intention of capitalizing on the goodwill of the senior user. In either case the emergence of this competitive, junior use of the surname trademark disrupts the business of the senior brand owner. If the competitor innocently adopted the mark in a geographically remote part of the country the senior user will have few legal remedies against it and that competitor's use will prevent the senior user from expanding its business into that area. While the brand owner could try to knock out the competitor's use through an unfair competition claim, those claims require proof of reputation in the trading area of the junior user and that the junior user knew of the senior use, making those claims difficult and expensive to win.<sup>248</sup> Securing a

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243. See *supra* Section IV and notes therein.

244. See *supra* Section IV.A. and notes therein.

245. See Trademark Act of 1946 (Lanham Act) § 2(f), 15 U.S.C. § 1052(f) (2018); *supra* Section IV and notes therein.

246. Trademark Act of 1946 (Lanham Act) § 2(f), 15 U.S.C. § 1052(f); TRADEMARK MANUAL, *supra* note 15, § 1212.05.

247. While the Lanham Act generally requires use of a mark as a precondition to registration, two sections permit registration without use. Sections 44 and 66(a) allow for U.S. registrations based on a registration in the registrant's home country, each through a different mechanism. Lanham Act §§ 44, 66(a), 15 U.S.C. §§ 1126, 1141f(a).

248. *Tana v. Dantanna's*, 611 F.3d 767, 780 (11th Cir. 2010) (“[I]t is well-established that the scope of protection accorded his mark is coextensive only with the territory throughout which it is known and from which it has drawn its trade.” (citing *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 416 (1916))); see also *Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 674 (7th Cir. 1982) (“A good faith junior user is one who begins using a mark with no knowledge that someone else is already using it.”).

nationwide registration for the surname trademark early in the life of the trademark offers a much more attractive option in term of both expense and convenience. And even if elimination of § 2(e)(4) ends up removing more surname trademarks from the public domain, proprietors can choose a trademark from a nearly unlimited universe of potential marks.<sup>249</sup>

Additionally, equity issues in the current § 2(e)(4) framework provide further grounds for eliminating the prohibition against trademark registration of terms deemed primarily merely surnames. The equity issues arise from the subjective nature of determining whether consumers will regard a term as primarily merely a surname. In practice, the USPTO recognizes White surnames more often than non-White surnames, longer surnames more than shorter surnames, and more common surnames more than rarer surnames.<sup>250</sup> As I have argued elsewhere, this unfairly disadvantages those with non-White, shorter, or rarer surnames, who find their names captured under exclusive rights by companies without any connection to the name, while others can freely use their names.<sup>251</sup> Allowing trademark registration of all surname trademarks once use commences would remedy this inequity, and other statutory provisions could safeguard against unfair uses of trademark surnames.<sup>252</sup>

Those statutory provisions include protections against inequitable or deceptive uses of surname trademarks. Section 2(a) of the Lanham Act prohibits registration of deceptive terms or those that would falsely suggest a connection:

No 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—

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249. *Surname Imitation*, *supra* note 64, at 149. *But see* Barton Beebe & Jeanne Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 947, 987 (2018) (arguing that trademarks occupy a finite, and shrinking, universe, and concluding that 61.5 percent of the U.S. population already had their surnames registered as trademarks).

250. Russell W. Jacobs, *The Impact of Race, Orthography, and Population on Trademark Registration of Surnames*, 22 J. GENDER RACE & JUST. (forthcoming).

251. *Id.*

252. Refusing trademark registration of all surnames would likewise resolve the equity issues but would not align to the observations on consumer behavior revealed in the multi-disciplinary research presented in this Article.

(a) Consists of or comprises . . . deceptive . . . matter; or matter which may disparage or falsely suggest a connection with persons, living or dead . . .<sup>253</sup>

The USPTO could refuse to register a surname trademark under § 2(a) if that surname trademark might deceive consumers into falsely believing that a known person with that surname offered or had endorsed the underlying goods or services.<sup>254</sup> That section not only prohibits deceptive marks, but it also explicitly forbids registration of “matter which may . . . falsely suggest a connection with persons, living or dead,” which would provide an additional statutory basis for rejecting a surname trademark that inequitably drew from an unrelated individual’s reputation.<sup>255</sup> Moreover, § 2(c) requires consent to registration if the mark consists of the name of a particular living individual.<sup>256</sup> Both of these sections provide protection for someone who had built a business through blood, sweat, and tears against attempts of a competitor to lock up a federal registration in that name.<sup>257</sup> A celebrity could use these sections to stop a pirate from registering the celebrity’s surname in an effort to ride on that celebrity’s fame.<sup>258</sup> A refusal

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253. Trademark Act of 1946 (Lanham Act) § 2(a), 15 U.S.C. § 1052(a) (2018).

254. See *In re White Jasmine LLC*, 106 U.S.P.Q.2d (BNA) 1385, 1391 (T.T.A.B. 2013) (non-precedential) (“It is well established that a mark may be found deceptive on the basis of a single deceptive term that is embedded in a larger mark. . .”).

255. Trademark Act of 1946 (Lanham Act) § 2(a), 15 U.S.C. § 1052(a).

256. *Id.*, § 1052(c).

257. Note that proprietors already use surname trademarks even if no one associated with the proprietor bears the name, including through purchase of a business and the associated trademark from someone bearing that name. Heymann, *supra* note 34, at 438. Professor Heymann notes:

Likewise, the use of the same name in different contexts is not necessarily impermissible, provided that those names are fulfilling different denotative functions. For example, an individual who has started a business under his or her name might sell that business, including the name-as-trademark, to another firm. The individual would then be prohibited from using his or her name as a mark if that use would be likely to confuse consumers as to the source of his or her goods or services, but he or she would not be restricted from using his or her name as a personal name (that is, to refer to the individual rather than to the former business).

*Id.* (citing *Goldwyn Pictures Corp. v. Goldwyn*, 296 F. 391, 397 (2d Cir. 1924) (“We have no doubt that one by contract may deprive himself of his exclusive right to use his name in industry.”)).

258. *In re Sloppy Joe’s Int’l Inc.*, 43 U.S.P.Q.2d 1350, 1353–54 (T.T.A.B. 1997) (not citable as precedent) (finding that friendship with Ernest Hemingway did not establish sufficient connection to entitle applicant to obtain registration for mark including portrait of the author).

under § 2(a) does not require a finding of intent to trade on the celebrity's goodwill.<sup>259</sup>

Further, trademark registrations only issue in the United States if the applicant has exclusive rights in the trademarks. Applicants must declare under penalty of perjury that they do not know of anyone else with rights in the mark. The declaration in the trademark application reads as follows:

To the best of the signatory's knowledge and belief, no other person, except, if applicable, concurrent users, have the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion of mistake, or to deceive.<sup>260</sup>

Signing the declaration with knowledge that someone else has rights in the mark constitutes fraud and would render any resulting registration void *ab initio*.<sup>261</sup> To register a surname trademark, an applicant therefore should not seek to register the mark if it knows of others using the same surname in connection with the same goods or services. An individual operating a business under his or her own surname could use fraud as a basis to oppose or cancel a registration of the same surname as a trademark filed with knowledge that someone else had prior use of the surname trademark, and thus protect its own ability to continue to use his or her own name. Of course, this puts the onus on the proprietor to bring the legal action rather than relying on the USPTO to protect the surname trademark.

Moreover, even a registration for a surname trademark does not endow the registrant with an absolute monopoly in the surname. Under United States trademark law, registration of a trademark does not undo competitors' already existing rights in their trademarks.<sup>262</sup> Using the mark before the registrant started use will create sufficient rights to permit continued use of the mark despite

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259. *S & L Acquisition Co. v. Helene Arpels, Inc.*, 9 U.S.P.Q.2d 1221, 1224 (T.T.A.B. 1987).

260. *TEAS Plus Trademark Application*, U.S. Pat. & Trademark Off., (Jan. 25, 2017), <https://bit.ly/2moQpId> [<https://perma.cc/8UV8-MDDC>].

261. *See, e.g., Medinol Ltd. v. Neuro Vasx, Inc.*, 67 U.S.P.Q.2d (BNA) 1205, 1208 (T.T.A.B. 2003) ("If fraud can be shown in the procurement of a registration, the entire resulting registration is void." (citing *Gen. Car & Truck Leasing Sys., Inc. v. Gen. Rent-A-Car Inc.*, 17 U.S.P.Q.2d (BNA) 1398, 1401 (S.D. Fla. 1990))).

262. TRADEMARK MANUAL, *supra* note 15, § 201.02 ("Upon registration, filing affords the applicant nationwide priority over others, except: (1) parties who used the mark before the applicant's filing date. . . .") (citations omitted).

the issuance of the registration to someone else.<sup>263</sup> The Lanham Act also has a provision under which multiple businesses that use the same mark in remote geographic areas each can obtain a concurrent use registration which grants exclusive rights, but only in their respective parts of the country.<sup>264</sup> With these provisions, multiple individuals with the same surname can simultaneously use their surnames as trademarks, particularly in different cities or states. The same surname trademarks can co-exist in an additional way—through use in connection with unrelated goods or services, since trademark rights only extend to particular goods or services and do not provide blanket exclusivity across all sectors.<sup>265</sup>

To provide additional protections for individuals to use their surnames in connection with their businesses, United States trademark jurisprudence could incorporate a principle found in the trademark law of other jurisdictions—the “own-name defense.” This principle upholds the right of an individual to use his or her own name as long as the use would not constitute unfair competition. The European Union incorporates this principle as a defense in its Trademark Directive, namely that “[a] Community trade mark shall not entitle the proprietor to prohibit a third party from using in the course of trade: (a) his own name or address . . . provided he uses them in accordance with honest practices in industrial or commercial matters.”<sup>266</sup> The High Court in Bengaluru, India recently recognized the own-name defense in a case between two members of the same family who both used their surname “Patil” in their business names.<sup>267</sup> The High Court affirmed the decision by the District Court against the trademark registrant who had sought to stop the defendant from using the trademark.<sup>268</sup> The Court held that under Article 19(1)(g) of the Constitution of India and section 35 of the Indian Trademark Act, “even a registered user or a regis-

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263. *Id.*

264. Trademark Act of 1946 (Lanham Act) § 2(d), 15 U.S.C. § 1052(d) (2018); Trademark Manual, *supra* note 15, § 1207.04(a).

265. TRADEMARK MANUAL, *supra* note 15, § 1207.01 (“In the ex parte examination of a trademark application, a refusal under §[ ]2(d) is normally based on the examining attorney’s conclusion that the applicant’s mark, as used on or in connection with the specified goods or services, so resembles a *registered* mark as to be likely to cause confusion.”).

266. Eur. Union Trademark Directive Art. 12(a) (Feb. 20, 2009), <https://bit.ly/2BMgNA7> [<https://perma.cc/J6KW-TJY3>] (“Limitation of the effects of a Community trade[ ]mark.”).

267. Patil v. Patil, (2018) Misc. First App. Of 2018 No. 2707, ¶ 11 (Bengaluru HC).

268. *Id.* at ¶ 17.



tered trademark proprietor cannot interfere with the bona fide use of a person of his own name or that of his place of business.”<sup>269</sup>

While the own-name defense could provide some protections for individuals to use their names in connection with their businesses it has its limitations. Individuals have difficulties succeeding with an own-name defense. Corporate entities responsible for the luxury brand Gucci overcame that defense in cases in Italy, Hong Kong, and the United States against members of the Gucci family who sought to use the Gucci name in their own marks. The Italian court held that use of the surname trademark created an unfair association with the fashion house.<sup>270</sup> In the U.S., the TTAB did not expressly consider the own-name defense, but acknowledged the family relationship when sustaining the opposition to register the junior user’s mark based on a likelihood of confusion with the GUCCI mark.<sup>271</sup> The Danish Supreme Court recently acknowledged the availability of the own-name defense, but concluded that it did not apply in a case brought by the “Jensen’s Bøfhus” chain of steakhouses against the “Jensen Fiskerestaurant” seafood restaurant because only one of the defendant’s shareholders and not the defendant itself had the name “Jensen.”<sup>272</sup> Finding the right balance between individual’s rights in their names and fair competition will require some adjustments in US trademark jurisprudence.

## CONCLUSION

The *anonymity heuristic* reflects the findings in the multi-disciplinary literature that consumers treat trademarks as source indicators, but that consumers do not take that source indicating function literally. This challenges the traditional legal characterization of surname trademarks as descriptive, i.e., as identifying the particular

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269. *Id.* at ¶ 11.

270. Lauren Milligan, *Gucci Vs Gucci*, VOGUE (July 25, 2012), <https://bit.ly/2lEAYoC> [<https://perma.cc/K42N-43UA>].

271. *Gucci America, Inc. v. UGP, LLC*, 2018 WL 3456009, at \*11 (T.T.A.B. 2018) (non-precedential). The board reasoned:

Given the ‘known’ family connection between Uberto Gucci and the famous Gucci family, Opposer’s history and fame, the nature of the goods and similarity of the marks, we find source confusion likely between, at the very least, Applicant’s mark UBERTO BY GUCCI for electronic cigarettes, and Opposer’s marks FLORA BY GUCCI for ‘essential oils for personal use’ and ‘perfumes’ (Reg. No. 3627729) and GUCCI for pens and moneyclips (Reg. Nos. 1093769 and 1200991).

*Id.*

272. Susanne Junker, *Jensen’s Bøfhus fortryder navnestrid med fiskerestaurant*, DR (May 6, 2016, 1:14 PM), <https://bit.ly/2mkMCM0> [<https://perma.cc/FPP9-6XSU>].

source of the goods. Instead of identifying a particular person who made the goods, the trademark signals an unknown brand concept. Like surnames, trademarks lack *sense*, so consumers will find no inherent meaning from trademarks. The lack of inherent associations between a surname and a trademark usage of a homograph indicates that consumers regard surname trademarks as arbitrary marks. Exceptions to this heuristic may arise in the narrow circumstances where a famous individual with a unique surname offers goods or services under the linked surname trademark or with a hyper-local business where the consumer interacts directly with the proprietor who has converted his or her surname into the trademark for the business.

This research suggests the need for a change to the legal framework for surname trademarks to reflect consumer reality. Rescinding the prohibition against registration of surname trademarks in § 2(e)(4) while ensuring strong protections against deceptive marks or terms suggesting a false connection, along with the introduction of an own-name defense, would better align the law to the realities of human behavior. Eliminating this section admittedly would disturb the common-law tradition of keeping surnames available for use as business names. But trademark policy must balance that tradition with the goals of consumer protection. Protecting exclusive rights in surname trademarks allows consumers to build associations between the *signifier* trademark and the *signified* source and make purchasing decisions quickly based on his or her impression of the brand. Moreover, concurrent use registrations and the own-name defense would still allow people to operate eponymous businesses. Aligning policy to the realities of consumer behavior would benefit both business owners and consumers.

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