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Intellectual Property and Employee Selection

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INTELLECTUAL PROPERTY AND
EMPLOYEE SELECTION

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I. INTRODUCTION

Like many other similar establishments, Playboy Clubs offer food, drink, and entertainment. Unlike any other establishment, however, the servers at the Playboy Clubs are young, beautiful women who wear costumes with rabbit ears and tails. They are called “Bunnies” and they must fit the “Bunny Image” in order to be hired and retained in their position.\(^1\) Bunnies must meet certain high appearance standards, and are evaluated on the following scale:

- #1 - A flawless beauty (face, figure and grooming)
- #2 - An exceptionally beautiful girl
- #3 - Marginal (is aging or has developed a correctable appearance problem)
- #4 - Has lost Bunny Image (either through aging or an uncorrectable appearance problem).\(^2\)

A Bunny Manual provides the rules governing the appearance and behavior of the Bunnies. It details, for instance, that Bunnies are never allowed to chew gum or sit down while on duty.\(^3\) They are not allowed to date customers, have bad hair, bad nails, bad makeup or a dirty tail.\(^4\)

When a business, like the Playboy Club, decides on a strategy to differentiate itself from its competitors in the marketplace, often this will lead to the creation of some Intellectual Property (IP). The Playboy Bunny costume is reported to be the first uniform registered as a trademark.\(^5\) The mark is described as “a three dimensional bunny costume worn by a woman. The costume includes a corseted bodice, bunny ears worn on the head, a bunny tail on the back of the bodice, a name tag on the front of the bodice, wrist cuffs and a bow tie collar.”\(^6\) It goes without saying that Bunnies must be female.\(^7\)

In today’s marketplace, service companies are increasingly


\(^2\) Id.


\(^4\) Id. at 80-81.


\(^6\) Id.

integrating their image into the service that they provide. This has come to be known as “branded service.” The human wearing the trade dress merges with the brand image. This then necessarily influences hiring decisions. If the Playboy Bunny costume is trademarked, only a person who fits the Bunny Image will wear that costume. No men and likely no females over a certain age (who no longer meet the appropriate proportions) are likely to be hired as Playboy Bunnies.

If a business decides not to hire a prospective employee because she does not fit the company’s image and that decision is challenged under the antidiscrimination laws, to what extent should Intellectual Property serve as a defense for the company’s employee selection? While the role of IP in employment generally is not new, no scholar has previously explored this aspect of the intersection: the role of Intellectual Property in an employment discrimination claim. As it currently stands, employment discrimination law does not consider IP in any capacity. Accordingly, this Article is the first to suggest and examine bridging the worlds of employment discrimination law and intellectual property.

The objective of the Article is to introduce the idea that there could be a place for IP in the employment discrimination jurisprudence. The proposed mechanism for integrating these two areas is through a flexible “IP Defense” which would require an employer defending an employment discrimination case on the basis of IP to establish that (1) it owns IP rights, (2) there is a relationship between the IP and the business practice that resulted in the employee selection decision, (3) the job description is tied to the IP, and (4) there is a direct financial correlation between the IP and the company’s business success.

To be clear, the IP Defense is not meant to replace or change the fundamental tenets of employment discrimination law, nor is the intent to make it easier for employers to discriminate. The reality is that plaintiffs in employment discrimination cases already face a much lower chance of success relative to defendant-employers, and more generally to other kinds of plaintiffs. Accordingly, effective

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9 Cases dealing with non-competition agreements, trade secrets, employee ownership issues, for instance, involve application of intellectual property in the workplace.

10 See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV.
use of the IP Defense by employers is not likely to swing the odds of winning away from plaintiffs in any significant way. Indeed, favoring the application of antidiscrimination policies, the IP Defense could benefit plaintiffs in the litigation process by adding greater specificity and objectivity to considerations of pretext. As one court has noted, “subjective criteria ‘are particularly easy for an employer to invent’” when trying to defeat a plaintiff’s discrimination claim,11 and as such the IP Defense would offer greater assurance that the employer’s proffered reason for its hiring decision is legitimate and not a pretext.

Moreover, the IP Defense is not akin to a grant of immunity. Rather, it requires balancing, on a case by case basis, IP rights and antidiscrimination policies, through the existing framework of Title VII. It embodies several limiting principles that both substantively and procedurally place the burden on the defendant-employer to establish, among other things, that there is a legitimate and strong nexus between the propounded IP right and the employee selection decision. In addition, as a normative matter, IP compares favorably to the wide variety of defenses and exceptions that already exist to insulate employee selection decisions in the employment discrimination jurisprudence.

Following this introduction, Part II provides examples of branded service and the ways in which some well-known companies have used and integrated it with their human resource policies, especially those rules governing employees’ appearance. Part III reviews the relevant employment law principles, with a focus on Title VII claims. Part IV introduces the IP Defense and explores why it makes sense to integrate IP into the employment discrimination framework. Finally, the Article concludes in Part V that the time has come to bridge this gap between employment discrimination law and IP.


11 Thomas v. Denny’s, Inc., 111 F.3d 1506, 1510 (10th Cir. 1997) (internal citations omitted).
II. ILLUSTRATIONS OF “BRANDED SERVICE”

Brands alone can be tremendously valuable to any company. The world’s most valuable brand, Apple, is estimated to be worth $153 billion.12 Successful branding is especially important in today’s competitive business environment because it helps form the corporate identity.13 “[A] strong brand can provide powerful competitive advantages such as great customer loyalty, higher margins, and opportunities for brand extension and licensing.”14 It offers powerful benefits to trademark owners as well as to consumers.15 This is why the companies highlighted in this Part place such an emphasis on branded service.

The term “branded service” refers to the process by which businesses integrate their image into the service that they provide using their human resource policies.16 In today’s competitive marketplace, brands are not just the logos or slogans that are attached to products and services. Instead, they “are the values, beliefs, and service experiences that underpin them.”17 Thus, customer service and the employees who deliver that service are of utmost importance.18 Intellectual property rights, such as trademarks,19 further support companies’ efforts to differentiate themselves from competitors, to be recognizable to consumers, and to communicate to consumers brand identity and corporate identity. This has always required consistency in the way the trademark looks (e.g. all the Playboy Bunny costumes must look exactly the same). More and more, however, business experts have noted that consistency is also required across the many

13 See Sonia K. Kaytal, Stealth Marketing and Anti-Branding: The Love that Dare Not Speak Its Name, 58 BUFFALO LAW REV. 795, 801 (2010).
14 Sally M. Abel, Trademark Licensing, 960 PLI/Pat 89, 95 (2009).
19 A trademark is statutorily defined as “any word, name symbol, or device, or any combination thereof, adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others. 15 U.S.C. § 1127.
ways in which customers encounter a company’s service, particularly in the human interactions with employees.\textsuperscript{20} Many companies have pursued branded service as a way to distinguish themselves from competitors. A few of their stories, representing a range of industries, are captured below.

A. Disney

One of the pioneering companies in branded service is Walt Disney. From the very beginning, the entrepreneur and animator cultivated the “Disney look” by hiring only clean-cut workers to staff his family-centered Disneyland park that opened in California in 1955.\textsuperscript{21} The goal was to create a wholesome atmosphere that would set Disneyland apart from the “sleazy carnival” image associated with amusement parks at the time.\textsuperscript{22} Early employee rules focused on the extremes, prohibiting excessive makeup and jewelry, extravagant hairstyles and unkempt looks.\textsuperscript{23} But by 1958, Disney’s general guidelines had become all-encompassing rules that are delineated today in a forty-page book with illustrations of permissible and impermissible attire and grooming.\textsuperscript{24} The appearance code is testimony to Walt Disney’s micromanaging approach to his product.\textsuperscript{25} Though the Disney patriarch died a year before the Magic Kingdom opened near Orlando in 1971, his brother Roy Disney ensured that the Florida-based workforce embodied the corporate image.\textsuperscript{26}

Efforts to create the Disney experience are legendary. The 62,000 workers\textsuperscript{27} who are part of Disney’s sprawling Florida empire are expected to fall in line. Even the language used by Disney inculcates its brand in the workforce. Prospective employees do not interview for jobs, they “audition” to become “cast members.”\textsuperscript{28} They wear

\textsuperscript{20} See JANELLE BARLOW & PAUL STEWART, BRANDED CUSTOMER SERVICE THE NEW COMPETITIVE EDGE 21-23 (2006).
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Mark Albright, PR and Pixie Dust, Too, ST. PETERSBURG TIMES, Oct. 2, 2011, at D1 (describing Walt Disney as “the kindest man and the most demanding micromanager” who “rarely handed out praise”).
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Kit Johnson, The Wonderful World of Disney Visas, 63 FLA. L. REV.
“costumes,” not uniforms. Those who interact directly with guests work “onstage,” while dishwashers, kitchen staff and others are “backstage” employees. All are responsible for creating “Disney magic” for the company’s 180,000 paying guests daily.

Every detail of employee appearance must conform to the Disney Look. Frowning is prohibited, and sunglasses are strongly discouraged because they block “interpersonal communication with Guests,” but if they must be worn, the worker’s eyes need to be visible through the lenses. Undergarments are required, but they must not be seen, or even “patterned or colored” if the employee’s costume is light in color. Prospective employees will not be hired if they have visible tattoos. Except for the earrings allowed on female employees, workers cannot have “[j]ewelry, spacers, retainers, or plugs” in any body piercings during working hours – even those that are not visible to the public. Other jewelry guidelines stress simplicity. Females can wear matching earrings, either pierced or clipped, but only one per ear and never exceeding the size of a quarter or extending more than two inches beneath the earlobe. Men are permitted one ring on each hand, a “classic, business-style wristwatch,” cuff links, and a small tie tack if desired.

The clothing requirements for each gender are exhaustive, allowing no more than three inches of skin to be visible above a female’s knees and limiting men to “traditionally acceptable” fabrics such as tweed, cotton, polyester, or silk. Hair coloring is permissible if “natural-looking and well maintained.” Subtle highlights are allowed, but the “Disney Look does not permit extremes in dyeing, bleaching or coloring.”

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915, 919 (2011) (describing how Disney successfully lobbied the government to create a special class of visas that allow Disney to employ thousands of international workers annually).

29 Id.
30 Id.
31 Id. at 948.
32 See Albright, supra note 5.
33 See Disney Int’l Programs, supra note 9.
34 Id.
35 Id.
36 Id. One wonders how Disney would know about non-visible body piercings.
37 Id.
38 Id.
39 Id.
40 Id.
allow facial hair on male employees, who must keep the hair trimmed to no more than a quarter of an inch in length. The guidelines tell cast members to consult Disney’s official Cast Image and Appearance team for specific feedback on acceptable mustaches, beards and goatees. Disney’s website provides this overarching message on appearance:

No matter where you work or what your role is, anytime you are in a public area, you are “on stage.” Your attitude and performance are direct reflections on the quality of our Disney show. Often it’s the seemingly little things that detract from our Guests’ enjoyment – chewing gum, having poor posture, using a cellular phone or frowning. Of course smoking and eating on stage are also strictly prohibited. All of this adds up to one of the most important aspects of your role in our show: good stage presence.

The approach ensures uniformity and propagates the wholesome, family image that Walt Disney himself insisted upon from the company’s earliest days. Moving beyond Disney, the remaining companies in this Part focused less on a wholesome family image and more on female sex-appeal in delivering their branded service.

B. Southwest Airlines

Southwest Airlines had a difficult beginning. After the airline incorporated in 1967, incumbent air carriers challenged Southwest’s application to enter the Texas commuter market, keeping it on the ground with both state and federal litigation that did not end until December 1970. Southwest finally could fly. But by that point, the airline had spent more than $530,000 in legal fees, leaving it with $143 in the bank and more than $100,000 in debt. In early 1971,
Southwest hired a Dallas advertising agency to pave its way into the market with a “catchy” image that would help it stand out.\textsuperscript{47} The result was the Love Airline.

The advertising agency found that Southwest’s competitors projected a conservative image for their mostly male business flyers.\textsuperscript{48} The agency decided that Southwest could differentiate itself by enticing travelers with “feminine youth and vitality.”\textsuperscript{49} The airline thus adopted an express policy preferring female employees who go “though life with great flair and exuberance.”\textsuperscript{50} The ideal Southwest employee was witty, charming, and exciting, yet efficient in undertaking “all her tasks with care and attention.”\textsuperscript{51} Long legs didn’t hurt, either.\textsuperscript{52} Sex appeal became the cornerstone of the airline’s personality. Flight attendants wore hot pants and calf-hugging boots that laced-up the front.\textsuperscript{53} In television commercials, the women sashayed across the runway, asking, “Remember what it was like before there was somebody else up there who loved you?”\textsuperscript{54} In one print advertisement under a headline that reads “The Love Seat,” three comely attendants dote on a disheveled, balding businessman.\textsuperscript{55} In others, bulging cartoon hearts are etched with the promise: “We’re Spreading Love All Over Texas.”\textsuperscript{56}

But it was about fun, too. The airline encouraged its flight attendants to create an informal atmosphere on board.\textsuperscript{57} They held who-has-the-biggest-hole-in-his-sock contests and encouraged passengers to see how many people could squeeze into the

\begin{itemize}
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} Id.
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id.
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} 60 Minutes: Herb Kelleher, CEO of Low-Cost Southwest Airlines (CBS television broadcast May 27, 1990) (explaining that Southwest only hired “flight attendants with long legs, big personalities, and, as Texas Monthly put it, looked like they all graduated from the same west Texas high school”).
  \item \textsuperscript{54} Wilson, 517 F. Supp. at 295.
  \item \textsuperscript{55} See YOUTUBE.COM, Southwest Airlines – Commercial (1970), available at http://www.youtube.com/watch?v=rSv-uHEPfXQ.
  \item \textsuperscript{57} Id.
\end{itemize}
bathroom. On Halloween, the plane was Transylplania, and flight attendants would cajole male passengers to don fangs and smear on fake blood as Draculas. Southwest once took out a two-page newspaper advertisement to explain how its sexy flight attendants embodied the airline’s “Fun-LUVing Attitude”:

She will not plee-aze you. Plee-aze is stiff, formal, and very affected English for please. People who say plee-aze to you are trying very, very hard to be nice to you. Too hard. And it isn’t real. It’s like plastic flowers vs. real flowers. You can feel the difference. That’s why in our hostess school, we haven’t taught our girls how to be nice to you. We figure if they didn’t already know, they weren’t for us.

Southwest became known both nationally and internationally by its “Love” persona, even trading on the New York Stock Exchange under the symbol “LUV.”

The strategy paid off. By 1975, Southwest was the only heavy carrier flying out of Dallas. By the early 1980s, Southwest had achieved “enormous success” in the Texas regional commuting market. A district court in Texas concluded in 1981 that “Southwest’s unique, feminized image played and continues to play an important role in the airline’s success.” Yet that unique image did not hold up under legal scrutiny and became one of the seminal cases in employment discrimination law, which will be discussed in the next Part.

After losing the lawsuit, Southwest was forced to hire men as flight attendants, and subsequently honed its image as a low-cost, joke-cracking airline where applicants were instructed to send resumes to the attention of “Elvis,” and the company’s chief

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58 See 60 Minutes, supra note 38 (interviewing three women who were among the first flight attendants hired by the airline).
59 Id.
60 Lusk, supra note 41 (explaining that the advertisement was timed to run near the time of Southwest’s first flights in 1971).
61 When Southwest Airlines began flying in the 1970s, flight attendants were referred to as “hostesses.”
62 Lusk, supra note 41.
63 Wilson, 517 F. Supp. at 294.
64 Id.
65 Id. at 295.
66 Id.
executive officer handed out peanuts at 30,000 feet.\(^{68}\) CEO Herb Kelleher declared that he believed in the “school of management by fooling around,” and students at Harvard, Stanford and other elite schools have studied his innovative business methods.\(^{69}\) The airline did not serve meals, assign seats, or offer a first-class section.\(^{70}\) Humor was mandatory, however, with personality replacing hot pants as the defining characteristic of Southwest flight crews. “At Southwest, hiring is almost a religion,” Kelleher explained in 1990. “Each employee is carefully screened for attitude. . . . We encourage people to be individualistic, to enjoy themselves and to have a good time.”\(^{71}\)

C. Hooters

Hooters was the brainchild of former University of Illinois football player, Lynn Stewart, who pooled funds with five friends to come up with $139,000 to build the first Hooters restaurant in Clearwater, Florida, in 1983.\(^{72}\) The men (who call themselves the Hooters Six\(^{73}\)) had a wings-sports-and-scantily-clad-waitress theme for their casual, beachy establishment. Yet they were not looking for just any pretty woman to deliver beer and food – they wanted her to be the centerpiece of the restaurant itself. They wanted the Hooters Girl.\(^{74}\) She had to be fresh-faced, all-American, shapely yet athletic.\(^{75}\) Beautiful yet not unattainable. The men found her at a bikini contest on the beach.\(^{76}\)

More than 300,000 women have worn the distinctive uniform.\(^{77}\)--

\(^{68}\) See 60 Minutes, supra note 38.

\(^{69}\) Id.


\(^{71}\) 60 Minutes, supra note 38.

\(^{72}\) Hoovers’ In-Depth Company Reports, Hooters of America, Mar. 9, 2011.

\(^{73}\) Id.

\(^{74}\) David Finkel, ‘Even If You’re Not Funny, We’ll Still Laugh: ‘At Hooters, men are men and the women are girls. Anyone got a problem with that?’, THE WASHINGTON POST MAGAZINE, July 28, 1996, at 8.

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Hooters reports that it currently employs about 17,000 Hooters Girls. See About Hooters, HOOTERS.COM, www.hooters.com. In 2004, a federal district court in Orlando concluded that Hooters’ orange shorts and white tank tops qualified as distinctive trade dress, but that Hooters could
orange shorts, panty hose, and snug white-tank top with “HOOTERS” stretched across the chest. The color scheme and the style have not changed since its inception in the early 1980s. Nor has much changed about the restaurant, either. The look is Florida beach shack, with wooden tables, t-shirts for sale, cheeky signs on the walls (“Caution: Blonds Thinking” and “Men – no shirt, no service. Women – no shirt, free food”), sports on the televisions, and 60s-era music playing in the background. Each table has its own roll of paper towels so patrons can sop up the wing sauce.

Hooters Girls must conform to the appearance regulations in the company handbook. Only white bras are permitted. The required pantyhose must be “suntan” in tone and changed immediately if snagged during the work shift. Shorts should fit comfortably, “never so small that the buttocks show.” The tank top cannot be baggy; and “[u]nder no circumstances should bra straps ever show.” Hooters Girls are forbidden to have visible tattoos or body piercings.

Hooters makes no excuses for its unabashed love of the female form – sarcastically noting on its website that claims “that Hooters exploits attractive women are as ridiculous as saying the NFL exploits men who are big and fast.” Hooters patrons are unlikely to lie about their reasons for visiting the chain. You can get wings just about anywhere. You go to Hooters for the view. Explained one columnist: “Hooters is more than food, which is secondary. It is entertainment, ambience, male bonding.” However, the ambience got Hooters in trouble in 1991, when the Equal Employment Opportunity Commission (EEOC) launched an investigation into the chain’s

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78 Id.
79 See Finkel, supra note 70.
80 Hoovers, supra note 68.
81 Id.
82 Finkel, supra note 70.
83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 HOOTERS.COM, supra note 75.
89 Bill Maxwell, A Meditation on the Magic of Hooters, St. PETERSBURG TIMES, Nov. 19, 1995, at D1.
practice of hiring only women. The case is discussed in the next Part.

D. Dallas Cowboy Cheerleaders

As the nation’s most recognizable cheerleading squad, the Dallas Cowboys Cheerleaders (DCC) must be pristine even in the 100-degree heat of a late summer football game in Texas. Yet they do not have the luxury of being mere eye candy. The cheerleaders master more than fifty song and dance routines for every football season. Embodying beauty, poise, and athleticism, the Dallas Cowboys Cheerleaders handpick the women who will represent their brand every year during a grueling process that starts with roughly 1,000 hopefuls and finishes with an elite team of thirty-six who wear the iconic star-spangled, blue-and-white uniform. The early DCC rules required promptness, no gum chewing on the field, and no fraternizing with the players. Today, there is a lengthy conduct and appearance code. Cheerleaders still cannot date Cowboys players; nor can they fraternize with coaches or team management. “Cheerleaders receive training in etiquette, communications skills,
media relations, and communications.”97 The trademarked uniforms can be worn only when authorized by the Dallas Cowboys Cheerleaders. When in uniform, the women are forbidden to drink, smoke or “conduct themselves in any manner not becoming to the tradition of the Dallas Cowboys Cheerleaders.”98

The cheerleading squad has unparalleled recognition among its NFL counterparts. The women have made guest appearances on television shows, and the DCC were the subject of two made-for-television movies, one starring Jane Seymour.99 They do USO tours overseas, star in commercials, and make their own exercise DVDs.100 Ever mindful of their ladylike image, the Dallas Cowboys Cheerleaders have challenged attempts to incorporate their coveted brand into less-than-genteel products. In 1979, the Second Circuit upheld a preliminary injunction barring release of a pornographic film in which an actress was partly or fully clad in a cheerleading uniform that was deemed confusingly similar to the DCC’s trademarked uniform.101

E. Olialia and the Island of Blonds

Finally, taking branded service to what some may consider an extreme, is a new resort planned for the Maldives. If a Lithuanian company follows through on its much-trumpeted plans,102 this is what vacationers can expect at its island getaway in Maldives. Guests will fly to the resort on a charter airline piloted by a blond woman.103 Or

97 Id.
98 Id.
99 Patoski, supra note 128.
100 Id.
101 Dallas Cowboys Cheerleaders v. Pussycat Cinema, 604 F.2d 200, 205 (2d Cir.1979) (enjoining release of “Debbie Does Dallas” for including twelve minutes of footage that included a uniform resembling the outfit worn by the Dallas Cowboys Cheerleaders).
they can sail to the island on a yacht with blond women captains.\textsuperscript{104} The bellhops who take visitors’ suitcases will be blond women. The front desk staff – blond women. The managers, bartenders, food servers, chefs, grounds crew – mostly blonds and mostly women. The Olialia company (pronounced ooh-la-LA) refers to its proposal as a “fantasy resort,” which the press has fittingly dubbed the Island of the Blonds.\textsuperscript{105}

The company already uses blond women to promote products ranging from cola and pizza to computer software and pop music.\textsuperscript{106} Its models appear in Olialia advertisements, sometimes wearing laboratory coats as they labor over the formula for Olialia cola; or applying makeup while draped around a conference table in tight business suits during a board meeting.\textsuperscript{107} Olialia claims that the marketing strategy works. The company claims that eighty percent of Lithuanians recognize its brand, and expected to net $10 million in profits in 2011.\textsuperscript{108} In joining the luxury vacation market, Olialia has hired Lithuanian architect Valerijus Starkovskis\textsuperscript{109} to design a 500-room resort, which has a tentative completion date of 2015.\textsuperscript{110} Leaving no detail untouched by the glitzy theme, Olialia plans to mold its Maldivian island in the shape of a high-heeled shoe through strategic reef reclamation.\textsuperscript{111}

Olialia officials do not apologize for the company’s blond branding strategy, which has evoked sharp criticism from within Lithuania and Maldives, an ethnically diverse chain of more than 1,100 islands in the Indian Ocean.\textsuperscript{112} Critics deride the plans as sexist,
demeaning to women, racist, and discriminatory. An Olialia official shrugged off such comments, explaining: “It is not discrimination. For example, if a ballet company is casting for a male-only dance performance, is it discrimination against women?” Nonetheless, under Maldivian law, at least fifty percent of the resort’s staff must be locals. This could be a challenge as the native population is overwhelmingly non-white and non-blond. However, neither Maldivian tourism officials or Olialia’s general manager see that requirement as a stumbling block. They have suggested that non-blond women can wear wigs or, in the alternative, “work behind the scenes.” Yet as Lithuania is a member of the European Union, some question whether the project violates EU employment law by preferentially seeking blond women. Again, Olialia officials dismiss those concerns, asserting that the company welcomes applicants of all ethnic backgrounds, hair colors, and ages. Men are expected to comprise about thirty-five percent of the resort’s workforce.

III. RELEVANT EMPLOYMENT LAW PRINCIPLES

While branded service may serve as a great marketing or business strategy, it could make companies vulnerable to discrimination claims from employees, and may not itself serve as a recognized defense to an employment decision. It is therefore legally significant for companies to rely on their intellectual property rights to defend business decisions, rather than a mere image or a brand. That is

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113 Margarita Jankauskaite, director of the Lithuanian Center for Equality Advancement, told the Associated Press: “I am ashamed that this initiative came from my country. This only sends a message to the world that Lithuania is a country of cheap beer and cheap blond women.” Dapkus, supra note 164.
114 Id.
115 Id.
116 See Boyle, supra note 156.
117 Dapkus, supra note 164.
118 McGuinness, supra note 160.
119 Id.
120 Dapkus, supra note 164.
121 A “brand name” as used in the business and marketing context does not carry legal significance. It could include a trademark, but not necessarily so. See J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 4:18 (2012). A marketing tool must meet certain criteria in order to qualify for trademark protection. Id. at § 3:3.
because, among other reasons, intellectual property has been recognized as a form of property,¹²² along with the attendant privileges of that label.¹²³ This sometimes means, for instance, that greater weight is given to intellectual property concerns when balanced against other constitutional considerations such as the First Amendment.¹²⁴ Moreover, IP rights of employers can also outweigh fundamental rules and policies governing employee conduct. Thus, for instance, the enforcement of non-competition agreements permit divergence from the employment at will doctrine by restricting employee mobility and competitive choices.¹²⁵

As the examples in Part II illustrate, branded service is becoming a recommended way of doing business and differentiating service in a competitive market. In doing so, employers have wide latitude to make decisions about the direction of their business and their workplace, including who to hire and how they should look at work.¹²⁶ As the previous company examples illustrate, employers generally have the right to regulate the appearance of employees.¹²⁷ For instance, an employer can regulate grooming,¹²⁸ hair length,¹²⁹ weight,³⁰ sexual or physical attractiveness,¹³¹ and the image of its

¹²² See, e.g., Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc., 141 F.3d 490, 497-98 (3d Cir. 1998) (“[t]rademarks are property” and “[t]he ownership of a trade-mark has, in general, been considered as a right of property” under Pennsylvania law); Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 720, 739 (2002) (a patent “is a property right”).
¹²⁷ See, e.g., Barker v. Taft Broad Co., 549 F.2d 400 (6th Cir. 1977).
¹²⁸ See Jespersen v. Harrah’s Operating Co., 444 F.3d 1104 (9th Cir. 2006).
employees. Thus, Disney’s and the Dallas Cowboy Cheerleaders’ extensive regulation of every detail of their employees’ appearance is permissible. Whether it’s maintaining the “Disney Look” or the Dallas Cowboy Cheerleaders’ image restrictions, employers routinely enact policies to govern their employees. Only if such policies create an “unequal burden” on a protected class, might the employer then run afoul of Title VII. The next subsection outlines the contours of Title VII that are relevant to this Article.

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment decisions on the basis of sex, race, religion, color, or national origin. The Age Discrimination in Employment Act (ADEA) separately prohibits discrimination based on age, and for the purposes of this Article, the protections are essentially the same as under Title VII. A Title VII violation can be brought under one of two theories: disparate treatment or disparate impact. With disparate treatment a plaintiff must show that the employer has a facially discriminatory employment practice, and that there is proof of discriminatory motive. Thus, there is intentional discrimination against a protected group; for example, an employer does not hire men for a particular job (such as Southwest Airlines not hiring men as flight attendants).

In setting out a prima facie case for disparate treatment, a plaintiff must establish, among other things, that he applied for and was

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131 See Yanowitz v. L’Oreal USA, Inc., 116 P.3d 1123, 1131 (Cal. 2005); Frank v. United Airlines, Inc., 216 F.3d 845, 855 (9th Cir. 2000).
132 See Wislocki-Goin v. Mears, 831 F.2d 1374, 1376 (7th Cir. 1987).
133 See Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2006); see also Alexis Conways, Leaving Employers in the Dark: What Constitutes A Lawful Appearance Standard After Jespersen v. Harrah’s Operating Co.?., 18 GEO. MASON U. CIV. RTS. L.J. 107, 107-08 (2007); see also EEOC Compliance Manual § 619.4(d) (permitting dress codes that are “equivalent for men and women with respect to the standard or burden that they impose.”) [available at 2006 WL 4672751].
134 42 U.S.C. § 2000e-2 (2000) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”
135 See 29 U.S.C. § 623(a)(2) and § 623(f).
qualified for the job. Whether a person is qualified for a job is based on the demands of the job, as specified by the employer. However, it is the plaintiff’s burden to establish the qualifications of the job and prove that he was qualified. The burden then shifts to the defendant-employer to articulate a legitimate, non-discriminatory reason for its decision. It is then up to the plaintiff to rebut the employer’s reason and prove that it is pretextual.

Claims based on disparate impact, on the other hand, involve employment practices that are facially neutral but that have a disproportionate effect on a protected group; this is unintentional discrimination. (Hiring only blonds, for instance, may exclude non-Caucasians). To succeed on a disparate impact claim, a plaintiff must show that an employer used “a particular employment practice that causes a disparate impact” on the basis of a protected class and the employer must have failed to show that “the challenged practice is job related for the position in question and consistent with business necessity.” Because this theory focuses on the consequences of the employer’s choices rather than the employer’s intent or motivation, plaintiffs in these disparate impact claims must offer statistical evidence to support their assertion that an employment practice created a disparate impact.

The theory on which a discrimination case proceeds also affects the defense which may be raised by the employer, and the attending evidentiary framework under which the case must proceed. While a thorough discussion and analysis of the complicated scheme of these theories is beyond the scope of this paper, this section will outline the two pathways that are relevant to the arguments in this paper. As

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140 See Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
141 See Gorence v. Eagle Food Centers, Inc., 242 F. 3d 759, 764 (7th Cir. 2001).
144 See 21 ARTHUR LARSON & LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 21.03 (2nd ed. 2012).
145 See generally, ARTHUR LARSON & LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION §11.02 (2nd ed. 2012) (discussing the BFOQ affirmative defense); ARTHUR LARSON & LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION §23.04-.07 (2nd ed. 2012) (discussing the business necessity defense).
is discussed below, the *bona fide* occupational qualification defense ("BFOQ") applies in disparate treatment cases, and a business necessity defense applies in disparate impact cases. Most employment discrimination claims tend to be based on disparate treatment.\(^{146}\) Ultimately, for the purposes of this Article, there is no significant difference in how intellectual property would be used with either defense. Accordingly, they are both briefly discussed below.

**B. Applying the BFOQ Defense**

The BFOQ is an affirmative defense in disparate treatment cases where the employer admits to discriminatory practices. It is successful when an employer can establish that the protected criterion (except as to race)\(^ {147}\) is a *bona fide* occupational qualification reasonably necessary to the normal operation of the business.\(^ {148}\) In essence, it provides a justification for employment practices that are otherwise discriminatory, where the employer can prove that its policy is necessary. The burden of proof falls on the employer.\(^ {149}\)

The BFOQ is meant to be a narrow exception to intentional discrimination.\(^ {150}\) It is most often used in gender discrimination cases, and as such, much of its jurisprudential development to date has been in the context of gender discrimination cases.\(^ {151}\) Contributing to further limitations in development of the law is the fact that there is very little legislative history on the BFOQ defense,
which has led to varying and sometimes inconsistent interpretations by the courts.\(^{152}\)

Courts analyzing BFOQ cases generally apply a three-part test, the most significant of which is the “essence of the business” test.\(^{153}\) The essence test was derived from a Fifth Circuit opinion involving Pan American World Airways, where the airline used the BFOQ defense to justify its hiring of females only as flight attendants.\(^{154}\) The court ruled that “[d]iscrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.”\(^{155}\) The court found that the primary function of an airline, i.e. the essence of its business operation, was to “transport passengers safely from one point to another” and that “having male stewards will [not] so seriously affect the operation of an airline as to jeopardize” that purpose.\(^{156}\)

At around the same time, Playboy Enterprises was also challenged for hiring only females as Bunnies. However, it was successful in arguing that being female is a BFOQ for being a Playboy Bunny.\(^{157}\) Supporting that conclusion was the court’s determination that the primary task of the Bunny was sex appeal, not just serving cocktails.\(^{158}\) The Bunny was therefore reasonably necessary to the normal operations of Playboy Clubs.\(^{159}\)

1. From Southwest Airlines to Hooters

Ten years after *Pan American* was decided, Southwest Airlines’ female-only policy was also challenged. In *Wilson v. Southwest Airlines*, a Texas district court held that Southwest could not exclude men from its ranks of flight attendants despite the airline’s claim that being female was “reasonably necessary” to its love-themed


\(^{153}\) See 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 404-05 (4th ed. 2007). The two other tests are the “all or substantially all” test and absence of reasonable alternatives to accomplish the business mission with less discriminatory impact. *Id.*

\(^{154}\) Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 386 (5th Cir. 1971).

\(^{155}\) *Id.* at 388.

\(^{156}\) *Id.* at 388.


\(^{158}\) *Id.*

\(^{159}\) *Id.*
In *Wilson*, a class of more than 100 male job applicants challenged Southwest’s female-only hiring policy for flight attendants as violating Title VII’s prohibition against gender discrimination. In its defense, Southwest claimed that being female was a bona fide occupational qualification (BFOQ) for its flight attendants.

The *Wilson* court explained that Southwest had to satisfy a two-part inquiry to qualify for a BFOQ: (1) Does the particular job require only one gender; and (2) is that requirement reasonably necessary to the essence of the employer’s business? In claiming that it met the test, Southwest conceded that men were capable of performing the “mechanical functions” of a flight attendant. Yet it argued that men could not fulfill the non-mechanical functions, such as attracting males who preferred female flight attendants and preserving Southwest’s unique feminized personality. Thus, the airline contended that women were reasonably necessary to maintaining the love-fest that was the “essence” of a Southwest flight.

Recognizing that it had to distinguish itself from *Pan American*, Southwest argued that its business essence was not just transporting passengers, but transporting passengers with “love.” It argued that its image as the “love airline” made it unique, was important to its financial success, and justified its policy. The court rejected the argument, finding irrelevant Southwest customers’ preference for females as flight attendants and Southwest’s financial concerns.

In rejecting Southwest’s arguments, the court reaffirmed that customer preference alone cannot support a BFOQ. The court explained that when based on sex appeal, a BFOQ is permitted only

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160 *Id.* at 304.
161 *Id.* at 293.
162 *Id.* at 295.
163 *Id.* at 299.
164 *Id.* at 300. *See also* Diaz v. United Air Lines, 464 F.2d 1006, 1008 n.2 (5th Cir. 1972) (“female sex is not a bona fide occupational qualification for the position of airline cabin attendant”).
167 *Id.* at 300, 303-04. *(Wilson)*
168 *Id.* at 389.
169 *Id.* at 303. *See also* Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 14 (1991) (“To allow a BFOQ because of a customer’s preference for a female flight attendant or a male salesman would only serve to perpetuate the very prejudices that Title VII was meant to overcome.”).
when the business’ primary service is sex or vicarious sexual recreation, such as a topless bar or social escort service. In contrast, Southwest’s primary service was safe transportation from one location to another. The fact that its legions of attractive flight attendants made the journey more enjoyable was “the manner of job performance, not the job performed.”

It is curious that the contours of the BFOQ defense were derived from two major cases involving airlines. The outcome in these cases may have been influenced by the backdrop against which they developed. At the time, before airline deregulation, fares were determined by the government and the airlines were left to differentiate themselves from their competitors by the kind of service they offered and the image they portrayed. The “stewardess” had to be “a nurse in the sky, a surrogate wife for lonely business passengers, a fantasy sexpot (“coffee, tea, or me”), and a fashion model.”

Along came the women’s movement and courts began to recognize these sexist requirements as contra to our antidiscrimination policies. As between corporate “image” and profitability on the one-hand and the strong public policy of permitting equal opportunity for and civil rights for men and women, the balance justifiably tipped to the latter. Thus, Wilson v. Southwest was likely influenced by the fact that it was framed as an employer asserting objectionable control over women at a time when feminist groups, and flight attendant activists in particular, were fighting hard to draw attention to the status of women. Indeed, groups like Stewardesses for Women’s Rights identified sexiness as a safety issue for airlines, arguing that passengers may not take them seriously in emergency situations. Since the 1990s through today, there are signs that the political

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170 Wilson, 517 F. Supp. at 301. Critics say it is ironic that a BFOQ defense can protect sex-service jobs that objectify and denigrate women. See Katie Manley, Note, The BFOQ Defense: Title VII’s Concession to Gender Discrimination, 16 DUKE J. GENDER L. & POL’Y 169, 185 (2009) (asserting that the BFOQ can be used to subordinate women).

171 Wilson, 517 F. Supp. at 302.


173 Id.


winds may not be blowing as strongly in favor of the pro-feminist cause in these kinds of cases. A lawsuit involving Hooters, for example, shows that today these high-profile cases are more likely to be settled than litigated, and that businesses are at the cusp of actually using the language of IP to defend their employee selection practices. In late 1993, several Chicago-area men filed a class-action employment discrimination lawsuit, claiming that they had been turned down for server jobs at Hooters because of their gender.176

In March 1996, a federal judge in the Northern District of Illinois certified the class of men.177 By then, Hooters already had gone on the offensive, orchestrating a public-relations campaign that featured billboards with a muscular, mustachioed man in the Hooters Girls’ tiny shorts and tank top.178 The billboard loudly screamed: “Hooters GUYS? Washington Get a Grip.”179 In November 1995, the company held the 100 Hooters Girls March on Washington, where the buxom women left a pair of shorts and a tank top on a sidewalk in the nation’s capital.180 Hooters claimed that patrons sent 500,000 complaining postcards – at the company’s expense – to their representatives in Congress.181 The most vocal critic within Congress was U.S. Rep. Harris W. Fawell, an Illinois Republican and chairman of the House subcommittee on employer-employee relations.182 Fawell publicly needled the EEOC, questioning why it was focusing on Hooters when the commission had a backlog of more than 100,000 cases.183 In Fawell’s opinion, the restaurant chain had a legitimate gender BFOQ for female food servers.184

The EEOC announced in 1996 that it was closing its investigation, citing scarce resources but noting that “[d]eny any American a job simply because of his or her sex is a serious issue.”185 Hooters settled the class-action lawsuit one year later, agreeing to pay $3.75 million and to hire more men for bartending and other positions, but

176 Hooters.com, supra note 75.
179 Id.
180 Maxwell, supra note 92.
181 Hooters.com, supra note 75.
182 Hutchcraft, supra note 93.
183 Id.
184 Id.
steadfastly retaining the right to keep its female-only Hooters Girls.\textsuperscript{186} By then, the company had adopted a parlance hinting at an understanding of the BFOQ exception. Company spokesman Mike McNeil told \textit{USA Today} that Hooters does not sell food, it sells sex appeal. “To have female sex appeal, you have to be female,” McNeil said.\textsuperscript{187}

Even if it intuitively makes sense that only a female can sell female sex appeal, it is not clear that this argument alone would win the day for Hooters, or for the next company needing to defend a discrimination claim. The bottom line is that when faced with an employment discrimination claim, an employer must show that its employee selection decision is justified as a BFOQ or as a business necessity.\textsuperscript{188} Exactly when and what circumstances would establish either of these defenses is not entirely clear, as the cases appear riddled with inconsistencies. Nevertheless, a few patterns and principles emerge that are relevant to this Article, and that have paved the way for introducing the language of IP into an employment discrimination defense.

2. Acceptable and Unacceptable Motives for BFOQ

The employment-at-will doctrine\textsuperscript{189} gives employers very wide latitude to regulate their employees and the workplace.\textsuperscript{190} The exception to the bar against intentional discrimination (except as to race)\textsuperscript{191} applies when employers in disparate treatment cases can establish that their selection criterion is a \textit{bona fide} occupational qualification reasonably necessary to the normal operation of the


\textsuperscript{187} Id.

\textsuperscript{188} See, \textit{e.g.}, Levin v. Delta Airlines, 730 F.2d 994, 1001 (5\textsuperscript{th} Cir. 1984).

\textsuperscript{189} The employment-at-will doctrine provides an employer great discretion in hiring and firing employees for any reason. \textit{See generally PEGGIE R. SMITH ET AL., PRINCIPLES OF EMPLOYMENT LAW} 21 (2009).


\textsuperscript{191} By its own terms, the provision does not include race. However, where racial characteristics are necessary for job performance a necessity defense has been recognized. \textit{See Miller v. Texas State Bd. of Barber Examiners}, 615 F.2d 650 (5\textsuperscript{th} Cir. 1980) (involving an undercover investigator).
As noted earlier, the BFOQ defense is a narrow exception. This means that many defenses propounded by employers as their motive for discriminatory choices will not suffice to escape liability. For instance, gender stereotypes are generally not permitted. In *Diaz v. Pan American World Airways*, Pan American’s argument that women were better at “providing reassurance to anxious passengers, giving courteous personalized service and, in general, making flights as pleasurable as possible . . .” was rejected as a BFOQ argument. The EEOC guidelines also provide that “[t]he refusal to hire an individual based on stereotyped characterizations of the sexes” will not suffice as a BFOQ exception.

Similarly, courts generally are not persuaded by BFOQ defenses based exclusively on customer preference. This argument can often be intertwined with stereotypes, as appeared to be the case in the early airline cases. In *Diaz* the court explained that “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid.” Thus, Southwest Airlines’ argument that passengers prefer its sexy female flight attendants was also not successful. Rather, sex appeal appears to be more readily accepted as a BFOQ for businesses that primarily sell sex, such as a strip club (or the Playboy Bunnies). This can be a very unclear line to draw, however, especially for businesses like Hooters that sell food and sex appeal.

A few categories of motives are more likely to be successful than those relying on stereotypes and customer preferences. These include authenticity and privacy. Again, however, the lines between what a

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192 42 U.S.C. § 2000e-2(e)(1) (2000) (“it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”)
193 442 F.2d 385, 387 (5th Cir. 1971).
195 442 F.2d 385 at 389.
198 See Hooters discussion in Part IIC supra.
199 Safety concerns can also serve as a BFOQ for employers where they can show that concerns for public safety justify eliminating certain
court might accept as permissible and not continues to be unclear. The courts’ various inconsistencies in applying antidiscrimination law have been widely noted by scholars. There has also been confusion and misapplication between the BFOQ defense and the business necessity concept. This Article highlights some of the areas where these inconsistencies appear.

a. Authenticity

EEOC guidelines recognize a BFOQ, and thus protect hiring for authenticity or genuineness. In such cases employers argue that preserving the authenticity of a product or service requires that a person be of a particular sex, national origin, or religion. This reasoning permits a Chinese restaurant to hire only chefs from China, and a Catholic university to hire only Jesuit priests to teach philosophy. Authenticity is a critical part of Disney’s brand. Company recruiters travel overseas to find college-aged workers to serve as “cultural representatives” in the countries of EPCOT. About 3,500 members of Disney’s workforce are international recruits, who must be fluent in English and emulate friendliness and poise while sharing information about their native countries with persons because of their age or gender. See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that maximum security prison could exclude women guards because the ability to maintain a safe and secure prison would be otherwise jeopardized); W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 419 (1985) (holding that age was a BFOQ for flight engineers since age related disabilities could prevent engineers from assisting the pilot).


204 See Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 353-54 (7th Cir. 1986).

205 See Johnson, supra note 28, at 919–20. EPCOT pays homage to eleven countries: Canada, the United Kingdom, France, Morocco, Japan, the United States, Italy, Germany, China, Norway, and Mexico. Id. at 921.
IP and Employee Selection

EPCOT visitors.\textsuperscript{206} Moreover, the EEOC guidelines list actors and actresses as an example of hiring that might fall under the authenticity exception.\textsuperscript{207} It’s unclear how broadly one may define actor or actress, however. One commentator has noted, is a Playboy Bunny at a Playboy Club in “a theatrical production that hires women to act in the roles of women[?]”\textsuperscript{208} Indeed, Bunnies were told that “[t]he Playboy Club is more like show business than the saloon business, and the Bunnies are stars. We have managers for directors, bartenders for stage managers, and porters and busboys for stagehands.”\textsuperscript{209} Another interesting application of authenticity involving practices in Hollywood is discussed later.

b. Privacy

Concerns for third parties’ privacy interests have been recognized as an acceptable BFOQ. Thus, in healthcare and other similar settings where patients or customers’ bodily privacy is involved, employers may choose their employees based on sex.\textsuperscript{210} Accordingly, hospitals may hire female nurses in labor and delivery rooms and in other personal care-giving capacities.\textsuperscript{211} It begs the question, however, whether these privacy interests of third parties are not essentially the same as the forbidden customer preference and stereotype motives.\textsuperscript{212} Moreover, if the essence of the business for Southwest Airlines is simply to fly passengers safely, shouldn’t the essence of the business

\textsuperscript{206} Ries Hillinger, \textit{Epcot’s International Pavilions Operate as True Global Village}, L.A. TIMES, Mar. 25, 1990, at E4. See also Gupta v. Walt Disney World Co., 256 Fed. Appx. 279, 280–81 (11th Cir. 2007) (describing the job of “Cultural Representative” as interacting with guests and sharing the culture, tradition, history, and language of the country that they are representing). In \textit{Gupta}, the Eleventh Circuit affirmed summary judgment for Disney, which had been accused of discriminating against the plaintiff for not being a native Norwegian. \textit{Id.} at 282.

\textsuperscript{207} 29 C.F.R. § 1604.2(a)(2) (1988).

\textsuperscript{208} McGinley, supra note 197, at 269.

\textsuperscript{209} \textit{RUSSELL MILLER, supra} note 3 at 78-79.

\textsuperscript{210} \textit{See Manley, supra} note 170 at 177.

\textsuperscript{211} \textit{See, e.g., Yuracko, supra} note 200, at156.

\textsuperscript{212} \textit{See, e.g., Manley, supra} note 170 at 186-87; Michael J. Frank, \textit{Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?}, 35 U.S.F.L. REV. 473, 490-91 (2001).
of a hospital delivery room be to deliver babies safely?\textsuperscript{213} Despite these inconsistencies, the privacy exception is justified if it is somehow materially different from mere customer preference. Perhaps it is grounded in the recognition of a constitutional right to privacy and the harm to one’s dignity that results from a violation. Some commentators have argued, however, that no such constitutional right to privacy exists, sufficient to override antidiscrimination law.\textsuperscript{214}

C. Business Necessity

Unlike the BFOQ defense, the business necessity doctrine is not statutorily based and applies to disparate impact claims. Like the BFOQ case law, however, the standards for the business necessity defense have been inconsistent.\textsuperscript{215} When an inference of discrimination arises from the discriminatory impact of a neutral-appearing employment policy, business necessity can be used by the employer to dismiss that inference.\textsuperscript{216} Unlike with a BFOQ defense, while the employer bears the burden of production in raising business necessity, the plaintiff ultimately carries the burden of persuasion in proving a disparate impact claim.\textsuperscript{217}

In general, it is easier for an employer to establish a business necessity defense than a BFOQ defense. The focus is on whether the employment practice is necessary to the employer’s business. Business necessity is satisfied if the employer’s practice has a “manifest relationship” to job performance.\textsuperscript{218} The Supreme Court has noted that the employment practice need not be “essential” or “indispensable” to the employer’s business.\textsuperscript{219} Business necessity is therefore not narrowly focused on job performance, but allows for

\textsuperscript{213} See Backus v. Baptist Medical Center, 510 F. Supp. 1191, 1196 (E.D. Ark. 1981) (permitting sex as a BFOQ for obstetrical nurse where testimony suggests that more than one half of patients would object to male nurses).


\textsuperscript{215} See THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 94 (2001).


\textsuperscript{218} Griggs, 401 U.S. at 432.

\textsuperscript{219} Wards Cove, 109 S.Ct at 2126.
broader consideration of issues that affect the employer’s interest, such as safety and cost. Unlike BFOQ it also applies to all types of discrimination, including race. Arguably, intellectual property concerns would also fit more readily here.

D. Apparent Exempt Sectors

In addition to the above defenses there are also other areas that seem to enjoy de facto exemptions for employment discrimination. In part, these may implicitly rely on some of the acceptable motives and exceptions discussed above or for policy reasons. Whatever the reason, they illustrate the fact that the antidiscrimination policies can be and are indeed outweighed by business, industry, and other policy concerns that may or may not be weightier than IP rights.

1. Hollywood

While employers may not post ads for employees that specify a particular race or gender, the rule does not seem to apply to the entertainment industry. More specifically, when casting actors and actresses for roles in films, the typical practice in Hollywood is to use a “breakdown” that could read “Male. Caucasian late 40’s.” This practice has contributed to a system where women and people of color receive fewer roles and compensation for those roles. “Actors of color live in a world where almost all roles are denied them because of their race . . . . [They] are silently and automatically excluded from

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220 See Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 (11th Cir. 1984).
222 See generally LARSON, supra note 139 at §23.04-.07(discussing the business necessity defense generally, and how an employment criteria or method that in practice creates a disparate impact on the basis of race can be defended with a business necessity argument).
223 Title VII prohibits an employer from “print[ing] or caus[ing] to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination based, based on race, color . . . [or] sex.” 42 U.S.C. § 2000e-3(b) (2005).
consideration for the majority of offered roles simply because they would be “inappropriate.”

Beyond race, even writers in the industry who are over age forty complain that television networks refuse to hire them because advertisers want writers who can communicate “youthful material.” Yet to date, this Hollywood practice appears to go unchallenged, as there have been no published Title VII discrimination cases filed by actors. Even if a claim were filed, it is likely that a defendant would use the BFOQ, authenticity, and the First Amendment as defenses to justify its casting decisions. Indeed, even the EEOC guidelines recognize (without explanation or elaboration) that sex can a BFOQ for an actor or actress “for the purpose of authenticity or genuineness.” Yet, when one views movie studios as businesses whose primary concern in casting is to ensure high gross receipts for films, it is difficult to see why they are not or should not be in relatively the same position as any other business that wants to select its employees in a way that would maximize its revenues. Instead, however, they are given a certain “artistic freedom of choice” that other businesses do not enjoy (for better or worse).

2. Churches

Akin to an extension of the authenticity defense, a catholic church cannot be sued for hiring only men to be priests. This is because religious organizations have an express statutory exemption in section 702 of the Civil Rights Act of 1964 which protects religious organizations from religious discrimination suits. Courts have created an even broader exemption, however, that essentially bars employees from suing religious organizations for employment discrimination – the ministerial exception.

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226 Sheppard, supra note 225, at 271 (internal citations omitted).
228 A recent search as of August 6, 2012 revealed no published cases involving claims relevant to this article. See also Robinson, supra note 224, at 2 (discussing a hypothetical claim of race discrimination in casting due to a lack of actual published cases and noting why cases have not been filed).
229 See Robinson, supra note 224, at 40-45.
230 29 C.F.R. § 1604.2(a)(2).
231 See, e.g., Robinson, supra note 224, at 8.
232 Sheppard, supra note 225, at 269-70.
234 See, e.g., Leslie C. Griffin, Twenty Years After Employment
The ministerial exception has been interpreted broadly to cover not only ordained ministers, but church secretaries, catholic school principals, church music teachers and choir directors. Furthermore, it extends beyond churches to such workplaces as “religious schools, universities, hospitals, and retirement homes.” This judicially created exception, as well as the statutory exemption, is grounded in the First Amendment religion clauses. The Supreme Court has recently recognized that this constitutional grounding for the ministerial exception outweighs the societal interest in enforcing employment discrimination laws. Thus, businesses with religious affiliation benefit from a kind of immunity from employment discrimination that is far broader than the IP Defense introduced in this Article.

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235 Division v. Smith: Assessing the Twentieth Century’s Landmark Case on the Free Exercise of Religion and How it Changed History, 32 CARDOZO L. REV. 1831, 1844 (2011) (arguing that the ministerial exemption is harmful to women); Mark E. Chopko and Marissa Parker, Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Taylor, 10 First Amend. L. Rev. 233 (2012) (supporting the ministerial exception).

236 Id. at 1977.

237 Id. at 710.

238 Id. at 710.

If IP rights are powerful enough to allow a company control over competitors and consumers, it makes sense that it should permit control over a company’s own employees and image. Already, IP regulates employee behavior and conduct (such as in protecting trade secrets, and enforcing non-competition agreements). Thus, in some ways the IP Defense is essentially the same idea in that it serves as a legitimate business reason for selecting employees. It is not intended to provide *carte blanche* to discriminate as it is of course, limited by Title VII. Yet Title VII, as the Supreme Court has recognized, is about balancing employee rights with employer prerogatives. The fact that the BFOQ and business necessity defenses exist reflect the congressional intent that employers retain flexibility in making hiring decisions that affect the core of their business. Therefore, just as IP rights can sometimes trump employment-at-will principles as well as constitutional protections such as the First Amendment, they should also be entitled to consideration in the employment discrimination framework.

At its simplest, the IP Defense permits an employer to use IP rights as a legitimate business reason supporting its employee selection decision. The IP Defense does not alter the fundamental tenets of employment discrimination law, nor does it swing the odds of winning away from plaintiffs in any significant way. Plaintiffs in employment discrimination cases already face a much lower chance

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239 See, e.g., Elizabeth A. Rowe, *Patents, Genetically Modified Foods, and IP Overreaching*, 64 SMU L. Rev. 859, 871-76 (2011) (patent license agreements prohibit farmers from saving or reselling seeds that they have purchased); Elizabeth A. Rowe, *Introducing a Takedown For Trade Secrets on the Internet*, 5 Wisconsin L. Rev. 1042, 1052 (2007) (copyright holders can exercise a form of censorship by issuing takedown notices); James B. Kobak, Jr., *Intellectual Property, Competition Law and Hidden Choices Between Original and Sequential Innovation*, 3 VA. J.L. & TECH. 6, 18 (1998) (intellectual property rights can be used to control access by competitors).


241 Id. at 242-43 (“[T]he existence of the BFOQ exception shows Congress’s unwillingness to require employers to change the very nature of their operations in response to the statute.”

242 See, e.g., *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S.Ct. 2971, 2983(1987) (noting that “The mere fact that the SFAA claims an expressive, as opposed to a purely commercial, purpose does not give it a First Amendment right . . . [t]he [trademark owner’s] right to prohibit use of the word . . . is at the core of its legitimate property right.”
of success relative to defendant-employers, and more generally to other kinds of plaintiffs.\textsuperscript{243} Indeed, favoring the application of antidiscrimination policies, the IP Defense could benefit plaintiffs to the extent that it adds value to considerations of pretext, and greater transparency in the litigation process. As one court has noted, “subjective criteria ‘are particularly easy for an employer to invent’” when trying to defeat a plaintiff’s discrimination claim,\textsuperscript{244} and as such the IP Defense would offer more objectivity and greater assurance that the employer’s proffered reason for its hiring decision is legitimate and not a pretext.

Moreover, the IP Defense does not function as a grant of immunity. Rather it requires balancing, on a case by case basis, the IP rights at stake versus the societal interest in protecting antidiscrimination policies, through the existing framework of Title VII. As described below, it embodies several limiting principles that place the burden on the defendant-employer to establish, among other things, that there is a legitimate and strong nexus between the propounded IP right and the employee selection decision.

A. \textit{How the IP Defense Fits in Employment Discrimination}

As envisioned here, the IP Defense is flexible in fitting within the existing employment discrimination framework. It is not meant to be a stand-alone affirmative defense (although it potentially could be conceived that way) but can be integrated into rebutting a \textit{prima facie} case, asserting a business necessity defense, or asserting a BFOQ affirmative defense. Thus, under whichever theory a Title VII claim proceeds, the IP Defense could play a role.\textsuperscript{245} In the case of unintentional discrimination, the IP Defense would be used to bolster the employer’s business necessity argument, rebutting the inference that its decision was discriminatory. Moreover, the defense could also be used by the employer to support its position that its articulated motivations were not pretextual.

If, however, the claim proceeds under a disparate treatment theory, the employer could use the IP Defense in two ways. First, it

\textsuperscript{243} See Clermont & Schwab, \textit{supra} note 10, at 127.

\textsuperscript{244} Thomas v. Denny’s, Inc., 111 F.3d 1506, 1510 (10th Cir. 1997) (internal citations omitted).

\textsuperscript{245} It is probably more likely that applicable cases would proceed under a disparate impact theory, because many employers would not admit to discriminating in their employee selection (and would have written job descriptions and searches in such a way that they do not explicitly exclude a protected class).
could be used to challenge the plaintiff’s *prima facie* case that she was qualified for the job in the first place. If an employer produces a job description that is tied to its IP, and the plaintiff does not meet that description, then she is unlikely to establish that she was indeed *qualified* for the position, a necessary element of the *prima facie* case.\textsuperscript{246} Courts respect an employer’s judgment in setting out the objective qualifications for a position as a business decision, one which is granted great deference.\textsuperscript{247} As one court noted, ”[t]he Court does not sit as a super-personnel department that reexamines an entity’s business decision.”\textsuperscript{248} As such, it is not up to a jury or judge to determine whether such qualification was reasonable.\textsuperscript{249} Thus, the IP defense would serve to show that the plaintiff was not qualified, while also serving as the articulated legitimate reason for the employer’s decision.\textsuperscript{250}

Second, the IP defense could also be used as part of the BFOQ affirmative defense. The employment law jurisprudence does not provide a specific meaning for the “essence of the business.”\textsuperscript{251} It appears to make a difference how broadly a court characterizes a company’s business purpose. For instance, if a court agrees that the purpose of a Playboy Club is to sell sexual titillation, then it may discriminate on the basis of sex by hiring attractive women.\textsuperscript{252} If, however, it characterizes it more broadly as a place that serves food and drink (like Hooters)\textsuperscript{253} then it may not make those very same choices.\textsuperscript{254}

\textsuperscript{246} See, e.g., Schaffner v. Glencoe Park Dist., 256 F.3d 616, 620 (7th Cir. 2001).
\textsuperscript{247} Id. at 621; see also Kephart v. Inst. Of Gas Tech., 630 F.2d 1217, 1223 (7th Cir. 1980); Jackson v. Univ. of New Haven, 228 F. Supp. 2d 156, 161 (D. Conn. 2002).
\textsuperscript{248} Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).
\textsuperscript{249} See Thornley v. Penton Pub., Inc., 104 F.3d 26, 29 (2d Cir. 1997).
\textsuperscript{250} See Dale v. Chicago Tribune Co., 797 F.2d at 464.
\textsuperscript{251} See, e.g., Yuracko, *supra* note 200, at 160.
\textsuperscript{252} See Avery and Crain, *supra* note 8, at 44.
\textsuperscript{253} Hooters cannot prevent a competitor from using a black tank top and black running shorts no more than a steak restaurant can claim servers who wear tuxedos. *Id.* at 1258-59.
\textsuperscript{254} See Patricia A. Casey, *Does Refusing to Hire Men as Food Servers Violate the Civil Rights Act? No: A Business has a Right to Choose its Own
The IP Defense could also serve as a limiting principle for the BFOQ “essence.” Some courts have noted that it would be self-serving to allow companies to identify their essence.\(^{255}\) Those courts may find it more persuasive for a company to identify its intellectual property and establish objective evidence of such rights. Moreover, courts have been inconsistent in the kinds of evidence they require for BFOQ defenses.\(^{256}\) The IP Defense could therefore enable greater precision in that only companies that have satisfactory proof of intellectual property rights will have a chance of a favorable outcome on liability using this defense.

Even those who favor expanding antidiscrimination laws to protect other areas, such as appearance, recognize that it could be difficult to set particular standards for courts and employers to judge appearance.\(^{257}\) The IP Defense may indeed be a step toward better framing such protection, because to the extent appearance is linked to a company’s IP, it will be tied to a legitimate business reason. Thus, in cases where retailers, like Abercrombie & Fitch, have requirements on what clothes employees are permitted to wear to work, and such requirements are alleged to have a disparate impact on a certain class, the existence (or lack thereof) of IP to support that requirement could make the decision easier for a court and easier for a plaintiff.\(^{258}\)

**B. Evidentiary Principles and Considerations**

Several principles guiding the application of the IP Defense should also help to address concerns about its use in the litigation process. These are derived from substantive considerations in the employment discrimination laws to help ensure consistency with the spirit and letter of Title VII case law discussed earlier. On evidentiary matters related to the IP Defense, the employer would bear the burden of proof. Depending on how the IP Defense is used in the case, the burden could be one of production (as through the *prima facie* case) and in others, a burden of persuasion (e.g. the BFOQ defense). This

\(^{255}\) See Yuracko, *supra* note 200 (discussing the ad hoc nature of defining a business’ essence in a BFOQ defense).

\(^{256}\) See Manley, *supra* note 170, at 188-89.


\(^{258}\) See Zakrzewski, *supra* note 257, at 200458.
would affect the timing of when the evidence is introduced and also the weight to be attached. Some of the key considerations are discussed below.

1. Proof of IP

First, proof of the IP right would be required. This could be demonstrated through a government issued certificate if the IP is registered, or through proof of a valid common law claim. This would go toward establishing, among other things, that the reason for the decision was not pretextual and that the IP is legitimate. It would offer objective pre-existing proof of the IP which guided the employment decision. This first step is a determinative factor for the IP Defense. The employer’s ownership of valid IP rights is a prerequisite for application of the IP Defense.

If a court is satisfied that the employer has valid IP rights then this prong is met and the other factors should be considered. An employer’s status as holder of IP rights does not by itself provide immunity against an employment discrimination claim (unlike the ministerial exception, for instance). The court still needs to weigh and balance the other considerations to determine whether they meet the existing rigors of the Title VII framework. If the ultimate finding is positive for the employer then it is not liable.

If the court finds that the defendant has not established valid IP rights, then the IP Defense is not applicable. However, the employer may continue to pursue an applicable defense under the currently existing employment discrimination framework. This could mean that even if the proffered IP is not protected, for example, the existing employment law generally allows employers to regulate its employees grooming and appearance. This could result in a win for the defendant under such defenses and exceptions as appearance, authenticity, or business necessity. Thus, in those circumstances the IP Defense would have had no effect on the outcome. Were the defense required then failing the first prong would have been fatal to the defendant. However, it is not envisioned that it will be applied in

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259 Another possible challenge is determining how, as a matter of procedure, a court would make this determination as part of the employment discrimination case. Perhaps a separate hearing be required on the IP claim, especially where there is no registered certificate.


261 See supra notes 126-133 and accompanying text.
a compulsory manner.

Where official registration of the IP has not been issued (such as an unregistered trademark) one possible challenge for a court would be determining whether the defendant has a valid right. In the area of trade dress, for instance, there are many areas that remain unclear or where the question of protection is a close call. When it comes to marketing, for example, the cases suggest that general marketing themes may not be protected. “The aura about a product, the cachet that ownership or display of it creates, and the kind of appeal it has to certain consumers do not dress a good in trade. Rather, those intangible “things” emanate from the good, its dress, and the marketing campaign that promotes the dressed good.”262 It would therefore be important that an employer be clear about that which it seeks to protect, particularly when it involves a combination, and identify it with specificity rather than in broad or general terms.263

The court would ultimately decide whether a common law or other protectable IP right exists.

2. Relationship Between IP and Business Practice

The defendant should also demonstrate the relationship between its IP and the business practice that resulted in the hiring selection decision. In effect, this would be one way to satisfy the court that the IP is integral to the operation of the business, rather than devised for the purposes of the litigation. Simply because an employer has IP protection in some area of its business does not mean that it is related to the employee selection decision. While it is not necessary that the look of the employee be protected, if, for instance, the uniform (like the Playboy Bunny costume) is trademarked, then this would establish the necessary nexus for selecting the right employee to wear the uniform. It would serve as one way to prove the relationship between the IP and the essence of the business or the business purpose. The employer may also offer evidence of a business plan or other corroboration that the IP-related business practice has been central to the business mission of the enterprise.

3. Relationship Between IP and Job Description

The defendant should also confirm that the job description or qualification is tied to the proffered IP. This is a further refinement of the second consideration above. It goes to establish that the IP is directly related to an employee’s qualification for the job. This is especially helpful in challenging a plaintiff’s prima facie case that she was qualified for a job in the first place. If an employer puts forth evidence of a job description that is tied to its IP, and the plaintiff does not meet that description, she is unlikely to establish that she was indeed qualified for the position, a necessary element of the prima facie case. Courts respect, as a business decision, an employer’s judgment in setting out the objective qualifications for a position, one which is granted great deference. As such, it is not up to a jury or judge to determine whether the articulated qualification was reasonable. Accordingly, the IP Defense would serve to show that the plaintiff was not qualified, while also serving as the articulated legitimate reason for the employer’s decision.

4. Relationship Between IP and Business Success

Finally, the employer should demonstrate a direct economic or financial correlation between the IP and its business success. This will help to demonstrate in quantitative terms the significance of the IP to the enterprise. One of the reasons why IP has come to play such an important role in today’s businesses is because of the financial benefits associated with IP rights. Both directly and indirectly, the economic value that IP contributes to companies is tied to the bottom line. Thus, the fight to acquire and protect IP is about revenues, profitability and in some instances, survival. Because of the important antidiscrimination policies at stake, however, it is desirable that the mere presence of IP does not necessarily make the defense successful.

264 See, e.g., Schaffner v. Glencoe Park Dist., 256 F.3d 616, 620 (7th Cir. 2001).
265 Id. at 621; see also Kephart v. Inst. of Gas Tech., 630 F.2d 1217, 1223 (7th Cir. 1980); Jackson v. Univ. of New Haven, 228 F. Supp. 2d 156, 161 (D. Conn. 2002).
266 See Thornley v. Penton Pub., Inc., 104 F.3d 26, 29 (2d Cir. 1997). If the employer’s criteria is subjective, rather than objectively stated, then such reasons are considered when it presents evidence that its legitimate reasons were not pretextual, rather than in the prima facie case. See Thomas, 111 F.3d at 1510.
267 See Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).
Rather, the IP ought to be at the core of the company’s economic success. While the more likely measure of the economic effect may be in financial terms (such as revenues or profits), this should not be an exclusive method. Depending on the circumstances (such as with more newly formed companies), other economic measures such as brand recognition or market share may also be useful indicators.

Departing from current employment discrimination jurisprudence, consideration of the economic effect on the company is an important consideration in the IP Defense. The employment cases have not typically given much weight to the financial consequences associated with employee selection. Thus, in assessing whether a certain practice is necessary or essential to a business, its financial effect on the company’s profitability or financial success has been disregarded. 268 Recall that the Wilson court did not give any weight to the consideration of the effect on Southwest’s profitability. 269 This approach is inconsistent with the economic realities of today’s business environment and with the way in which the law often regards economic interest.

Courts have generally recognized and protected the economic interest of a corporation, where certain conduct affects its ability to do business, resulting in financial harm. 270 This is true, for instance, in the area of libel. 271 Even the business necessity defense allows for consideration of cost. 272 Corporations not only should, but must, prioritize the profitability and financial stability of their businesses. It is a bedrock principle in corporate law that corporations have a duty to their shareholders, and that duty includes making money. 273 Whether articulated in such terms as “fiduciary duty,” “shareholder value maximization,” or “shareholder primacy,” it is difficult to refute

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268 See, e.g., Wilson, 517 F. Supp. at 304.
272 See Brodin, supra note 221 at 334.
the importance of these goals and obligations for businesses.\textsuperscript{274} Accordingly, it does not seem reasonable, especially in today’s economic conditions and climate of business competitiveness for courts to discount or disregard these financial concerns in the employment discrimination context. While the fear of loss profits should not justify or excuse illegal action, these financial realities deserve consideration within the overall picture of understanding a company’s essence.

C. IP Compares Favorably to Existing Exceptions

As a normative matter, IP compares favorably to the wide variety of defenses and exceptions that already exist to insulate employee selection decisions. For instance, under the ministerial exception the First Amendment religion clauses push aside the antidiscrimination laws. IP outweighs First Amendment concerns (sometimes).\textsuperscript{275} Accordingly, IP should at least enter into the balance with discrimination laws. If religious workplaces have the authority to decide who best will fulfill their mission, why shouldn’t other secular businesses that are IP owners have a similar right? This is not to suggest that employment discrimination laws should be replaced, reduced or left to more efficient market forces.\textsuperscript{276} Rather, it seems fair and reasonable to grant IP rights sufficient status as a legitimate business reason upon which to base certain employee related decisions.

Furthermore, with the privacy exception (which some argue has dubious constitutional grounding), the courts tend to bend their interpretation of the essence of the business test, suggesting that

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\textsuperscript{274} See, e.g., Newby v. Enron Corp., 188 F. Supp. 2d 684, 704 (S.D. Tex. 2002)(“Directors and officers owe a fiduciary obligation to shareholders because property has been entrusted to the corporate fiduciaries to be managed for the shareholders’ benefit); Anant k. Sundaram & Andrew C. Inkpen, The Corporate Objective Revisited, ORG. SCIENCE, May/June 2004, at 350 (“[T]he logic of shareholder value maximization is accepted as being so obvious that textbooks just assert it, rather than argue for it.”)

\textsuperscript{275} See, e.g., Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 555-60 (1985) (noting that the First Amendment does not protect speech that infringes copyright); DVD Copy Control Ass’n, Inc. v. Bunner, 75 P.3d 1, 14 (Cal. 2003) (weighing property interest in trade secrets more heavily than First Amendment concerns).

\textsuperscript{276} See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 159 (1992).
perhaps discrimination is measured on a malleable scale.\textsuperscript{277} Where the right (like privacy) or authenticity (Hollywood) is strong enough, then the essence test is interpreted in a manner that defines the practice outside of the employment discrimination prohibitions. Accordingly, IP rights should be weighted at least as heavily as privacy on a scale that balances antidiscrimination policies. Moreover, IP rights, in particular trademark rights, require authenticity and consistency. Otherwise, trademark owners could face losing their rights. Thus, to the extent the authenticity argument supports the employment practices in Hollywood; it should also support or be placed in an equivalent position with the IP Defense.

It is widely accepted that employers are generally permitted to regulate the appearance of their employees. In fact, some employers would probably already argue that appearance is a necessary qualification for the job. As one author has noted, “[t]he Clift’s gorgeous new staff and designer uniforms were as important to its image as its remodeled guest rooms and designer lobby. The Ritz-Carlton’s customers expect elegance and refinement, not the working-class flash of big hair and press-on nails . . .”\textsuperscript{278} It has also been recognized that employers have a legitimate interest in protecting the relationships between their employees and customers.\textsuperscript{279} “The employee in essence becomes the ‘face’ of the employer.”\textsuperscript{280} Accordingly, IP should be (and already is) a legitimate justification for regulating employees, hiring employees, and deciding which prospective applicants are qualified to become employees.

Another illustration of how IP already influences business decisions is in franchising. Franchisors, such as McDonald’s, allow franchisees to make use of their “intellectual property and brand identity, marketing experience, and operational methods”\textsuperscript{281} in exchange for a licensing fee. Hooters of America, for instance, currently operates or franchises 430 locations in twenty-seven countries.\textsuperscript{282} However, franchisors (and all those who otherwise license their trademarks) are required to control the use of their marks and to ensure the consistency of use, in order to avoid loss of the

\textsuperscript{277} See privacy discussion in Part III.B.2.b supra.
\textsuperscript{278} FORD, supra note 172, at 143.
\textsuperscript{280} Id. at 645.
\textsuperscript{281} 62B AM. JUR. 2D Private Franchise Contracts § 4 (2012).
\textsuperscript{282} Hooters.com, supra note 77. Hooters of America, and its trademark rights, was purchased in 2011 by a consortium led by Chanticleer Holdings. Id.
IP and Employee Selection

Thus, businesses have an obligation to ensure that their brand image, to the extent it is protected by trademark rights, is accurate and consistent, even if it implicates regulation of their employees. Indeed, an interesting case involving a well-known franchise, Jazzercize, is worth noting. A few years ago a 240-pound aerobics instructor was denied the opportunity to be a Jazzercise franchisee because she did not have the “fit appearance” that was consistent with the brand’s image. The franchisor argued that an overweight aerobics instructor did not fit the appropriate image for a company that sold fitness.

There may be some concern that the IP Defense might encourage employers to make discriminatory decisions. While this would certainly not be a desirable policy outcome, all things considered, it is unlikely to be the case. If there was evidence that the already existing defenses and exceptions to employment discrimination have encouraged employers’ discriminatory practices, then perhaps that may be a pressing concern. In the absence of such evidence, however, there is nothing about the nature of IP rights that would make them more likely to be tied to or support discriminatory choices. To the contrary, the kinds of IP rights that may implicate employee selection are more likely to be driven by decisions about company values, vision, and financial goals and strategies. IP has become a critical and significant part of American businesses, innovation, and the economy. Intellectual property, including trademarks, comprises the majority of most companies’ intangible assets. These intellectual property rights serve as “market differentiators” for companies, enhancing their economic value and appeal to consumers. To the extent their objectives clash with societal norms and expectations, then the marketplace will serve as a further safeguard to the legal protections under Title VII.

The Playboy Clubs are a good example. There is now one remaining club in Las Vegas, which opened in 2006. Christie

283 See Sally M. Abel, Trademark Licensing, 960 PLI/Pat 89, 97 (2009).
285 A lawsuit ensued and the case settled. See Rhode, supra note 257 at 1063.
286 Id.
288 Pauline O’Connor, Playboy Club: The Sequel, N.Y. Times, Oct. 15,
Hefner once explained, “The clubs made a lot of money for years. They were great image builders for us. When you think about it, they were the original theme restaurants.”\textsuperscript{289} She said the Clubs simply became outdated. Men want to go to bars where they might meet women. The Clubs started to lose their lure. “In a world where there were single bars in every city, women weren’t going to go to hang out in a Playboy Club,” she said.\textsuperscript{290} As businesses often learn, the one-gender-workforce is not a recipe for ultimate success, and image is not a static concept. While Hooters Restaurants might have fared well, the sexy-female strategy did not work for Hooters Airlines.\textsuperscript{291} Meanwhile, Southwest Airlines’ new low-cost-joke-cracking image and focus on customer service has kept it soaring.\textsuperscript{292} Even if it survives legal scrutiny, the Blond Island Resort may wish to take note.

VI. CONCLUSION

The realities of today’s competitive business climate make it necessary that companies distinguish themselves from competitors in order to attract customers and maximize revenues. In utilizing a branded service approach, a company’s IP may influence the selection of employees. When such decisions result in employment discrimination claims, this Article introduced a novel approach to bridge the gap between employment discrimination law and intellectual property law. The proposed IP Defense has the flexibility to fit within the existing Title VII employment discrimination framework. While there remains much to refine about precisely how it may be implemented and accompanying implications, it is the right time to open the discussion.

\textsuperscript{289} Paul Farhi, Christie Hefner Is Reshaping and Reviving Her Father’s Adult Empire, THE WASH. POST, Aug. 3, 1997, at H1.
\textsuperscript{290} Id.
\textsuperscript{291} Hooters Air launched in 2003. It included two Hooters girls on every flight (in addition to a regular flight crew). Hooters Air started off as a small, regional carrier based out of Myrtle Beach, S.C. At its height, the airline flew to 15 destinations, including Las Vegas and the Bahamas. Operating at a heavy loss, the airline closed in 2006. See Steven Lott, Hooters Air to Drop Scheduled Service, AVIATION DAILY, Apr. 3, 2006, at 6.