

INTELLECTUAL PROPERTY AND EMPLOYEE SELECTION

*Elizabeth A. Rowe**

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

* Feldman Gale Term Professor in Intellectual Property, UF Research Foundation Professor of Law, and Director, Program in Intellectual Property Law, University of Florida Levin College of Law. Thank you to Mary Jane Angelo, Jacqueline Lipton, Xuan-Thao Nguyen, Roger Perlstadt, and Katheryn Russell-Brown for comments or conversations about ideas expressed in earlier versions of this work. I appreciate the feedback from participants at the 2011 Intellectual Property Scholars Conference held at DePaul University College of Law, a faculty colloquium at Case Western University Reserve Law School, and an early work discussion at the University of Florida Levin College of Law. I am very grateful to Robyn Shelton for excellent research assistance at the inception of this project and to Matthew Morrow and Andrew Simler who later joined the effort. Finally, thank you to the University of Florida Levin College of Law for its research support.

1. *Aromi v. Playboy Club, Inc.*, No. CS-32986-74, slip op. at 6 (N.Y. State Div. Human Rights Aug. 1, 1985) (quoting *Margarita St. Cross v. Playboy Club, Inc.*, No. CSF-22618-70 (N.Y. State Human Rights App. B. Dec. 17, 1971)), available at <http://njlegallib.rutgers.edu/misc/aromi.pdf>.

2. *Id.*

3. See RUSSELL MILLER, *BUNNY: THE REAL STORY OF PLAYBOY 80* (1984).

not allowed to date customers or 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 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 integrating their image into the service that they provide. This has come to be known as "branded service."⁸ 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 women over a certain age (who no longer meet the appropriate proportions) will 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 antidiscrimination laws, to what extent should IP law serve as a defense for the company's employee selection? While the role of IP in employment generally is not new,⁹ no scholar has previously explored this aspect of the intersection: the role of IP 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 this Article is to introduce the idea that there could be a place for IP in employment discrimination jurisprudence. The proposed mechanism for integrating these two areas is through

4. *Id.* at 80–81.

5. *See, e.g.*, U.S. Patent No. 762,884 (filed June 24, 1963); *The Bunny Costume*, SMITHSONIAN INST., <http://historywired.si.edu/detail.cfm?ID=126> (last visited Nov. 8, 2012).

6. PLAYBOY ENTERPRISES INTERNATIONAL, INC., Registration No. 77,033,482.

7. *Aromi*, No. CS-32986-74, slip op. at 5–7.

8. Dianne Avery & Marion Crain, *Branded: Corporate Image, Sexual Stereotyping, and the New Face of Capitalism*, 14 DUKE J. GENDER L. & POL'Y 13, 19 (2007).

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

a flexible “IP Defense” that 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 plaintiff-employees in employment discrimination cases already face a much lower chance of success relative to defendant-employers, and more generally to other kinds of plaintiffs.¹⁰ Accordingly, effective 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 I 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 II reviews the relevant employment law principles, with a focus on

10. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009); see also Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 367–68 (2008).

11. *Thomas v. Denny’s, Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997) (internal quotation marks omitted).

Title VII claims. Part III introduces the IP Defense and explores why it makes sense to integrate IP into the employment discrimination framework. Finally, the Article concludes that the time has come to bridge this gap between employment discrimination law and IP.

I. 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 \$182 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 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 IP 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,

12. *BrandZ Top 100 Most Valuable Global Brands 2012*, BRANDZ, http://www.wpp.com/NR/rdonlyres/4B44C834-AEA8-4951-871A-A5B937EBFD3E/0/brandz_2012_top_100.pdf (last visited Nov. 13, 2012).

13. See Sonia K. Katyal, *Stealth Marketing and Antibranding: The Love that Dare Not Speak Its Name*, 58 BUFF. L. REV. 795, 801 (2010).

14. Kirk Martensen, *How Much for the Brand License?*, GOLDMARKS (Nov. 2003), http://www.goldmarks.net/papre_brand_license.shtml.

15. See Jerre B. Swann, *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943, 954–57 (2006).

16. Avery & Crain, *supra* note 8, at 18–19.

17. See JANELLE BARLOW & PAUL STEWART, *BRANDED CUSTOMER SERVICE: THE NEW COMPETITIVE EDGE* 23 (2006).

18. See *id.*

19. A trademark is statutorily defined as “any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others.” 15 U.S.C. § 1127 (2006).

however, business experts have noted that consistency is also required across the many ways in which customers encounter a company's service, particularly in the human interactions with employees.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 1955.²¹ 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.²² Early employee rules focused on the extremes—prohibiting excessive makeup and jewelry, extravagant hairstyles, and unkempt looks.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.²⁴ The appearance code is testimony to Walt Disney's micromanaging approach to his product.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.²⁶

Efforts to create the Disney experience are legendary. The 62,000 workers²⁷ 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."²⁸ They wear "costumes," not uniforms.²⁹ Those who interact directly with guests work "onstage," while dishwashers, kitchen staff, and

20. See BARLOW & STEWART, *supra* note 17, at 21–23.

21. Avery & Crain, *supra* note 8, at 27.

22. *Id.*

23. *Id.*

24. *Id.*

25. Mark Albright, *PR and Pixie Dust, Too*, ST. PETERSBURG TIMES (Florida), Oct. 2, 2011, at D1 (describing Walt Disney as "the kindest man and the most demanding micromanager" who "rarely handed out praise").

26. *See id.*

27. *Id.*

28. Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 919–20 (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.* at 919.

others are “backstage” employees.³⁰ All are responsible for creating “Disney magic”³¹ for the company’s 180,000³² paying guests daily.

Every detail of an employee’s 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.³³ Undergarments are required, but they must not be seen, and cannot be “patterned or colored” if the employee’s costume is light in color.³⁴ Prospective employees will not be hired if they have visible tattoos.³⁵ 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.³⁶ 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.³⁷ Men are permitted one ring on each hand, a “classic, business-style wristwatch,” cuff links, and a small tie tack if desired.³⁸

The clothing requirements for each gender are exhaustive, allowing no more than three inches of skin to be visible above a female’s knees³⁹ and limiting men to “traditionally acceptable” fabrics such as tweed, cotton, polyester, or silk.⁴⁰ Hair coloring is permissible if “natural-looking and well maintained.”⁴¹ Subtle highlights are allowed, but the “Disney Look does not permit extremes in dyeing, bleaching or coloring.”⁴² Disney only recently amended its policy to allow facial hair on male employees,⁴³ who

30. *Id.*

31. *Id.* at 948.

32. See Albright, *supra* note 25.

33. See *The Disney Look: General Guidelines*, DISNEY INT’L PROGRAMS, https://www.disneyinternationalprograms.com/seasonal/look_guidelines.html (last visited Nov. 7, 2012).

34. *Id.*

35. *Id.*

36. *Id.* One wonders how Disney would know about nonvisible body piercings.

37. *The Disney Look: All Female Cast Members*, DISNEY INT’L PROGRAMS, https://www.disneyinternationalprograms.com/seasonal/look_femalecast.html (last visited Nov. 8, 2012).

38. *The Disney Look: All Male Cast Members*, DISNEY INT’L PROGRAMS, https://www.disneyinternationalprograms.com/seasonal/look_malecast.html (last visited Nov. 8, 2012).

39. *The Disney Look: All Female Cast Members*, *supra* note 37.

40. *The Disney Look: All Male Cast Members*, *supra* note 38.

41. *Id.*

42. *Id.*

43. *Fashion Statements: The Disney Look*, NEWSWEEK, Feb. 6, 2012, at 14.

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.⁴⁴ 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.⁴⁵

The approach ensures uniformity and propagates the wholesome, family image that Walt Disney himself insisted upon from the company's earliest days.⁴⁶ 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 1970.⁴⁷ 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.⁴⁸ 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.⁴⁹ The result was the Love Airline.⁵⁰

The advertising agency found that Southwest's competitors projected a conservative image for their mostly male business flyers.⁵¹ The agency decided that Southwest could differentiate

44. See *The Disney Look: All Male Cast Members*, *supra* note 38.

45. *The Disney Look: General Guidelines*, *supra* note 33.

46. Avery & Crain, *supra* note 8, at 27.

47. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 293–94 (N.D. Tex. 1981) (explaining that the U.S. Supreme Court denied the incumbent airlines' petition for a writ of certiorari in December of 1970).

48. *Id.* at 294.

49. *Id.*

50. *Id.*

51. *Id.*

itself by enticing travelers with “feminine youth and vitality.”⁵² The airline thus adopted an express policy preferring female employees who go “through life with great flair and exuberance.”⁵³ The ideal Southwest employee was witty, charming, and exciting, yet efficient in undertaking “all her tasks with care and attention.”⁵⁴ Long legs didn’t hurt either.⁵⁵ Sex appeal became the cornerstone of the airline’s personality. Flight attendants wore hot pants and calf-hugging boots that laced up in the front.⁵⁶ 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?”⁵⁷ In one print advertisement under a headline that read “The Love Seat,” three comely attendants doted on a disheveled, balding businessman.⁵⁸ In others, bulging cartoon hearts were etched with the promise: “We’re Spreading Love All Over Texas.”⁵⁹

But it was about fun too. The airline encouraged its flight attendants to create an informal atmosphere on board.⁶⁰ They held who-has-the-biggest-hole-in-his-sock contests and encouraged passengers to see how many people could squeeze into the bathroom.⁶¹ On Halloween, the plane was Transylplania, and flight attendants would cajole male passengers to don fangs and smear on fake blood as Draculas.⁶² Southwest once took out a two-page newspaper advertisement to explain how its sexy flight attendants embodied the airline’s “Fun-LUVing Attitude”⁶³:

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

52. *Id.*

53. *Id.*

54. *Id.*

55. *60 Minutes: Herb and His Airline* (CBS television broadcast May 27, 1990), available at <http://www.cbsnews.com/video/watch/?id=7423170n> (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”).

56. *Wilson*, 517 F. Supp. at 295.

57. See *Southwest Airlines 1970’s Commercial 4*, YOUTUBE, <http://www.youtube.com/watch?v=2-g0yOFUIOQ> (last visited Jan. 16, 2013).

58. Brian Lusk, *Flashback Fridays: Early Southwest Print Advertisements*, BLOG SOUTHWEST (Jan. 14, 2011), <http://www.blogsouthwest.com/blog/flashback-fridays-early-southwest-print-advertisements>.

59. *Id.*

60. *Id.*

61. See *60 Minutes*, *supra* note 55 (interviewing three women who were among the first flight attendants hired by the airline).

62. *Id.*

63. See Lusk, *supra* note 58 (explaining that the advertisement was timed to run near the time of Southwest’s first flights in 1971).

real. It's like plastic flowers vs. real flowers. You can feel the difference. That's why in our hostess⁶⁴ 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.⁶⁵

Southwest became known both nationally and internationally by its "Love" persona, even trading on the New York Stock Exchange under the symbol "LUV."⁶⁶

The strategy paid off. By 1975, Southwest was the only heavy carrier flying out of Dallas.⁶⁷ By the early 1980s, Southwest had achieved "enormous success" in the Texas regional commuting market.⁶⁸ 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."⁶⁹ Yet that unique image did not hold up under legal scrutiny and became the basis for one of the seminal cases in employment discrimination law, as 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,"⁷⁰ and the company's chief executive officer handed out peanuts at 30,000 feet.⁷¹ 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.⁷² The airline did not serve meals, assign seats, or offer a first-class section.⁷³ 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."⁷⁴

64. When Southwest Airlines began flying in the 1970s, flight attendants were referred to as "hostesses."

65. Lusk, *supra* note 58.

66. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 294 (N.D. Tex. 1981).

67. *Id.*

68. *Id.* at 295.

69. *Id.*

70. *A Hunk of Burning Love*, ADWEEK, Oct. 8, 1990.

71. *See 60 Minutes*, *supra* note 55.

72. *Id.*

73. Associated Press, *Southwest Airlines Grows Up To Face Some Mature Questions*, CHI. TRIB., Feb. 18, 1986, at C6.

74. *60 Minutes*, *supra* note 55.

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 1983.⁷⁵ The men (who call themselves the “Hooters Six”⁷⁶) had a wings-sports-and-scantly-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.⁷⁷ She had to be fresh-faced, all-American, and shapely yet athletic.⁷⁸ Beautiful yet not unattainable. The men found her at a bikini contest on the beach.⁷⁹

More than 300,000 women have worn the distinctive uniform⁸⁰—orange shorts, panty hose, and a snug, white tank top with “HOOTERS” stretched across the chest.⁸¹ The color scheme and style have not changed since the uniform’s inception in the early 1980s. Nor has much changed about the restaurant either.⁸² 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.⁸³ Each table has its own roll of paper towels so patrons can sop up the wing sauce.⁸⁴

Hooters Girls must conform to the appearance regulations in the company handbook.⁸⁵ Only white bras are permitted.⁸⁶ The required pantyhose must be “suntan” in tone and changed

75. HOOVER’S IN-DEPTH CO. REPORTS, HOOTERS OF AMERICA (2011).

76. *Id.*

77. 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?*, WASH. POST MAG., July 28, 1996, at 8.

78. *Id.*

79. *Id.*

80. Hooters reports that it currently employs about seventeen thousand Hooters Girls. See *About Hooters*, HOOTERS, www.hooters.com/Company/About.aspx (last visited Jan. 16, 2013). 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 not prevent other restaurants from dressing their waitresses in other short-and-tank-top combinations. *Hi Ltd. P’ship v. Winghouse of Florida*, 347 F. Supp. 2d 1256, 1258–59 (M.D. Fla. 2004), *aff’d*, 451 F.3d 1300 (11th Cir. 2006)

81. *Hi Ltd. P’ship*, 347 F. Supp. 2d at 1258.

82. See Finkel, *supra* note 77.

83. HOOVER’S IN-DEPTH CO. REPORTS, *supra* note 75.

84. *Id.*

85. Finkel, *supra* note 77.

86. *Id.*

immediately if snagged during the work shift.⁸⁷ Shorts should fit comfortably but “never . . . so small that the buttocks show.”⁸⁸ The tank top cannot be baggy, and “[u]nder no circumstances should bra straps ever show.”⁸⁹ Hooters Girls are forbidden from having visible tattoos or body piercings.⁹⁰

Hooters makes no excuses for its unabashed love of the female form—sarcastically noting on its website that “[c]laims that Hooters exploits attractive women are as ridiculous as saying the NFL exploits men who are big and fast.”⁹¹ 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.”⁹² However, the ambience got Hooters in trouble in 1991, when the Equal Employment Opportunity Commission (“EEOC”) launched an investigation into the chain’s practice of hiring only women.⁹³ The case is discussed in the next Part.

D. Dallas Cowboys 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.⁹⁴ 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.⁹⁵ Embodying beauty, poise, and athleticism, the DCC handpick the women who will represent their brand every year during a grueling process that starts with roughly one thousand hopefuls and finishes with an elite team of thirty-six who wear the

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *About Hooters*, *supra* note 80.

92. Bill Maxwell, *A Meditation on the Magic of Hooters*, ST. PETERSBURG TIMES (Florida), Nov. 19, 1995, at 1D.

93. Chuck Hutchcraft, *Hooters Case Won't Get a Second Look: EEOC Chairman Cites Scarce Resources*, CHI. TRIB. (May 2, 1996), http://articles.chicagotribune.com/1996-05-02/business/9605020273_1_hooters-girls-hooters-restaurants-eeoc.

94. *See DCC History*, DALLAS COWBOYS CHEERLEADERS, <http://www.dallascowboyscheerleaders.com/dcc-history/> (last visited Jan. 18, 2013) (explaining that Dallas Cowboys general manager Tex Schramm had attempted to use attractive models instead of professional dancers, but three hours of exertion in the 100-degree heat “left them in worse shape after the game than the football players”).

95. *Id.*

iconic star-spangled, blue-and-white uniform.⁹⁶ The early DCC rules required promptness, no gum chewing on the field, and no fraternizing with the players.⁹⁷ Today, there is a lengthy conduct and appearance code.⁹⁸ Cheerleaders still cannot date Cowboys players, nor can they fraternize with coaches or team management.⁹⁹ “Cheerleaders receive training in etiquette, communications skills, media relations, and fan mail.”¹⁰⁰ The trademarked uniforms can be worn only when authorized by the DCC. When in uniform, the women are forbidden to drink, smoke, or “conduct themselves in any manner not becoming to the tradition of the DCC.”¹⁰¹

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.¹⁰² They do USO tours overseas, star in commercials, and make their own exercise DVDs.¹⁰³ Ever mindful of their ladylike image, the DCC 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 DCCs’ trademarked uniform.¹⁰⁴

96. *Id.* The intense competition to become a DCC has been the subject of a Country Music Television network reality series, *The Dallas Cowboys Cheerleaders: Making the Team*. The show warns:

This is not your mother’s beauty contest. Sure, each girl has to be attractive but, most important, they have to prove themselves in a range of categories that include: athleticism (specific requirements for everything from crunches to running the mile), dance (a range of performances, from freestyle to being able to interpret a tightly choreographed routines), football knowledge (yes, you have to prove you know the game via a variety of tests), personality (you are representing the Dallas Cowboys, the NFL, and a 50-year history of tradition) and overall style.

About Dallas Cowboys Cheerleaders: Making the Team, CMT, http://www.cmt.com/show/dallas_cowboys_cheerleaders/season_2/series.jhtml (last visited Jan. 13, 2013).

97. Joe Nick Patoski, *Two, Four, Six, Eight. Who Do We Appreciate? The Original Dallas Cowboy Cheerleaders*, TEX. MONTHLY, Sept. 2001, at 124, 157.

98. *DCC History*, *supra* note 94.

99. *Id.*

100. *Id.*

101. *Id.*

102. Patoski, *supra* note 97, at 157.

103. *Id.*

104. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 205 (2d Cir. 1979) (enjoining the release of “Debbie Does Dallas” for

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,¹⁰⁵ 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.¹⁰⁶ Or they can sail to the island on a yacht with blond women captains.¹⁰⁷ 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.¹⁰⁸

The company already uses blond women to promote products ranging from cola and pizza to computer software and pop music.¹⁰⁹ 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.¹¹⁰ 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 2011.¹¹¹ In joining the luxury vacation market, Olialia has hired Lithuanian architect Valerijus Starkovskis¹¹² to design a

including twelve minutes of footage that included a uniform resembling the outfit worn by the DCC).

105. Christina Boyle, *Lithuanian Company Olialia Wants to Operate Resort in Maldives Run Exclusively by Blonds*, N.Y. DAILY NEWS (Oct. 3, 2010, 4:00 AM), http://articles.nydailynews.com/2010-10-03/news/27077001_1_blonds-limo-and-bus-service-island.

106. *The 'Island of the Blonds' in Maldives to be Shaped like Mega High-Heeled Shoe*, MALDIVESTODAY.COM (Jan. 25, 2011), <http://www.maldivestoday.com/2011/01/25/the-%e2%80%98island-of-blondes%e2%80%99-in-maldives-to-be-shaped-like-mega-high-heeled-shoe/>.

107. See Boyle, *supra* note 105.

108. *Blonde-Only Fantasy Resort Planned for Maldives*, CBSNEWS.COM (Feb. 4, 2011, 8:46 AM), http://www.cbsnews.com/2100-202_162-7314171.html; *Blondes-Only Resort Planned for the Maldives: Lithuanian Company Envisions an 'Island of Blondes' but Critics Call Proposal Discriminatory*, MSNBC.COM (Oct. 5, 2010, 2:59 PM), <http://www.msnbc.msn.com/id/39521684/ns/travel-news/t/blondes-only-resort-planned-maldives/>.

109. Damien McGuinness, *Lithuanian Blonde Island Plan Raises Eyebrows*, BBC NEWS (Oct. 1, 2010, 9:50 PM), <http://www.bbc.co.uk/news/world-europe-11442920>.

110. *Id.*

111. *Id.*

112. Matt Garrick, *Peroxide Paradise Riles the Natives*, BALTIC TIMES, May 4, 2011, available at <http://www.baltictimes.com/news/articles/28611/>.

500-room resort, which has a tentative completion date of 2015.¹¹³ 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.¹¹⁴

Olialia officials do not apologize for the company's blond branding strategy, which has evoked sharp criticism from within Lithuania and the Maldives—an ethnically diverse chain of more than 1100 islands in the Indian Ocean.¹¹⁵ Critics deride the plans as demeaning to women, sexist, racist, and discriminatory.¹¹⁶ 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?"¹¹⁷ Nonetheless, under Maldivian law, at least fifty percent of the resort's staff must be locals.¹¹⁸ This could be a challenge as the native population is overwhelmingly nonwhite and nonblond.¹¹⁹ However, neither Olialia's general manager nor Maldivian tourism officials see that requirement as a stumbling block. They have suggested that nonblond women can wear wigs or, in the alternative, "work behind the scenes."¹²⁰ Yet as Lithuania is a member of the European Union, some question whether the project violates EU employment law by preferentially seeking blond women.¹²¹ Again, Olialia officials dismiss those concerns, asserting that the company welcomes applicants of all ethnic backgrounds, hair colors, and ages.¹²² Men are expected to comprise about thirty-five percent of the resort's workforce.¹²³

II. 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

113. Liudas Dapkus, *Blonde Island Resort in Maldives Planned by Lithuanian Firm*, HUFFINGTON POST (Feb. 3, 2011, 1:25 PM), http://www.huffingtonpost.com/2011/02/03/blonde-island-resort-in-m_n_818005.html.

114. *The 'Island of the Blonds' in Maldives to be Shaped like Mega High-Heeled Shoe*, *supra* note 106.

115. Dapkus, *supra* note 113.

116. 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." *Id.*

117. *Id.* (internal quotation marks omitted).

118. *Id.*

119. See Boyle, *supra* note 105.

120. Dapkus, *supra* note 113.

121. McGuinness, *supra* note 109.

122. *Id.*

123. See Dapkus, *supra* note 113.

recognized defense to an employment decision. It is therefore legally significant for companies to rely on their IP rights to defend business decisions, rather than a mere image or a brand.¹²⁴ That is because, among other reasons, intellectual property has been recognized as a form of property,¹²⁵ along with the attendant privileges of that label.¹²⁶ This sometimes means, for instance, that greater weight is given to IP concerns when balanced against other constitutional considerations such as the First Amendment.¹²⁷ Moreover, IP rights of employers can also outweigh fundamental rules and policies governing employee conduct. Thus, for instance, the enforcement of noncompetition agreements permits divergence from the employment-at-will doctrine by restricting employee mobility and competitive choices.¹²⁸

As the examples in Part I demonstrate, branded service is becoming a recommended way of doing business and differentiating between services 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.¹²⁹ As the previous examples illustrate, employers generally have the right to regulate the appearance of employees.¹³⁰ For instance, an employer can regulate grooming,¹³¹ hair length,¹³² weight,¹³³ sexual or physical attractiveness,¹³⁴ and

124. 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 (4th ed. 2012). A marketing tool must meet certain criteria in order to qualify for trademark protection. *Id.* § 3:3.

125. See, e.g., *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002) ("[A patent] is a property right."); *Krebs Chrysler-Plymouth, Inc. v. Valley Motors, Inc.*, 141 F.3d 490, 497–98 (3d Cir. 1998) (stating that "[t]rademarks are property" and, "[u]nder Pennsylvania law, '[t]he ownership of a trade-mark has, in general, been considered as a right of property.'" (internal citations omitted)).

126. See Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 108 (1990).

127. See generally Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425 (2009).

128. See generally PEGGIE R. SMITH ET AL., *PRINCIPLES OF EMPLOYMENT LAW* 145–48 (2009); Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 188–91 (2005).

129. See, e.g., Lucille M. Ponte & Jennifer L. Gillan, *Gender Performance Over Job Performance: Body Art Work Rules and the Continuing Subordination of the Feminine*, 14 DUKE J. GENDER L. & POL'Y 319, 322 (2007).

130. See, e.g., *Barker v. Taft Broad. Co.*, 549 F.2d 400, 401 (6th Cir. 1977).

131. See, e.g., *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1106 (9th Cir. 2006).

132. See, e.g., *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1386 (11th Cir. 1998).

the image of its employees.¹³⁵ Thus, Disney's and the Dallas Cowboys Cheerleaders' extensive regulation of every detail of their employees' appearance is permissible. Whether it is maintaining the "Disney Look" or the Dallas Cowboys 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.¹³⁶ The next Subpart 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.¹³⁷ 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.¹³⁸ 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 proof of discriminatory motive.¹³⁹ 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 qualified for the job.¹⁴⁰ Whether a person is qualified for a job is

133. See, e.g., *Marks v. Nat'l Commc'ns Ass'n*, 72 F. Supp. 2d 322, 330 (S.D.N.Y. 1999).

134. See, e.g., *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854 (9th Cir. 2000); *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123, 1131 (Cal. 2005).

135. See, e.g., *Wislocki-Goin v. Mears*, 831 F.2d 1374, 1376 (7th Cir. 1987).

136. See *Jespersen*, 444 F.3d at 1110 ("Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII."); see also EEOC Compl. Man. § 619.4(d) (BNA) (Aug. 2009) (permitting dress codes that are "equivalent for men and women with respect to the standard or burden that they impose"); Alexis Conway, *Leaving Employers in the Dark: What Constitutes a Lawful Appearance Standard After Jespersen v. Harrah's Operating Co.?*, 18 GEO. MASON U. C.R. L.J. 107, 107-08 (2007).

137. 42 U.S.C. § 2000e-2 (2006) ("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.")

138. See 29 U.S.C. § 623(a)(2), § 623(f) (2006).

139. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

140. See *id.* at 802.

based on the demands of the job, as specified by the employer.¹⁴¹ However, it is the plaintiff's burden to establish the qualifications of the job and prove that he was qualified.¹⁴² The burden then shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for its decision.¹⁴³ It is then up to the plaintiff to rebut the employer's reason and prove that it is pretextual.¹⁴⁴

Claims based on disparate impact, on the other hand, involve employment practices that are facially neutral but have a disproportionate effect on a protected group; this is unintentional discrimination.¹⁴⁵ 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."¹⁴⁶ 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.¹⁴⁷

The theory on which a discrimination case proceeds also affects the defense that 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 Article,¹⁴⁸ this Part will outline the two pathways that are relevant to the arguments in this Article. As is discussed below, the bona fide occupational qualification ("BFOQ") defense 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.¹⁴⁹ Ultimately, for the purposes of this Article, there is no significant difference in how IP would be used with either defense. Accordingly, they are both briefly discussed below.

141. See *Thornley v. Penton Pub., Inc.*, 104 F.3d 26, 29 (2d Cir. 1997).

142. 1 LEX K. LARSON, *LARSON ON EMPLOYMENT DISCRIMINATION* § 8.02[3] (2d ed. 2012).

143. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

144. See *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 764 (7th Cir. 2001).

145. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971).

146. 42 U.S.C. § 2000e-2(k)(1) (2006).

147. See 2 LARSON, *supra* note 142, § 21.03.

148. See generally 1 *id.* § 11.02 (discussing the BFOQ defense); 2 *id.* § 23.04–.07 (discussing the business necessity defense).

149. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 112 (2009).

B. Applying the BFOQ Defense

The BFOQ defense 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)¹⁵⁰ is a bona fide occupational qualification reasonably necessary to the normal operation of the business.¹⁵¹ 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.¹⁵²

The BFOQ is meant to be a narrow exception to intentional discrimination.¹⁵³ 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 those cases.¹⁵⁴ 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.¹⁵⁵

Courts analyzing BFOQ defenses generally apply a three-part test, the most significant of which is the "essence of the business" test.¹⁵⁶ 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.¹⁵⁷ 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."¹⁵⁸ 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 [would not] so

150. 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. See *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 654 (5th Cir. 1980) (involving an undercover investigator).

151. 42 U.S.C. § 2000e-2(e)(1) ("[I]t 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.").

152. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 248 (1989).

153. See 29 C.F.R. § 1604.2(a) (1988) [hereinafter EEOC Regulations].

154. See MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* 284-86 (1988).

155. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986); *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 297 (N.D. Tex. 1981).

156. 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.*

157. *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

158. *Id.* at 388.

seriously affect the operation of an airline as to jeopardize" that purpose.¹⁵⁹

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.¹⁶⁰ Supporting that conclusion was the court's determination that the primary task of the Bunny was sex appeal, not just serving cocktails.¹⁶¹ The Bunny was therefore reasonably necessary to the normal operations of Playboy Clubs.¹⁶²

1. *From Southwest Airlines to Hooters*

Ten years after *Diaz v. Pan American* was decided, Southwest Airlines's female-only policy was also challenged. In *Wilson v. Southwest Airlines*,¹⁶³ 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 enterprise.¹⁶⁴ In *Wilson*, a class of more than one hundred male job applicants challenged Southwest's female-only hiring policy for flight attendants as violating Title VII's prohibition against gender discrimination.¹⁶⁵ In its defense, Southwest claimed that being female was a BFOQ for its flight attendants.¹⁶⁶

The *Wilson* court explained that Southwest had to satisfy a two-part inquiry to qualify for a BFOQ defense: (1) does the particular job require only one gender? and (2) is that requirement reasonably necessary to the essence of the employer's business?¹⁶⁷ In claiming that it met the test, Southwest conceded that men were capable of performing the "mechanical functions" of a flight attendant.¹⁶⁸ Yet it argued that men could not fulfill the nonmechanical functions, such as attracting males who preferred female flight attendants and

159. *Id.*

160. *St. Cross v. Playboy Club*, No. CSF-22618-70, Appeal No. 773, at 7 (N.Y. State Human Rights App. B. 1971), available at <http://njlegallib.rutgers.edu/misc/aromi.pdf> (including a letter from the New York Division of Human Rights explaining that the original *St. Cross* opinion has been lost from the archives and the relevant text from *St. Cross*. Note that the pagination in the preceding citation corresponds to the page in the *Aromi* opinion which cites the *St. Cross* decision).

161. *Id.*

162. *Id.*

163. 517 F. Supp. 292 (N.D. Tex. 1981).

164. *Id.* at 303-04.

165. *Id.* at 293.

166. *Id.*

167. *Id.* at 299.

168. *Id.* at 300; see also *Hailes v. United Air Lines*, 464 F.2d 1006, 1008 n.2 (5th Cir. 1972) ("[F]emale sex is not a bona fide occupational qualification for the position of airline cabin attendant.").

preserving Southwest's unique feminized personality.¹⁶⁹ Thus, the airline contended that women were reasonably necessary to maintaining the love theme 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."¹⁷⁰ It argued that its image as the "love airline" made it unique, was important to its financial success, and justified its policy.¹⁷¹ The court rejected the arguments, finding irrelevant Southwest customers' preference for females as flight attendants and Southwest's financial concerns.¹⁷²

In rejecting Southwest's arguments, the court reaffirmed that customer preference alone cannot support a BFOQ defense.¹⁷³ The court explained that when based on sex appeal, a BFOQ is permitted only when the business's primary service is sex or vicarious sexual recreation, such as a topless bar or social escort service.¹⁷⁴ 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."¹⁷⁵

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.¹⁷⁶ The "stewardess" had to be "a nurse in the sky, a surrogate wife for

169. *Wilson*, 517 F. Supp. at 300.

170. *Id.* at 294, 300.

171. *Id.* at 300, 303.

172. *See id.* at 303-04.

173. *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.").

174. *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).

175. *Wilson*, 517 F. Supp. at 302.

176. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 149 (2008).

lonely business passengers, a fantasy sexpot ('coffee, tea, or me'), and a fashion model."¹⁷⁷

Along came the women's movement, and courts began to recognize these requirements as contrary to our antidiscrimination policies. As between corporate "image" and profitability on the one hand and the strong public policy of permitting equal opportunity and civil rights for men and women on the other, the balance justifiably tipped to the latter. Thus, *Wilson v. Southwest Airlines* 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.¹⁷⁸ 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.¹⁷⁹

Since the 1990s through today, there have been signs that the political 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.¹⁸⁰ In March 1996, a federal judge in the Northern District of Illinois certified the class of men.¹⁸¹ 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.¹⁸² The billboard loudly screamed: "Hooters GUYS? Washington Get a Grip."¹⁸³ 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.¹⁸⁴ Hooters claimed that patrons sent 500,000 complaining postcards—at the company's

177. *Id.*

178. See Avery & Crain, *supra* note 8, at 121.

179. Kathleen Barry, "Too Glamorous to be Considered Workers": Flight Attendants and Pink-Collar Activism in Mid-Twentieth Century America, 3 LAB.: STUD. WORKING-CLASS HIST. AM. 119, 135–36 (2006).

180. *About Hooters*, *supra* note 80.

181. *Latuga v. Hooters*, No. 93C7709, 1996 WL 164427, at *1 (N.D. Ill. Mar. 29, 1996).

182. Editorial, *Looks As If Washington Got A Grip*, S. FLA. SUN-SENTINEL, May 5, 1996, at G4.

183. *Id.*

184. Maxwell, *supra* note 92.

expense—to their representatives in Congress.¹⁸⁵ The most vocal critic within Congress was U.S. Representative Harris W. Fawell, an Illinois Republican and chairman of the House subcommittee on employer-employee relations.¹⁸⁶ Fawell publicly needled the EEOC, questioning why it was focusing on Hooters when the commission had a backlog of more than 100,000 cases.¹⁸⁷ In Fawell's opinion, the restaurant chain had a legitimate gender BFOQ defense for female food servers.¹⁸⁸

The EEOC announced in 1996 that it was closing its investigation, citing scarce resources but noting that “[d]enying any American a job simply because of his or her sex is a serious issue.”¹⁸⁹ 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 steadfastly retaining the right to keep its female-only Hooters Girls.¹⁹⁰ By then, the company had adopted a parlance hinting at an understanding of the BFOQ exception. Company spokesman Mike McNeil told *USA Today* that Hooters does not sell food; it sells sex appeal. “To have female sex appeal, you have to be female,” McNeil said.¹⁹¹

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.¹⁹² Exactly 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.

185. *About Hooters*, *supra* note 80.

186. *Hutchcraft*, *supra* note 93.

187. *Id.*

188. *Id.*

189. Associated Press, *Federal Agency Won't Get into Hooters Case, Says Issue Should Be Taken Seriously*, AKRON BEACON J., May 2, 1996, at A6.

190. Del Jones, *Hooters to Pay \$3.75 Million in Sex Suit*, USA TODAY, Oct. 1, 1997, at 1A.

191. *Id.*

192. *See, e.g.*, *Levin v. Delta Air Lines*, 730 F.2d 994, 1001 (5th Cir. 1984).

2. *Acceptable and Unacceptable Motives for BFOQ*

The employment-at-will doctrine¹⁹³ gives employers very wide latitude to regulate their employees and the workplace.¹⁹⁴ The exception to the bar against intentional discrimination (except as to race)¹⁹⁵ applies when employers in disparate treatment cases can establish that their selection criterion is a BFOQ reasonably necessary to the normal operation of the business.¹⁹⁶

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 defense.¹⁹⁷ 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.¹⁹⁸

Similarly, courts generally are not persuaded by BFOQ defenses based exclusively on customer preference. This argument can often be intertwined with stereotypes, as was illustrated 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."¹⁹⁹ Thus, Southwest Airlines's argument that passengers prefer its sexy female flight attendants was also not successful.²⁰⁰ 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

193. The employment-at-will doctrine provides an employer great discretion in hiring and firing employees for any reason. See generally SMITH ET AL., *supra* note 128, at 21.

194. See Avery & Crain, *supra* note 8, at 90.

195. 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. See *Miller v. Tex. State Bd. of Barber Exam'rs*, 615 F.2d 650, 652-53 (5th Cir. 1980) (involving an undercover investigator).

196. 42 U.S.C. § 2000e-2(e)(1) (2006) ("[I]t 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.").

197. *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 387 (5th Cir. 1971).

198. 29 C.F.R. § 1604.2(a)(1)(ii) (2012).

199. *Diaz*, 442 F.2d at 389.

200. *Wilson v. Sw. Airlines Co.*, 517 F. Supp. 292, 302 (N.D. Tex. 1981).

Playboy Bunnies).²⁰¹ This can be a very unclear line to draw, however, especially for businesses like Hooters that sell food and sex appeal.²⁰²

A few categories of motives are more likely to be successful than those relying on stereotypes and customer preferences. These include authenticity and privacy.²⁰³ Again, however, the line between what a court might accept as permissible or not continues to be unclear. The courts' various inconsistencies in applying antidiscrimination law have been widely noted by scholars.²⁰⁴ There has also been confusion and misapplication between the BFOQ defense and the business necessity concept.²⁰⁵ 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.²⁰⁶ 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 China²⁰⁷ and a Catholic university to hire only Jesuit priests to teach philosophy.²⁰⁸ 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.²⁰⁹ About 3,500 members of Disney's workforce are international

201. See *id.* at 301; see also Ann C. McGinley, *Babes and Beefcakes: Exclusive Hiring Arrangements and Sexy Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 257, 267 (2007).

202. See Hooters discussion *supra* Part I.C.

203. Safety concerns can also serve as a BFOQ for employers if they can show that concerns for public safety justify eliminating certain persons because of their age or gender. See, e.g., *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); *Dothard v. Rawlinson*, 433 U.S. 321, 335–36 (1977) (holding that a maximum security prison could exclude women guards because the ability to maintain a safe and secure prison would be otherwise jeopardized).

204. See, e.g., Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1, 26 (2000); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CALIF. L. REV. 147, 150 (2004); Manley, *supra* note 174, at 177.

205. See LINDEMANN & GROSSMAN, *supra* note 156, at 358–60.

206. EEOC Regulations, *supra* note 153.

207. See *Util. Workers v. S. Cal. Edison*, 320 F. Supp. 1262, 1265 (C.D. Cal. 1970).

208. See *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351, 353–54 (7th Cir. 1986).

209. See Johnson, *supra* note 28. 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.

recruits who must be fluent in English and emulate friendliness and poise while sharing information about their native countries with EPCOT visitors.²¹⁰

Moreover, the EEOC guidelines list actors and actresses as an example of hiring that might fall under the authenticity exception.²¹¹ It is unclear how broadly one may define actor or actress, however. One commentator has wondered, is a Playboy Bunny at a Playboy Club in “a theatrical production that hires women to act in the roles of women[?]”²¹² 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.”²¹³ 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 defense. Thus, in healthcare and other similar settings where patients’ or customers’ bodily privacy is involved, employers may choose their employees based on sex.²¹⁴ Accordingly, hospitals may hire female nurses in labor and delivery rooms and in other personal care-giving capacities.²¹⁵ 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.²¹⁶ Moreover, if the essence of the business for Southwest Airlines is simply to fly passengers safely, shouldn’t the essence of the business of a hospital delivery room be to deliver babies safely?²¹⁷ Despite these inconsistencies, the privacy exception is justified if it is somehow materially different from mere

210. Charles Hillinger, *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 F. App’x 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 *Gupta*, the Eleventh Circuit affirmed summary judgment for Disney, which had been accused of discriminating against the plaintiff for not being a native Norwegian. *Id.* at 282–83.

211. EEOC Regulations, *supra* note 153.

212. McGinley, *supra* note 201, at 269.

213. MILLER, *supra* note 3, at 78–79.

214. See Manley, *supra* note 174, at 177.

215. See, e.g., Yuracko, *supra* note 204, at 156.

216. See, e.g., Michael J. Frank, *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); Manley, *supra* note 174, at 186–87.

217. See *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1196 (E.D. Ark. 1981) (permitting sex as a BFOQ for an obstetrical nurse where testimony suggested that more than one half of patients would object to male nurses).

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.²¹⁸

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.²¹⁹ 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.²²⁰ 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.²²¹

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.²²² The Supreme Court has noted that the employment practice need not be "essential" or "indispensable" to the employer's business.²²³ Business necessity is therefore not narrowly focused on job performance but allows for broader consideration of issues that affect the employer's interest, such as safety²²⁴ and cost.²²⁵ Unlike BFOQ, it also applies to all types of discrimination, including race.²²⁶ Arguably, IP concerns would also fit readily here.

218. See, e.g., Deborah A. Calloway, *Equal Employment and Third Party Privacy Interests: An Analytical Framework for Reconciling Competing Rights*, 54 *FORDHAM L. REV.* 327, 342 (1985); Amy Kapczynski, Note, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 *YALE L. J.* 1257, 1267-68 (2003).

219. See THOMAS R. HAGGARD, *UNDERSTANDING EMPLOYMENT DISCRIMINATION* 94 (2001).

220. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

221. See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 659 (1989), *superseded by statute*, 42 U.S.C. § 2000e-2(k) (2006), *as recognized in Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

222. *Griggs*, 401 U.S. at 432.

223. *Wards Cove*, 490 U.S. at 659.

224. See *Hayes v. Shelby Mem'l Hosp.*, 726 F.2d 1543, 1552 (11th Cir. 1984).

225. See, e.g., Mark S. Brodin, *Costs, Profits, and Equal Opportunity*, 62 *NOTRE DAME L. REV.* 318, 334 (1987).

226. See generally 2 LARSON, *supra* note 142, at § 23.04-.07 (discussing the business necessity defense generally, and how an employment criterion or method that in practice creates a disparate impact on the basis of race can be defended with a business necessity argument).

d. Apparently 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 other policy reasons. Regardless, 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.

i. Hollywood

While employers may not post ads for employees that specify a particular race or gender,²²⁷ the law 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.”²²⁸ This practice has contributed to a system where women and people of color receive fewer roles and less compensation for those roles.²²⁹ “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 consideration for the majority of offered roles simply because they would be ‘inappropriate.’”²³⁰ Beyond race, even writers in the industry who are over the age of forty complain that television networks refuse to hire them because advertisers want writers who can communicate “youthful material.”²³¹

Yet, to date, this Hollywood practice appears to go unchallenged, as there have been no published Title VII discrimination cases filed by actors.²³² 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.²³³

227. 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) (2006).

228. Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 10 (2007).

229. *Id.* at 18, 23; Jennifer L. Sheppard, *Theatrical Casting – Discrimination or Artistic Freedom?*, 15 COLUM. J.L. & ARTS 267, 268 (1991).

230. Sheppard, *supra* note 229, at 271 (internal citations omitted).

231. Gina Browne, Comment, *Target Hiring to Reach a Target Audience*, 23 LOY. L.A. ENT. L. REV. 125, 127–132 (2002).

232. A recent search as of August 6, 2012, revealed no published cases involving claims relevant to this Article. See also Robinson, *supra* note 228, at 1–2 (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).

233. See *id.* at 40–45.

Indeed, even the EEOC guidelines recognize (without explanation or elaboration) that sex can be a BFOQ defense for a claim by an actor or actress “for the purpose of authenticity or genuineness.”²³⁴ Yet, when one views movie studios as businesses whose primary concern in casting is to ensure high gross receipts for films,²³⁵ 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”²³⁶ that other businesses do not enjoy (for better or worse).

ii. 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 § 702 of the Civil Rights Act of 1964 that protects religious organizations from religious discrimination suits.²³⁷ Courts have created an even broader exemption, however, that essentially bars employees from suing religious organizations for employment discrimination—the ministerial exception.²³⁸

The ministerial exception has been interpreted broadly to cover not only ordained ministers but also church secretaries, Catholic school principals, church music teachers, and choir directors.²³⁹ Furthermore, it extends beyond churches to such workplaces as “religious schools, universities, hospitals, and retirement homes.”²⁴⁰ This judicially created exception, as well as the statutory exemption, is grounded in the First Amendment religion clauses.²⁴¹ The Supreme Court has recently recognized that this constitutional grounding for the ministerial exception outweighs the societal

234. EEOC Regulations, *supra* note 153.

235. See, e.g., Robinson, *supra* note 228, at 8.

236. Sheppard, *supra* note 229, at 269–70.

237. 42 U.S.C. § 2000e-1(a) (2006).

238. See, e.g., Mark E. Chopko & Marissa Parker, *Still a Threshold Question: Refining the Ministerial Exception Post-Hosanna-Tabor*, 10 FIRST AMENDMENT L. REV. 233, 235 (2012) (supporting the ministerial exception); Leslie C. Griffin, *Smith and Women’s Equality*, 32 CARDOZO L. REV. 1831, 1844 (2011) (arguing that the ministerial exemption is harmful to women).

239. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1976 (2007).

240. *Id.* at 1977.

241. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 703 (2012) (“The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own.”).

interest in enforcing employment discrimination laws.²⁴² 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.

III. INTRODUCING THE IP DEFENSE

If IP rights are powerful enough to allow a company control over competitors and consumers,²⁴³ it makes sense that those rights should permit control over a company's own employees and image. Already, IP regulates employee behavior and conduct (such as protecting trade secrets and enforcing noncompetition 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.²⁴⁴ The fact that the BFOQ and business necessity defenses exist reflects the congressional intent that employers retain flexibility in making hiring decisions that affect the core of their business.²⁴⁵ Therefore, just as IP rights can sometimes trump employment-at-will principles as well as constitutional protections (such as the First Amendment),²⁴⁶ 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

242. *Id.* at 710.

243. See, e.g., James B. Kobak, Jr., *Intellectual Property, Competition Law and Hidden Choices Between Original and Sequential Innovation*, 3 VA. J.L. & TECH. 6, ¶18 (1998) (highlighting that intellectual property rights can be used to control access by competitors); Elizabeth A. Rowe, *Introducing a Takedown for Trade Secrets on the Internet*, 5 WIS. L. REV. 1041, 1059 (2007) (commenting that copyright holders can exercise a form of censorship by issuing takedown notices); Elizabeth A. Rowe, *Patents, Genetically Modified Foods, and IP Overreaching*, 64 SMU L. REV. 859, 871–76 (2011) (explaining that patent license agreements prohibit farmers from saving or reselling seeds that they have purchased).

244. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

245. *Id.* (“[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.”).

246. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 541 (1987) (“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 winning away from plaintiffs in any significant way. 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.²⁴⁷ 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,²⁴⁸ 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. *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 prima facie case, asserting a business necessity defense, or asserting a BFOQ defense. Thus, under whichever theory a Title VII claim proceeds, the IP Defense could play a role.²⁴⁹ 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 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

247. See Clermont & Schwab, *supra* note 10.

248. *Thomas v. Denny’s, Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997) (internal citations omitted).

249. 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).

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.²⁵⁰ 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.²⁵¹ As one court noted, "The Court does not sit as a super-personnel department that reexamines an entity's business decisions."²⁵² As such, it is not up to a jury or judge to determine whether such qualifications were reasonable.²⁵³ 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.²⁵⁴

Second, the IP Defense could also be used as part of the BFOQ defense. While the employment law jurisprudence does not provide a specific meaning for the "essence of the business,"²⁵⁵ 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 the Playboy Club may discriminate on the basis of sex by hiring attractive women.²⁵⁶ If, however, the court characterizes it more broadly as a place that serves food and drink (like Hooters),²⁵⁷ then the Club may not make those very same choices.²⁵⁸

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.²⁵⁹ Those courts

250. See, e.g., *Schaffner v. Glencoe Park Dist.*, 256 F.3d 616, 620 (7th Cir. 2001).

251. *Id.* at 620–21; 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).

252. *Dale v. Chi. Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986).

253. See *Thornley v. Penton Publ'g, Inc.*, 104 F.3d 26, 29 (2d Cir. 1997). If the employer's criteria are 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.

254. See *Dale*, 797 F.2d at 463–64.

255. See, e.g., *Yuracko*, *supra* note 204, at 160.

256. See *Avery & Crain*, *supra* note 8, at 44.

257. See generally *Hi Ltd. P'ship v. Winghouse of Fla., Inc.*, 347 F. Supp. 2d 1256 (M.D. Fla. 2004), *aff'd*, 451 F.3d 1300 (11th Cir. 2006). Hooters cannot prevent a competitor from using a black tank top and black running shorts any more than a steak restaurant can claim servers who wear tuxedos. *Id.* at 1258–59.

258. 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 Character*, A.B.A. J., Feb. 1996, at 41.

259. See *Yuracko*, *supra* note 204, at 154–60 (discussing the ad hoc nature of defining a business's essence in a BFOQ defense).

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 a BFOQ defense.²⁶⁰ The IP Defense could therefore enable greater precision in that only companies that have satisfactory proof of IP 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.²⁶¹ 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 of people, the existence (or lack thereof) of IP to support that requirement could make the decision easier for a court and easier for a plaintiff.²⁶²

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) or one of persuasion (e.g., the BFOQ defense). This 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

260. See Manley, *supra* note 174, at 188–89.

261. See, e.g., Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1068–69 (2009); Karen Zakrzewski, Comment, *The Prevalence of "Look"ism in Hiring Decisions: How Federal Law Should Be Amended to Prevent Appearance Discrimination in the Workplace*, 7 U. PA. J. LAB. & EMP. L. 431, 460–61 (2005).

262. See Zakrzewski, *supra* note 261, at 458–59.

decision was not pretextual and that the IP is legitimate. It would offer objective preexisting 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.²⁶³ 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).²⁶⁴ 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 will generally allow employers to regulate their employees' grooming and appearance.²⁶⁵ 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 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

263. 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 would be required on the IP claim, especially where there is no registered certificate.

264. See Corbin, *supra* note 239, at 1968.

265. See *supra* notes 129–136 and accompanying text.

intangible 'things' emanate from the good, its dress, and the marketing campaign that promotes the dressed good."²⁶⁶

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.²⁶⁷ 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, 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, the plaintiff is unlikely to establish that she was indeed *qualified* for the position, a necessary element of the prima facie case.²⁶⁸ Courts respect, as a business decision, an employer's judgment in setting out the objective

266. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 630–31 (6th Cir. 2002).

267. *See Best Cellars, Inc. v. Wine Made Simple, Inc.*, 320 F. Supp. 2d 60, 71 (S.D.N.Y. 2003).

268. *See, e.g., Schaffner v. Glencoe Park Dist.*, 256 F.3d 616, 620–21 (7th Cir. 2001).

qualifications for a position, one which is granted great deference.²⁶⁹ As such, it is not up to a jury or judge to determine whether the articulated qualification was reasonable.²⁷⁰ 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.²⁷¹

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. 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.²⁷² Recall that the *Wilson* court did not give any weight to the consideration of the effect on

269. *Id.* at 620–21; *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).

270. *See* Thornley v. Penton Pub., Inc., 104 F.3d 26, 29 (2d Cir. 1997). If the employer's criteria are 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 v. Denny's, Inc., 111 F.3d 1506, 1510 (10th Cir. 1997).

271. *See* Dale v. Chi. Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).

272. *See, e.g.,* Wilson v. Sw. Airlines, Co., 517 F. Supp. 292, 304 (N.D. Tex. 1981).

Southwest's profitability.²⁷³ 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.²⁷⁴ This is true, for instance, in the area of libel.²⁷⁵ Even the business necessity defense allows for consideration of cost.²⁷⁶ 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.²⁷⁷ Whether articulated in such terms as "fiduciary duty," "shareholder value maximization," or "shareholder primacy," it is difficult to refute the importance of these goals and obligations for businesses.²⁷⁸ 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 lost 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. Sometimes IP outweighs First Amendment concerns.²⁷⁹ Accordingly, IP should at least enter into the balance

273. *Id.*

274. *See, e.g., S. Air Transp., Inc. v. Am. Broad. Cos.*, 670 F. Supp. 38, 41 (D.D.C. 1987); *Heritage Optical Ctr., Inc. v. Levine*, 359 N.W.2d 210, 212 (Mich. Ct. App. 1984); John L. Hines, Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 SEDONA CONF. J. 97, 98-99 (2003).

275. *See S. Air Transp., Inc.*, 670 F. Supp. at 41; *Levine*, 359 N.W.2d at 212; Hines, Jr. et al., *supra* note 274.

276. *See Brodin, supra* note 225.

277. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684-85 (Mich. 1919).

278. *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*, 15 ORG. SCI. 350, 350 (2004) ("[T]he logic of shareholder value maximization is accepted as being so obvious that textbooks just assert it, rather than argue for it.").

279. *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

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.²⁸⁰ 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 perhaps discrimination is measured on a malleable scale.²⁸¹ 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, "The 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 . . ." ²⁸² It has also been recognized that employers have a legitimate interest in protecting the relationships between their employees and customers.²⁸³ "The employee in essence becomes the 'face' of the employer."²⁸⁴ Accordingly, IP should be (and already is) a legitimate justification for regulating employees, hiring employees, and

that infringes copyright); DVD Copy Control Ass'n, Inc. v. Bunner, 75 P.3d 1, 14 (Cal. 2003) (weighing a property interest in trade secrets more heavily than First Amendment concerns).

280. See RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 159 (1992).

281. See privacy discussion *supra* Part II.B.2.b.

282. FORD, *supra* note 176, at 143.

283. See Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999) (citing Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984)).

284. *Id.*

deciding which prospective applicants are qualified to become employees.

Another illustration of how IP already influences business decisions is franchising. Franchisors, such as McDonald's, allow franchisees to make use of their "intellectual property and brand identity, marketing experience, and operational methods"²⁸⁵ in exchange for a licensing fee. Hooters of America, for instance, currently operates or franchises 430 locations in twenty-seven countries.²⁸⁶ 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 their use, in order to avoid loss of the trademark right.²⁸⁷ 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, Jazzercise, 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.²⁸⁸ The franchisor argued that an overweight aerobics instructor did not fit the appropriate image for a company that sold fitness.²⁸⁹

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 were 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

285. 62B AM. JUR. 2D *Private Franchise Contracts* § 4 (2005).

286. *About Hooters*, *supra* note 80. Hooters of America, and its trademark rights, was purchased in 2011 by a consortium led by Chanticleer Holdings. Sarah E. Lockyer, *Hooters Sold to Chanticleer Holdings*, NATION'S RESTAURANT NEWS (Jan. 24, 2011), <http://www.nrn.com/article/hooters-sold-chanticleer-holdings>.

287. See Sally M. Abel, *Trademark Licensing*, in 1 PRACTICING LAW INST., ADVANCED LICENSING AGREEMENTS 2009 at 89, 97 (Joseph Yang & Ira J. Levy eds., 2009).

288. See Dan Ackman, *The Case of the Fat Aerobics Instructor*, FORBES.COM (May 9, 2002), <http://www.forbes.com/2002/05/09/0509portnick.html>.

289. A lawsuit ensued, and the case settled. See Rhode, *supra* note 261, at 1063.

businesses, innovation, and the economy. IP, including trademarks, comprises the majority of most companies' intangible assets.²⁹⁰ These IP rights serve as "market differentiators" for companies, enhancing their economic value and appeal to consumers.²⁹¹ 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 2006.²⁹² Christie 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."²⁹³ 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.²⁹⁴ 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.²⁹⁵ Meanwhile, Southwest Airlines's new low-cost-joke-cracking image and focus on customer service have kept it soaring.²⁹⁶ Even if it survives legal scrutiny, the Blond Island Resort may wish to take note.

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

290. KEVIN A. HASSETT & ROBERT J. SHAPIRO, WHAT IDEAS ARE WORTH: THE VALUE OF INTELLECTUAL CAPITAL AND INTANGIBLE ASSETS IN THE AMERICAN ECONOMY, at V (2001), available at http://www.sonecon.com/docs/studies/Value_of_Intellectual_Capital_in_American_Economy.pdf.

291. Joseph Richard Falcon, Comment, *Managing Intellectual Property Rights: The Cost of Innovation*, 6 DUQ. BUS. L.J. 241, 250 (2004).

292. Pauline O'Connor, *Playboy Club: The Sequel*, N.Y. TIMES (Oct. 15, 2006), <http://www.nytimes.com/2006/10/15/fashion/15BOITE.html?scp=2&sq=&st=nyt>.

293. Paul Farhi, *Christie Hefner Is Reshaping and Reviving Her Father's Adult Empire*, WASH. POST, Aug. 3, 1997, at H1.

294. *Id.*

295. 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 fifteen 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.

296. See Amy Cortese, *Inventive Minds*, CHIEF EXECUTIVE.NET (Sept. 30, 2001), <http://chiefexecutive.net/inventive-minds>.

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 IP 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.