

If the Dress Fits, Hire Him: Exploring the Intersection of Intellectual Property and Employment Discrimination Law

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In the early 1970s Southwest Airlines branded itself as the “love airline,” promising to fly passengers with “love.” It projected a sexy, youthful, feminine image and ran ads that promised its predominantly male passengers “tender loving care.” It hired only attractive females as flight attendants and ticket agents, and they wore high boots and hot-pants. Their female flight attendants personified Southwest’s corporate image. This love fest came to an end in 1981, when a federal court ruled that Southwest’s hiring policy unlawfully discriminated against men.

This Article revisits the Southwest case, thirty years later, to launch an examination of the role of intellectual property on employment hiring decisions today. Interestingly, Southwest and the line of similar cases that have followed over the years have all been argued and analyzed exclusively within the framework of employment discrimination law. Southwest and other companies have only made indirect references to their intellectual property rights, merely mentioning image, marketing, or branding to explain their motivation for hiring decisions. Accordingly, there has been no consideration of intellectual property law or the balancing of intellectual property rights *vis a vis* employment anti-discrimination policies in these cases. None of the companies have articulated or carved out intellectual property justifications for their hiring practices.

This Article, for the first time, will introduce the language, significance, and doctrine of intellectual property law into the discussion. It will examine the significant changes in intellectual property law related to companies’ image and service (such as in trade dress and patent protection) over the last few decades, as well as the effect of intellectual property on business decisions and business success. Moreover, the Article will explore how the power of intellectual property today might influence litigants’ arguments, and ultimately judicial analysis, in cases where intellectual property affects hiring decisions. Finally, it will examine larger questions about (i) how intellectual property protection, although granted in a relatively value-neutral way, may lead to discrimination in its application, and (ii) the appropriate role of intellectual property in employment discrimination law, considering the possible negative and positive consequences of introducing intellectual property doctrine in this context.