

REVIEW OF JACOB H. ROOKSBY'S:
THE BRANDING OF THE AMERICAN MIND:
HOW UNIVERSITIES CAPTURE, MANAGE,
AND MONETIZE INTELLECTUAL PROPERTY
AND WHY IT MATTERS

BY C. J. RYAN

Jacob Rooksby's task in *The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why it Matters* is an ambitious one. At the outset, Rooksby makes clear that his book seeks not only to introduce the reader to intellectual property law—specifically how universities engage with intellectual property law—but also to do so in a way that is accessible to a non-legal audience. Rooksby succeeds at this endeavor in spite of the complexities of intellectual property law and modern universities.

Throughout the book, and especially within the book's second chapter, Rooksby treats the reader to a thorough and comprehensible summary of intellectual property law—trademark, patent, and copyright—and its close kin—trade secrets, internet domains, and rights of publicity. The legal-trained reader will find this book neatly provides a focused review of intellectual property principles. While the non-legal audience will appreciate that the work is not as jargon-laden as most intellectual property scholarship. Notwithstanding some of the commentary on patents, which retains a shade of legalese density, Rooksby's digest of the law is remarkably accessible to any reader.

The Branding of the American Mind is comprehensive in both its erudite analysis of the way universities interact with the contemporary intellectual property complex, often for private gain, as well as its explanation of the same for lay and legal audiences. However, the book is most successful in developing a robust discussion of the emerging existential conflict in higher education: universities that engage in activities to produce purely private gain while seeking to fulfill their public-good missions. The first chapter introduces the reader to this central conflict at the beginning of the modern era in which universities ventured boldly into the world of monetizing their intellectual property. Starting with the passage of the Bayh-Dole Act in 1980, which allowed universities to take patent ownership of inventions produced with federally-funded research, Rooksby recounts dozens of examples of the delicate balance universities walk between pursuing public good and private benefit. One example is the OncoMouse, Harvard's genetically-modified cancer research rodent, the development of which was partially funded by the National Institutes for Health, and for which Harvard received a watershed patent on a living organism. Through this example, Rooksby poses a critical question that lies at the heart of the first chapter and motivates the entire book: should a university, which to Rooksby is a "public-sector entity," receive a private benefit, such as an intellectual property right, from an invention developed with

public funds?

On this point, Rooksby's view is unambiguous: "[t]he accumulation, use, and enforcement of intellectual property by colleges and universities reflects choices to engage in a system that ... takes knowledge and information that is otherwise subject to ... public use and restricts it, by attaching private claims to it." However, Rooksby does not nakedly assert this bold claim; rather, he positions this argument as an offshoot of the "two-good framework"—that the activities of a university serve either its public-service mission or its concern for revenue generation. Rooksby's reasoning also runs parallel to critiques of "academic capitalism" and how universities exploit their relationships with industry for private reward. As such, Rooksby outlines a strong argument for how a university's relentless pursuit of monetizing its intellectual property closely resembles revenue generation rather than serving a university's public function.

An additional strength of the book is its intuitive organization, given its examination of intellectual property law's component parts. The third chapter is the book's most substantive and successful, investigating the way that universities engage in trademark rights accretion, protection, and enforcement. By summarizing illustrative cases and presenting compelling statistical trends, Rooksby reveals the rapidly increasing, sometimes frivolous, and often absurd rate and ferocity with which universities pursue protection and enforcement of their brand—all for almost entirely private gain.

In a memorable illustration of this trend, the University of Alabama and its trademark-holding company sued to enforce the university's trademark against a small-town bakery that deigned to ornament cupcakes with the infamous, stylized, crimson "A"—proving once again that the Tide roll over their opponents on and off the gridiron. Though the parties settled and the bakery agreed to pay a licensing fee, the legal fees alone associated with this dubious trademark enforcement cost the university over \$1.5 million. Thus, as universities continue the relentless pursuit of their brand, ostensibly at any cost, questioning how universities can serve the public good and curry public favor while suing any possible infringer of their brand, no matter how remote the infringement or how economically unsound the enforcement, is more timely than ever.

Following the discussion of trademark, in the fourth chapter, Rooksby delves into the world of patent law. Universities have long engaged in this sector of intellectual property but have only recently had an incentive to engage more vigorously, as changes to patent policy have afforded them greater protections—as well as opportunities to extract revenue from infringement lawsuits. Rooksby underscores an important asymmetry when enumerating many examples of how, for university research resulting in a patented invention, the benefits of patent protection almost always accrue to the university and seldom accrue in any significant sense to the researchers themselves. That said, Rooksby treads lightly on the fact that university research, generated by faculty and research staff, rarely results in profitable patented inventions, a fact that would bolster his argument against universities' blind pursuit of intellectual property portfolio growth. Yet, universities continue to seek patents, transfer them to the technology transfer offices, and enforce them at an alarming rate. Rooksby's argument that the focus of

the university should be innovation, not litigation, dovetails with his discussion in the fifth chapter as the book turns its attention to copyright law and the university. Here, Rooksby champions policies that promote open-access and creativity for faculty and students—not the transparent snatching up of rights by the university. Innovation within the scientific disciplines is impeded by both patent infringement litigation and when universities or their publishers restrict or embargo innovative research—Rooksby rightly scrutinizes such practices.

Finally, the book closes with a consideration of elements of a university's brand portfolio—such as protecting domain names, images, and secrets, as well as trademarking slogans—as a means of illustrating the apparent dangers of the often typhlotic pursuit of “brand.” Rooksby's recommendations in the final chapter conclude the book's thoughtful discussion of the pitfalls of this pursuit and attempt to equilibrate an untenably imbalanced environment in higher education.

Drawing on his experience as an intellectual property attorney and legal academic, Rooksby's first book-length effort is as broad as it is deep. The result is a definitive discussion of the 21st Century university and its employment of intellectual property law both as a shield and sword. In fact, readers will remember this book for its important discussion of the underlying question: what should the role of higher education be in relation to the public good and increasing private rights? On consideration of this question, Rooksby's book is in a class of its own, posing and answering a question that all future research for which the university serves as the primary unit of analysis must reckon.

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