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THE BRANDING OF THE AMERICAN MIND: HOW UNIVERSITIES CAPTURE, MANAGE, AND MONETIZE INTELLECTUAL PROPERTY AND WHY IT MATTERS, by **Jacob Rooksby**, Johns Hopkins University Press, 2016. 392 pp., Hardcover, \$29.95.

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American research universities faced with intensifying economic pressures are being forced to compete with increasing vigor in a variety of different but closely related academic marketplaces. These universities are competing for students and the tuition dollars they bring; “star” faculty and the intellectual and reputational capital they might generate; federal, state and local government support; and industry funds and private philanthropy. For those universities with large medical centers there is additional competition for patients and the revenues they generate. The result of this heightened competition for resources has been an increasing market-like approach to the functions of the university. In a world in which students have a growing number of choices over what, how, and where to study, universities are adopting a service provider mentality that focuses on the student as customer. They are investing heavily in distinguishing their brand and in cultivating the services they believe students will find attractive. As a former comfortable reliance on government support is overshadowed by concerns over how to capture a share of the shrinking pools of government funds, universities are increasingly positioning themselves as drivers of economic development. Robust technology transfer efforts and flexible industry partnerships are used to lure the support of corporations, and a host of carefully tailored and branded university initiatives are designed to appeal to philanthropists.

This changing regime in higher education has been aptly termed “academic capitalism”.¹ In their efforts to compete for funds from external resource providers in these various marketplaces, universities are modifying their traditional functions of public knowledge production and dissemination to integrate more commercially-oriented pursuits. As part and parcel of this process of competition for resources, different constituents within the university are forced to find ways of measuring and demonstrating their value – often in quantifiable economic terms. Intellectual property plays diverse and increasingly important roles in all of these pursuits, providing mechanisms for protecting and

exploiting university brands, facilitating technology transfer, and extracting commercial value from the content of new and in many cases digitalized educational programs. University administrators now see the cultivation of intellectual assets as an opportunity to both measure value as well as to generate further (economic) value. Administrations are often pressed to utilize different aspects of shared resources, such as the use of university branding to attract students on the one hand and to generate licensing revenue on the other.

Jacob Rooksby's book, *THE BRANDING OF THE AMERICAN MIND* provides a timely and comprehensive examination of the intersections between different forms of intellectual property and the pursuits, interests, and objectives of different constituencies within the university as it competes in these academic marketplaces. Rooksby demonstrates how the expanded use of intellectual property is both a reflection of, and a contributor to, the changing nature of the university. He warns of the need to recalibrate university policies and strategies in response to these changes to ensure that the accumulation and enforcement of private rights supports rather than subverts the university's public goods mission.

Rooksby's study provides a valuable overview of intellectual property management within higher education, making the issues of intellectual property in this context accessible in ways that allow people unfamiliar with this area of law to grapple with the challenging policy issues that underlie it. He begins the book by providing an interesting and accessible primer on the types of intellectual property that come into play in the modern American research university. He takes the time to separate out the different types of intellectual property – trademark, patent, trade secret, and copyright- and the roles that each plays within the university. Armed with this working knowledge, the reader is then invited to consider the tensions between public and private aspects of knowledge creation, dissemination, and use that are inherent in the ways that universities are choosing to capture, manage and exploit these intellectual assets.

The important role of university branding in the intensifying competition for resources makes trademark law a natural starting point. Rooksby suggests that the university brand “represents a negotiated identity, and colleges and universities in fierce competition with one another sense that they cannot risk being complacent in matters involving self-identification and self-promotion” (p. 5). He highlights the intertwined nature of university brands and trademark law and documents what he terms the phenomenon of “trademark-rights accretion” as well as the proliferation of domain names registered by universities. After investing heavily in their brands, universities naturally turn to the opportunities afforded by commercializing them. Often different groups within the university's central administration are charged with these different aspects of brand, sometimes in communication with each other--though sometimes not--each pursuing commodification of some aspect of the university identity. Rooksby warns that expansive commercialization of the university brand can jeopardize public-interest aspects of higher education.

University patenting activities provide another frontier in which the boundaries between publicly accessible knowledge and private rights are being redrawn. Since the passage of the Bayh-Dole Act in 1980,² universities have increasingly engaged in efforts to patent and license their technologies and inventions developed on campus. Indeed, a new profession of technology transfer professionals has arisen, which fuels the growth of this academic industry. More recently government pressure on universities to demonstrate their economic value has intensified pressures to produce measurable economic outcomes, if only in the form of inventions patented, licenses issued, or start-up companies launched. Universities are showing up more and more often in once unfamiliar terrains in their pursuit of patent-generated revenues, such as on the doorsteps of the courthouse to sue for patent infringement or in negotiations with patent assertion entities to monetize unlicensed patents. For example, in the aftermath of a very public patent dispute between two leading research universities over path-breaking CRISPR technology, both parties quickly turned their attention to the business of managing the CRISPR technology through a series of partnerships with private entities that promised millions of dollars in return. In doing so, these universities are testing the boundaries between a non-profit research institution and a for-profit corporation in ways that are becoming increasingly common.

Copyright issues have traditionally dominated debates over public access to publications. However, the new frontier of challenges in this domain lies in the shift towards on-line education, where ownership of the content becomes a more integral part of the business model of the university, and rights formerly left either implicitly or explicitly to professors now become university property. Even students are not immune from the reach of many university intellectual property policies.

The conflicts that Rooksby identifies in the intellectual property sphere both manifest and impact broader trends in American higher education, and his views are an important contribution to this conversation about the future of universities. The concerns that he expresses over what he argues is an over-protection of intellectual property are a natural result of the embrace of a more corporate-like model of the university, one that prioritizes increased efficiency and the ability to generate outcomes that have measurable economic value. This shift towards a business mindset is not limited to intellectual property but rather pervades all domains of intellectual production. However, it is the legal structures put in place to facilitate technology transfer and the commercial potential of the university's intellectual assets that make intellectual property a natural focus of business expansion.

Where universities increasingly behave like private corporations in their use and defense of intellectual property, Rooksby rightly focuses attention on the risks to the public knowledge mission of the university. He argues that risks arise, not from the ability to harness intellectual property, but rather from the operational

and policy decisions of higher education institutions operating in an increasingly business-oriented and now financially challenging world. The ability to balance technology commercialization with the public creation and dissemination of knowledge is essential to the healthy university, and yet there are no clear guidelines and little consensus as to what that balance should be or how to achieve it.

The evolution of university intellectual property policies that focus on commercialization of research and education are also reflective of the rise of the administrative-university, with its commodification of the process of knowledge production and dissemination and its focus on efficiency, assessment of measurable outcomes, and attention to the satisfaction of stakeholder interests. One of the dangers of the current trend towards measurement and assessment in economic terms is the disadvantaging of types of knowledge and knowledge production that are of significant public value but nonetheless evade quantification. In pursuit only of the measurable and the measured we jeopardize areas of intellectual production that are essential to the public knowledge mission of the university.

After documenting the tensions between private rights and the public goods nature of the university that arise from what he argues is the over-protection and over-commercialization of university intellectual property, Rooksby goes on to suggest how universities might begin to recalibrate the balance between private rights and the public good. He supports a more limited approach to the accumulation and use of trademarks, advances proposals that would pull universities farther away from competitive patent market practices, and argues for a more circumscribed approach to copyright ownership. Perhaps more importantly, he advocates for a reframing of how universities understand their intellectual property issues, suggesting that intellectual property decisions should not be regarded as routine decisions left to business or legal administrators, but rather deserve full-scale treatment as core academic issues. He concludes that universities must recognize that “intellectual property policies and activities go to the heart of higher education’s existence in the public sphere as primarily an academic institution, not a corporate or a bureaucratic entity” (p. 283).

While I agree that some kind of recalibration of university intellectual property policies is needed, I do suggest a note of caution in framing the debate around a rebalancing of private rights and the public good for several reasons. First, this seems to presume that different stakeholders agree that the university has a public goods mission and, furthermore, that they can reach agreement on what the public good is. Universities have always been contested spaces and will continue to be so, as different constituencies bring their own views as to what the mission of the university should be, what the public good consists of, and what processes will best promote this public good. Second, we should also consider the changing structure of the economy within which the university is situated and the changes that might be needed to ensure the sustainability of the university of the future.

The cost of university education has become unsustainable for the majority of students, many of whom find it impossible to get jobs upon graduation that pay enough to cover their growing financial investment in higher education. Universities have adopted research practices that presume a steady flow of government grant funding that can no longer be assured. Academic marketplaces are crowded with a large range of alternative providers of both research and educational programs, all competing for resources that universities once took for granted. We cannot ignore the very real economic and political constraints under which current universities must operate, and thus need to evaluate intellectual property practices with these constraints in mind.

Notwithstanding these caveats, Rooksby's message is an important one. "As the United States moves further towards an information and knowledge-based economy," he tells us, "the impetus to lay claim to intangible outputs is increasing" (p. 255). Universities, as originators of much of this production, face critical decisions about when to amass private rights in knowledge and about how to manage these private rights for the public good. It is essential for them to preserve their "fundamental value and historic orientation towards the public" by putting into place practices that ensure private rights are used for the public good.

ENDNOTES

¹ Sheila Slaughter and Larry L. Leslie, *ACADEMIC CAPITALISM: POLITICS, POLICIES, AND THE ENTREPRENEURIAL UNIVERSITY* (Johns Hopkins University Press, 1997).

² Bay-Dole Act of 1980 (Patent Rights in Inventions Made with Federal Assistance) 35 U.S.C. §§ 200 et seq.

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