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An Interview with Jacob H. Rooksby, J.D., M.Ed., Ph.D., Dean of Gonzaga University School of Law

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Abstract

In this interview, Jacob Rooksby discusses his work and research in intellectual property and higher education law, including a critical examination of the role of copyright on the modern university campus. The conversation, with the *Journal of Copyright in Education and Librarianship's* (JCEL) Micah Zeller and Tucker Taylor, covers trends concerning student entrepreneurship, faculty ownership, donor-imposed restrictions in special collections, and why everyone involved—from trustees, administrators, instructors, students, and library staff—should care and know how law and policies affect their interests. The discussion draws on Rooksby's 2016 book, *The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why It Matters*, which describes problematic practices of institutions, opportunities for those working in this space, and how intellectual property issues connect to our moral expectations for higher education. Professor Rooksby also flags areas for readers to keep an eye on in the future.

Keywords: intellectual property, higher education, copyright, universities, entrepreneurship

Introduction

On January 22, 2018, the *Journal of Copyright in Education and Librarianship's* (JCEL) Micah Zeller (Columns Editor) and Tucker Taylor (Co-Editor) spoke with Jacob Rooksby about his work and research in intellectual property (IP) and higher education law. At the time, Professor Rooksby was Associate Dean of Administration and Associate Professor of Law at Duquesne University, but began as Dean of Gonzaga University School of Law on June 1, 2018. The discussion draws on Professor Rooksby's 2016 book, *The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why It Matters*,¹ which details problematic practices and policies of institutions and opportunities for those in this space. The interview has been edited for content and flow.

What drew you to the world of IP law and higher ed?

I was one of those odd ducks who was very interested in higher education while in law school. In fact I'd almost pursued a PhD in higher education directly out of college as opposed to a law degree. And it was in law school where I first became introduced to intellectual property through a course taught by Lillian BeVier at the University of Virginia. I became enchanted with the subject and had some work experiences with IP in a firm over the summer. In particular I had the good fortune of working with Madelyn Wessel back when I was in law school and she was associate general counsel at the University of Virginia.

So all those things started to coalesce around the same time. I then joined McGuireWoods LLP, and I got to see first-hand how colleges and universities deal with intellectual property issues and got to advise them on those subjects. And really it was an experience representing a university in a patent infringement lawsuit that drove me back to pursue my PhD in higher education. I was taken by how conflicted the university seemed in its interest in enforcing its patent. And its licensee, a for-profit company, had a totally different orientation toward that activity. So I went back to the University of Virginia to pursue my PhD and study the dynamic of how universities litigate patents: why they do it, when they do it, and how they do it. That was the first part of what became a much larger research agenda devoted to intellectual property and higher ed.

1. Rooksby, J. H. (2016). *The branding of the American mind: How universities capture, manage, and monetize intellectual property and why it matters*. Baltimore, MD: Johns Hopkins University Press.

That certainly makes it clearer why you're doing what you do now. In your book, you talk about being an "intellectual property populist." Can you share a little bit about what that means, and how it shapes your approach to helping people address IP issues?

Certainly. So that's a phrase I made up, and one I rather like! In a sense, what I'm getting at is I believe intellectual property is for everyone. It is important in that it impacts everyone. And everyone deserves to be able to learn about it and to understand it. Within the legal academy we sometimes overcomplicate the issues, and sometimes act like if you can't speak our language, then you don't understand and you're not worthy of knowing just exactly what we mean when we talk about intellectual property. I think this can be off-putting and diminishes the importance of the subject. In fact, IP is incredibly important to everyone. So part of the focus of my book is to demystify IP, and impress upon readers its importance in higher education. And I do that by telling stories and by talking about IP in plain language—by highlighting the policy ramifications that are often lurking in the background of an IP legal decision or issue in higher education. So it really has informed the way I address these topics and the way I talk about intellectual property to wider audiences.

I think we can all identify with that IP populism, especially those of us in university libraries that work with a variety of people on campus representing a range of understanding and familiarity with the issues.

Our thinking about IP in higher ed can be overly legalistic. And sometimes lost is its importance as social and higher-ed policy. It's one thing to say "oh it's a legal issue" or "we're going to have to talk to legal" or "legal told us this" or "we have to do it because legal said so." What I do in the book is unpack that really a lot of that is not true. What we're really dealing with are policy choices made by someone with perhaps a legal background. But those without legal backgrounds could make different and similarly informed policy decisions, and that certainly does go on in places. But we need more of it. And part of that is simply demystifying and taking away some of the legal trappings of intellectual property, and highlighting instead the impact of this on all of us.

One suggestion you make is to better align law and policy with "our moral expectations for higher ed." So along with IP populists, do we need better—or more precise—policy language? Or just more consistent application of existing policy language?

I think we need first better understanding of what the applicable

policies are, which should lead to a discussion of “are these the policies we want, or should they in some way change?” Everyone can have a role and should have a role in that conversation, not just attorneys, and not just a business office. Many of these policies were drafted in a different era to fit a different set of needs, and many campuses are now undertaking the hard work of revising them. Some of the unfortunate situations involving intellectual property on college campuses occur because of outdated or outmoded policies, or the misapplication of existing policies. So this is a call to action in part for faculty and staff in higher ed to take a hard look at what these things say. Universities have lot of policies, so in one sense asking people to really take a look at any one in particular is a big ask. But I think this is time well spent for most of us in higher education, simply because higher ed exists to create original works, and to use existing works. So by definition really all of us are going to be impacted by this in one way or another. We already are even if we don’t realize it. But there’s no getting around the fact it does require effort and understanding where we should have more clarity when it comes to these policies.

You share stories from around the country of different interactions between student creators and their institutions or third parties. From the perspective of the university, what do you think motivates institutional ownership claims in the first place? When do schools have the right to control the use of their constituents’ works?

I think it differs depending on the status of the creator. I am deeply skeptical of institutional ownership claims of student work in most cases, unless the student is an employee of the institution and has created the work in furtherance of that employment. With respect to faculty, I think they are in fact employees. And most works they create of a scholarly or teaching nature, they are doing to fulfill their employee obligations. But the university should not have an interest in owning most of those. And they should have a policy that clearly says they are assigning copyright in teaching materials and in traditional scholarly materials back to the faculty who created them. I think it’s a different matter if the institution directs a faculty member to create an online course, for example, and I can see an argument for institutional ownership there.

I think there are certain aspects of university investment in faculty that go above and beyond normal. This is what these policies tend to contemplate with “substantial use” of university facilities or resources. The problem is that phrase is often not well-defined. It’s maybe tied to a dollar figure, but how do you count it? And so I think institutions should be much clearer about what constitutes “substantial use” of university facilities. And

I think the presumption should be that anything they use is not substantial use, unless the university affirmatively tells faculty on a website that these facilities—and they would be specifically named—the use of them constitutes “substantial use.” Our understanding of how these pieces fit together has evolved, and as more and new and different types of technologies become available, new questions arise.

One of your recommendations is for institutions to consider creating a new position that “recognizes the importance of the academic and policy dimensions of IP” as opposed to simply the legal dimensions. How do you see that role fitting in with existing units on campus?

That’s a great question and it’s one I’ve given some thought to. I know that to suggest the addition of a new administrative position is somewhat controversial. So it could be added on to the job description of someone like an associate or assistant provost. And I do believe that the provost’s office is probably the preferred spot for this position, because people campus-wide think of the provost’s office as having the academic interest of the faculty and the institution front and center. To me it’d be a natural outgrowth of that sort of office to have an ombudsperson or a point person who could in some ways prompt and then mediate the conversations on campus regarding intellectual property, without having necessarily an agenda for how those conversations should be resolved.

Even if this type of position doesn’t always fit in campus libraries, what advice would you give to staff who want to learn about these issues and make a difference at their institutions?

I think it depends on the library. I know practices and resources vary depending on the size and scope of the institution. But libraries can be a real source of discussion through educational programming on copyright issues and fair use. But the broader questions of ownership closer to home I think are where sometimes the dialogue has been lacking. And it may be because of a feeling, again, of inability to effect change because this is “a legal issue” and “we’re not in the general counsel’s office.” But I do think that much could be done using the library as a forum for discovery of the importance of these issues and how the rubber meets the road, with course offerings, third-party materials, and with students.

I think students have been historically overlooked with respect to these issues. And we’re only going to see more controversy arise involving student work given now the push for entrepreneurialism in courses and the close working relationships with faculty that we’re seeing on many college

campuses. It used to be many students could go four years in college and really never even scratch the surface of what their special collections library has to offer. I'm heartened that many institutions now are making this part of undergraduate coursework, where they're doing primary research in special collections and really bringing technology to bear, which then of course is raising some of these issues. When students themselves create works of value or interest through their coursework, we're only going to see more of these questions come up.

You write about the growth of special collections and the importance of institutions receiving materials free from donor-imposed restrictions. How does this connect to your larger thesis?

I view the purpose of libraries in large part driven by the dual concerns of preservation and access. College and university libraries have done a wonderful job with the former, but I think need to do a better job with the latter. I'm familiar with wonderful collections at universities where access to them is quite limited, and online access is nonexistent. This is a real encumbrance on researchers, and on the public, who doesn't know this material is available. They're not going to go to the library physically to find it, and yet they should be able to find it online.

One reason we hear for this inaccessibility is funding—it's expensive to digitize collections and it takes time, and I think that's certainly true in many cases. But it's also true that these works are often encumbered by copyright law and/or by restrictions or embargoes imposed by the donor. Which to me raises the questions: Why are those necessary? Why were they agreed to? And who was involved in the discussion that led to the decision to accept these gifts with those conditions? So I make the case in the book that donors are having their cake and eating it too. They get preferred tax treatment for these donations, but yet the public is not receiving access. Technically yes, they are available for perusal in person. But we know that many are not going to go to that effort. I would love to see a world where special collections materials are made available, certainly to anyone with a university login and ID, and even better to the public at large through library websites. And so I think we need some change in institutional practices in order for that to occur.

I can see how this lack of understanding could affect our donors. If I can backtrack and ask a different question: I've noticed a big change in the number of adjuncts we hire. And I'm wondering if they might be considered employees in some ways—like under the *Community for Creative Non-Violence v. Reid* standard. Is this something people should be concerned about?

Yes, I think it is. You raise a good point in mentioning that case, which deals squarely with the issue of who's an employee versus who's an independent contractor. And I think you're right that many adjuncts are independent contractors. Certainly if they're teaching one course and they're getting paid a lump sum for that course and that's it, then they're an independent contractor, and the default presumption is that they own the intellectual property in whatever they create.

There are arguments that if an adjunct is teaching multiple courses, and performing functions like advising and serving as a liaison with student groups, then they look a lot like an employee and yet the university is not treating them as such, because they're not providing them benefits.

With respect to intellectual property, if the university expects to own the course—and it's an online course that may be their expectation—they should clarify in writing that copyright in it is going to be assigned by that adjunct to the university. Now will the adjunct agree to that? Maybe, maybe not. But that opens up a bargaining conversation. As an adjunct, I would probably not agree to outright ownership. Or if I did, I would want a royalty for the continued use of the course.

You talk about clarifying expectations not only in the context of adjuncts but also in the case of students. At our institutions, we see coursework with third-party sponsors or community partnerships where external groups seek some claim over the work produced. What can we do to be clear about the issues here?

It's a great question and I think that this is an area of higher ed that is particularly problematic. But what I identify as a problem others see as a feature. This ties back into the trend for entrepreneurial activity—which I'm generally in favor of. But students should have rights. I really resist any notion that, as part of taking a course, whether required or optional, a student automatically grants rights via language in a syllabus or via a separate, signed agreement that is presented and required of them. We talked about the moral notion and expectation for higher education. I think it really cuts against traditional conceptions of higher education being a safe place to grow and learn intellectually. So I would favor treating students as creators and treating them as adults, which would mean that third-party sponsors would have to obtain rights from students if they want them. But the extraction of those rights could not be required in order to take a course or complete a certain project or get a certain grade.

There are many who might say to me: "Well I guess you're against education being real-life, and practical. And we want entrepreneurship and that means we need students to be exposed to real-life data and problems."

I don't think the two are mutually exclusive. And if you have a sponsor who says they are unwilling to participate in this course unless every student signs this agreement, then I think it's incumbent on the faculty member offering the course and the institution to say, "We're sorry, we don't want your involvement in this course." In my view this absolutely should be the expectation. Someone has to stick up for the students, and somebody I think has to look at the moral direction of the institution and not permit it to be held hostage by a faculty member or a third-party sponsor. And the two, by the way, may often be in cahoots, where there is some relationship there, some quid pro quo, where the faculty member gets a benefit by having this outside sponsor. Perhaps it's a consulting arrangement with the sponsor; at the very least it's not having to drudge up the hard work of creating content yourself to offer in the course. And so really I think we have to keep faculty in check in many of these instances.

It befuddles me how people feel that it's reasonable to charge students twice for tests, study guides, and lecture notes.

I know. Unfortunately, it's been a long-standing practice. I'm heartened by a movement in the legal academy where certain faculty have resisted the impulse of publishers to come out with a new edition of their book every year. The works that we deal with in law school are often public domain works: court decisions and legal opinions that are not under copyright and never were. So some faculty have decided to create their own texts, and offer them to students as downloadable PDFs at very low or even no cost. I think this is great. I personally moved to this in the book that I teach from now in my intellectual property course. So I abandoned the \$290 book—a new edition of which was coming out each year without even really being that new—in favor of a textbook published by Semaphore Press.² Students are encouraged to pay \$20 for the download, but they can pay actually whatever amount they want. And I found that the educational value of the book was the same, if not better than, what I had been using.

That's fantastic. Why are universities emphasizing student entrepreneurship, in your view?

I think entrepreneurship has gone from being almost a dirty word twenty years ago to now being something that it would be unthinkable not to offer and embrace in higher ed. Look at its use in mission statements

2. Loren, L., & Miller, J. S. (2017). *Intellectual property law: Cases & materials*. Oregon City, OR: Semaphore Press. https://semaphorepress.com/IntellectualPropertyLaw_overview.html.

and strategic plans. I think one can make the case that this has come about because of the interest of board members, who are often in business, where the term was accepted much earlier on as being a good thing. To the extent it means being intellectually interested, curious, and nimble, I am all for it. And by the same token I think it's appropriate that students expect some level of practicality in their education. Philosophers like John Dewey wrote about this decades ago. So in many ways it's not a new concept, but the ethos has certainly had an impact here in the last twenty years on higher education. Because of that, both faculty and student collaboration has been encouraged to a degree we didn't use to see in higher education, where the relationships were often at arm's length, especially at large universities in the undergraduate setting. Now there's just much more opportunity for entrepreneurial endeavor inside and outside of the classroom. I think it's exciting and I think it's good, provided that we keep in mind students are still paying for an education, and they deserve one. And they shouldn't be nicked and dimed for every attribute that's part of their educational experience, nor should the classroom be a prelude to a rights contest between them and the faculty or between them and the institution.

Amen. These are important issues.

They're big issues and they're exciting issues. And if it means we are starting to move discussions of legal issues into a broader spectrum, into the undergraduate setting, then I think that's a good thing. We lawyers know that there are a lot of folks in society who don't have a firm grasp of what their basic rights are, and in other cases may think they have a right and they do not. So to the extent because of this movement we are seeing more discussion at an earlier age about how rights are drawn, I think that's a good thing. I think this taps in again to my "intellectual property populist" perspective that we shouldn't shy away from these conversations, and instead we should invite them, because the activity is right there in front of us. And if we want more of the activity, we have to figure out these issues in a way that's going to be fair and consistent with what we expect from higher education. And that's really what I think the broader question is: Why do we educate? What are the goals? Is what we're doing consistent with those goals? Those are fun conversations to have. If you look at the history of American higher education, there has been some change. We talked about entrepreneurship being added to mission statements and strategic plans. It is the case that higher ed can change. We know it happens slowly. But it does happen. And this is just one piece of the puzzle. We're not even getting into the immense changes that have come about with respect to bodily integrity and freedom on campus in the area of Title IX. I know that's

not the focus of our discussion, but a lot has changed in that realm as well, for the better.

I know that those issues occupy a large part of our general counsels' time.

Yes they do. I hear people say, "Well, it's hard to say that intellectual property is as important as some of these other pressing legal concerns involving sexual assault and rape on campus." And that can be a difficult argument to make when time is limited and resources are constrained. I'm certainly not going to say that IP is more important than those subjects. I will say that it affects everyone, and that as a student, and certainly as a faculty or staff member in higher education, you will have an intellectual property question or concern at some point in your career, probably sooner rather than later. So I don't think it's something we can punt off into the future forever and say, "Well, I'll worry about it when the time comes." By then it may be too late.

Were there topics that we didn't get to that you'd like to share with JCEL readers?

The other thing I want to mention is trade secrecy. This is the one area within intellectual property that people are natively familiar with, because they know what a secret is. But by the same token, historically it's seemed absolutely irrelevant to higher education, so there hasn't been much focus on it. And that was my thought also. But as I was performing research for my book, I came across a number of instances where, in the past fifteen years, universities have claimed trade secrecy in certain information that they collect and maintain. And they're claiming this to resist efforts to divulge this information to students, to funders, and to the public in response to open records request, for example. As we see institutions behave more like businesses, they are claiming a business advantage to keeping some information private. And when the institution itself is public, I think that raises some real concerns from the standpoint of whose interest is the institution serving in making these claims.

And they're doing it in instances where often the information is related to athletics, or donors, and they're claiming that the names and the amounts in those areas are not subject to public scrutiny or investigation. And I do think that's unfortunate, because there's a long history of higher education being open. I think that's in fact why the public trusts—or historically has trusted—higher education to act for our benefit. Because we know that it's open for inspection and that its orientation is not to hide or to obfuscate, it's to share and to make available.

I think we're seeing more of this, unfortunately. And trade secrecy under state law is a reason why an institution can refuse to disclose material that they otherwise would be required to disclose. So that's a story that I would flag for readers as we move forward because I think there are going to be more of those claims, and they're going to come up in instances that may surprise us—and in fact they already have.

These are things that have an impact on everybody. And so who decides what the model and functions are within an institution to deal with these questions is something we all should be thinking about.

Yes and if I may just briefly say at the end here, that certainly for public institutions, what we're really arguing about here is the future of public higher education. Will it continue in the same form that we have seen it heretofore? Or will the practices of public higher ed become so similar to corporate practice and to private business practice that the public will eventually say, "Enough, we don't trust you, and if that's how you want to play, then we're not going to subsidize you anymore." Sort of live by the sword, die by the sword. And I think the recent efforts in Congress are emblematic of this shift, where there is this growing sense that, in some ways, public higher education has betrayed our trust, and therefore must face some funding consequences. That may be a future that some want, and some may not. But these practices involving intellectual property really invite that discussion.

It's really been my pleasure to speak with you both, and thank you for this opportunity. And I thank the readers of the journal for the interest in my work.