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UNIVERSITY™: TRADEMARK RIGHTS ACCRETION IN HIGHER EDUCATION

*Jacob H. Rooksby**

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* Jacob H. Rooksby, M.Ed., J.D., Ph.D., Assistant Professor of Law, Duquesne University School of Law. Earlier versions of this work benefitted from the thoughtful comments and suggestions of faculty at Cleveland-Marshall College of Law at Cleveland State University and faculty participants at the Houston Higher Education Law Roundtable, sponsored by the University of Houston Law Center's Institute for Higher Education Law and Governance. Special thanks to Dionissi Aliprantis, Bill Kaplin, Michael Madison, Michael Olivas, Al Peláez, Alex Roberts, Leland Ware, and Jeff Williams for their insightful suggestions on earlier drafts, to Joe Walton for his expert technical assistance, and to Matthew Beddingfield for his invaluable help with research and data collection. All errors are my own.

I. INTRODUCTION

Colleges and universities are no strangers to intellectual property.[1] In a higher education environment increasingly challenged by dwindling state appropriations and stagnant or declining tuition revenue, the pressure is on for colleges and universities to generate revenue via new channels.[2] The commercialization of intellectual property has proven to be a popular, albeit imperfect, vehicle in furtherance of these efforts. Although there is no shortage of both legal and higher education commentary focusing on the treatment of patents and copyrights by institutions of higher education,[3] trademark activity by colleges and universities largely has escaped attention.[4]

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1. *See generally* CORYNNE MCSHERRY, WHO OWNS ACADEMIC WORK? BATTLING FOR CONTROL OF INTELLECTUAL PROPERTY (2001) (arguing that efforts in higher education to generate revenue from intellectual property sources create tension with universities' traditional role as primary forums for the public domain).

2. *See, e.g.*, E. Gordon Gee, *Colleges Must Find Innovative Ways To Finance Their Missions*, CHRON. HIGHER EDUC. (Oct. 30, 2011), http://chronicle.com/article/Colleges-Must-Find-Innovative/129568/ (describing the author's efforts as president of The Ohio State University to generate revenue from non-traditional sources).

3. *See, e.g.*, AM. ASS'N OF UNIV. PROFESSORS, RECOMMENDED PRINCIPLES TO GUIDE ACADEMY-INDUSTRY RELATIONSHIPS 141–62 (2014) (providing a higher education perspective on intellectual property management); Irwin Feller, *Technology Transfer from Universities*, *in* 12 HIGHER EDUCATION: HANDBOOK OF THEORY AND RESEARCH 1–42 (John C. Smart ed., 1997) (describing the centralization of technology transfer in higher education); Pat K. Chew, *Faculty-Generated Inventions: Who Owns the Golden Egg?*, 1992 WIS. L. REV. 259 (1992) (arguing that faculty ownership of inventions should not preclude universities from benefitting from faculty inventions to some extent); Jay P. Kesan, *Transferring Innovation*, 77 FORDHAM L. REV. 2169 (2009) (arguing that higher education has primarily limited its technology transfer activities to licensing and that higher education should pursue additional technology-transfer revenue streams); Laura G. Lape, *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 VILL. L. REV. 223 (1992) (discussing professor ownership of copyrights and methods to resolve ownership conflicts between professors and universities); Gregory Kent Laughlin, *Who Owns the Copyright to Faculty-Created Web Sites?: The Work-for-Hire Doctrine's Applicability to Internet Resources Created for Distance Learning and Traditional Classroom Courses*, 41 B.C. L. REV. 549 (2000) (exploring who owns materials associated with distance education); Michael A. Olivas, *Introduction: Intellectual Property on Campus: Computers, Copyright, and Cyberspace*, 27 J.C. & U.L. 1 (2000) (introducing a collection of articles from a conference on intellectual property in

One obvious explanation for this oversight is that trademark is the outlier of the traditional intellectual property group (i.e., copyright, patent, and trademark). For starters, its fundamental underpinnings differ substantially from those of copyright and patent, both of which were contemplated by the Framers as rights in gross available for authors and inventors for a limited time, in recognition of the need "[t]o promote the Progress of Science and useful Arts."[5] Accordingly, copyright and patent overlay nicely on higher education's traditional charge to create and disseminate new knowledge. Works and innovations protected by these legal regimes also track their creation to individuals, who in higher education consist of the faculty, the traditional locus of resources and power in higher education.[6]

The granting of trademark protection, on the other hand, finds its roots in Congress's ability to regulate commerce between the states. Viewed as a right appurtenant to commercial activity, trademark protection by rights holders exists to protect consumers from confusion in the marketplace over the source of goods and services. This objective is important, but at first blush may seem ancillary to, or even in ten-

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higher education, largely discussing copyright); Dale P. Olson, *Copyright and Fair Use: Implications of* Nation Enterprises *for Higher Education*, 12 J.C. & U.L. 489 (1986) (reviewing implications of the Supreme Court's limitation of the fair use defense for higher education); Jacob H. Rooksby, *Innovation and Litigation: Tensions Between Universities and Patents and How To Fix Them*, 15 YALE J.L. & TECH. 312 (2013) (recommending changes to university patent policies and an amendment to the Patent Act that would enable universities to generate revenue from patent ownership while avoiding patent litigation); Sheila Slaughter & Gary Rhoades, *The Social Construction of Copyright Ethics and Values*, 16 SCI. & ENG'G ETHICS 263 (2010) (explaining approaches to copyright law in higher education).

4. For a recent exception, see Alexandra J. Roberts, *Goodwill U: School Name Change & Trademark Law*, 3 IP THEORY 129 (2013), discussing the role of institutional names in branding and consumer perception. *See also* Samantha King & Sheila Slaughter, *Sports 'R' Us: Contracts, Trademarks, and Logos*, *in* ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION 256, 267–78 (Sheila Slaughter & Gary Rhoades eds., 2004) (arguing that trademark and licensing activity blur the line between nonprofit and commercial activity in higher education); Ann Bartow, *Trademarks of Privilege: Naming Rights and the Physical Public Domain*, 40 U.C. DAVIS L. REV. 919, 948 (2007) (discussing naming opportunities at colleges and universities); Celeste L. Geier, Comment, *Protection of University Symbols*, 38 BAYLOR L. REV. 661 (1986) (analyzing recent developments in trademark law and their impact on colleges and universities); Alayne E. Manas, Note, *Harvard as a Model in Trademark and Domain Name Protection*, 29 RUTGERS COMPUTER & TECH. L.J. 475 (2003) (arguing that institutions should look to Harvard University as a model for trademark and domain name protection strategies); C. Knox Withers, Note, *Sine Qua Non: Trademark Infringement, Likelihood of Confusion, and the Business of Collegiate Licensing*, 11 J. INTELL. PROP. L. 421 (2004) (arguing that colleges and universities should not be able to enjoin merchandisers from selling unlicensed products if the seller identifies his products as unlicensed); Glenn M. Wong, *Recent Trademark Law Cases Involving Professional and Intercollegiate Sports*, 1986 DET. C.L. REV. 87, 100–19 (1986) (addressing litigation over collegiate sports trademarks and discussing licensing opportunities as an alternative to litigation).

5. U.S. CONST. art. I, § 8, cl. 8.

6. *See generally* SHEILA SLAUGHTER & LARRY L. LESLIE, ACADEMIC CAPITALISM: POLITICS, POLICIES, AND THE ENTREPRENEURIAL UNIVERSITY (1997) (describing the traditional role of faculty in higher education).

sion with, higher education's traditional detachment from the market.[7] Instead of individual authors or inventors, the creation of trademark rights also tracks to entities, which in higher education consist of the college or university as an institution, a traditionally secondary actor viewed as subservient to, or at least controlled by, the faculty.

But the history of modern higher education is a story of higher education's gradual embrace of the market[8] and the weakening grip of faculty over issues of governance and decision making.[9] Consistent with these trends, one might expect colleges and universities to have fully embraced the pursuit of trademarks as an activity that serves institutional interests while providing for the possibility of revenue generation. Trademarks, after all, have value because of their meaning in the market, as readily attested to by a visit to any Football Bowl Subdivision institution on a Saturday afternoon in the fall. For colleges and universities, trademarks most visibly involve logos and insignia, sweatshirts and jerseys — products made by Nike and Adidas.

It would be easy to think of trademarks in higher education as beginning and ending with marks such as these, and indeed the vast majority of the sparse commentary on trademarks in higher education focuses on collegiate licensing programs and the use of institutional

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7. To better understand this traditional detachment, see, for example, DAVID L. KIRP, SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION 7 (2003), explaining that

> embedded in the very idea of the university — not the storybook idea, but the university at its truest and best — are values that the market does not honor: the belief in a community of scholars and not a confederacy of self-seekers; in the idea of openness and not ownership; in the professor as a pursuer of truth and not an entrepreneur; in the student as an acolyte whose preferences are to be formed, not a consumer whose preferences are to be satisfied.

See also CHRISTOPHER NEWFIELD, UNMAKING THE PUBLIC UNIVERSITY: THE FORTY-YEAR ASSAULT ON THE MIDDLE CLASS 223 (2008) ("The university and business are partners that should not fuse, neighbors that need good fences, friends that must remember that opposites attract."); WILLIAM C. TIERNEY, TRUST AND THE PUBLIC GOOD: EXAMINING THE CULTURAL CONDITIONS OF ACADEMIC WORK (2006) (exploring the history of higher education and perceptual issues arising from competition in a market economy).

8. *See* ELIZABETH POPP BERMAN, CREATING THE MARKET UNIVERSITY: HOW ACADEMIC SCIENCE BECAME AN ECONOMIC ENGINE 158 (2012) (describing how market logic came to prevail over the logic of science in higher education); NEWFIELD, *supra* note 7, at 172 (describing how revenue-center management accounting practices helped "confirm[] the market not as academic servant but as academic master, the de facto final authority on the health of the enterprise"); SLAUGHTER & LESLIE, *supra* note 6, at 5–8; Paolo Guarda, *Creation of Software Within the Academic Context: Knowledge Transfer, Intellectual Property Rights and Licences*, 44 INT'L REV. INTELL. PROP. & COMPETITION L. 494, 496 ("[W]e are witnessing a whole series of pressures to make universities, and the activities performed there, cater to the needs of the market.").

9. *See generally* LIONEL S. LEWIS, WHEN POWER CORRUPTS: ACADEMIC GOVERNING BOARDS IN THE SHADOW OF THE ADELPHI CASE (2000) (describing the illusion of faculty-shared governance in the era of self-perpetuating boards of trustees at private colleges and universities).

trademarks in athletics.[10] But athletics and athletics-related trademarks are only one part of a larger story. For years, institutions of higher education have quietly been amassing substantial trademark portfolios with marks that go beyond athletics and touch more squarely on topics of education and research — the very activities widely deemed as defining higher education.[11]

So what trademarks have colleges and universities obtained? How common is trademark activity in higher education, and which institutions engage in it? What are the trends in terms of numbers of trademarks registered? This Article provides empirical answers to these questions by reporting results of a comprehensive study to locate every federal trademark registration currently owned by an American college or university. The data provides insight into an important and growing area of academic capitalism.[12] It also offers footing for nor-

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10. *See, e.g.*, Ruth H. Alexander, *The Economic Impact of Licensing Logos, Emblems and Mascots*, 5 J. LEGAL ASPECTS SPORT 28 (1995) (discussing the economic value of trademarks in collegiate athletics); David A. Anderson, *Licensing of College and University Trademarks*, 8 J.C. & U.L. 97 (1981) (explaining how changes in case law allowed universities to more easily profit from their marks in athletic merchandise); Scott Bearby & Bruce Siegal, *From the Stadium Parking Lot to the Information Superhighway: How To Protect Your Trademarks from Infringement*, 28 J.C. & U.L. 633 (2002) (recommending that colleges and universities adopt various remedies for infringement of sports trademarks in order to protect and increase trademark value); Richard L. Irwin, David K. Stotlar & Aaron L. Mulrooney, *A Critical Analysis of Collegiate Licensing Policies and Procedures*, 20 J.C. & U.L. 97 (1993) (reporting on a survey of sport licensing and collegiate programs and recommending administrative protocols); Robert Lattinville, *Logo Cops: The Law and Business of Collegiate Licensing*, 5 KAN. J.L. & PUB. POL'Y 81 (1996) (outlining the history of trademarks in higher education and intercollegiate sports and predicting future revenue streams for sports-related trademarks); Jack Revoyr, *Non-Definitive History of Collegiate Licensing*, 88 TRADEMARK REP. 370 (1998) (outlining the evolution and spread of trademark licensing programs in higher education and noting the parallel rise of the popularity of intercollegiate athletics); Michael G. Schinner, *Establishing a Collegiate Trademark Licensing Program: To What Extent Does an Institution Have an Exclusive Right to Its Name?*, 15 J.C. & U.L. 405 (1989) (reviewing the case law governing new registration of marks that are used in third-party commercial sales); Finus P. Gaston, Administrative Decision Making: A Study of Collegiate Trademark Licensing Programs (Mar. 19, 1984) (unpublished Ph.D. dissertation, University of Alabama) (on file with University of Alabama).

11. *See, e.g.*, ACADEMY OF LIFELONG LEARNING, Registration No. 2,121,095 (registered Dec. 16, 1997 to the University of Delaware, in relation to "educational services, namely, offering continuing education courses at the collegiate and graduate level"); WHERE THEORY INFORMS PRACTICE AND PRACTICE INFORMS THEORY, Registration No. 2,107,400 (registered Oct. 21, 1997 to Harvard School of Public Health, in relation to "conducting workshops, seminars, courses and conferences in the field of public health care"); *see also infra* notes 219–222 and accompanying text.

12. Academic capitalism is a conceptual theory in higher education that was developed in the late 1990s. It describes what was then an emerging shift of priorities, allegiances, financing, and structure of tertiary education. Two of its chief conceptualists, Sheila Slaughter and Gary Rhoades, describe the theory as follows: "[T]he increasing engagement of higher education institutions and participants in marketlike and market behaviors in creating and taking to the marketplace (1) research and education products and services that commodify higher education's basic work and (2) nonacademic products and services that feature higher education as a nonacademic consumption item." Gary Rhoades & Sheila Slaughter, *Academic Capitalism and the New Economy: Privatization as Shifting the Target of Public Subsidy in Higher Education*, *in* THE UNIVERSITY, STATE, AND MARKET: THE POLITICAL

mative arguments concerning the trademark behavior of institutions of higher education.[13]

From a conceptual standpoint, this Article claims that trademark accretion within higher education is an affront to the public's interest in higher education. Trademark registration data in this Article is used to describe how many institutions have staked rights to various descriptive aspects of their educational programming and research undertakings, including the names of faculty or institutional research goals or initiatives aimed at solving public interest problems, academic and co-curricular programs intended to benefit their students, and university-developed products that were funded by the public and are intended to benefit the public's health and safety. I argue that these marks, and the exclusive rights they represent, threaten to undermine the public-serving soul of non-profit higher education.[14]

Seemingly overlooked by institutions in their wide-reaching trademark activity is society's interest in higher education serving as an open and public sphere, where private rights such as trademarks should be deployed sparingly, and only to further the most compelling of public interests. When colleges and universities seek and obtain trademark protection in expansive and unnecessary ways, they lay claim to words and devices in a manner that threatens to diminish, as opposed to maintain, a vibrant public domain. Because trademark registrations signify rights to commercial uses of words, rights holders and the public often mistakenly think they confer ownership in words themselves. This misperception tends to promote risk aversion and stifle otherwise fair expression: Determining when a mark is confusingly similar to another, or divining impermissible commercial uses of a term from fair uses of it, are complicated legal questions.

Through empirical data and normative suggestions, this Article argues that we should not want or expect institutions of higher educa-

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ECONOMY OF GLOBALIZATION IN THE AMERICAS, 103–04 (Robert A. Rhoads & Carlos Alberto Torres eds., 2006).

13. The scope of my arguments concerning college and university trademark behavior is limited by design. The background and data presented in this Article raise additional empirical questions, including ones that involve college and university enforcement of unregistered marks; college and university registration of trademarks at the state level; the relationship between college and university branding and trademark law; and the role of false advertising law in the commercial activities of colleges and universities. I leave for follow-on work more detailed examinations of these topics. This Article's focus also should be distinguished from concerns involving collegiate mascots and trade dress, both of which have as much to do with branding and marketing as do trademarks. Collegiate mascots, in particular, have been the focus of important public interest concerns, not addressed here. *See, e.g.*, Andrew Mytelka, *U. of North Dakota Restores "Fighting Sioux" Mascot, as Debate Moves to Ballot Box*, CHRON. HIGHER EDUC.: THE TICKER (Feb. 8, 2012), http://chronicle.com/blogs/ticker/u-of-north-dakota-restores-fighting-sioux-mascot-as-debate-moves-to-ballot-box/40386.

14. See Jacob H. Rooksby, *Colleges Need Free Speech More Than Trademarks*, CHRON. HIGHER EDUC. (Feb. 24, 2014), http://chronicle.com/article/Colleges-Need-Free-Speech-More/144907/, for additional treatment of this subject.

tion to seek private rights in uses of language that describe or promote educational services or represent attempts to solve community concerns. These forays clutter the linguistic market and are causing a growing blizzard of marks in higher education. Fueling the storm are institutions' hypersensitive image consciousness and the mistaken belief that any pet phrase needs "protection" in the form of a trademark registration. Unfettered speech — long considered a hallmark of academia — has great potential to be buried under drifts of regulated intellectual "property."

Some may reject these premises, and argue that — akin to a public corporation's duty to stockholders — colleges and universities bear a weighty responsibility to the public to protect their assets, whether tangible or intangible. I recognize the force of the protection argument, but it overlooks the inescapable root problem of higher education's own making: Many institutions are staking claim to aspects of their identity that should be left unmarked. There is no reason for colleges and universities to build trademark portfolios as if they were stockpiles. Unlike for-profit companies, higher education institutions operate without any prospect of a buyout that would be made more attractive by an arsenal of trademarks.

A few guiding words on what follows. Part II introduces readers to trademark precepts, describes the history of college and university trademark activity, reviews scholarly commentary on the subject, and highlights notable examples of trademark enforcement and accretion in higher education. Part III reviews the original mixed-methods study I conducted for this Article, including decisions that influenced its results. Part IV is the empirical heart of the Article. It describes the study's findings and considers their implications. Finally, Part V offers proposals and recommendations for developing a concept of model behavior or norms for colleges and universities that seek trademarks.

II. BACKGROUND ON COLLEGE AND UNIVERSITY TRADEMARK ACTIVITY

To understand the growth of college and university trademark activity first requires a background in trademarks, how they are obtained, and what protections they provide. Then, a brief history of collegiate licensing, followed by anecdotal evidence of trademark accretion and enforcement activity by colleges and universities, will elucidate the data examined in this Article's empirical study.

A. Trademarks Explained

Trademarks are unusual creatures. Protected by common law and by statute, and protectable at the federal level as well as the state level, trademarks are relatively easy to create and maintain. These features distinguish them from their intellectual property brethren, copyrights and patents. Patentable inventions seldom are easy to create, and although copyrights can protect even trivial expressions, the most valuable works protected by copyright (e.g., books, movies, software) are not born in a day. Whereas the terms of protection for copyrights and patents have expanded dramatically throughout history, neither compares to the term of protection for trademarks, which in theory can be protected in perpetuity as long as they are used.

Use is a *sine qua non* of trademark protection (again, different from copyright and patent). Common law rights do not inure in marks that are not used, and trademark registration certificates — whether from a state or the federal government — are not issued unless the applied-for mark is being used. Ultimately, registration at either level is not necessary in order to state a cause of action for infringement under the federal Lanham Act, as common law protection extends wherever the mark is used (i.e., if a mark only is used in two states, the mark holder's presumptive zone of protection only extends to those two states, subject to the rights of any senior claimants of the same mark).[15]

Although the use requirement is strict, what qualifies as a protectable trademark is quite expansive. Under the Lanham Act, "any word, name, symbol, or device, or any combination thereof" is eligible, provided that it indicates source, identifies goods and/or services, and distinguishes those goods and/or services from those of others.[16] State statutes and common law protection mirror these requirements. Of critical concern is that the mark indicate source as opposed to merely serving as a description of a product or service.[17] Thus, a generic word such as "apple" cannot serve as a trademark for a brand of apple, for to award protection effectively would prevent others from accurately describing their product. But "apple" can serve to indicate source if used in relation to computers and other electronic gadgets.

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15. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:26 (4th ed. 2014) (describing infringement actions under the Lanham Act for either registered or unregistered trademarks); 5 *id.* §§ 26:2, 26.27, 26.28 (4th ed. 2014) (describing the territorial extent of common law trademark protection).

16. 15 U.S.C. § 1127 (2012).

17. TMEP § 1213.03(a) (8th ed. Oct. 2013) ("Typically, an unregistrable component of a registrable mark is the name of the goods or services, other matter that does not indicate source, matter that is merely descriptive or deceptively misdescriptive of the goods or services, or matter that is primarily geographically descriptive of the goods or services.").

How one uses a mark therefore is of relevance in assessing the scope of trademark protection. The registration system maintained by the federal government does not permit Apple, Inc. to "own" the word *apple* with respect to every product or service imaginable.[18] Instead, Apple's rights in the word are appurtenant to its use of it. Registration certificates issued by the United States Patent and Trademark Office ("USPTO") contain a listing of the goods and/or services in relation to which the trademark is used and protected, and registrants cannot use these certificates as evidence of any superior right to use the mark in relation to goods and/or services outside of those listed on the registration certificate.[19] The USPTO requires trademark applicants to divulge additional information during the application process, such as the date the applicant claims to have first used the mark in commerce in relation to the claimed goods and/or services.[20] Applicants also must submit a specimen of the mark — i.e., evidence showing the mark as actually used — before the USPTO will permit registration.[21]

Many mark holders prefer to seek federal registration over state registration, although state registration is easier and cheaper to obtain.[22] Federal registration — which may be maintained in renewable,

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18. However, some argue that the provision of the Lanham Act that establishes a cause of action for trademark dilution comes close to conferring a form of ownership over a word. *See, e.g.*, Sandra L. Rierson, *The Myth and Reality of Dilution*, 11 DUKE L. & TECH. REV. 212, 291 (2012) ("Dilution laws come close to granting trademark rights 'in gross.'"); *see also* Robert G. Bone, *A Skeptical View of the Trademark Dilution Revision Act*, 11 INTELL. PROP. L. BULL. 187 (2007). *But see generally* Clarissa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006) (arguing that judicial use of dilution law has had less effect than commentators predicted).

19. As the Eighth Circuit describes,

> The registered trade-mark is limited by its claim, and the applicant is concluded by his statement made a part of his application. The exclusive right to use the mark should be limited to use on the class of goods for which it was registered, as set forth in the statement filed, and to merchandise of substantially the same descriptive properties.

Walgreen Drug Stores v. Obear-Nester Glass Co., 113 F.2d 956, 960 (8th Cir. 1940), *cert. denied*, 311 U.S. 708 (1940). Colleges and universities often have different markets in which they seek protection of their trademarks. Their primary market consists of educational services, and a federal trademark registration claiming an institution's name as used in relation to educational services can be used to reflect and support the institution's freedom to operate under its chosen name in higher education, and to prevent others from adopting an institutional name that might confuse those who consume educational services (i.e., students and faculty). But colleges and universities operate in other markets as well, and therefore may seek federal trademark registrations that pertain to their activities in these ancillary markets, such as entertainment services or various classes of consumable wares (e.g., sweatshirts, t-shirts, athletic apparel). *See infra* Part IV.A.

20. *See* TMEP § 901 (8th ed. Oct. 2013) (describing the use-in-commerce requirement).

21. *See id.* § 904 (describing the specimen requirement).

22. For an example, compare *Initial Application Forms*, USPTO, http://www.uspto.gov/trademarks/teas/initial_app.jsp (last visited May 5, 2014) (indicating that federal registration costs are $325 or $275 depending on type of application) with *Application for Registration of Trademark or Service Mark*, PENN DEP'T OF ST. http://www.portal.state.pa.us/portal/server.pt/gateway/

ten-year terms, assuming the mark is still in use and required filings are made with the USPTO, as required by law — provides several benefits over state registration. First, federal registration provides prima facie evidence of validity, ownership, and exclusive right to use the mark in commerce with respect to the claimed goods or services.[23] Second, it provides prima facie evidence of use of the mark in all fifty states, regardless of whether actual use has occurred in all states.[24] Third, it provides national constructive notice of the claim of rights.[25] This benefit means that later adopters of the mark are deemed as being "on notice" of the senior user's rights in the mark. Fourth, it allows for the possibility of the mark becoming incontestable after five years of continuous use.[26] Incontestability means the registration serves as conclusive evidence of the exclusive right to use the mark for the claimed goods or services in interstate commerce.

No matter the protection afforded (common law, state, or federal), the primary theory behind providing trademark protection is the same. Trademarks reduce consumer search costs by allowing consumers to quickly identify those goods and services that emanate or are affiliated with a source they have come to recognize as denoting quality.[27] This efficiency goal effectively awards continuous and ongoing investment in a distinctive brand and serves as a quality control measure for consumers.

When these balances are disrupted, a cause of action for trademark infringement may lie. The likelihood of consumer confusion, as evidenced by consideration of a variety of factors that vary to a degree by federal circuit court, forms the core of the cause of action.[28] If a likelihood of confusion exists, trademark infringement is found, and injunctive and monetary relief are possible awards.

PTARGS_0_160329_488558_0_0_18/1112.pdf (last visited May 5, 2014) (indicating that Pennsylvania registration costs are $50).

23. 15 U.S.C. § 1057(b) (2012).

24. *Id.* § 1057(c).

25. *Id.*

26. *Id.* § 1065.

27. *See generally* Deven R. Desai, *From Trademarks to Brands*, 64 FLA. L. REV. 981 (2012).

28. *See* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:1 (4th ed. 2014). For an example of this variance, one can examine analysis of actual confusion, a factor always considered in likelihood of confusion. Because unsolicited statements by consumers that adduce actual confusion are hard to come by, survey evidence is the typical vehicle for attempting to show that confusion exists in the marketplace in light of how an accused infringer is using a mark; however, the amount of confusion deemed persuasive on this factor depends on the facts. Some circuits have found a likelihood of confusion based on a consumer survey showing as few as fifteen percent of relevant consumers confused. *See, e.g.*, Exxon Corp. v. Texas Motor Exch. of Houston, Inc., 628 F.2d 500, 507 (5th Cir. 1980).

B. Growth of Collegiate Licensing

1. Background and Early History

Collegiate licensing entails institutions of higher education licensing the use of their trademarked names, logos, and insignia to companies that produce consumption products such as sportswear, stationery, and office goods.[29] According to recent estimates, the collegiate licensing industry is a $4.6-billion industry,[30] up from $100 million in 1981.[31] Royalties generated from the sale of officially licensed merchandise are returned to those institutions that license their trademarks.[32]

Though no one today seriously questions the existence of this industry or the ability of colleges and universities to participate in and profit from it, the emergence of the industry about forty years ago was met with heated debate. Some viewed the collection of royalties by colleges and universities as akin to taxation.[33] Others resisted the notion that colleges and universities could exert control over who could capitalize on their names and insignias, on the belief that higher education served a public purpose that yielded public ownership.[34] Regardless of the ownership question of institutional trademarks, some simply resisted licensing out of fear that it would alter the traditional nonprofit ethos of higher education.[35]

Although the collegiate licensing industry as we recognize it today is relatively young, the use of college and university names, logos, and insignia on tangible products dates back much further. Collegiate athletic teams have worn uniforms adorned with identify-

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29. "A license is nothing more than an agreement not to sue an infringer in exchange for the payment of money or 'royalties.'" Anderson, *supra* note 10, at 100. In reality, licenses contain much more than a promise not to sue, although such provision is the *sine qua non* of a license. Additional provisions typically include details concerning the scope of the license, product approval prior to sale, quality specifications and quality control measures, and accounting procedures. JACK REVOYR, THE NEW COMPLETE "HOW TO" GUIDE TO COLLEGIATE LICENSING 46–50, 114–22 (1990); Schinner, *supra* note 10, at 424–25 n.121; Lattinville, *supra* note 10, at 99–124.

30. *The Collegiate Licensing Company Names Top Sellers for Fiscal Year 2011–12*, THE COLLEGIATE LICENSING COMPANY (Oct. 8, 2012), http://www.clc.com/News/Archived-Rankings/Rankings-Annual2012.aspx.

31. Suzette M. Thweatt, Collegiate Licensing at the University of North Carolina: A Historical Review of the Past and Present Role of Licensing at UNC and Recommendations for Future Growth 2 (2001) (unpublished M.A. thesis, University of North Carolina at Chapel Hill) (on file with University of North Carolina at Chapel Hill).

32. Royalty rates for collegiate merchandise are typically five to seven percent, although some institutions are able to negotiate higher rates. Anderson, *supra* note 10, at 100; *see also* Gaston, *supra* note 10, at 40 (noting typical rates between five and ten percent).

33. Gaston, *supra* note 10, at 36–37.

34. *Cf.* Univ. Book Store v. Univ. of Wisc. Bd. of Regents, 33 U.S.P.Q.2d 1385, 1394 (T.T.A.B. 1994) (rejecting the argument that collegiate trademarks promote "harmful monopolies").

35. Gaston, *supra* note 10, at 59–62.

ing marks of their sponsoring institutions for as long as teams have been fielded, and individual college and university bookstores sold folders, binders, and pencils imprinted with college and university marks since at least the early 1900s.[36] But these activities were always incidental undertakings, intended only to benefit the institution and its students and alumni directly — never industries unto themselves for the consuming public.

The market for widespread sale of products featuring the marks of colleges and universities emerged in the mid-to late-1970s, coincident with the boom in collegiate sports telecasting.[37] Commentators point to The Ohio State University and the University of California-Los Angeles ("UCLA") as being the first institutions to establish official licensing programs,[38] although records are incomplete and other evidence points to earlier, informal licensing efforts at a variety of institutions.[39] Ohio State launched its licensing program in September 1974 by decree of its board of trustees.[40] UCLA licensed the UCLA Bruin mascot to a manufacturer of watches in July 1973, at a royalty of four percent.[41] More licensing deals for UCLA soon followed.

As for federal registrations of trademarks, some scholars claim that the University of Houston became the first college or university to obtain federal registration of its institutional seal as a trademark in 1971.[42] Two years later, Ohio State achieved federal registration of its name and mascot, an event that some viewed as path breaking.[43]

2. The 1980s and the Industry's Emergence

The collegiate licensing industry started slowly. Typically only large institutions had licensing programs until the 1980s, when they became more pervasive.[44] About seventy colleges and universities had

36. *See* Revoyr, *supra* note 10, at 371.

37. *Id.*; Lattinville, *supra* note 10, at 81 ("By the early to mid-1980s, an exponential increase in televising college sports inspired many colleges and universities to implement licensing programs in order to insure [sic] control over goods and services bearing collegiate marks.").

38. *See* Schinner, *supra* note 10, at 425 n.128; Revoyr, *supra* note 10, at 372–73.

39. The University of Pittsburgh, for example, registered the design of its class ring at the state level in Pennsylvania in 1961 and subsequently licensed it to jewelers who produced the rings. *See* Univ. of Pittsburgh v. Champion Prods., Inc., 686 F.2d 1040, 1043 n.10 (3d Cir. 1982). The University of Notre Dame licensed production of its class rings in 1930. Schinner, *supra* note 10, at 414.

40. Revoyr, *supra* note 10, at 372.

41. *Id.* at 374.

42. *See* Thweatt, *supra* note 31, at 14.

43. *See id.*

44. *See, e.g.*, Bd. of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167, 169 (M.D.N.C. 1989) (noting that "in late 1982, the University [of North Carolina at Chapel Hill], prompted in large measure by the proliferation of collegiate products, decided to develop and implement a trademark licensing program").

licensing programs in 1984.[45] The decade as a whole saw several important developments that would help set the course for the industry's formation.

The first developments were on the legal front. In 1981, the Internal Revenue Service issued an important private letter ruling concerning licensing of trademarks.[46] The ruling determined that payments to licensors for use of their names, logos, and insignia were royalties, and as such, not taxable as unrelated business income. This ruling came at an important time in the growth of licensing and as other aspects of higher education operations were under scrutiny for possible unrelated business income infractions.[47]

In 1982, the University of Southern California ("USC"), UCLA, and the University of Pittsburgh ("Pitt") sued Champion Products, Inc. — the biggest supplier of branded athletic merchandise at the time — for trademark infringement.[48] Champion had for years taken the position that it could sell to the general public athletic merchandise imprinted with college and university names and insignia without licenses from the institutions whose names and insignia appeared on the merchandise.[49] The fact that most institutions at that time did not have federal trademark registrations for their names, logos, and insignias, or robust licensing programs, no doubt bolstered Champion's position.[50]

Whereas USC and UCLA settled with Champion early in the case, Pitt continued to trial in a district court in Western Pennsylvania, seeking prospective injunctive relief. The court ruled against the local plaintiff at trial, finding that Pitt's infringement claims were barred by laches.[51] The Court of Appeals for the Third Circuit reversed. Although Pitt had failed to enforce its rights in its marks vis-à-vis Champion — which had been selling Pitt-imprinted merchandise in Pittsburgh since 1936 or earlier — the court held that Champion did not rely on Pitt's inaction to its detriment, and injunctive relief there-

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45. Revoyr, *supra* note 10, at 393.

46. *See* Rev. Rul. 81-178, 1981-2 C.B. 135; *see also* I.R.C. § 512(b)(2) (2012) (excluding "all royalties" from unrelated business income); Treas. Reg. § 1.513-1(d)(4)(iv) (1983) (providing that commercial activities of an exempt organization that exploit goodwill or other intangibles generated by performance of exempt functions are unrelated trade or business income unless the commercial activities themselves "contribute importantly" to the accomplishment of an exempt purpose).

47. *See* John Brooks, *The Marts of Trade: The Law School and the Noodle Factory*, THE NEW YORKER, Dec. 26, 1977, at 48–49.

48. *See* Univ. of Pittsburgh v. Champion Prods., Inc., 686 F.2d 1040, 1041–42 (3d Cir. 1982).

49. *Id.* at 1042 ("Champion does not now, and apparently never has, maintained any licensing arrangement with, or paid royalties to, any of the schools or colleges whose insignia it uses.").

50. *See* Revoyr, *supra* note 10, at 390–91.

51. Univ. of Pittsburgh, 686 F.2d at 1044.

fore was possible.[52] The appellate court noted that the case did not present a situation where Pitt, through inaction, was attempting to capitalize on the efforts of Champion.[53] To the contrary, "it is Champion which seeks to profit from Pitt's investment, particularly in its athletic program."[54] Therefore, the court correctly recognized that the alleged confusion at issue in the case did not involve the products' source of manufacture (i.e., until *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing, Inc.*[55] and its progeny,[56] the only source of confusion recognized by courts), but rather the sponsorship, affiliation, or approval of the products by Pitt, whose names and emblems were the "triggering mechanism[s]" for the products' sales.[57]

The Third Circuit remanded the case for consideration of Pitt's claim of trademark confusion.[58] On remand, the trial court conceded that "[t]he notion that a university's name and insignia are its own property, to do with as it chooses, has a certain common-sense appeal."[59] However, the court ultimately decided that there was no likelihood of confusion — "whether of source, origin, sponsorship, endorsement, or any other nature"[60] — a finding many found surprising.[61] Even though Champion won the case on remand, it executed a licensing agreement with Pitt in November 1983, and the district court decision was vacated as part of the agreement.[62] The market for affinity wear was expanding rapidly, and Champion likely realized that it stood to generate more revenue by working with colleges and universities to license their marks in new markets, as opposed to pursuing a course that inevitably would lead to more distracting and costly legal challenges.

Despite the case's trial outcome and ultimate settlement, the Third Circuit's opinion in *University of Pittsburgh* was of vast importance to the growth of the collegiate licensing industry.[63] In its

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52. *Id.* at 1049. The appellate court agreed with the trial court, however, that Pitt could not recover any of Champion's past profits. *See id.* at 1041.

53. *See id.* at 1047.

54. *Id.*

55. 510 F.2d 1004 (5th Cir. 1975).

56. *See, e.g.*, Univ. of Ga. Athletic Assoc. v. Laite, 756 F.2d 1535 (11th Cir. 1985); Ky. Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368 (5th Cir. 1977).

57. *Univ. of Pittsburgh*, 686 F.2d at 1047–48 ("With negligible exception, a consumer does not desire a 'Champion' T-shirt, he (or she) desires a 'Pitt' T-shirt.").

58. *See* Univ. of Pittsburgh v. Champion Prods., Inc., 566 F. Supp. 711 (W.D. Pa. 1983).

59. *Id.* at 712.

60. *Id.* at 713.

61. *See* David A. Anderson, *Protecting the Demon — A Practical Guide to the Licensing of College and University Trademarks*, 4 CBA REC., July–Aug. 1990, at 29, 30.

62. Schinner, *supra* note 10, at 424; Gaston, *supra* note 10, at 32.

63. *See* Wong, *supra* note 4, at 101 (calling the *University of Pittsburgh* case "an especially important development in sports trademark law, given the previously unrestricted use of educational institutions' symbols, which manufacturers/sellers had enjoyed for years").

opinion, the appellate court thoughtfully considered and legitimized an emerging and more expansive theory of confusion — i.e., that consumers can be confused as to a product's sponsorship, affiliation, or approval, not solely its source of manufacture.[64] Recognition of this theory was of particular importance to trademark holders who sought to capitalize on their "brand" by applying it to wares outside of their primary service market. Courts and commentators initially had doubted whether federal trademark law permitted mark holders to license collateral, or non-competitive, uses of their marks — that is, uses of their marks in channels unrelated to their primary uses (in the case of colleges and universities, uses apart from educational services).[65] The Third Circuit's opinion in *University of Pittsburgh* clarified that such collateral uses are trademark eligible, opening the door for universities to "maximize royalties" through wide licensing of products unrelated to educational services.[66] The decision further established that college and university names, logos, and insignias are not de facto in the public domain, even if their owners did not actively police their use in the past.[67]

A second development in the 1980s that helped burnish the emerging collegiate licensing industry was the emergence of licensing consortia. The first such group — International Collegiate Enterprise ("ICE") — was formed in late 1979.[68] The purpose of the group was to provide an efficient mechanism by which member institutions could partner with quality manufacturers who would produce licensed merchandise. To manufacturers who wished to market collegiate apparel, consortia offered the lure of one-stop-shopping that reduced transaction costs and realized economies of scale.[69]

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64. Other courts around the country soon adopted this broader understanding of confusion in other contexts as well. *See, e.g.*, Univ. of Ga. Athletic Assoc. v. Laite, 756 F.2d 1535 (11th Cir. 1985). This understanding was also eventually codified in the Lanham Act. *See* 15 U.S.C. § 1125 (2012); *see also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:8 (4th ed. 2014) (noting that this change was made in 1989).

65. *See* Anderson, *supra* note 10, at 98; Lattinville, *supra* note 10, at 85.

66. Wong, *supra* note 4, at 111.

67. *Cf.* Gaston, *supra* note 10, at 28 ("[P]ersonal defenses [such as laches] are peculiar to each individual manufacturer-university relationship and do not provide a general basis for avoiding the institution's request to enter a trademark license agreement as a condition to selling goods bearing the institution's symbol." (citation omitted)). *See also* Bd. of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167, 171 (M.D.N.C. 1989) (holding that the University of North Carolina's ("UNC") failure to prosecute substantial uncontrolled use of its marks by third parties for nearly 190 years did not render the marks abandoned by UNC).

68. Gaston, *supra* note 10, at 16.

69. Incidentally, the consortia approach to trademark licensing has no analogue in the university patent licensing world. University patent owners and the Association of University Technology Managers ("AUTM") resist occasional calls for university technology transfer offices to merge operations based on geographic location or technological skill. *See* Robert E. Litan & Robert M. Cook-Deegan, *Universities and Economic Growth: The Importance of Academic Entrepreneurship, in* RULES FOR GROWTH: PROMOTING INNOVATION

Other licensing management companies were created in the early 1980s, such as Golden Eagle Enterprises, Inc., which merged with ICE in 1983, creating a licensing group of sixty member institutions called Collegiate Concepts, Inc.[70] Now known as Collegiate Licensing Company ("CLC"), and owned (since 2007) by IMG Worldwide, the company represents nearly 200 colleges, universities, conferences, bowls, the National Collegiate Athletic Association ("NCAA"), and the Heisman Trophy.[71] Although CLC is the industry leader, not all institutions affiliate with it. Some license their trademarks independently, while others are members of a competitor consortium, Licensing Resource Group, which represents more than 180 institutions.[72]

These consortia played an important role in exposing colleges and universities to new markets. Institutions typically initiated their licensing programs by licensing their trademarks for use on athletic apparel, but involvement with consortia allowed for easy expansion into non-apparel markets, such as paper products, leisure equipment, and even coffins.[73] Involvement with these organizations also provided one-

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AND GROWTH THROUGH LEGAL REFORM 55–82, 73 (2011); *Free Agency*, ASS'N OF U. TECH. MANAGERS, https://www.autm.net/Free_Agency.htm (last visited May 5, 2014). One wonders whether collaboration across offices might lead to more technology being transferred to society, and more efficient transfer.

70. *See* Gaston, *supra* note 10, at 17–18; *see also* Revoyr, *supra* note 10, at 375–76.

71. *See About CLC*, COLLEGIATE LICENSING COMPANY, http://www.clc.com/About-CLC.aspx (last visited May 5, 2014).

72. *See About*, LICENSING RESOURCE GROUP, http://lrgusa.com/about (last visited May 5, 2014). Some colleges and universities contract with different companies to license their names, logos, and insignia internationally. Revoyr, *supra* note 10, at 392. Although monitoring international uses of such marks may seem unimportant to all but the largest and most famous of institutions, even institutions like Western Kentucky University ("WKU") have encountered trademark issues on the international front. In 2004, WKU sued an Italian media company in Italy, claiming the company had appropriated wholesale its furry mascot, known as "Big Red," for use in a popular television show. Eric Sylvers, *Are Origins of Italian Star Found in Hills of Kentucky?*, N.Y. TIMES (Feb. 27, 2004), http://www.nytimes.com/2004/02/27/business/worldbusiness/27mediaset.html. Even though the show's creator admitted that he copied the show's character from the WKU mascot, the Italian judge ruled in favor of the media company, which happened to be owned by the country's former prime minister, Silvio Berlusconi. Justin Story, *Italian Judge Rules Against Big Red*, BOWLING GREEN DAILY NEWS, (Jan. 6, 2008, 12:00 AM), http://www.bgdailynews.com/news/italian-judge-rules-against-big-red/article_639f217b-ccdf-540e-8e87-fb613d5ae4e4.html. From Bowling Green to Italy, WKU showed it lives up to its motto of being "A Leading American University with International Reach." *See* WKU — A LEADING AMERICAN UNIVERSITY WITH INTERNATIONAL REACH, http://www.wku.edu/ (last visited May 5, 2014).

73. *See* Lattinville, *supra* note 10, at 90. Market expansion continues. Notre Dame recently unveiled a branded fragrance line, which will come in his and her versions, to be called "ND Gold Eau de Toilette" and "Lady Irish Eau de Parfum." *See The Smell of Support: Notre Dame Unveils Fragrance Line*, CHRON. HIGHER EDUC.: THE TICKER (June 21, 2013), http://chronicle.com/blogs/ticker/the-smell-of-support-notre-dame-unveils-fragrance-line/62097. The bottles will retail for approximately $60 each. *Id.*

stop-shopping for colleges and universities looking to conduct business with companies and products of known quality.[74]

Given the services these consortia provide, and the revenue they generate from providing them, one might question why the NCAA — ever in search of revenues from collegiate athletics, and eager to situate itself in positions of power — has no involvement in them, and instead is a client of CLC.[75] In fact, the NCAA did endeavor to capitalize on collegiate licensing in the 1970s but achieved limited success. In 1974, the NCAA sent letters to the athletic directors at 125 institutions well-known for their sports programs, asking them to give the NCAA the right to use their names and other indicia so that it could license such uses in Japan.[76] Amazingly, eighty-four institutions agreed, and a licensee in Japan soon made millions of dollars in revenue selling apparel bearing these institutions' marks.[77] The company even went so far as to apply to register in its own name many of these marks in Japan and other foreign countries, which its agreement with the NCAA purported to allow it to do.[78] Some institutions withdrew from this arrangement once they learned of its full parameters, which only highlighted the importance of seeking trademark rights in institutions' names, logos, and insignia and carefully monitoring their use.[79]

A third development in the 1980s that bolstered the growth of collegiate licensing was the formation of an industry group, the Association of Collegiate Licensing Administrators ("ACLA"). Formed in 1986, ACLA held its first meeting in Anaheim, California in 1987, where more than thirty institutions were represented.[80] ACLA's annual meetings and programming helped to professionalize and unify a fledgling industry.[81] In 2002, ACLA merged with another industry group to form the International Collegiate Licensing Association

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74. Michael Smith, *Champions: Bill Battle, Licensing Icon*, STREET & SMITH'S SPORTSBUSINESS J. (Mar. 26, 2012), http://www.sportsbusinessdaily.com/Journal/Issues/2012/03/26/Champions/Battle.aspx (reporting that the advent of the CLC helped clean up "a rogue business that turned out unsavory products like condoms and beer with unofficial school marks"). Condoms and collegiate licensing cannot be mentioned without reference to the University of Wisconsin. In the late 1980s and early 1990s, enterprising students in Madison took to selling — without authorization, of course — condoms emblazoned with the logo of Bucky Badger, the university's mascot. *See* Olivas, *supra* note 3, at 1. The packaging read: "Get Lucky Bucky." *See* Karen Grassmuck, *Colleges Fight Bootleggers as Sales Boom for Goods That Bear Logos and Emblems*, CHRON. HIGHER EDUC., Feb. 21, 1990, at A32.

75. *The Collegiate Licensing Company — Client Detail,* COLLEGIATE LICENSING COMPANY, http://www.clc.com/Clients/Client-Detail.aspx?id=259&t=4 (last visited May 5, 2014).

76. *See* Revoyr, *supra* note 10, at 389–90.

77. *Id.*

78. *Id.* at 391–92.

79. *Id.* at 390.

80. *Id.* at 393.

81. *See id.*

("ICLA"), which is administered by the National Association of Collegiate Directors of Athletics ("NACDA").[82]

A fourth and final development that contributed to the institutionalization of the collegiate licensing industry was the academic attention it received beginning in the 1980s. Finus P. Gaston devoted his 1984 doctoral dissertation to understanding all aspects of the emerging collegiate licensing industry,[83] and others credit his work for sparking further study of the movement.[84] He surveyed over 150 university administrators (presidents, financial vice presidents, athletic directors, and chairpersons of intercollegiate athletic committees) to learn their views on various aspects of collegiate licensing.[85] One important finding from his study concerned the organizational units that housed trademark-licensing programs at the institutions surveyed. Unlike patenting — which universities largely have managed through institutional offices of technology transfer — trademark activities were centered in a wide variety of institutional offices: financial affairs (41.9%); student affairs (2.3%); academic affairs (2.3%) athletic departments (16.3%); offices of the president (11.6%); development (2.3%); and other areas (20.9%), such as offices of general counsel, public relations, and auxiliary services.[86]

However, consensus characterized the majority of Gaston's findings. The majority of respondents were in agreement concerning legal and financial principles central to collegiate licensing, although they differed as to how licensing income should be distributed.[87] Fundamental agreement also existed concerning the legitimacy of the activity for institutions of higher education and institutions' legal right to protect the use of their names, logos, and insignia on commercial products.[88] Most respondents felt that the primary purpose for establishing a collegiate licensing program should not be to create a source of unrestricted income for the institution.[89] Respondents also recog-

82. *See New Licensing Association Formed; Officers/Directors Announced*, NATIONAL ASS'N OF COLLEGIATE DIRECTORS OF ATHLETICS (Jan. 9, 2002), http://www.nacda.com/nacda/release-20020109.html.

83. *See generally* Gaston, *supra* note 10.

84. *See, e.g.*, Jon Solomon, *University of Alabama Aggressively Defends Trademarks. How Far Is Too Far?*, AL.COM (Nov. 17, 2013, 7:00 AM), http://www.al.com/sports/index.ssf/2013/11/university_of_alabama_aggressi.html; Richard L. Irwin, Development of a Collegiate Licensing Administrative Paradigm 12–13 (1990) (unpublished Ed.D. dissertation, University of Northern Colorado) (on file with University of Northern Colorado).

85. Gaston, *supra* note 10, at 132. Targeted participants were administrators at universities holding membership in the College Football Association, the Big Ten Athletic Conference, or the Pacific Coast Athletic Conference. *Id.*

86. *Id.* at 116.

87. *Id.* at 133–35.

88. *Id.* at 144.

89. *Id.*

nized that litigation may be necessary to protect their trademark rights.[90]

Gaston's dissertation led to further examination of the nascent industry by academics,[91] a number of whom — like Gaston — themselves had ties to or roles within the collegiate licensing industry.[92]

3. Subsequent Growth

The 1990s saw increasing numbers of institutions establish licensing programs staffed with full-time licensing professionals. However, as competition for market share escalated, licensing revenue leveled off as markets became saturated and oversupplied with inventory.[93] Colleges and universities no longer competed primarily with each other for closet space and shelf space. Teams, institutions, and companies of every kind and level of fame found that consumers were interested in purchasing items emblazoned with their names, logos, and insignia.

As the industry continued to professionalize within higher education, the 1990s and 2000s also brought more efforts by colleges and universities to enforce their trademarks.[94] Many of these cases concerned interests close to home. For example, some colleges and universities went after local businesses with names that might suggest sponsorship, affiliation, or approval by the local college or university.[95] These efforts were part of a larger movement to police unauthor-

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90. *Id.* This finding contrasts markedly with how administrators in higher education view the prospect of involvement in patent infringement litigation, even forty years after passage of the Bayh-Dole Act, which formalized our system of technology transfer. *See* Rooksby, *supra* note 3, at 350 (reporting results of 2011 survey that found university administrators sharply divided on the question of whether participation in patent infringement lawsuits is consistent with institutional mission).

91. *See, e.g.*, Irwin, *supra* note 84; Jane Cecilia Meyer, Perceptions of Agencies That Market Collegiate Emblematic Merchandise Toward Selected Factors Related to Royalty Income (1992) (unpublished Ph.D. dissertation, University of Iowa) (on file with University of Iowa).

92. Dr. Gaston has spent most of his career handling trademark licensing for the University of Alabama, where — as of Winter 2014 — he was Senior Associate Athletics Director and Chief Financial Officer of the university's athletics department. *See Finus Gaston Bio*, ROLLTIDE.COM, http://www.rolltide.com/genrel/gaston_finus00.html (last visited May 5, 2014).

93. Thweatt, *supra* note 31, at 19.

94. Of course, colleges and universities enforcing their trademarks was not unheard of prior to this time. *See, e.g.*, Cornell Univ. v. Messing Bakeries, Inc., 138 N.Y.S.2d. 280 (App. Div. 1955) (holding that defendant bakery had unfairly exploited Cornell's name for business purposes).

95. *See, e.g.*, Bd. of Regents of the Univ. Sys. of Ga. v. Buzas Baseball, Inc., 176 F. Supp. 2d 1338 (N.D. Ga. 2001) (lawsuit by university against minor league baseball team); Trs. of Columbia Univ. v. Columbia/HCA Healthcare Corp., 964 F. Supp. 733 (S.D.N.Y. 1997) (lawsuit by university against health care services provider); Bd. of Trs. of the Univ. of Ark. v. Prof'l Therapy Servs., 873 F. Supp. 1280 (W.D. Ark. 1995) (lawsuit by university against sports and physical therapy clinic); Temple Univ. v. Tsokas, Civ. A. No. 88-1106, 1989 WL 104823 (E.D. Pa. 1989) (lawsuit by university against dental laboratory and real

ized uses of college and university trademarks,[96] even ones made by persons or groups with some plausible tie to the institution.[97] Novel arguments in favor of institutional trademark protection occasionally were advanced.[98]

Colleges and universities also faced new challenges to their trademarks brought by the advent of cyberspace and the cheap availability of domain names. Educause — a nonprofit organization that promotes the use of information technology in education — has managed the generic, top-level domain name extension .EDU since 2001.[99] Although this organization establishes the rules for who can register .EDU domain name extensions,[100] it has no ability to prevent individuals or companies from registering domain names in other top-level extensions that may replicate or incorporate trademarks owned by colleges and universities. Thus, when cybersquatters began registering in the late 1990s .COM, .NET, and .ORG domain names that

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estate businesses); Pa. State Univ. v. Univ. Orthopedics, Ltd., 706 A.2d 863 (Pa. Super. Ct. 1998) (lawsuit by university against medical practice); Julianne Basinger, *Universities Allege Trademark Violations*, CHRON. HIGHER EDUC., Nov. 21, 1997, at A38 (reporting six universities sued a retail company selling university-branded cufflinks and buttons without authorization); Harry Cooperman, *Penn Files Lawsuit over Alleged Trademark Infringement of "Wharton,"* THE DAILY PENNSYLVANIAN (Mar. 30, 2013, 4:47 PM), http://www.thedp.com/article/2013/03/penn-files-lawsuit-over-trademark-infringement (reporting lawsuit filed by University of Pennsylvania against business consulting company with office in Philadelphia); Ariel Kaminer, *In Case of Big Yale v. Tiny Yale, Victor Kept the Name*, N.Y. TIMES (July 2, 2013), http://www.nytimes.com/2013/07/03/nyregion/in-case-of-big-yale-v-tiny-yale-victor-kept-the-name.html (reporting lawsuit brought by Yale University against Yale Academy, a prep school for college entrance exams); Richard Piersol, *Barry's Hits Trademark Trouble with "Husker Bar" Tagline*, LINCOLN JOURNAL STAR (Mar. 31, 2013, 4:15 AM), http://journalstar.com/news/local/barry-s-hits-trademark-trouble-with-husker-bar-tagline/article_9c039258-ff31-5368-976e-f34eaa385701.html (reporting enforcement by the University of Nebraska of its trademark HUSKER against a local sports bar that adopted it as a secondary tagline); Anne K. Walters, *Emory U. Relies on Diplomacy in Safeguarding Its Trademark*, CHRON. HIGHER EDUC., Feb. 17, 2006, at A33 (reporting trademark enforcement efforts undertaken by Emory, including against a laser vision center, a flower shop, a dental practice, an animal hospital, and a Chinese language academy).

96. *See* A. Meaghin Burk & Jacqueline Knapp, *Patent and Trademark Licensing at Universities*, 58 MISS. LAWYER 15, 17 (reporting that CLC confiscated unlicensed items valued at more than $1 million throughout the 2010-11 academic year); Anderson, *supra* note 61, at 29 (noting that "schools across the nation are taking . . . steps to protect their reputations"); Grassmuck, *supra* note 74, at A32.

97. *See, e.g.*, Villanova Univ. v. Villanova Alumni Educ. Found., Inc., 123 F. Supp. 2d 293 (E.D. Pa. 2000) (granting preliminary junction to university in case against alumni association formerly approved by the university); *Harvard U. Puts More Limits on Use of Its Name*, CHRON. HIGHER EDUC., Mar. 6, 1998, at A8 (reporting that Harvard implemented a new policy to more closely control the use of its name, even by people associated with the university).

98. *See, e.g.*, Univ. of Fla. v. KPB, Inc., 89 F.3d 773, 776 (11th Cir. 1996) (the University of Florida argued, unsuccessfully, that its course numbering system — including numbers, locations of classes, and times that classes met — was a service mark).

99. *See Policy Information*, EDUCAUSE, http://net.educause.edu/edudomain/policy.asp (last visited May 5, 2014).

100. *See infra* note 283 for more on these rules.

incorporated college and university trademarks, institutions were without an external ally to prevent or remedy offending registrations. Many of the domain names and associated website content were of a sexually explicit nature, and colleges and universities turned to arbitration and litigation avenues available to all trademark rights holders when these activities surfaced.[101]

In a trend that no doubt reflects higher education's emerging focus on innovation and entrepreneurialism, students themselves have emerged as potential enforcement targets, as well as enforcement comrades, for colleges and universities looking to create, or assert, intellectual property.[102] Recently, for example, Texas A&M football player and Heisman Trophy winner Johnny Manziel decided to seek federal registration of his nickname, JOHNNY FOOTBALL, in relation to various athletic apparel and entertainment services after it was discovered that a company — believed to be affiliated with an Aggie booster — already had filed a trademark application.[103] Unable to capitalize on Manziel's name itself (due to NCAA regulations), Texas A&M professed to support Manziel's efforts, which already have resulted in a lawsuit by Manziel against an alleged infringer.[104] Even though NCAA regulations prohibit Manziel from receiving one cent of any sale of Aggie football merchandise emblazoned with his number (No. 2) on it, the NCAA has said that he can keep whatever damages he receives through such enforcement efforts without violating the organization's stringent policies concerning amateurism.[105]

Manziel's success does not come at the university's expense, but such was not the case for Robert Morris University in 2010, when news circulated about its failed efforts to acquire rights in the mark BOBBY MO from a company run by a former student.[106] For years, students and the institution used "Bobby Mo" informally as a nickname for the institution and its namesake.[107] As part of a business

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101. *See, e.g.*, Jennifer Jacobson, *Sexually Explicit Web Site Sued by U. of North Carolina*, CHRON. HIGHER EDUC., June 8, 2001, at A34 (describing federal lawsuit brought by UNC against owners of <uncgirls.com>); *see also* Manas, *supra* note 4 (describing domain name litigation brought by Harvard University).

102. *See, e.g.*, Michael C. Shull, *Biting the Hand That Feeds: How Trademark Protection Might Threaten School Spirit*, Comment, 21 MARQ. SPORTS L. REV. 641, 641 (2011) (noting enforcement efforts against student organizations at the University of Texas and University of Kansas involving unauthorized use of university trademarks).

103. Darren Rovell, *A&M, Family Covet "Johnny Football*," ESPN, http://espn.go.com/college-football/story/_/id/8619087/johnny-manziel-family-trademark-johnny-football (last updated Nov. 11, 2012, 8:11 AM ET).

104. Rick Reilly, *Selling Johnny Football*, ESPN (Feb. 26, 2013), http://espn.go.com/espn/story/_/id/8990966/selling-johnny-football.

105. *Id.* However, the NCAA has said that any effort by a Texas A&M booster to filter money to Manziel by infringing his trademark would be an NCAA violation. *See id.*

106. Michael Sanserino, *Robert Morris Graduates Coin a Phrase*, PITTSBURGH POST-GAZETTE (Feb. 2, 2010, 10:00 AM), http://www.post-gazette.com/stories/sports/rmu/robert-morris-graduates-coin-a-phrase-231689/.

107. *Id.*

course taken in 2005, Nathaniel Benz pitched the idea to create an athletic apparel company called Uwear.[108] The university liked the idea and ultimately gave Benz and other students involved with his fledgling enterprise $3000 in seed money to help launch the business.[109] At their professor's suggestion, they used part of the money to seek registration of BOBBY MO, which was at the time unregistered.[110] As Benz explained: "[The university] really goofed up [in not registering it], and we picked it up under their noses."[111] Unable to successfully purchase the trademark from Uwear, Robert Morris University was forced to coin a new nickname — "RoMo" — for its mascot.[112] What did Benz learn from this experience? Perhaps one of the very lessons that colleges and universities nationwide have learned from their own forays into trademarks: "If you have a good idea and all your ducks are in a row, just do it. Deal with the consequences and with what everyone else thinks later."[113]

C. Notable Examples of Trademark Accretion and Enforcement in Higher Education

Current and historical news articles describing trademark growth and enforcement by colleges and universities slowly formed the genesis for the study described in this Article. Because one cannot enforce a trademark without first having or asserting rights in a mark, I surmised that an anecdotally observed growth in enforcement activity likely reflected an empirically supported growth in trademark registration activity by colleges and universities. In short, my untested assumption was that, in higher education at least, trademark rights accretion and trademark enforcement correlate to some degree. This Subsection identifies many of the more colorful examples of trademark accretion and enforcement I identified before undertaking the study described in Part III. These examples are emblematic of how higher education's questionable trademark rights-claiming and enforcement pursuits can harm the public good by diminishing zones of free speech and locking up elements of the linguistic market that should be left unclaimed by higher education for others to use.

Before describing these examples, I should note that every industry has its own "trademark stories," including examples of clear overreaching or questionable enforcement tactics. Indeed, hardly a month

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108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Of course, the university was sure to seek and obtain federal registration for ROMO. *See* ROMO, Registration No. 3,529,382 (registered Nov. 4, 2008 to Robert Morris University).
113. Sanserino, *supra* note 106.

goes by without listserv or blog postings that provide illustrative examples of trademark attorney gamesmanship that are bound to delight or disgust the public, depending on one's view of trademark rights.[114]

In light of these stories, one could view instances of questionable trademark accretion and enforcement by colleges and universities as similar. That is, higher education did not invent the trademark system. If the industry plays within the rules of that system, then the public has no reason to complain. If one does not like the trademark system, then the solution is to fix the system; the problem is not with colleges and universities.

I disagree with this position. Though colleges and universities increasingly are tied to the market, it should not follow that their behavior must resemble in every respect that of commercial actors. Nonprofit higher education as an industry receives tax subsidies precisely because the industry exists to serve the public. When institutions of higher education take adversarial stances and advance legal positions that have tenuous ties to the public good, we as a public should take note of these activities and question them.

A classic example of concerning enforcement behavior was the decision of CLC and several universities to sue Smack Apparel in 2005.[115] Smack sold t-shirts featuring the two-tone color schemes of various collegiate football powerhouses, but it was careful not to use any registered marks of the institutions the shirts called to mind.[116] One shirt was intended for University of Southern California fans. It

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114. *See, e.g.*, Manny Fernandez, *Not To Be, Um, Trifled with, Texas Guards Its Slogans*, N.Y. TIMES, Sept. 15, 2013, at A13, *available at* http://www.nytimes.com/2013/09/15/us/not-to-be-um-trifled-with-texas-guards-its-slogans.html (describing efforts by the Texas Department of Transportation to enforce its registered trademark DON'T MESS WITH TEXAS against over one hundred companies and individuals, including the author of a romance novel); Andy Newman, *Cup in Logo Is at Heart of a Trademark Dispute*, N.Y. TIMES, May 30, 2013, at A18, *available at* http://www.nytimes.com/2013/05/30/nyregion/new-york-challenges-a-coffee-shop-logo.html (describing efforts by the New York State Department of Economic Development to enforce its registered trademark I ♥ NY against a local coffee shop that used the logo I ☕ NY); *Eat 'n Park Sues Texas Company over "Smiley Cookie®" Design*, PITTSBURGH TRADEMARK LAWYER (Jan. 12, 2010), http://pittsburghtrademarklawyer.wordpress.com/2010/01/12/eat-n-park-sues-texas-company-over-smiley-cookie%C2%AE-design/ (describing trademark owned by Eat 'n Park — a regional restaurant chain — for a smiley-faced cookie design, and a trademark infringement lawsuit it brought against an online purveyor of cookies iced with smiley faces); *Officially Our Best-Ever Cease and Desist*, THINKGEEK (June 21, 2010), http://www.thinkgeek.com/blog/2010/06/officially-our-bestever-cease.html (describing a cease-and-desist letter sent by attorneys for the National Pork Board to ThinkGeek, Inc., which playfully sold cans of "unicorn meat" by using the phrase "unicorn: the new white meat"). For additional interesting examples of outlandish cease-and-desist letters, see CHILLING EFFECTS, http://www.chillingeffects.org (last visited May 5, 2014).

115. *See* Bd. of Supervisors for La. State Univ. Agric. & Mech. Coll. v. Smack Apparel Co. (*Smack*), 550 F.3d 465, 475 (5th Cir. 2008) (finding university color schemes protectable as trademarks); *see also* Martin Van Der Werf, *Colors Are Trademarks, Court Says*, CHRON. HIGHER EDUC., Aug. 11, 2006, http://campusviewpoint.com/article/Colors-Are-Trademarks-Court/6644/ (describing the district court's decision in the *Smack* case).

116. *See Smack*, 550 F.3d at 472–74.

read "Got eight?" on the front and "We Do! Home of the 8 Time National Champions!" on the back.[117] The back of the shirt also included a depiction of the state of California with a star marked "SoCal" in the university's colors of cardinal and gold.[118] Unlicensed by CLC or any of the university plaintiffs, Smack boasted that it was licensed only by the First Amendment.[119]

If only. Even though no shirt incorporated any registered mark of one of the university plaintiffs, the district court ruled in favor of the plaintiffs on their Lanham Act claims, holding that an individual institution's colors, when used on merchandise that combines other identifying indicia referring to the university, can serve a source-identifying function.[120] The court awarded the plaintiffs $10,506 in actual damages and $35,686 in lost profits.[121] The Fifth Circuit affirmed these rulings on appeal, in a ruling that CLC's general counsel called a "powerful precedent for collegiate institutions . . . particularly since few courts across the country have directly addressed the issue of protecting color schemes as marks."[122] Powerful indeed, as it effectively conferred to colleges and universities — which do not actually make t-shirts — a right in gross they can use to control graphical and verbal references that call to mind their particular institution. Association can now imply source identification or endorsement, and colleges and universities are using this decision to squelch expression they find offensive.[123]

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117. *Id.* at 473.

118. *Id.*

119. Jeff Zuber & D. Dennis La, LSU v. Smack Apparel: *Trademark Protection for Color Schemes*, LAWUPDATES.COM (Feb. 6, 2009), http://www.lawupdates.com/commentary/ilsu_v_smack_apparel_i_trademark_protection_for_color_schemes.

120. *Smack*, 550 F.3d at 478. It also found that the alleged marks were non-functional and had acquired secondary meaning, and that no fair use defense was available to Smack. *Id.* at 477, 488–89.

121. *Id.* at 474.

122. Bruce Siegal, *Colorful Trends in Collegiate Trademark Protection: School Colors as Trademarks*, 25(4) ENT. & SPORTS LAW. 6, 8 (2008).

123. *See* Arelis Hernandez, *School Attorneys: FAMU Settlement with Porn Video Company Sets Precedent for Trademark Protection*, DIVERSE: ISSUES IN HIGHER EDUC., May 27, 2010, at 11. Florida A&M University ("FAMU") extracted an apology and hefty financial settlement from a company that produced and distributed a pornographic video that included orange and green props (orange and green are FAMU's colors), a wall clock displaying FAMU's mascot, and several "verbal allusions" to FAMU. *Id.* The university's attorney called the settlement "a home run" because the defendant "acknowledged that the university and all other universities have a protectable interest in their university color schemes especially when combined with insignia identifying the university." *Id.* I am no proponent of pornography, but I do believe that the First Amendment permits speakers to make degrading and even offensive allusions to colleges and universities without incurring Lanham Act liability. More concerning from a policy perspective: which societal institutions will expose the nation's youth to controversial ideas and invite critical thought about them, if not our colleges and universities? For a pre-*Smack* dispute involving similar facts, see Kelly McCollum, *NYU Sues Proprietor of "Dorm Cam" Sex Site*, CHRON. HIGHER EDUC., July 31, 1998, at A20 (quoting university official as saying "it's our fundamental right to choose when and how our name gets used" (internal quotation marks omitted)).

My position is not that colleges and universities have no business seeking and enforcing trademarks. Every institution should enjoy rights in its name and related logos and insignia (assuming they serve a source-identifying function). The public benefits from the recognition and maintenance of these rights, as they limit the potential for confusion when college applicants determine where to apply and employers decide whom to hire.[124] In this respect, the trademark infringement lawsuit filed in 2012 by Regent University (a religiously-affiliated institution in Virginia) against the University System of Georgia makes sense.[125] Regent University — which has used that name since 1990, when it changed its name from CBN ty[126] — was concerned that the proposed name for a new university, "Georgia Regents University," would cause confusion.[127] Whether a likelihood of confusion existed between the two marks or not, the propriety of using trademark law to allow universities to resolve such a dispute is apparent.[128]

Disputes such as these suggest that administrators at some colleges and universities have little understanding of or appreciation for the trademark doctrine of nominative fair use, which — as classically styled — permits use of another's mark when the following criteria apply: the product or service cannot be readily identified without using the trademark, the use includes only so much of the mark as is necessary for that identification, and the use does not suggest sponsorship or endorsement by the trademark holder. For a thorough review of how the circuit courts have analyzed and applied nominative fair use, see Peter M. Brody & Alexandra J. Roberts, *What's in a Domain Name? Nominative Fair Use Online After* Toyota v. Tabari, 100 TRADEMARK REP. 1290, 1301–18 (2010).

124. It is no secret that higher education plays a sorting function. The value of a Yale degree becomes cheapened if there is more than one university with that name. Trademark protection helps set the rules of the educational hierarchy that exists in this country. Within any given student's academic career, thousands of decisions are made by student and institution alike (e.g., which courses are offered, which are taken, how hard one works, the grades one receives, etc.) that help set the student on a given path in life. But ultimately these decisions fade into personal and institutional memory, and the only thing lasting is the degree, which is part certification and part brand.

125. *See* Walter C. Jones, *Regent University of Virginia Sues Georgia University System Regents for Trademark Infringement*, THE FLORIDA TIMES-UNION (Aug. 22, 2012, 2:20 PM), http://jacksonville.com/news/georgia/2012-08-22/story/regent-university-virginia-sues-georgia-university-system-regents.

126. *See History of Regent*, REGENT U., http://www.regent.edu/about_us/overview/history.cfm (last visited May 5, 2014).

127. Jones, supra note 125. We will never know which institution would have prevailed in the infringement case, as the parties entered into a confidential settlement in June of 2013 that led to the case's dismissal, less than a year after Regent University filed its complaint. *See* Steve Crawford, *Regents Reach Settlement with Virginia School in Trademark Lawsuit*, THE AUGUSTA CHRON. (June 28, 2013, 5:52 PM), http://chronicle.augusta.com/news/education/2013-06-28/regents-reach-settlement-virginia-school-trademark-lawsuit.

128. It also is far from unprecedented. *See, e.g.*, Trs. of Columbia Univ. v. Axenfeld, 241 N.Y.S. 4 (Sup. Ct. 1930) (enjoining defendant's use of the name "Columbia Educational Institute"); Commonwealth v. Banks, 48 A. 277 (Pa. 1901) (enjoining defendant business school's adoption of the name "University of Philadelphia" due to its similarity to the University of Pennsylvania); Lisa Guernsey, *Washington University Sues To Defend Its Name*, CHRON. HIGHER EDUC., Apr. 3, 1998, at A25 (describing trademark infringement lawsuit brought by Washington University in St. Louis against Washington University, a for-profit, distance-learning institution based in Pennsylvania); Joye Mercer, *Colgate University Ob-*

I also have no issue with decisions by colleges and universities to monetize their names, logos, and insignia through licensing programs, including athletic licensing. Athletics enjoy a unique role in American higher education. Most sports generate zero revenue for institutions and in fact produce a net loss in operating budgets, yet their value for students — including the educational value for students who play them — is significant. Without the potential to generate revenue from the "money sports" (i.e., football and basketball), the long-term viability of smaller sports would be in jeopardy.[129] Furthermore, for athletic licensing — and even licensing outside of athletics — perhaps the most salient point is this: If colleges and universities did not enjoy exclusive rights to their names, logos, and insignia, someone else would be monetizing these valuable intangibles and not sharing the profits with institutions of higher education. Indeed, such was the norm in higher education before institutions reclaimed their names. If anyone is to benefit, the very institutions that have invested much in burnishing their brand in the consciousness of consumers deservedly lay claim to this income source.

But anecdotal evidence suggests that colleges and universities are moving beyond seeking trademarks for purposes of institutional identity protection and revenue generation through licensing their names, logos, and insignia.[130] Indeed, evidence suggests that some institutions

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jects to Another Institution's Using Its Name, CHRON. HIGHER EDUC., May. 9, 1997, at A40 (describing efforts by Colgate University in Hamilton, New York, to prevent an upstart university in Louisiana from using the same name for the institution); Julie L. Nicklin, *2 State Institutions Battle over "Ohio,"* CHRON. HIGHER EDUC., Jan. 16, 1998, at A44 (describing a dispute between The Ohio State University in Columbus and Ohio University in Athens over which institution can call itself OHIO in athletic contests and licensing); Kristine Gill, *What's in a Name? Edison State College Considers Rebranding To Distinguish Itself from Ohio, New Jersey Schools*, NAPLES DAILY NEWS (July 24, 2013, 6:52 PM), http://www.naplesnews.com/news/2013/jul/24/whats-in-a-name-edison-state-college-considers/ (describing effort by institution in Florida formerly known as Edison State College to cancel the federal trademark registration of Thomas Edison State College in New Jersey). *But see* President & Trs. of Colby Coll. v. Colby Jr. Coll. for Women, 359 F. Supp. 571, 576 (D.N.H. 1973) (denying plaintiff's request to enjoin defendant's name).

129. This is not to suggest that I support wholesale the state of collegiate athletics. The ills are many (e.g., exorbitant salaries for basketball and football coaches; unworkable and unfair regulations by the NCAA which serve to hurt, not promote, the concept of the "student-athlete"; coaches' contracts with athletic equipment manufacturers that compromise the freedom and interests of student-athletes), but collegiate licensing is not among them. For a more fulsome review of the problems plaguing collegiate athletics, much of them at the expense of student-athletes, see generally JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107 (2012); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Oct. 2011, at 80. To imagine recreating a world where athletics play a secondary role to academics at Division I institutions certainly is a healthy exercise, but ending collegiate trademark licensing in furtherance of that goal would be to throw the baby out with the bathwater.

130. A few earlier commentators noted this development, but never in a critical fashion. For example, writing in 1986, Glenn Wong noted that universities may face decisions concerning whether to register new marks that go beyond institutional names, logos, and insig-

use trademarks as a means of squelching innocuous and unrelated speech with virtually no potential to confuse anyone.

For example, in 2012, lawyers representing the University of Alabama accused Mary Cesar, owner of Mary's Cakes & Pastries in Northport, Alabama, of trademark infringement. [131] Her alleged misdeed? Selling Crimson Tide-themed cookies and cakes.[132] Because colleges and universities have successfully fought for and won trademark protection in their colors alone, apart from use along with their names,[133] the door has been opened for alleged infringements to be found in any number of contexts.

The University of Alabama has developed a history of aggressive assertion of trademark rights, issuing over 150 trademark cease-and-desist letters in the past ten years alone.[134] In 2005, the university sued an alumnus, Daniel Moore, who since 1979 had been painting famous football scenes depicting the university's team.[135] The paintings feature realistic portrayals of the team's uniforms, including helmets and jerseys, in the university's crimson and white colors. Importantly, however, no university trademark appeared outside of the image area of these paintings.

In an attempt to suppress this creative activity (because Moore refused to pay licensing fees to the university), Alabama argued that Moore could not use any of the university's trademarks or colors in his paintings, even though he used them incidentally to his depiction of historical events. An appellate court roundly rejected this argument,

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nia, such as the University of Houston's decision to seek registration of "Phi Slama Jama," a nickname given to the university's men's basketball teams from 1982 to 1984. *See* Wong, *supra* note 4, at 115; *see also* Wikipedia, *Phi Slama Jama*, http://en.wikipedia.org/wiki/Phi_Slama_Jama (last modified Mar. 11, 2014, 5:11 PM). The University of Houston obtained a federal registration for PHI SLAMA JAMA, which was subsequently cancelled in 1992. *See* PHI SLAMA JAMA, Registration No. 1,397,158 (registered June 10, 1986 to the University of Houston). However, in 2011, the university subsequently applied for two new registrations of PHI SLAMA JAMA, one of which had registered as of this writing. *See* PHI SLAMA JAMA, Registration No. 4,301,563 (registered Mar. 12, 2013 to the University of Houston); U.S. Trademark Application Serial No. 76,706,705 (filed Mar. 9, 2011 by the University of Houston and published for opposition Nov. 29, 2011).

131. Xarissa Holdaway, *Cupcakes Collide with Tuscaloosa Trademarks*, CHRON. HIGHER EDUC.: TWEED (Aug. 27, 2012), http://chronicle.com/blogs/tweed/cupcakes-collide-with-tuscaloosa-trademarks/30290?. Cesar and the university settled the dispute, with Cesar agreeing to pay a $10 licensing fee. Solomon, *supra* note 84. Although she considered fighting the university, Cesar determined, "[i]t's one of those things where doing the right thing and the practical thing may not be the same." *Id.* She said that, as of November 2013, the university had not cashed her $10 check. *Id.*

132. Holdaway, *supra* note 131; Solomon, *supra* note 84.

133. *See supra* text accompanying notes 115–120 (discussing the *Smack* decision).

134. *See* Solomon, *supra* note 84.

135. Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266, 1269 (11th Cir. 2012); *see also* Daniel Grant, *Free Speech vs Infringement in Suit on Alabama Artwork*, N.Y. TIMES (Jan. 30, 2012), http://www.nytimes.com/2012/01/31/sports/ncaafootball/artist-still-fighting-alabama-over-football-paintings.html (noting that Moore graduated from the university in 1976).

concluding that "the First Amendment interests in artistic expression so clearly outweigh whatever consumer confusion that might exist on these facts that we must necessarily conclude that there has been no violation of the Lanham Act."[136]

Twenty-seven universities with major athletics programs filed an amicus brief in the case,[137] in support of Alabama's expansive view of trademark protection that it spent nearly $1.5 million in legal fees to advance.[138] These amici couched their limited and dangerous view of artists' rights in terms of concern for their institutions' image, which they deemed critical to maximizing philanthropic donations. They wrote: "Amici control their image, in part, by controlling those symbols that identify and distinguish them to the public — viz., their trademarks and service marks, which are typically presented in the specific school colors of each university, as well as those colors themselves."[139]

More recently, the University of Alabama and the estate of its late football coach, Paul "Bear" Bryant, opposed a trademark application filed by two Alabama football fans who sought to register HOUNDSTOOTH MAFIA in stylized fashion, overlaid on a houndstooth pattern.[140] The university has sold merchandise and apparel featuring a crimson and white houndstooth pattern, modeled after the fedoras that Bear often wore on game days, since at least as early as 2009.[141] Its use of the pattern dates back to 1983, the year that Coach Bryant died, when Alabama football players wore helmet stickers bearing a houndstooth pattern to commemorate their late coach.[142] The university claimed in the opposition that its use of the pattern had come to identify Coach Bryant and the university's goods and educational and athletic services.[143] Even though the applicants admitted that their trademark references the houndstooth hat that Coach Bryant wore at Alabama football games,[144] the Trademark Trial and Appeal Board rejected the university's opposition.[145] It held that the houndstooth pattern as used by the university did not serve as an indicator of source or sponsorship (i.e., a trademark), but rather was used in an

136. 683 F.3d at 1276.

137. Scott Jaschik, *Appeals Court Backs Artist in Lawsuit Watched by Many Universities*, INSIDE HIGHER ED (June 12, 2012), http://www.insidehighered.com/news/2012/06/12/appeals-court-backs-artist-lawsuit-watched-many-universities.

138. *See* Solomon, *supra* note 84.

139. *See* Jaschik, *supra* note 137.

140. Bd. of Trs. of the Univ. of Ala. v. Pitts, Opp. No. 91,187,103 (T.T.A.B. July 23, 2013), *available at* http://ttabvue.uspto.gov/ttabvue/ttabvue-91187103-OPP-71.pdf. "[H]oundstooth mafia" apparently is a phrase that "refers to a group of guys who 'hang out' together, sometimes attending college football games, including Alabama games." *Id.* at 16.

141. *Id.* at 14–15.

142. *Id.* at 14.

143. *Id.* at 3.

144. *Id.* at 17.

145. *Id.* at 68.

ornamental fashion as a non-distinctive background design.[146] The Board concluded that "[t]he mere fact that Coach Bryant was recognized for wearing patterned fedoras at the University's football games does not endow . . . the University with trademark rights in the Houndstooth Pattern."[147] The University of Alabama's self-sufficient athletics department reportedly spent over $150,000 in legal fees to advance its losing argument.[148]

Further examples abound of colleges and universities asserting trademark claims in questionable circumstances. For example, Texas A&M University owns two federal trademark registrations for the phrase 12TH MAN.[149] Although "12th man" is a common term in football used to refer to a given team's fans (who support their team's eleven players on the field), Texas A&M has owned the federal registration for the term since 1990.[150] When the Seattle Seahawks used the term in a marketing campaign before the 2006 Super Bowl, Texas A&M sued them in federal court for trademark infringement, apparently emboldened by previously successful enforcement efforts against the Buffalo Bills and the Chicago Bears.[151]

Texas A&M is not the only university to take its football trademarks seriously, of course. In 2010, the University of Florida sent a cease-and-desist letter to Glades Day School — a private, K-12 school just south of Lake Okeechobee, Florida — demanding that the school cease using a particular gator logo in connection with its athletic teams.[152] The university felt that Glades's logo too closely resembled the university's gator logo, even though Glades does not compete with the University of Florida in athletics (or anything else) and had been using its gator logo — without objection from the university — since the school's founding in 1965.[153] In the face of the university's demand, the school decided to change its logo, at a cost of $60,000, ra-

146. *Id.* at 27.

147. *Id.* at 23. In addition to claiming trademark rights in the houndstooth pattern, the university also asserted trademark rights in its crimson and white color scheme. *Id.* at 44. The Board rejected this argument as well, mainly because the trademark application did not claim any specific color, and the university's rights in its color scheme only extend so far as it is used in connection with other trademarks or indicia of the university. *Id.* at 45–46.

148. *See* Solomon, *supra* note 84.

149. *See* 12TH MAN, Registration No. 1,948,306 (registered Jan. 16, 1996 to Texas A&M University); 12TH MAN, Registration No. 1,612,053 (registered Sept. 4, 1980 to Texas A&M University).

150. Erin Strout, *Texas A&M Challenges Seattle Seahawks' Use of "12th Man" Trademark*, CHRON. HIGHER EDUC., Feb. 10, 2006, at A25, *available at* http://chronicle.com/article/Texas-A-M-Challenges-Seattle/14704.

151. *Id.*

152. Adam Himmelsbach, *We're the Gators. So Are We. Can't Look Alike, Colleges Say.*, N.Y. TIMES, Nov. 27, 2010, at A1, *available at* http://www.nytimes.com/2010/11/27/sports/football/27logos.html.

153. *Id.*

ther than defend a pricier lawsuit.[154] The school's principal noted: "It just hurts; it has a sting to it. We send them our students, we send them our money and we support them. It just flies in the face of common sense that they would come after us."[155]

In 2008, Auburn University sued an individual who was selling six-fingered foam-hand novelty souvenirs through the Internet.[156] Each digit bore the year and score of Auburn's six successive victories over the University of Alabama in the rivals' annual Iron Bowl.[157] Emblazoned across the palm of each foam hand were two of Auburn's registered trademarks: AUBURN and WAR EAGLE.[158] The defendant behind this fly-by-night operation sold a grand total of fourteen foam hands.[159] He also admitted under oath that his commercial ambition consisted of making "enough money to pay the cost and buy some beer."[160] One might think that with such low stakes Auburn would have much preferred to resolve this dispute out of court. Instead, the university alleged irreparable harm and successfully obtained an injunction.[161]

As the above discussion of the *Smack* and *Moore* cases suggested,[162] some colleges and universities think of their trademark portfolios in more expansive terms than simply institutional names, logos, and insignia, and instead seek to control entire market references to their institution. For example, in 2012, West Virginia University — home of the Mountaineers — sued a company that was selling blue and gold shirts with the phrase "Let's Go! Drink Some Beers!" emblazoned across the front of them.[163] WVU claimed these shirts infringed its common law rights in the phrase "Let's Go Mountaineers" and, in part because of the shirts' blue and gold colors, were likely to cause confusion as to the university's affiliation or approval of the product.[164] Never mind that blue and gold are the official colors of the state of West Virginia, or that the words "Mountaineers," "WVU," or "West Virginia University" did not appear on the shirts themselves.[165]

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154. *Id.*

155. *Id.*

156. *Auburn Univ. v. Moody*, No. 3:08-cv-796, 2008 WL 4877542, at *1 (M.D. Ala. Nov. 4, 2008).

157. *Id.*

158. *Id.*

159. *Id.* at *3.

160. *Id.* at *4.

161. *Id.* at *6, *8.

162. *See supra* text accompanying notes 115–120, 135–139.

163. Lydia Nuzum, *WVU Aims To Stop Sale of Illegal Apparel*, THE DAILY ATHENAEUM (Feb. 9, 2012, 12:00 AM), http://www.thedaonline.com/article_59ca7354-1d8a-52cf-847d-5d7efe7ade0d.html.

164. Jessica M. Karmasek, *WVU Suing Clothing Manufacturer for Obscene Shirts*, W. VA. REC. (Jan. 23, 2012, 11:42 AM), http://wvrecord.com/news/241161-wvu-suing-clothing-manufacturer-for-obscene-shirts.

165. *Id.*

A similar situation of negligible if not improbable confusion pertains to cheeky activity by a pair of undergraduates at the University of Delaware, who in 2012 received a cease-and-desist letter from their university when the duo announced their plans to sell t-shirts at homecoming bearing the slogan "U can suck our D."[166] Administrators at Delaware threatened the students with "severe" disciplinary sanctions if they moved forward with their plans to sell the apparel, which they had sold at the university's 2011 homecoming without incident.[167] Notably, the "U" and "D" on the shirts — which the students already had printed, at a cost of nearly $10,000 — were in a different font than the interlocking UD logo used by the university.[168] According to the university, confusion is not the issue: The shirts "disparage[] the goodwill and positive image that members of the community have regarding our trademark and the university more generally, whether or not they believe that the university produced the shirts."[169] Apparently the university believes that prompting someone to think bad thoughts about it or its trademarks should result in civil liability and university disciplinary action.[170] No doubt somewhere George Orwell is smiling.

Examples of problematic trademark claims and enforcement efforts by institutions of higher education are not limited to athletic concerns. Indeed, colleges and universities have been seeking and obtaining far-reaching trademarks for some time. For example, in 1988, the New Jersey Institute of Technology obtained federal registration for the term VIRTUAL CLASSROOM as used in connection with computer programs.[171] By the mid-1990s, as the concept of e-learning was implemented and in vogue in higher education, the public university sought to enforce non-profit and for-profit uses of "virtual classroom."[172]

More recently, East Carolina University grabbed headlines when in 2013 it sued Cisco Systems, Inc., the computer-networking giant,

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166. *Pair Sues Del. College over "U Can Suck Our D" T-Shirts*, USA TODAY (Dec. 14, 2012, 9:53 AM EST), http://www.usatoday.com/story/news/nation/2012/12/14/tshirts-free-speech-lawsuit/1769195/. Apparently, some fans at University of Delaware football games use the refrain to heckle opponents and their supporters.

167. *Id.*

168. *Id.*

169. *Id.*

170. Interestingly, the students decided to beat the university to court, bringing a federal lawsuit alleging infringement of their free speech rights. *Id.* Predictably, the university responded that the case had everything to do with trademark infringement and nothing to do with censorship. *Id.* In a statement, Delaware officials noted that the university has been aggressively protecting its logos and trademarks "as other universities do" with the assistance of CLC. *Id.*

171. *See* VIRTUAL CLASSROOM, Registration No. 1,542,293 (registered June 6, 1989 to the New Jersey Institute of Technology).

172. The university elected not to renew the registration, and subsequently it was cancelled in January of 2010. *Id.*

for trademark infringement.[173] What is the nexus between higher education and a leading purveyor of computer infrastructure? East Carolina University enjoys federal trademark protection of the phrase TOMORROW STARTS HERE as used in relation to "education services in the nature of courses at the university level."[174] Cisco used the same phrase in its new line of marketing (unrelated, naturally, to courses and education), which drew the university's attention.[175] Here, too, the potential for confusion seems minimal — much more speculative than the prospect of a settlement that could lead to needed revenue flowing back to the university.

At Washington State University, the link between budgetary woes and trademark activity has been made explicit. Of all its activities, the university recently turned to its farm operations as a trademark opportunity, selling cuts of Wagyu beef marked with the identifying brand W.S.U.[176] As justification for the unusual move, the chair of the university's animal science department told a reporter for the *New York Times*, "We've all taken a [financial] hit. These programs have to be self-sustaining."[177] Where there is money to be made in college or university operations, it seems trademark activity soon follows.[178]

A reasonable-sounding defense of these activities would be that licensing royalties often serve as revenue sources for important institutional programs and services, including student scholarship funds. I do not dispute that universities often put licensing royalties to these noble uses, but we must question whether the ends justify the means.

Examples of colleges and universities changing direction amidst questions of effect are numerous. For example, protesters rightly called administrators with oversight of college and university endowments to account for investments in South African companies that supported apartheid during the 1980s, leading many campuses to disinvest in South Africa.[179] More recently, in the patent space, several

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173. Nick DeSantis, *East Carolina U. Fights with Cisco over Marketing Slogan*, CHRON. HIGHER EDUC.: THE TICKER (Jan. 11, 2013), http://chronicle.com/blogs/ticker/east-carolina-u-fights-with-cisco-over-marketing-slogan/54071?.

174. *See* TOMORROW STARTS HERE, Registration No. 3,950,816 (registered Apr. 26, 2011 to East Carolina University).

175. DeSantis, *supra* note 173.

176. Kirk Johnson, *A University Steak To Go with that Sweatshirt?*, N.Y. TIMES (Mar. 2, 2013), http://www.nytimes.com/2013/03/03/us/how-about-a-university-steak-with-your-sweatshirt.html?.

177. *Id.*

178. This anecdote is not to suggest that branding university agricultural output is a new phenomenon. Such output frequently has been branded in recent years, although typically not with the name of the university. *See* John Seabrook, *Crunch: Building a Better Apple*, THE NEW YORKER, Nov. 21, 2011, at 54 (describing development of apples branded as SweeTango at the University of Minnesota); *see also* SWEETANGO, Registration Nos. 3,455,128; 3,905,291; 3,901,739; 4,028,686 (all owned by the University of Minnesota and covering SWEETANGO as used in relation to fresh apples and related products).

179. *See* Alan Pifer, *Beyond Divestment: The Moral University*, 38(9) AAHEA BULL., May 1986, at 3.

universities have agreed not to license their patents to pharmaceutical companies that insist on charging monopoly prices to patients in developing countries whose lives would be improved by a particular drug but who cannot afford to pay the price typically charged for the drug in the developed world.[180] Although the moral dimension of college and university trademark behavior pales in comparison to these two examples, the point is the same: If we believe higher education to be a moral industry, we must expect it to recalibrate when its behavior proves to be harming, not furthering, the public good. And such is the case with many aspects of college and university trademark behavior, as the next Part further reveals.

III. A STUDY OF COLLEGE AND UNIVERSITY OWNERSHIP OF TRADEMARKS

In the fall of 2012, I undertook a study to collect comprehensive trademark registration data for colleges and universities within the United States. The main objectives of the data collection portion of the study were to obtain federal trademark registration data concerning type and frequency of trademark activity in higher education.

A. Methods

In order to obtain this data, a structured search of a database containing trademark records (the U.S. Trademark Electronic Search System, or "TESS") was conducted to locate trademark registrations meeting the inclusion criteria.[181] Maintained by the USPTO, the TESS database contains a free-form search tool that allows for tailored searches within a variety of fields, including the registrant name field.

Each trademark record was individually examined to verify that the registrant was in fact a college or university, that the trademark was "live" (i.e., subsisting and not abandoned or cancelled), and that

180. *See* Goldie Blumenstyk, *Graduate Students Press for "Humanitarian Licensing" Vow in U. of California Patent Policy*, CHRON. HIGHER EDUC., (Dec. 14, 2011), http://chronicle.com/article/Graduate-Students-Press-for/130097/.

181. The general search language used was: "(college university)[ON] AND LIVE [LD] AND `RD >XXXX0000<XXXX0000." The first segment, "(College University) [ON]," refined the search results so as to include only registrants (ON = Owner Name) with the words *college* or *university* in their name. The second segment, "AND LIVE [LD]," refined the search results so as to include only those trademarks that still are active and subsisting, and not lapsed due to cancellation or failure to renew. The third and last segment of the search language, "and `RD >XXXX0000< XXXX0000," refined the search results so as only to include those trademarks registered within a certain year or period of years. For instance, if the years inputted read as "19970000 <19980000," then all trademarks registered in 1997 that otherwise met the search criteria would be returned. Different ranges of years were used in order to return data that could be reviewed in manageable chunks. After all records for a particular year were analyzed, a new search was conducted by changing the search language to correlate with the subsequent year.

the college or university listed as the registrant is located within the United States. Upon verification, specific information for each trademark record was exported for compilation in a dataset in Excel. Each record in the dataset contains information about each trademark's institutional owner, including the following: institution name; for-profit / non-profit status; public / private status; [182] religious affiliation status;[183] and miscellaneous (for any relevant information not otherwise listed, such as change in registration). The dataset also contains the following information for each trademark, as obtained through TESS: serial number; registration date; registration number; date of first use; filing date; mark (either the image of the mark, or the words that constitute the mark); mark type (whether the trademark is a design mark, stylized mark, or word mark); the class(es) of goods / services for which the mark is registered; and the description of the goods / services for which the mark is registered.

Many records returned in the searches were excluded from the dataset for failing to meet the study's criteria. For example, records of various foreign universities and colleges that own trademark registrations were excluded. Also, records for institutions not included within the Carnegie Classifications database (e.g., the American College of Physicians, Pensacola Christian College) were excluded, as were records for trademark registrations originally owned by a college or university but subsequently assigned to an entity not affiliated with the institution.[184]

Trademark records in the dataset were edited for consistency. For example, some institutions register trademarks under corporate names that do not indicate their affiliation with a particular institution, such

182. The correct spelling of an institution's name, whether it is a public or private entity, and whether it is a for-profit or non-profit institution were verified using the Carnegie Classifications database. *See Institution Lookup*, CARNEGIE FOUND., http://classifications.carnegiefoundation.org/lookup_listings/institution.php, (last visited May 5, 2014). For example, Northwestern is a private, non-profit institution. *See Northwestern University*, CARNEGIE FOUND., http://classifications.carnegiefoundation.org/lookup_listings/view_institution.php?unit_id=147767 (last visited May 5, 2014).

183. The religious affiliation of any particular registrant was determined using the U.S. News and World Report's College Profiling. *See Best Colleges*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/ (last visited May 5, 2014). For example, Northwestern has no religious affiliation. *See Northwestern University*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/northwestern-university-1739 (last visited May 5, 2014). If the religious affiliation was not included, a search on the institution's official website or a Google search for the religious affiliation was conducted.

184. In a license arrangement, the original owner of the federal trademark registration maintains ownership of the registration while the licensee uses the mark with the owner's permission. This structure differs from an assignment, where the original owner's rights in the mark terminate after it assigns ownership of the registration to a different entity. For information on trademark assignments, including how they are recorded and their effect, see *Assignments: Change of Owner & Change of Owner Name*, USPTO, http://www.uspto.gov/trademarks/process/assign.jsp (last visited May 5, 2014).

as "University Athletic Association," which actually is the entity responsible for intercollegiate athletics at the University of Florida.[185] In these instances, the college or university that is the real party in interest for the trademark was noted in the dataset.[186] Other instances where editing was required occurred for institutions belonging to a university system. Some university systems register trademarks in the name of the governing body of the system, whereas others allow individual campuses to register trademarks in their own names. For purposes of this study, any trademark registration of an institution included within a university system was treated as owned by the university system.

The review, edits, and refinements identified above were made over several weeks in the fall of 2012. The final dataset resulting from this process included 10,265 trademark records, out of 13,042 records reviewed. This dataset was then analyzed using a variety of descriptive statistics, as further discussed in Part IV.

B. Limitations

As with any empirical project, this study has several limitations. Most importantly, the data reported is only as complete as the database from which it was gathered. Although the TESS database reasonably is believed to be accurate, inaccuracies or gaps in coverage are bound to exist, particularly in the earlier years of trademark registration. Additionally, only certain trademark records are available in TESS; applications and registrations that were inactive prior to 1984 generally are not locatable through TESS.

On the subject of database completeness, it bears mentioning that during the study's pendency the USPTO released for the first time detailed information on 6.7 million trademark applications filed or registrations issued between January 1870 and January 2012.[187] Although this data provides a wealth of information, the magnitude and arrangement of it makes using the data for nuanced research difficult. Unlike the TESS database, in which all relevant information about a given trademark registration is displayed in one record, the raw data

185. *See* UNIV. OF FLA. ATHLETICS, http://www.gatorzone.com/ (last visited Feb. 15, 2014).

186. In the patent context, many universities have established separately-incorporated, loosely-affiliated organizations to own and license patents for inventions made by university faculty. *See* GARY W. MATKIN, TECHNOLOGY TRANSFER AND THE UNIVERSITY 307–08 (The Oryx Press 2000). These "buffer" organizations typically provide universities with more flexibility and discretion in managing their technology transfer activities. *Id.* Concerns for flexibility and discretion may motivate some institutions to take a similar approach with respect to their trademarks, although such possibility has not been explored or mentioned in the literature.

187. *See Trademark Case Files*, USPTO, http://www.uspto.gov/ip/officechiefecon/tm_casefiles.jsp (last visited Feb. 15, 2014).

released by the USPTO does not offer such relative ease of access. Information about the owner of each trademark in the dataset (including, most importantly, the registrant's name) is not included in the main data file. This data can be manipulated to provide telling information in the aggregate (e.g., in response to research questions concerning "by year" or "by category" data), but it is not as well suited as the TESS database to provide the "by registrant type" data (i.e., college and university) that this study sought. While this data could be used to provide a more ample and complete picture of the trademark activity that I sought to locate using TESS, doing so is unlikely to result in the identification of significantly more trademarks owned by colleges or universities.[188]

Another important limitation also goes to the under-inclusiveness of the findings reported here. Due to the use-based nature of common law trademark protection, colleges and universities unquestionably enjoy rights in more trademarks than were identified in my dataset.[189] The data reported here reflects trademark filing and registration activity; it does not completely reflect the entire universe of marks over which colleges and universities may claim rights or assert ownership, whether in the abstract ("We think this mark is ours, even though we do not own a federal registration for it") or in the particular ("We are going to sue a defendant for using a mark that is too similar to an unregistered mark that we consider ours").[190] The data also does not account for any trademark registrations obtained by a college or university that were no longer valid or subsisting at the time of data collection.[191] Ultimately, the best way to obtain a complete and accurate picture of the trademark rights of colleges and universities would

188. Indeed, assuming that every registration that was "active" in 1984 is included in both TESS and the raw data recently released by the USPTO, the only advantage the raw data offers is the utility of being able to identify all trademarks that were once owned by a college or university but that were no longer active by 1984. Mindful of my study's purpose (to identify federal trademark registrations currently owned by American colleges and universities), the heightened accuracy of the raw data did not justify the increased complexity and time in working with it.

189. For example, Fusion is the name of Case Western University's interdisciplinary, graduate-level certificate program in technology development and commercialization. As indicated on the program's website, the university claims trademark rights in the program's name. *See* FUSION, http://www.fusioninnovate.com/ (last visited May 5, 2014). However, as of the publication date of this Article, the institution does not own a federal trademark registration for FUSION. Relatedly, some institutions may register a mark in one or a few classes of goods and services (e.g., educational services, entertainment services, clothing), but choose to assert rights in uses that are different from or broader than the descriptions of their use of the mark in their filings with the USPTO.

190. The fact that this study did not capture trademark registrations owned by colleges or universities at the state level relates to this concern.

191. Actions that could place a trademark registration in this category include the failure of the registrant to make periodic required filings with the USPTO (including payment of maintenance fees), invalidation of the registration by a court, or cancellation of the registration in a cancellation proceeding conducted by the Trademark Trial and Appeal Board.

be to ask knowledgeable respondents at each institution to divulge the contents of their institution's portfolio.[192]

The search terms used in the study present another limitation. Not all trademark registrations owned by a college or university contain the words "college" or "university" in the corporate name of the entity listed as the mark's registrant with the USPTO.[193] Indeed, not every institution regarded as a college or university has one of those two words in its corporate or common name (e.g., Massachusetts Institute of Technology), although the vast majority do. Although adding the word "institute" to the search query would have helped alleviate this concern, doing so would have resulted in thousands of additional records to review, only a small fraction of which were likely to be associated with an institution of higher education. Therefore, in the interest of expediency, only the words "college" and "university" were searched for in the registrant field.[194]

Finally, the possibility of human error always is present when compiling, reviewing, and coding a large set of data. Such error likely is to have resulted in some amount of Type II error (i.e., false negatives, or incorrectly excluding a trademark from the dataset) in the records reviewed. The likelihood of Type I error (i.e., false positives, or incorrectly including a trademark in the dataset) is believed to be small and was further diminished by frequent spot-checking and quality-control measures.[195]

IV. FINDINGS AND IMPLICATIONS

A. Overview of Findings

The dataset was analyzed across a variety of metrics to help answer the main research questions that guided the study: What trademarks have colleges and universities obtained? How common is trademark activity in higher education, and which institutions engage

192. *See infra* Part V (in which I advance this suggestion).

193. Unfortunately, there is no easy way to identify which institutions engage in the practice of registering their trademarks using the name of an entity that does not include the word "college" or "university" in it. If such information were known, tailored searches for those entities could be conducted in TESS.

194. If one were interested, searches tailored to those known higher education institutions that do not contain "college" or "university" in their name could be conducted in TESS in order to account for this limitation. As an example, a search in TESS for "live" registrations owned by Rochester Institute of Technology, California Institute of Technology, and Massachusetts Institute of Technology returned 27, 25, and 48 trademark registrations owned by the institutions, respectively, as of March 2014. Their role as research-intensive institutions may account for the relatively high number of trademark registrations owned by them, many of which appear to be product trademarks, as defined in *infra* Part IV.A.5.

195. My research assistant and I both reviewed and discussed any unusual or atypical record. Additionally, coding concerns were discussed as they arose so that consistency protocols could be established and followed.

in it? What are the trends in terms of numbers and types of trademarks registered? The Subsections below present data that helps describe the results.

1. Descriptive Statistics, Top Registrants, and Ownership by Number

The study revealed 10,265 federal trademark registrations owned by American colleges and universities.[196] Data analysis showed that for American colleges and universities that own at least one trademark registration at the federal level, the average number of federal trademark registrations owned per institution is nearly ten.[197] The number of registrations owned ranged from one registration (which is the number of registrations owned by most colleges and universities) to 294 (owned by the University of Texas System). Table 1 provides additional descriptive statistics on trademark ownership; Table 2 displays the top thirty institutions based on the number of trademark registrations owned.

Table 1: Descriptive Statistics on American College and University Trademark Registrations Owned at the Federal Level

Statistics	Value
Mean	9.9
Median	3
Mode	1
Range	293
Standard Deviation	20.99
Minimum	1
Maximum	294

196. It is important not to conflate trademark registrations with trademarks. Institutions often have multiple registrations (e.g., covering different classes of goods or services, or different graphical displays of the mark) for what consumers would consider the same trademark. *Compare, e.g.*, UNIVERSITY OF VERMONT, Registration No. 1,380,806 (registered Jan. 10, 1985 to the University of Vermont), *with* UNIVERSITY OF VERMONT, Registration No. 2,316,281 (registered Dec. 11, 1998 to the University of Vermont) (the former registered in relation to "educational services, namely conducting courses of instruction on a university level; entertainment services, namely presenting intercollegiate sporting events," the latter registered in relation to "clothing, namely caps, t-shirts and sweatshirts").

197. It bears noting that not all American colleges and universities own at least one trademark registration.

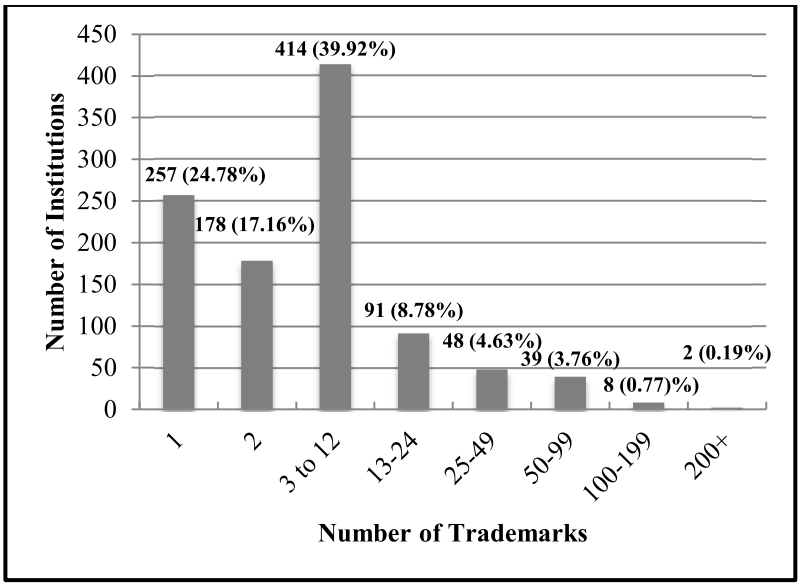
Table 2: Top Thirty American College and University Owners of Federal Trademark Registrations

Institution	No. of TMs Registered
University of Texas System	294
University System of Georgia	264
University of Pennsylvania	145
Harvard University	141
Indiana University System	140
Arizona University System	126
University of California System	118
University of Central Florida	110
Rice University	103
University of North Carolina	100
University of Arkansas System	95
Ohio State University	93
University of Florida	88
University of Washington	86
University of Southern California	80
University of Chicago	79
Oregon University System	77
Colorado State University System	75
SUNY	75
American University	73
University of Wisconsin System	73
Syracuse University	72
University System of Maryland	72
California State University System	70
Baylor University	69
Wake Forest University	68
Dartmouth College	67
University of Pittsburgh	66
Vanderbilt University	64
University of Michigan	63

1,037 different American colleges and universities were identified as owning one or more trademark registrations at the federal level. Of these institutions, many (n = 414, or 39.92%) own three to twelve federal trademark registrations, although nearly a full quarter (n = 257, or 24.78%) own only one. Graph 1 depicts college and university

ownership of trademarks by number of federal trademark registrations owned.

Graph 1: American College and University Ownership of Trademarks by Number of Federal Trademark Registrations Owned



2. Trademark Ownership by Institution Type

Non-profit colleges and universities own the vast majority of federal trademark registrations (n = 10,055, or 97.95%) located in the study, with public institutions owning slightly more registrations than private ones (5344 registrations compared to 4711 registrations). Table 3 provides further information on trademark ownership by institution type.

Table 3: Federal Trademark Registration Ownership by Type of American College or University

	Non-Profit	**For-Profit**	**Total**
Private	4,711 (46.85%)	210 (2.05%)	4,921 (47.94%)
Public	5,344 (53.15%)	0 (0%)	5,344 (52.10%)
Total	10,055 (97.95%)	210 (2.05%)	10,265

Religiously-affiliated colleges and universities own approximately seventeen percent of all federal registrations located in the study. Of these — as shown in Table 4 — most are owned by private, non-profit institutions. Only four trademark registrations owned by a private, for-profit institution with a religious affiliation were returned, all of which are owned by Bob Jones University.

Table 4: Federal Trademark Registration Ownership by Religiously-Affiliated American Colleges and Universities

	Religiously Affiliated
Private/Non-Profit	1,745 (16.99%)
Private/For-Profit	4 (.04%)
Total	1,749 (17.04%)

Table 5 shows federal trademark registration ownership by the religious denomination of the college or university owner. As illustrated, Catholic institutions own the most federal trademark registrations (n = 656) of all religious denominations represented. Methodist institutions are a distant second (n = 254).

Table 5: Federal Trademark Registration Ownership by Religious Denomination of Private American Colleges and Universities

Religion	**No. of TM Registrations**
Catholic	656
Methodist	254
Presbyterian	177
Baptist	147
Christian	125
Lutheran	68
Church of Christ	62
Evangelical	46
Non-Denominational	45

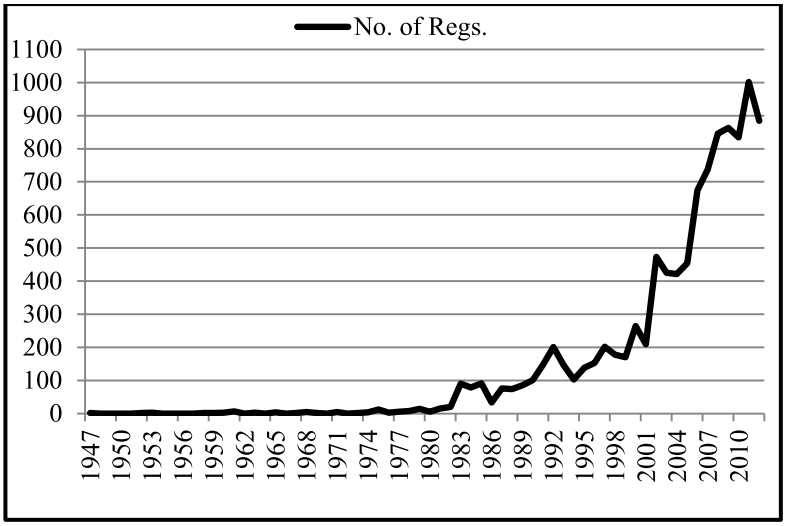
3. Registrations by Year

Ownership of federal trademark registrations by American colleges and universities has increased dramatically in the past decades. Graph 2 illustrates the number of new federal trademark registrations

issued by the USPTO to a college or university each year.[198] As noted, moderate growth occurred from the 1970s through the 1980s, followed by significant growth thereafter. The earliest-issued federal trademark registration in the dataset is a design mark registration owned by LeTourneau University in Longview, Texas.[199] It was issued in 1947, which represents the beginning point on Graph 2.

The year 2011 brought the most federal trademark registrations issued to American colleges and universities (n = 1002) compared to any other year. Graph 2 also shows that the USPTO has issued over 800 registrations to American colleges and universities every year since 2008.

Graph 2: Number of Federal Trademark Registrations Issued to American Colleges and Universities per Year[200]



4. Trademarks by Type

Trademark registrations in the dataset were coded depending on the type of trademark: word mark, stylized mark, or design mark. Word marks — which provide the broadest protection of the three types of marks — consist only of text that does not appear in stylized

198. A trademark registration had to be valid and subsisting at the time of data collection in order to be included in the dataset.

199. *See* NOW, Registration No. 0,427,814 (registered Feb. 25, 1947 to R.G. Le Tourneau, Inc., subsequently assigned to LeTourneau University).

200. For purposes of Graph 2, a federal trademark registration initially issued to an entity other than a college or university, then subsequently assigned to a college or university, is listed as issuing to the college or university in the year it was registered. The vast majority of trademarks in the dataset have never been assigned.

fashion, such as the following example from the dataset: BASKETBALL WAS BORN HERE.[201]

In comparison, stylized marks also consist only of text, but the text is claimed in a stylized fashion, such as the following example from the dataset:  .[202]

Finally, design marks are any marks that contain a design element, either alone or in conjunction with words. The following is an example of a design mark from the dataset: 

.[203]

Table 6 displays the total numbers of each type of mark that are registered to American colleges and universities. As indicated, located registrations were rather evenly distributed between the three types of marks, with design marks constituting 38.2 percent, stylized marks representing 37.4 percent, and word marks making up 24.4 percent of all located registrations.

Table 6: Number of Word Marks, Stylized Marks, and Design Marks Registered to American Colleges and Universities

Word Marks	Stylized Marks	Design Mark
2,505	3,842	3,918

5. Trademarks by Typology

Review of the dataset allowed for the identification of trademarks by typology. Seven different, non-mutually exclusive typologies emerged from the data:

- Name trademarks: those trademarks that consist of a college or university name, nickname, or abbreviation (e.g., UNIVERSITY OF THE VIRGIN ISLANDS for "clothing, namely, sweat shirts, t-shirts, and hats";[204] "educational services, namely, university level courses of instruction,"[205] or UWG for "[m]etal license plates";[206]

201. *See* BASKETBALL WAS BORN HERE, Registration No. 2,199,872 (registered Oct. 27, 1998 to Springfield College).

202. *See* Registration No. 1,185,873 (registered Jan. 12, 1982 to the University of California).

203. *See* Registration No. 2,193,051 (registered Oct. 6, 1998 to the University of North Alabama).

204. *See* UNIVERSITY OF THE VIRGIN ISLANDS, Registration No. 3,230,190 (registered Apr. 17, 2007 to the University of the Virgin Islands).

205. *See id.*

"[s]tickers, notebooks and binders";[207] "[p]lastic key chain tags";[208] "[d]rinking cups and mugs";[209] [s]weat shirts, t-shirts, shirts, shorts, pants, and hats";[210] "[e]ducational services, namely conducting courses of study at the university level and entertainment services, namely providing intercollegiate sporting events"[211])

- Logo trademarks: those trademarks that consist of a college or university seal, emblem, crest, or other graphical insignia or design (e.g., 

for "[d]rinking glasses, mugs, bottle openers; drinking cups," registered to Springfield College,[212] or 

for "[p]aper products, namely, paper diplomas, pamphlets, namely, in the field of law school activities; brochures, namely, about law school activities; paper tags; business cards; envelopes and stationery"[213])
- Product trademarks: those trademarks that may on their face bear no connection to a college or university, but that in fact relate to a product that is somehow tied to a college or university (e.g., AZULUNA for "food products, namely, dairy products, namely, European style cow, sheep, and goat cheeses, meat and meat products, namely, beef, pork, chicken and chicken parts, lamb, and goat, and frozen dinners, namely veal and pork entrees,"[214] or TICK BITE PATCH for "[t]ransdermal patches for use in the treatment of humans to evoke: a tick-borne disease im-

206. *See* UWG, Registration No. 3,229,918 (registered Apr. 17, 2007 to the University System of Georgia).

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.*

211. *See id.*

212. *See* Registration No. 3,537,478 (registered Nov. 25, 2008 to Springfield College).

213. *See* Registration No. 3,585,219 (registered Mar. 10, 2009 to Liberty University).

214. *See* AZULUNA, Registration No. 3,088,162 (registered Sept. 13, 2005 to Tufts University); *see also* AZULUNA, Registration No. 3,088,161 (as used in relation to "food products, namely, eggs and egg products, namely, blue eggs, green eggs, blue-green eggs, speckled eggs, hard-boiled blue eggs, and salmonella tested eggs, meat and meat products, namely, veal," registered May 2, 2006 to Tufts University).

mune response, acquired tick-borne disease resistance, and tick-borne disease transmission blocking effects"[215])

- Athletics trademarks: those trademarks that relate in any way to college or university athletics, such as team names, nicknames, mascots, or cheers (e.g., REGALS for "[t]ank-tops";[216] "[e]ntertainment services, namely, arranging and conducting of competitions for athletic events, tournaments, competitions and exhibitions,"[217] or NC A&T AGGIES for "[m]etal key rings; license plates made of metal"[218])
- Program trademarks: those trademarks that consist of the name of a college- or university-sponsored program, school, initiative, conference, or other event or undertaking (e.g., HARVARD LIBRARY for "[l]ibraries; on-line library services, namely, providing electronic library services which feature books, pamphlets, photographs, diaries, manuscripts, magazines, and catalogs; on-line academic library services; electronic publishing services, namely, publication of text and graphic works of others on-line in a wide range of topics;"[219] or ARIZONA STATE UNIVERSITY — PHOTOVOLTAIC TESTING LABORATORY for "[p]roduct research and development; [l]aboratory services, namely, testing fuel cells and photovoltaic cells; [m]aterials testing and evaluation; [p]roduct testing; [t]esting, analysis and evaluation of the goods of others for the purpose of certification"[220])
- Slogan trademarks: those trademarks that consist of mottoes, sayings, catchphrases, and other refrains used by a college or university to market or brand itself or some aspect of its operations (e.g., THE FUTURE OF MEDICINE for "educational services, namely, offering workshops, conferences and seminars on the subjects of patient health care and medical issues related thereto; and providing courses of instruction at the college and gradu-

215. *See* TICK BITE PATCH, Registration No. 3,963,791 (registered May 17, 2011 to the University of Rhode Island).

216. *See* REGALS, Registration No. 3,333,546 (registered Nov. 13, 2007 to California Lutheran University).

217. *See id.*

218. *See* NC A&T AGGIES, Registration No. 3,631,803 (registered June 2, 2009 to North Carolina A&T State University).

219. *See* HARVARD LIBRARY, Registration No. 3,462,163 (registered July 8, 2008 to Harvard University).

220. *See* ARIZONA STATE UNIVERSITY — PHOTOVOLTAIC TESTING, Registration No. 3,700,838 (registered Oct. 27, 2009 to Arizona State University).

ate levels in the fields of medicine and health,"[221] or GETTING TO OUTCOMES for "[e]ducational services, namely, providing presentations, training classes, workshops in the fields of setting and accomplishing goals and problem solving"[222])

- Domain name trademarks: those trademarks that consist of a second-level domain name, whether as a word, design, or stylized mark (e.g., GMU.EDU for "[p]roviding university level educational courses through distance learning and enabling on-line registration of students via an on-line global computer network,"[223] or BUCKSCORE.COM for "[p]roviding information about bucks and deer in the field of buck and deer observations and hunting via a global computer information network"[224])

All trademark registrations in the database were coded according to the typologies identified above, then tallied by decade of registration. Logos were further classified based on whether they primarily consisted of an institutional seal or an institution's name, or whether they primarily pertained to athletics, a program, or a product. Some slogans also were further classified based on whether they primarily pertained to a program, athletics, or a product.[225] Table 7 depicts this array of trademark typologies across years.[226]

221. *See* THE FUTURE OF MEDICINE, Registration No. 2,197,580 (registered Oct. 20, 1998 to the University of Pennsylvania); *see also* THE FUTURE OF MEDICINE, Registration No. 1,970,607 (as used in relation to "medical services," registered Apr. 23, 1996 to the University of Pennsylvania).

222. *See* GETTING TO OUTCOMES, Registration No. 3,488,332 (registered Aug. 19, 2008 to the University of South Carolina).

223. *See* GMU.EDU, Registration No. 2,638,139 (registered Oct. 22, 2002 to George Mason University).

224. *See* BUCKSCORE.COM, Registration No. 3,881,788 (registered Nov. 23, 2010 to Mississippi State University).

225. A slogan for an institution as a whole was not further classified.

226. Many registrations in the dataset easily were classified into one of these typologies. Some of the registrations, however, were "close calls" in the sense that they could have been categorized in a different way than the way selected. The primary limitation of the data presented in Table 7 is its internal consistency reliability; although the author was careful to code data consistently, other coders might make different judgment calls.

Table 7: Typologies of American College and University Federal Trademark Registrations across Years

Trademark Type	**No. of Regs. ≤1970s**	**No. of Regs. 1980s**	**No. of Regs. 1990s**	**No. of Regs. 2000s**	**No. of Regs. ≥2010**
Name	9	168	390	715	296
Program	5	44	197	1003	496
Athletics	8	68	103	226	93
Product	9	22	125	629	291
Logo–Name	7	51	144	488	277
Logo–Seal	20	107	242	348	164
Logo–Program	0	18	79	592	315
Logo–Athletics	5	69	183	543	293
Logo–Product	10	3	21	111	69
Slogan	0	6	27	334	181
Slogan–Program	0	0	22	255	160
Slogan–Athletics	0	10	7	54	42
Slogan–Product	0	0	1	45	34
Domain Name	0	0	0	23	8
Total	**73**	**566**	**1541**	**5366**	**2719**

As Table 7 indicates, initial trademark activity in the 1970s and 1980s by American colleges and universities focused predominantly on protecting institutional names, seals, and athletics names and logos. While additional registrations in these areas occurred in the 1990s at similar levels, programmatic-related trademarks nearly doubled in percentage terms, from 7.8 percent of all college and university trademarks registered in the 1980s to 12.8 percent of all such trademarks registered in the 1990s. This number jumped to 18.7 percent of all college and university trademarks registered in the 2000s, and the data for the first years of the 2010s reflects a similar level of activity (i.e., 18.2 percent of all such trademarks registered through 2012).

Also on the rise since the 2000s is the registration of slogans, whether for the institution as a whole, or for some programmatic aspect of it. From the 1990s to the 2000s, registration of slogans jumped from 1.8 percent to 6.2 percent of all college and university trademarks registered in each respective decade, while registration of programmatic slogans moved from 1.4 percent to 4.8 percent.

Meanwhile, registration of institutional names has tapered off from a peak of 29.7 percent of all college and university trademarks registered during the 1980s. In the 2000s, only 13.3 percent of trademarks registered to colleges and universities constituted institutional names. However, registration of logos that predominantly incorporate an institution's name has been steady through the years, at about nine to ten percent of all college and university trademarks registered.

Of recent popularity is the registration of domain names as trademarks, although this activity is *de minimis* when considered as a percentage of total registrations. A few of the registered domain names consist entirely of an institution's .EDU domain.[227] Others pertain to athletics, products, or programs of the institution.[228]

B. Implications

Data from the study leads to several concerns related to trademark registration and enforcement by colleges and universities, as well as financing and higher education policy.

1. Registration Concerns

The chief concern from a registration standpoint is the kinds of trademarks that colleges and universities are amassing. No longer satisfied with protecting merely their names and related athletic insignia, colleges and universities are seeking (and obtaining) trademark protection for a wide variety of marks; some of these registrations, and the exclusive rights they represent, risk altering the public-serving soul of non-profit colleges and universities.

These potentially problematic registrations can be broadly categorized as fitting within one of three groupings that emerged from the

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227. *See, e.g.*, NORTHWESTSTATE.EDU, Registration No. 3,966,142 (registered May 24, 2011 to Northwest State Community College); GRANTHAM.EDU, Registration No. 2,781,763 (registered Nov. 11, 2003 to Grantham Education Corp., subsequently assigned to Grantham University, Inc.); MATC.EDU, Registration No. 2,742,588 (registered July 29, 2003 to Milwaukee Area Technical College); GMU.EDU, Registration No. 2,638,139 (registered Oct. 22, 2002 to George Mason University); WWW.WGU.EDU, Registration No. 2,374,880 (registered Aug. 8, 2000 to Western Governors University).

228. *See, e.g.*, GOCRIMSON.COM, Registration No. 4,229,166 (registered Oct. 23, 2012 to Harvard University); STRONGERMARRIAGE.ORG, Registration No. 4,008,747 (registered Aug. 9, 2011 to the Utah Commission on Marriage, subsequently assigned to Utah State University); OSUGIVING.COM, Registration No. 3,311,458 (registered Oct. 16, 2007 to Oklahoma State University); DARTMOUTHIMAGES.COM, Registration No. 3,128,682 (registered Aug. 15, 2006 to Dartmouth College); REELGOOD.TV, Registration No. 3,055,231 (registered Jan. 31, 2006 to Regent University); SOONERSPORTS.COM, Registration No. 3,041,815 (registered Jan. 10, 2006 to Oklahoma State University); ZEV.NET, Registration No. 2,990,242 (registered Aug. 30, 2005 to the University of California); MSUCARES.COM, Registration No. 2,952,228 (registered May 17, 2005 to Mississippi State University); DREXEL.COM, Registration No. 2,893,677 (registered Oct. 12, 2004 to Drexel University).

data: higher education as enterprise; higher education "products"; and public good activities.

a. Higher Education as Enterprise

Trademark registrations involving higher education as enterprise are identified as any registration that confers exclusive rights to a college or university to a trademark that, by virtue of the mark itself and/or the registered goods or services, implicates rights covering a traditional teaching, research, or service function of higher education. Representative examples of trademarks in this category include the following:

- PATSTATS.ORG for "[p]roviding on-line information in the field of patent law litigation statistics"[229]
- BIOFLEX for "[l]aboratory research in the field of biological and medical devices and technologies enabled by the use of flexible materials; [. . .] [s]cientific research; [. . .] [s]cientific study and research in the fields of biological and medical devices and technologies enabled by the use of flexible materials"[230]
- FOOD, WINE & ALL THAT JAZZ for "[f]undraising services, namely, raising funds for providing educational, informative, and entertaining programs for the benefit of non-profit organizations";[231] "[e]ntertainment services, namely, providing food and wine tasting"[232]
- BE THE DIFFERENCE for "[e]ducation services in the nature of courses at the university level"[233]
- THE PREMIER ONLINE HIGH SCHOOL for "[e]ducational services, namely, providing on-line courses of education at the high-school level"[234]
- RESOLVE for "[p]rinted periodicals in the field of engineering and applied science"[235]

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229. *See* PATSTATS.ORG, Registration No. 4,240,553 (registered Nov. 13, 2012 to the University of Houston).

230. *See* BIOFLEX, Registration No. 4,233,646 (registered Oct. 30, 2012 to Kent State University).

231. *See* FOOD, WINE & ALL THAT JAZZ, Registration No. 4,021,644 (registered Sept. 6, 2011 to Grand Valley State University).

232. *See* FOOD, WINE & ALL THAT JAZZ, Registration No. 4,021,644 (registered Sept. 6, 2011 to Grand Valley State University).

233. *See* BE THE DIFFERENCE, Registration No. 3,850,004 (registered Sept. 21, 2010 to Marquette University).

234. *See* THE PREMIER ONLINE HIGH SCHOOL, Registration No. 3,829,839 (registered Aug. 3, 2010 to the University of Miami).

235. *See* RESOLVE, Registration No. 3,368,260 (registered Jan. 15, 2008 to Lehigh University).

- STUDENT LIFE for "[p]rinted publications, namely, periodicals featuring news and information associated with a university"[236]; "[e]lectronic publishing services, namely, providing online periodicals featuring news and information associated with a university"[237]
- THE FIRST-YEAR EXPERIENCE for "[e]ducational services, namely, conducting conferences, seminars, workshops and college courses for secondary and post secondary educators and students addressing transition from high school to the university level"[238]
- FAST-TRACK MBA for "[e]ducational services, namely, providing courses of instruction at the college level and distributing course material in connection therewith"[239]
- COMPLEMENTARY CONCENTRATIONS for "educational services; namely, providing courses of instruction at the college level"[240]
- ONE-COURSE-AT-A-TIME for "education services — namely, the conduct of college-level educational courses and/or programs"[241]

These trademarks raise concerns in the sense that each confers rights that suggest exclusivity over some traditional aspect of college and university functions. We expect colleges and universities to conduct laboratory research, provide educational services, publish results of university research, and even to entertain us and ask us to donate money. Indeed, all of these traditional higher education activities can be conducted successfully without colleges and universities seeking rights in marks other than ones that identify them by name.

So what happens when one institution obtains federal trademark rights that it may use to claim the exclusive ability to market education services, "in the nature of courses at the university level," using the phrase "be the difference"? Should we care that the phrase "first-year experience" used as a mark in relation to educational services for high-school students transitioning to college presumptively belongs to one institution? I believe that registrations such as these are concerning, as the rights conferred have the capacity to chill the very teach-

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236. *See* STUDENT LIFE, Registration No. 3,049,560 (registered Jan. 24, 2006 to Washington University in St. Louis).

237. *See id.*

238. *See* THE FIRST-YEAR EXPERIENCE, Registration No. 2,340,992 (registered Apr. 11, 2000 to the University of South Carolina).

239. *See* FAST-TRACK MBA, Registration No. 2,308,809 (registered Jan. 18, 2000 to Eastern University).

240. *See* COMPLEMENTARY CONCENTRATIONS, Registration No. 1,670,584 (registered Dec. 31, 1991 to St. John's University).

241. *See* ONE-COURSE-AT-A-TIME, Registration No. 1,522,966 (registered Jan. 31, 1989 to Cornell College).

ing, research, and services we traditionally have looked to higher education to perform. To be clear, I am not suggesting that these registrations actually prevent uses of the phrases "be the difference" or "first-year experience" on college campuses other than their owners'. What I am suggesting is that misunderstandings and misimpressions over how free speech rights overlay with trademark rights — and the understandable desire not to want to spend scarce discretionary dollars on legal fees to find out who is right — may lead to the constraining of discourse and related activity on campus. Such an outcome would be unfortunate, as concern for trademarks does not often make for good pedagogy.

One must question the propriety or perceived need for colleges and universities to seek "higher education as enterprise"-type rights in the first instance. Will Marquette University send a cease-and-desist letter to another college or university that uses the phrase "be the difference" in relation to its educational services? How much confusion will trigger action? Will Eastern University demand a royalty from any graduate school of business that offers a "fast-track MBA"? Is "fast-track" ever descriptive? What kind of use of "fast-track MBA" constitutes use of the phrase as a mark in commerce? The problem with registrations such as these is that they have the potential to create uncertainty for colleges and universities that seek to go about their traditional functions without provoking a distracting trademark battle.

One reality of obtaining trademark protection is that federal trademark registration can lead to a feeling of entitlement when enforcement opportunities present themselves. Often forgotten are more basic questions like "What is the purpose of our registering and maintaining this mark?," or "Are consumers really likely to be confused if more than one non-profit educational institution uses this mark?" In their place slips the easier logic: "We own a federal registration for this trademark and you don't, so stop what you're doing right now."

Even more particular to higher education, many of the common justifications for seeking trademark protection seem suspect when the very words an institution seeks to protect deal with aspects of the institution that are unlikely to lead to confusion. The consumers of higher education primarily identify institutions by their names, logos, and insignia, not by names for individual programs, educational features, or curricular initiatives. Therefore, instead of signifying source, alleged marks such as "one-course-at-a-time" and "complementary concentrations" are more likely to be viewed as features of a broader intellectual commons, owned by no single institution, and presumptively free for all within higher education to use without threat of enforcement.[242] The mere fact that these phrases are registered,

242. *Cf.* Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *The University as Constructed Cultural Commons*, 30 WASH. UNIV. J.L. & POL'Y 365 (2009) (de-

however, adds legal risk to using common educational features by name, excessively raising the tough question of distinguishing between descriptive fair use and use as a mark in a field where it should occur less often.

b. Higher Education "Products"

A second category of potentially problematic registrations that I identified pertains to what I call higher education "products." These types of trademarks relate to a product or service developed at a college or university, most often with public funds. To be clear, there is nothing improper about universities benefiting from the fruits of their research. Indeed, the Bayh-Dole Act contemplates that benefits deriving from faculty research sponsored by the federal government will be shared between universities and the faculty whose inventive work leads to commercialization.[243] What should concern all of us, however, when it comes to university behavior in the trademark space, is precisely what should, and does, concern commentators when it comes to university behavior in the patent space: Does university ownership of this form of intellectual property frustrate the university's purpose of disseminating research results as widely and usefully as possible?[244] The University of Florida understandably receives a royalty on PepsiCo's sales of Gatorade®, given that the product was invented at the university and was named after its mascot (the Gators).[245] But for a university to trademark a product that results from public research investment, especially when the product is of fundamental importance to the public's health or safety, calls into question how private rights-staking by the institution furthers the public good, particularly when nothing about the mark ties it to the university. If inventive products of such historic importance as the polio vaccine — invented by Jonas Salk while a faculty member at the University of Pittsburgh — were never trademarked,[246] we should question the al-

scribing the university as a "constructed cultural commons" and exploring the intersection of innovation with patent and copyright strictures within such environment).

243. *See* 35 U.S.C. § 202(c)(7)(B) (for inventions over which a university has retained ownership, requiring the university to share royalties with the inventor).

244. *See, e.g.*, Liza Vertinsky, *Universities as Guardians of Their Inventions*, 2012 UTAH L. REV. 1949 (2012) (arguing that universities need more discretion, responsibility, and accountability over inventions made by their faculty in order to successfully meet society's growing demand for university innovation).

245. For more on the sports drink's history, see DARREN ROVELL, FIRST IN THIRST: HOW GATORADE TURNED THE SCIENCE OF SWEAT INTO A CULTURAL PHENOMENON (2005). Although the University of Florida does not own a trademark registration for Gatorade®, it does receive a royalty for its use, pursuant to contractual agreement with Stokely-Van Camp, Inc., which owns the trademarks. *Id.* at 74.

246. Comprehensive searches in the TESS database for Salk, University of Pittsburgh, and March of Dimes (the organization that funded Salk's polio vaccine research) show no

leged necessity for institutions to trademark any given higher education "product" of the moment.

Representative examples of higher education "product" trademarks include the following:

- SWEETANGO for "[f]resh apples"[247]
- PORTFOLIO for "[m]aintaining medical records and information via an electronic interactive system to patients, practitioners and researchers"[248]
- NEURADIAB for "[p]harmaceutical preparations for the treatment of cancer"[249]
- TICE for "BCG vaccine, a nonspecific immunostimulant used in the treatment of cancer in humans"[250]
- HASKIN CROSBREED for "live oysters"[251]
- BEEFCON for "[f]oodstuffs of animal origin, namely, beef bacon"[252]
- BON for "[c]ancerous cells for use in scientific research, laboratory research and medical research"[253]
- BREATHALYZER for "apparatus for measuring the alcohol content of individuals"[254]

The University of Minnesota's registration of SWEETANGO serves as an illustrative example of the potential issues these types of trademarks present. Using public funds, researchers at Minnesota's College of Food, Agricultural and Natural Resources developed the SweeTango apple, a new variety of apple.[255] Instead of releasing the apple to growers without charge as an "open release" — as the university had done with previous blockbuster apples, such as the Honeycrisp — Minnesota decided to tightly manage who would be allowed to produce and sell the apple.[256] Obtaining federal trademark

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trademarks owned or assigned to any of the aforementioned that list "vaccine" or "polio" in the goods description field.

247. *See* SWEETANGO, Registration No. 3,905,291 (registered Jan. 11, 2011 to the University of Minnesota).

248. *See* PORTFOLIO, Registration No. 3,825,430 (registered July 27, 2010 to University of Maryland Medical System).

249. *See* NEURADIAB, Registration No. 3,531,554 (registered Nov. 11, 2008 to Bradmer Pharmaceuticals, subsequently assigned to Duke University).

250. *See* TICE, Registration No. 3,134,902 (registered Aug. 29, 2006 to the University of Illinois).

251. *See* HASKIN CROSBREED, Registration No. 2,914,941 (registered Dec. 28, 2004 to Rutgers, the State University of New Jersey).

252. *See* BEEFCON, Registration No. 2,781,298 (registered Nov. 11, 2003 to the University and Community College System of Nevada).

253. *See* BON, Registration No. 2,646,242 (registered Nov. 5, 2002 to the University of Texas System).

254. *See* BREATHALYZER, Registration No. 0,661,636 (registered May 13, 1958 to Robert F. Borkenstein, subsequently assigned to Indiana University).

255. *See* Seabrook, *supra* note 178, at 61.

256. *Id.*

registration over the apple's name — which the university declined to do with the Honeycrisp — facilitated its management strategy.[257] More broadly, the rising number of trademarks for higher education "products" serves as some indication of what the public is losing in exchange for the rights granted in situations like this one. The loss is not necessarily that exclusive ownership rights should lie with a company instead of with a university. The loss is that colleges and universities are seeking to control things they never used to control. What we as a public once received unfettered, in exchange for the granting of considerable state and federal research dollars, we now may only receive with strings attached.

c. Public Good Activities

The final category of potentially problematic registrations — indeed, perhaps the most problematic of the three — is what I call "public good activities." These types of registrations cover activities or invoke concepts that go to the heart of what it means to work in the public interest. If we believe that higher education exists to serve the public good over private interests, and that society's most pervasive problems require public attention and collective action, then registrations of this sort are most troubling. Representative examples of trademarks in this category include the following:

- STUDENTS WITH DIABETES for "providing information in the field of diabetes"[258]
- WORKING TOWARD A WORLD WITHOUT CANCER for "promoting the public interest and awareness in cancer research, treatment, and education"[259]
- READY TO BE HEARD for "educational services, namely, training and seminars for women in the fields of advocacy, politics and public policy"[260]
- CURE VIOLENCE for "[p]romoting public awareness of violence as a public health epidemic; [. . .] [p]roviding an interactive and motivational website the primary mission

257. *See id.* Licensed growers would complain to the university if other producers were identified selling the same apple under the same name, posing enforcement challenges for the university. Therefore, having a trademark on the apple's name furthers the university's goals of identifying and protecting legitimate producers from unlicensed copycats. I do not dispute that trademark law can be used appropriately to achieve this purpose; rather, I am concerned that colleges and universities are turning to trademark as a vehicle for denying the public the full and unfettered benefits of higher education products.

258. *See* STUDENTS WITH DIABETES, Registration No. 3,989,066 (registered July 5, 2011 to the University of South Florida).

259. *See* WORKING TOWARD A WORLD WITHOUT CANCER, Registration No. 3,982,684 (registered June 21, 2011 to the University of Kansas).

260. *See* READY TO BE HEARD, Registration No. 3,842,487 (registered Aug. 31, 2010 to Chatham University).

of which is to stop the spread of violence, and to raise awareness of the issue of violence as a public health epidemic"[261]

- TOUCHED BY A NURSE for "charitable fundraising services by means of organizing, managing and supervising fundraising events, namely, entertainment in the nature of charity balls and dinners; [. . .] charitable fundraising services for the purpose of funding educational scholarships"[262]
- WE'RE CONQUERING CANCER for "[p]romoting public awareness of the need for cancer education and prevention practices";[263] "[m]edical and scientific research to facilitate the discovery of the causes, prevention, treatment and cure of cancer";[264] "[m]edical services, namely, multi-disciplinary treatment of patients"[265]
- POWER for "providing information relating to the generation of energy from wind; scientific research for wind energy development"[266]
- LITERACY COLLABORATIVE for "[e]ducational services for primary grade teachers, namely, conducting workshops, conferences, seminars, and leadership training programs relating to literacy and the design of literacy related curriculum"[267]
- CRUCIAL EARLY YEARS for "conducting conferences, continuing education seminars, and workshops relating to various aspects of education of young children; development and dissemination of educational materials for others relating to literacy and the design of literacy related curriculum; development of literacy assessment and testing systems"[268]
- PROJECT SAFETY for "printed educational materials, namely teacher's workbook, poster, handouts and

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261. *See* CURE VIOLENCE, Registration No. 3,833,196 (registered Aug. 10, 2010 to Lincoln Schatz Sculpture, Inc., subsequently assigned to the University of Illinois).

262. *See* TOUCHED BY A NURSE, Registration No. 3,826,265 (registered July 27, 2010 to the University of Colorado).

263. *See* WE'RE CONQUERING CANCER, Registration No. 3,365,147 (registered Jan. 8, 2008 to Cancer Therapy and Research Center, subsequently assigned to the University of Texas System).

264. *See id.*

265. *See id.*

266. *See* POWER, Registration No. 2,924,489 (registered Feb. 1, 2005 to the University of North Dakota).

267. *See* LITERACY COLLABORATIVE, Registration No. 2,419,790 (registered Jan. 9, 2001 to The Ohio State University).

268. *See* CRUCIAL EARLY YEARS, Registration No. 1,926,011 (registered Oct. 10, 1995 to the University of Missouri).

achievement test sold as part of a kit related to sun awareness and the prevention of skin cancer"[269]

- BREAK CLEAR for "educational services; namely, conducting seminars and classes in the field of smoking cessation"[270]
- TIMBER WOLF ALLIANCE for "promoting the public awareness with regard to timber wolves"[271]
- WORKSAFE IOWA for "consulting and providing information in the field of occupational health and safety"[272]

Each of these examples should pose critical questions for the institutions that own these trademark registrations. To further illustrate just a few of them: What educational or societal purpose is served when one university-affiliated hospital presumptively has superior rights to use the phrase "working toward a world without cancer" in the promotional sphere? Why should but one higher education institution have a lock on "cure violence" as a public awareness slogan?

Registrations like these raise serious concerns. When research and calls for concerted action by higher education involve public good activities — such as curing cancer or promoting awareness of violence, diabetes, women's advocacy, literacy problems, skin cancer, and yes, even timber wolves — no college or university should look to trademark law to provide an avenue of exclusivity. We as a public are harmed when they do so, as staking rights over language plays little beneficial role in public good undertakings. Any registration that covers such activities is only likely to stifle legitimate third-party activity in the public interest, by for-profit and non-profit actors alike. Such registrations also may lead to inappropriate enforcement urges, with flimsy allegations of confusion bandied whenever a similar use is identified.

To be clear, I am not arguing that the USPTO erred in granting these registrations or that legislation should be enacted to prevent these types of marks from registering. For-profit entities, as well as non-profit entities outside of higher education, may find that seeking such registrations is critical to maintaining the integrity of their missions and constituencies.[273] But the mission and constituency of high-

269. *See* PROJECT SAFETY, Registration No. 1,914,851 (registered Aug. 29, 1995 to the University of Texas System).

270. *See* BREAK CLEAR, Registration No. 1,776,057 (registered June 8, 1993 to the University of Texas System).

271. *See* TIMBER WOLF ALLIANCE, Registration No. 1,662,066 (registered Oct. 22, 1991 to Northland College).

272. *See* WORKSAFE IOWA, Registration No. 1,583,042 (registered Feb. 13, 1990 to the University of Iowa).

273. I am thinking, for example, of organizations like Livestrong. Anyone wanting to make a buck selling small yellow rubber wristbands with Livestrong imprinted on them would be very successful absent LIVESTRONG, Registration No. 3,052,284 (registered

er education, particularly public higher education, are quite different. Neither is served through parceling out intangible rights that clutter the public sphere and potentially frustrate public benefit from the research and investment for which society already has paid.

2. Enforcement Concerns

The gradual rights accretion discussed above leads naturally to enforcement concerns. Although the mere existence of a federal trademark registration is enough to cause many companies to change their plans for product and service branding, not all companies will be so dissuaded when they learn that a college or university claims rights in a trademark they plan on adopting. Similar to the patent licensing industry, which views university patent holders as "toothless tigers,"[274] companies might also take comfort in the impression that colleges and universities — as non-profit entities — have not made it their business to be sanguinary with trademarks.

Even if a college or university threatens to enforce a trademark, a company might discount such clamor given the nature of higher education's core business of educational services. So long as the company is not competing with a college or university for educational services or jeopardizing its established licensing market, one might deem it unlikely that a college or university actually would take enforcement action given the costs involved. Yet companies likely underestimate colleges and universities as trademark enforcers at their peril. The more trademark registrations that institutions of higher education accumulate, the more entrenched these institutions become in market forces and market decision making.

A critical question therefore emerges concerning the propriety of trademark enforcement efforts by universities. Enforcement is understandable — even desirable — when a college sues another college whose new name treads too closely to the first institution's name. But a hypothetical decision by the University of Illinois to levy an enforcement campaign against anyone who dares to promote public awareness of violence as a public health epidemic by using the words "cure violence" in relation to such activities would be of a different stripe entirely.

Such lawsuits likely would engender ill will in the public, as the benefit derived from, or necessity in bringing them, would be difficult to articulate. In patent infringement lawsuits, universities often high-

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Jan. 31, 2006 to the Lance Armstrong Foundation, subsequently transferred to The Livestrong Foundation), covering the mark as used in relation to "jewelry."

274. *See* Jacob H. Rooksby, *When Tigers Bare Teeth: A Qualitative Study of University Patent Enforcement*, 46 AKRON L. REV. 170 (2013) (reporting results of interviews with university patent licensing personnel who acknowledged that companies often view universities as unwilling to defend or enforce their patents).

light their investments in the research that created these patents as well as the value added from university involvement in technology transfer.[275] A story university plaintiffs like to tell — which has much appeal — is that it is not fair for businesses to steal patented inventions that germinate from costly university research investments without paying a licensing fee.[276] This story resonates less soundly in the context of trademarks. Unlike patents — which are expressly contemplated in the Constitution and are inextricable from their public good underpinnings — trademarks are purely commercial tools that the public often sees only as benefitting private rights holders without any attendant contribution to the public domain. Also, trademark law is devoid of legislation that encourages colleges and universities to seek trademark protection, unlike in the patent space, where the Bayh-Dole Act explicitly contemplates college and university market activity and ownership of patents when public money is involved.[277] For these reasons, colleges and universities are not well positioned, in most cases, to argue that their trademark enforcement efforts help further any interest other than their own financial ones.

However, some similarities to the patent context may lie in how colleges and universities approach trademark enforcement opportunities. Just as many do with patents,[278] colleges and universities may turn down enforcement opportunities that entities concerned primarily with revenue generation would not overlook. Is trademark enforcement reluctance ultimately good for higher education? And if one believes that it is, does trademark enforcement reluctance actually imply dubiousness about the propriety of the asserted rights in the underlying trademark? If so, why seek formal registration of such rights in the first instance? Or perhaps instead of being reluctant enforcers, colleges and universities will or should become comfortable asserting their trademarks, adopting enforcement norms on par with those of for-profit companies or other non-profits? If so, what then — wither the concept of higher education in the public interest?

These conflicts involving institutional decision making are not limited to higher education. Instead, they go to fundamental questions that every institution should be able to answer: What drives our deci-

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275. *See* Jacob H. Rooksby, *University Initiation of Patent Infringement Litigation*, 10 J. MARSH. REV. INTELL. PROP. L. 623, 667–70 (2011) (citing language in complaints filed by the University of Iowa, the University of Washington, and Wisconsin Alumni Research Foundation).

276. *See id.*

277. *See* 35 U.S.C. §§ 200, 202(c)(3) (2013) (describing the policy and objective of the Bayh-Dole Act to be, in part, "to promote collaboration between commercial concerns and nonprofit organizations, including universities," and requiring universities electing to retain rights in inventions covered by the Act to seek patents on those inventions).

278. *See* Alexander Poltorak, *Thar's Gold in Them Thar Patents: Why It Pays To Protect Patent Portfolios*, 12(9) UNIV. BUS. 18, 23 (2009) (describing reluctance of many universities to enforce their patents).

sion to obtain trademark rights in the first instance? What goals do we further through obtaining trademarks and enforcing them? As long as the answers to these questions are unclear, or the questions unasked, trademark enforcement by most colleges and universities is likely to be scattershot or even inopportune.

Concerns about third-party enforcement may provide one potential explanation for the rise in college and university trademark activity, most particularly at private institutions. The possibility of being sued by a third party for trademark infringement may cause a college or university to seek federal registration in the first instance, in order to obtain presumptively superior rights. This suggestion is untested; in any case, it would seem to apply only in limited circumstances. For example, it seems unlikely that counsel at the University of South Florida determined it imperative to seek registration of STUDENTS WITH DIABETES, lest the university face potential liability for "providing information in the field of diabetes" using the same phrase. More to the point, preventing an infringement lawsuit brought by another is unlikely to motivate public institutions to seek federal trademark protection, as public institutions effectively already enjoy immunity from money damages for trademark infringement.[279] Although injunctive relief against state entities is a possibility, the motivational effect of a potential injunction is likely substantially less than the motivational effect of potential money damages. Simply put, because the stakes are low for public institutions accused of trademark infringement, there is no need to race to the USPTO to obtain a protective shield in the form of a trademark registration certificate.[280]

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279. *C.f.* Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999) (holding that that a provision of the Trademark Remedy Clarification Act that purported to make states liable for false advertising violated the Constitution); *see also Bd. of Regents of the Univ. of Wisc. Sys. v. Phoenix Int'l Software, Inc.,* 653 F.3d 448, 458 (7th Cir. 2011) (stating that the Supreme Court's decision in *College Savings Bank* "appear[s] to foreclose any argument that Congress" properly abrogated state immunity from liability for trademark infringement damages); 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:66 (4th ed. 2014) ("[The anomaly] is that a state can own a trademark and sue for infringement of it in federal court, but that state cannot be held accountable for monetary damages for its own violations of another's trademark unless the state waives its sovereign immunity and consents to be sued.").

280. Eleventh Amendment immunity obviously is of no help to private institutions, which still could be held liable for money damages if they infringe trademarks. Here, too, I am skeptical of the argument that the fear of liability motivates private institutions to seek trademark protection. Amidst the mounting history of cases brought by colleges and universities alleging trademark infringement, see *supra* Part II.C., I did not locate one case where a third party was the first to allege infringement against a college or university (although such an allegation in rare circumstances was raised in a counterclaim).

3. Finance Concerns

Accretion has a way of begetting more accretion, and the data located in the study reported here seem to confirm this adage. The explanation for this accretion, from a financial perspective, is understandable. The marginal cost of seeking and obtaining one federal trademark registration likely is minimal in view of one college or university's total legal or administrative budget.[281] Yet however rational a financial decision to seek federal registration of a trademark may be in any given instance, the cost of these decisions adds up once institutions accumulate portfolios that need frequent tending. As registrations accrue across schools and departments within an institution, additional human resources are needed to track, coordinate, monitor, and correspond with others concerning the institution's trademark activity.

The sheer volume of federal trademark registrations owned by American colleges and universities indicates that many institutions must be spending considerable sums on these undertakings. Of course, the richest of institutions likely recoup these expenditures by licensing their registrations. However, if the past record of universities active in technology transfer serves as any indication,[282] not all institutions are equally well suited to break even, let alone prosper, from amassing trademarks. Indeed, particularly as institutions register more trademarks less amenable to licensing (e.g., institutional slogans, program names) or seek duplicative or overlapping registrations,[283] there is no

281. *See infra* note 304 (describing the average cost to obtain a federal trademark registration).

282. *See* Joshua B. Powers & Eric G. Campbell, *University Technology Transfer: In Tough Economic Times*, 41 CHANGE 43, 46 (2009) (reporting that no university exceeded a sixty-five percent chance of achieving profitability from technology transfer in ten years, and that thirty-five percent of universities active in technology transfer never realized a profit over the ten-year period, no matter how much they invested).

283. For example, the registration of second-level domain names in the .EDU extension that incorporate entirely the registered name, abbreviation, or nickname of an institution seems unnecessary and duplicative, particularly considering that registration in the .EDU extension is not open to everyone (i.e., only U.S. postsecondary institutions that are institutionally accredited by agencies on the U.S. Department of Education's list of Nationally Recognized Accrediting Agencies are eligible to register a domain). *See .EDU Eligibility*, EDUCAUSE, http://net.educause.edu/edudomain/eligibility.asp (last visited May 5, 2014). .EDU "land grabs" simply are unlikely, particularly given that eligible institutions may register only one second-level domain name, and .EDU domain name registrations may not be assigned or transferred. *Id.*; *see also* Cooperative Agreement Between Nat'l Telecomms. & Info. Admin. and EDUCAUSE, Amendment 1 (July 2002), *available at* http://www.ntia.doc.gov/page/2011/edu-domain-space. Therefore, the best explanation for such registrations may be that they plausibly are useful in pursuing cybersquatters who register confusingly similar second-level domain names in other extensions (like .COM, .NET, .ORG, etc.). But .EDU registrations are far from necessary to protect against such activity. To the extent a .EDU registration incorporates entirely the registered name, abbreviation, or nickname of an institution, its primary trademark registration could be asserted, and should be given more weight. *Cf.* TMEP § 1209.03(m) (8th ed. Oct. 2013) ("Portions of

guarantee that maintaining a registration on the shelf will lead to money on the books.

For example, consider the following twenty federal trademark registrations owned by the University of Virginia, each registered in relation to "health care services":

- IMAGINATION BEYOND MEASURE[284]
- INNOVATION BEYOND MEASURE[285]
- PERCEPTION BEYOND MEASURE[286]
- INGENUITY BEYOND MEASURE[287]
- INQUISITIVENESS BEYOND MEASURE[288]
- DEDICATION BEYOND MEASURE[289]
- EMPATHY BEYOND MEASURE[290]
- INTELLIGENCE BEYOND MEASURE[291]
- SKILL BEYOND MEASURE[292]
- INVENTIVENESS BEYOND MEASURE[293]

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the uniform resource locator ('URL'), including the beginning ('http://www.') and the top-level Internet domain name ('TLD') (e.g., '.com,' '.org,' '.edu'), function to indicate an address on the World Wide Web, and, therefore, generally serve no source-indicating function."). But the USPTO might change this policy in light of potential new generic TLDs:

> To the extent that some of the new gTLDs under consideration comprise existing registered trademarks or service marks that are already strong source identifiers in other fields of use, some of the premises underlying existing USPTO policy regarding the registration of gTLDs may no longer hold true for such gTLDs (e.g., a gTLD consisting of a coined mark is not an abbreviation of an entity type or class of intended user of domain space). Where the wording following the "." or "dot" is already used as a trademark or service mark, the appearance of such marks as a gTLD may not negate the consumer perception of them as source indicators. Accordingly, the USPTO is amending its gTLD policy to allow, in some circumstances, for the registration of a mark consisting of a gTLD for domain-name registry operator and registrar services.

Examination Guide 1-14: Applications for Marks Comprising gTLDs for Domain-Name Registry Operator and Registrar Services, USPTO (Mar. 2014), http://www.uspto.gov/trademarks/resources/ExamGuide1-14-gTLD.doc.

284. *See* IMAGINATION BEYOND MEASURE, Registration No. 3,620,461 (registered May 12, 2009 to the University of Virginia).

285. *See* INNOVATION BEYOND MEASURE, Registration No. 3,620,476 (registered May 12, 2009 to the University of Virginia).

286. *See* PERCEPTION BEYOND MEASURE, Registration No. 3,620,477 (registered May 12, 2009 to the University of Virginia).

287. *See* INGENUITY BEYOND MEASURE, Registration No. 3,624,117 (registered May 19, 2009 to the University of Virginia).

288. *See* INQUISITIVENESS BEYOND MEASURE, Registration No. 3,624,118 (registered May 19, 2009 to the University of Virginia).

289. *See* DEDICATION BEYOND MEASURE, Registration No. 3,624,119 (registered May 19, 2009 to the University of Virginia).

290. *See* EMPATHY BEYOND MEASURE, Registration No. 3,624,120 (registered May 19, 2009 to the University of Virginia).

291. *See* INTELLIGENCE BEYOND MEASURE, Registration No. 3,624,122 (registered May 19, 2009 to the University of Virginia).

292. *See* SKILL BEYOND MEASURE, Registration No. 3,624,128 (registered May 19, 2009 to the University of Virginia).

- ORIGINALITY BEYOND MEASURE[294]
- CLEVERNESS BEYOND MEASURE[295]
- CURIOSITY BEYOND MEASURE[296]
- EXPERIENCE BEYOND MEASURE[297]
- FULFILLMENT BEYOND MEASURE[298]
- PERSISTENCE BEYOND MEASURE[299]
- DRIVE BEYOND MEASURE[300]
- INITIATIVE BEYOND MEASURE[301]
- ENTHUSIASM BEYOND MEASURE[302]
- COLLABORATION BEYOND MEASURE[303]

A reasonable estimate would be that it cost the University of Virginia over $50,000 to register this family of "beyond measure" trademarks.[304] To maintain them will of course cost the university additional thousands of dollars over the years.[305] To what end? If an accepted precept of branding is never to confuse the consumer, seeking registration of twenty variations on the same theme would seem to create more headaches than it solves. Regardless, haphazard accretion and registration of trademarks beyond measure — particularly ones unlikely to present licensing opportunities — unquestionably raises

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293. *See* INVENTIVENESS BEYOND MEASURE, Registration No. 3,624,129 (registered May 19, 2009 to the University of Virginia).

294. *See* ORIGINALITY BEYOND MEASURE, Registration No. 3,624,130 (registered May 19, 2009 to the University of Virginia).

295. *See* CLEVERNESS BEYOND MEASURE, Registration No. 3,624,133 (registered May 19, 2009 to the University of Virginia).

296. *See* CURIOSITY BEYOND MEASURE, Registration No. 3,624,136 (registered May 19, 2009 to the University of Virginia).

297. *See* EXPERIENCE BEYOND MEASURE, Registration No. 3,628,676 (registered May 26, 2009 to the University of Virginia).

298. *See* FULFILLMENT BEYOND MEASURE, Registration No. 3,628,677 (registered May 26, 2009 to the University of Virginia).

299. *See* PERSISTENCE BEYOND MEASURE, Registration No. 3,658,924 (registered July 21, 2009 to the University of Virginia).

300. *See* DRIVE BEYOND MEASURE, Registration No. 3,658,926 (registered July 21, 2009 to the University of Virginia).

301. *See* INITIATIVE BEYOND MEASURE, Registration No. 3,658,927 (registered July 21, 2009 to the University of Virginia).

302. *See* ENTHUSIASM BEYOND MEASURE, Registration No. 3,664,460 (registered Aug. 4, 2009 to the University of Virginia).

303. *See* COLLABORATION BEYOND MEASURE, Registration No. 3,664,462 (registered Aug. 4, 2009 to the University of Virginia).

304. This figure assumes total legal fees and costs of $2500 per mark, which is a conservative estimate. According to a nationwide survey of IP lawyers conducted in 2012 by the American Intellectual Property Law Association, total average fees (exclusive of USPTO filing costs) to conduct a trademark clearance search and analysis, file a federal application, and prosecute the application to registration were $3644. DAVID A. DIVINE ET AL., AIPLA REPORT OF THE ECONOMIC SURVEY 2013, at I-100 (American Intellectual Property Law Association 2013). Actual figures varied by region of the country and by size of the law firm. *Id.*

305. In 2012, IP lawyers received $998 on average per mark for preparing and filing a renewal application and statement of use, exclusive of costs. *Id.* at I-101–02.

legal costs and affects the bottom lines of those programs and departments within colleges and universities that seek them.[306]

Additional financial concerns relate to the question of licensing opportunities. What will market saturation look like for any given college or university? How many trademarks are optimal from a licensing standpoint, and when do diminishing returns set in? Though these concerns were not the focus of this study, certainly the data reported here provides the empirical support for the need to answer such questions.

Finally, although institutional reports of licensing revenue received are not commonly publicized, one must wonder at what point renewed consideration will or should be given to taxing trademark licensing revenues as unrelated business income.[307] Indeed, renewed focus already is being placed on university patent royalties.[308] Conferring tax benefits to colleges and universities that successfully license a handful of trademarks consisting of institutional names, logos, and insignia arguably furthers non-profit tax policy; permitting colleges and universities to trademark every conceivable associational aspect of their identity, without any tax consequences, seems an abuse of the system. Whereas revenues from both the former and the latter type of trademark activity may be used to further the institution's mission, seeking trademark upon trademark may change the character of non-profit higher education in ways that those responsible for tax policy might care about.

4. Higher Education Policy Concerns

Perception in trademark law has a tendency to be self-fulfilling — and self-defeating. As consumers encounter more licensed uses of trademarks, and fewer unlicensed uses, they become accustomed to viewing licensing as the norm.[309] This perception, in turn, shades how consumers view unlicensed uses of trademarks: confusing at best,

306. This concern speaks to a problem first identified in Gaston's dissertation in 1984: unless policy responsibility for trademark matters falls within one department or office at a given institution, decision making about which trademarks to register likely will be indiscriminate. *See* Gaston, *supra* note 10, at 116 and text accompanying note 86. Additional research should be conducted to understand how institutions make decisions concerning the registration and enforcement of trademarks.

307. See *supra* note 46 for the historical IRS rulings that address licensing of college and university trademarks. To my knowledge, there have been no efforts to reconsider these rulings in light of changed conditions involving the use of trademarks in higher education.

308. *See* Goldie Blumenstyk, *Princeton's Royalty Windfall Leads to Challenge of Its Tax-Exempt Status*, CHRON. HIGHER EDUC.: BOTTOM LINE (July 8, 2013), http://chronicle.com/blogs/bottomline/princetons-royalty-windfall-leads-to-challenge-of-its-tax-exempt-status/.

309. *See* James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 907–08 (2007).

illegal at worst.[310] Either impression benefits those who wish to obtain, license, and enforce trademarks.

The concern for higher education is that institutions are internalizing a message that every conceivable piece of intellectual property that is trademark-eligible must be claimed and registered, lest the institution "lose" something that is rightfully theirs. This belief results in conduct that may help the institution protect its identity in many legitimate instances, but results from the study presented here show that many colleges and universities are doing much more than protecting their identities. Instead of standing to lose from trademark inactivity, the greater harm — to institutions and to the public — likely comes from trademark over-activity. Hyper-branding of every aspect of modern higher education leads to the unfortunate impression that such activity is necessary to "protect" something, even the mere functioning of traditional scholarly and teaching activities at colleges and universities — which eventually it may, as colleges and universities accumulate and assert more trademarks.[311]

As trademark activities increase, colleges and universities become more deeply entwined with the market and market concerns. Different historical contexts help illustrate how these values inevitably present tensions and eventually conflict with academic values and norms.[312] Should the university send a cease-and-desist letter to another educational institution it believes to be infringing a mark, even though the mark calls to mind a public problem or research undertaking, and not the identity of the institution itself? What about a private company that may employ the institution's graduates or contribute financially to the institution? As questions like these arise, colleges and universities expend untold financial and political capital policing often questionable "investments" in the hope of some return.

Even if a federal trademark registration does not lead to an enforcement itch, its very existence serves to clutter the commercial market, chill competition, and cause risk aversion by well-intentioned individuals and companies. Savvy businesses and non-profits commonly conduct trademark clearance searches before unveiling a new brand. Registrations owned by colleges and universities appear in these searches, thereby casting a deterring shadow on contemplated activities and marks that may come too close to a given college's or

310. Indeed, confusion as to the existence of a license is actionable confusion. *See supra* Part II.A.

311. There may be some room to question the extent of college and university agency over the accretion of federal trademark registrations. In particular, private giving occasionally may be hinged on the deployment of "trademark-building projects . . . and the other special interests of donors." NEWFIELD, *supra* note 7, at 192. Nevertheless, just as colleges and universities do not acquire physical property without inviting attention, nor should their forays into intellectual property ownership be overlooked or dismissed, regardless of whose interests actually drive decisions to seek federal trademark protection.

312. *See generally* Jacob H. Rooksby, *Sue U.*, 98 ACADEME 24 (2012).

university's registration and claimed rights. This effect is desired and proper when the mark in question is the name of a higher education institution and the searcher is a would-be competitor — society benefits when copycat institutions cannot trade on the reputation of other higher education institutions. But the effect hurts society when businesses are deterred from pursuing legitimate activities because of a college- or university-owned trademark.

A problem for higher education is that what defines "competitor" has come to include an untold number of actors. As colleges and universities seek and obtain registrations in classes of goods and services other than "educational services," they have identified themselves as active in many industries that are ancillary to their *raison d'être*. Although the institutions themselves are not entirely to blame for this accretive behavior — after all, policymakers for years have been encouraging them to become more entrepreneurial — we must question how adept colleges and universities can be at establishing and managing wide-ranging trademark portfolios with ties to nearly every aspect of the higher education enterprise, not just athletics.

At a more fundamental level, as zones of previously free speech become areas of regulated, rights-laden speech, college and university brand protection threatens to compete with mission protection and the traditional academic values of higher education. The pursuit of truth and the norms of science risk playing a secondary role to institutional image consciousness and dictates of the market. As Professors Samantha King and Sheila Slaughter presciently warned ten years ago, "Signs and symbols, integral to the work performed by members of colleges and universities, are no longer valued only for their meanings but for their commercial potential."[313] Indeed, Professor Deven Desai has argued that the brand — a community-situated, multi-stakeholder, market-responsive information device — has come to subsume historical precepts of trademark law, regardless of the industry in which brands emerge.[314] The trademarks accreting in higher education — a rising number of which pertain to slogans and programs — stand as proof of the shifting focus of trademark activity: image is everything; concern for likelihood of confusion is beside the point.

The effects of this commodification of language and the very building blocks of knowledge production and dissemination are incalculable but likely significant. Unfortunately, as the former president of Harvard University, Derek Bok, has recognized when it comes to the effects of commercialization in higher education more generally,

> [t]he principal advantage to the institution — money — will usually seem immediate, tangible, and ex-

313. King & Slaughter, *supra* note 4, at 273.
314. *See generally* Desai, *supra* note 27.

> tremely useful to help meet pressing needs. In contrast, the dangers — to the conscientiousness of faculty, or to the moral education of students, or to the trust of the public — are all intangible and remote. They may never materialize, at least not for a long time, so that it is all too easy to overlook them.[315]

In short, fiduciary responsibility for language and higher education as an ethics-driven, public-facing, and public-serving institution too often buckles when money is on the line. Although champions or defenders of trademark rights accretion will insist that the activity poses no risks to higher education's essence or mission, that song has been sung for different audiences before; indeed, many of the industry's historic forays into technology transfer, online education, and quasi-professional athletics suggest that incongruences and tensions are inevitable and, at times, irreconcilable.[316]

The trademark trends identified in this Article reflect a larger story concerning the changing role of higher education's place in American consciousness. Part V endeavors to identify what can be done to correct the course, although there is no questioning that the commercialization ship in higher education has long since sailed. Can trademark rights accretion ever further the public good in higher education? I do not see how, unless we abandon the idea of higher education as resting, by design, within the public sphere.[317]

V. TOWARD A MODEL FOR COLLEGE AND UNIVERSITY TRADEMARK BEHAVIOR

This Article is by no means the first to consider how accretion of commercial trappings is changing the character of American higher

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315. Derek Bok, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 118–19 (2004).

316. *See id.* at 119–21.

317. *C.f.* Brian Pusser, *Power and Authority in the Creation of a Public Sphere*, *in* UNIVERSITIES AND THE PUBLIC SPHERE: KNOWLEDGE CREATION AND STATE BUILDING IN THE ERA OF GLOBALIZATION 27, 41 (Brian Pusser, Ken Kempner, Simon Marginson & Imanol Ordorika eds., 2012) ("[E]lite postsecondary institutions face a crisis of legitimacy, particularly as prestige competition and the seemingly insatiable demand for increased revenue moves them further from their traditional obligations to the public good."); David F. Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34(1) AM. EDUC. RES. J. 39, 42–43 (1997) (defending the concept of education as a public good in the face of mounting efforts to ignore its public impacts in favor of private sphere orientations and rewards); Simon Marginson, *Higher Education and Public Good*, 65 HIGHER EDUC. Q. 411, 413 (2011) ("[T]he public character of higher education is not so much a function of the timeless character of universities but grounded in social practices. Higher education institutions are more or less 'public' and 'private' according to the policy and funding configuration chosen for them.").

education.[318] The data presented here can be considered further evidence of the rise of what legendary scholar and university president Clark Kerr identified as the "multiversity."[319] Administrative functions are central to the identity of the multiversity, which strives to be more like industry than any ancient, romantic concept of "the idea" of the university. The modern multiversity is a complex balance of disparate activities and interests held together by a conservative governance structure. Acquisition of trademarks by the dozen is very much consistent with the administrative- and administrator-driven characterization of modern higher education. Perhaps cognizant of losing earlier fights to maintain claim over some aspect of their intellectual commons, colleges and universities are choosing to be proactively defensive and protective of anything the law allows them to claim as "theirs."

Other possible explanations for this behavior abound, informed by academic perspectives as diverse as sociology, organizational theory, and management. Subsequent efforts should be undertaken to examine why trademark rights accretion has occurred, and what forces drive it, but ultimately I want to conclude with a view toward the future: What would a model for college and university trademark behavior look like? Perhaps by stating an ideal, commentators can better assess where we are now, and practitioners can reflect on where to go next.

I think every institution needs to start by identifying which trademarks are truly "mission critical" to the institution. That is to say, which trademarks protect the primary identity and essence of the institution? The answer is likely to be an array of formal and abbreviated names, logos, and insignia. Federal trademark registrations for these items are defensible and often necessary. Likely to be further afield are trademarks for programs, slogans, and products developed at the institution to address public health and safety needs. These are less often necessary to protect any internal or popular conception of what it is the institution "does," and in some instances — particularly where they lay claim to some aspect of the public good — may not even be defensible.

As part of this conscientious exercise, institutions should place primacy on protecting trademarks that create licensing opportunities instead of only creating enforcement opportunities. The licensing opportunity, however, ideally should have some clear nexus to the institution, apart from merely reflecting a product, service, or idea that

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318. *See, e.g.*, Patricia J. Gumport & Brian Pusser, *A Case of Bureaucratic Accretion: Context and Consequences*, 66(5) J. HIGHER EDUC. 493, 500 (1995) ("Our data [concerning expenditures in the UC system] suggest the existence of a disproportionate amount of administrative growth relative to growth in instruction. We refer to this as bureaucratic accretion.").

319. *See generally* CLARK KERR, THE USES OF THE UNIVERSITY (5th ed. 2001).

emanated from the institution. Licensing opportunities may abound if what is sought are trademarks of a generalized and broad sort, such as "bioflex" for scientific research or "the premier online high school" for high school education services. But what links these marks, in the public's eye, to higher education, let alone to a particular institution of higher education? Colleges and universities should seek to protect what we would expect them to protect, not venture into registering marks whose primary association with the institution will be when an attorney links the two while drafting a cease-and-desist letter.[320]

Colleges and universities should decline to assert ownership in trademarks that suggest a removal of teaching, scholarship, and research activities from the public sphere. Institutions of higher education receive tax subsidies and other preferential treatment precisely because they undertake scholarship and research for reasons that do not translate into return on investment in the quantifiable sense that stockholders of for-profit corporations expect. To a large degree, the people are the stockholders of non-profit higher education, and colleges and universities should not be in competition with them. By parceling out and asserting rights to fundamental aspects of their teaching, scholarly, and research activities, colleges and universities are abusing their historic pact to pursue those activities for the benefit of everyone, not just those who pay a licensing fee for the privilege.[321]

All of these suggestions raise a common question: When is federal registration of a mark actually necessary for colleges and universities?[322] What may be "best practices" for for-profit companies looking to dominate a given market by use of a catchphrase or slogan should not dictate the behavior of colleges and universities. Colleges and universities do not operate in hopes of a "liquidity event" that would

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320. For an example of a type of trademark obtained by a university that could be prone to enforcement abuse (but without commenting on whether such abuse already has occurred or might occur in the future), see THE CLOUD, Registration No. 3,028,364 (registered Dec. 13, 2005 in relation to "marketing and promoting the goods and services of others via a wireless network; text and numeric wireless digital messaging services; hosting of digital content on the Internet" to the University of Georgia Research Foundation, subsequently assigned to Scott A. Shamp). The registration's current owner is a professor of telecommunications at the University of Georgia. *See Scott Shamp Profile*, UNIVERSITY OF GEORGIA, GRADY COLLEGE, http://www.grady.uga.edu/directory/profile/shamp (last visited May 5, 2014).

321. Here I draw a point of distinction from the patent context, where the federal government explicitly encourages university ownership and licensing of patents via the Bayh-Dole Act. *See supra* note 277 and accompanying text. No such equivalent legislation exists that could be read as encouraging college and university ownership of trademarks.

322. This question is more important for colleges and universities than it is for actors outside of higher education, precisely because of higher education's placement in the public sphere. Thoughtless accretion of trademarks for actors outside of higher education may not be advisable, but the ramifications of such behavior are less profound for the public. We expect businesses to make business judgments that are not in the public's best interests; higher education certainly is a business, but the public's interest is never far from anything the industry does — or at least it should not be.

entail transferring trademark rights, free and clear, to a new owner.[323] Most are not start-ups looking to make a name for themselves, nor do all pull "buyers" — or substantial numbers of buyers — from all fifty states. And although the competition between colleges and universities for students increasingly is fierce, institutions supported by and intended to benefit the public should not pursue marketing advantages at the expense of a public marketplace unfettered by excessive and needless rights-staking.[324]

These suggestions deserve measured consideration by every college and university that claims rights in a trademark. They also merit implementation. Antitrust concerns may prevent colleges and universities from collectively agreeing to play by the rules sketched above, but nothing prevents the development of "points to consider" or other hortatory documentation that institutions publicly could endorse and profess to follow,[325] including, at a minimum, the following:

- Register only "mission critical" trademarks
- Favor the registration of trademarks with clear or apparent ties to the institution
- Place registration primacy on marks that the institution plans to use well into the future or that present legitimate and natural licensing opportunities
- Seek registration of trademarks for their institutional value, never for their enforcement value
- Decline to assert ownership in, or seek registration of, trademarks that suggest the removal of teaching, scholarship, or research functions from the public sphere

As part of preparing or endorsing these suggested practices, colleges and universities should make their trademark holdings — whether registered or unregistered — easily publicly accessible in one place on their institutional website, obviating the need for knowledge of the USPTO's TESS database and how to use it. Such a public listing should be seen as a commitment to transparency, as it would allow

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323. Private, for-profit companies often are advised to establish a federal trademark portfolio as a method of "adding value" to the company and substantiating an asking price.

324. Some may counter that higher education institutions are not the only non-profits that seek and obtain federal trademark registrations that go beyond institutional name or insignia. Though true, this point is distinguishable from what I argue, precisely because colleges and universities are not interchangeable in design, governance, or aspiration with other non-profit organizations. Non-profits outside of higher education answer primarily to those who fund them. In contrast, higher education — whether public or private — at some level answers to the public, which funds colleges and universities both directly and indirectly. The public also reaps the byproducts of higher education — namely, an educated populace — in a way that is not analogous to benefits from the outputs of other non-profits.

325. Indeed, leading universities have taken such steps in the patent context. *See* White Paper, Stanford Univ. et. al., *In the Public Interest: Nine Points To Consider in Licensing University Technology* (Mar. 6, 2007, 2:00 PM PT), http://otl.stanford.edu/documents/whitepaper-10.pdf.

the public and other constituents the opportunity to learn about the metes and bounds of the college or university as a commercial, corporate entity. Secrecy and obfuscation have no legitimate roles to play in this arena, and a public listing of an institution's claimed rights likely would discourage the institution from asserting infringement of unlisted "rights," or infringement of listed rights in situations of negligible confusion and marginal threat to the institution's interests (e.g., attempts to squelch lewd speech that administrators find objectionable for its potential to call to mind the institution in some way).[326]

Unfortunately, college and university trademark activity seldom captures the concerted attention of higher education policy groups or commentators, likely in part because of the mistaken assumption that the activity begins and ends with athletics. The ties of ICLA — the only industry group that focuses on trademark issues in higher education — to athletic directors likely prevents trademark issues in higher education from attracting more widespread attention and discussion.

These obstacles must not prevent long-overdue discussion and action aimed at creating sensible trademark norms in higher education. Trademark rights do not have to last forever. Colleges and universities choose which trademarks to register and which to maintain. At present, the choices are many, but the guiding principles are few. It is time to encourage the reclaiming of the public good in higher education, and the release of college and university trademarks that lay claim to important parcels of the public domain, before it is too late.

VI. CONCLUSION

This Article tells a concerning story. What started as a natural and understandable method for colleges and universities to protect their identities, and generate revenue in the process, has grown into a vast and overlooked activity with important policy ramifications for higher education. Yet the size and nature of the beast were previously unknown.

What the data reveals is that college and university trademark activity illuminates significant policy concerns for those who study and are affected by the commercial activities of higher education. And although college and university trademark activity is substantial in real terms, it has attracted far less attention than copyright and patent issues in higher education, particularly as they relate to the concept of

326. Of course, precisely because this level of transparency effectively could stymie or hamper an institution's future enforcement efforts is why lawyers for an institution likely would oppose this proposal. However, one of the main points of this Article is that trademark accretion implicates educational policy, and that the ramifications of trademark activity in higher education are too important — not too legal or too specialized — for other stakeholders within higher education to cede all decision making in this arena to the lawyers.

a shared intellectual commons.[327] The reasons for this oversight can be debated, but what cannot be ignored is that trademark accretion in higher education implicates many of the same public interest concerns that color discussion and inform decision making in the copyright and patent context.

Contrary to historical belief, which trademarks colleges and universities choose to protect and enforce is no trifling matter. These decisions are important — too important to be overlooked or written off as simply the nature of higher education in the marketplace in the twenty-first century. Data presented in this Article illuminates the story of trademark activity in higher education, but the narrative is far from complete. If we as a society expect higher education to further the public good, we must expect its leaders to do more than simply allow trademark accretion to run its course. To thoughtfully manage and control higher education's relationship with trademarks is to ensure a vibrant cultural commons that benefits us all.[328]

327. *See* Madison, Frischmann & Strandburg, *supra* note 242.

328. *Cf.* LEWIS HYDE, COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP (2010) (arguing for a commons that involves more collective ownership than carefully managed individual ownership).