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Wisconsin Patent Acquisition in the Final Frontier: Creating a Void

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Wisconsin Patent Acquisition in the Final Frontier: Creating a Void

I. INTRODUCTION

In early 2006, the Wisconsin Legislature passed 2005 Wisconsin Act 335, creating the Wisconsin Aerospace Authority (WAA).[1] Unique to this particular act is the enumeration of the power to acquire intellectual property by the WAA.[2] While granting them the power to acquire intellectual property is not unique, there is an interesting problem with that acquisition: the Act does not conform to the Parker Doctrine, and thus allows the WAA to be subject to antitrust litigation in its intellectual property acquisition under the proper circumstances. Specifically, the Act allows the WAA to enter into exclusive contracts that allow the WAA to acquire intellectual property rights in patents and copyrights. If entering into these contracts are found to be in violation of antitrust law, the contracts could be challenged, and state contract law would be preempted by federal patent or copyright law. If federal law preempts state law and the contractual relationship is a violation of antitrust law, the specific provisions of the Act that allow for intellectual property rights acquisition could be held void. The key factor is the broad language in the Act and the limitless authority it grants to the WAA in acquiring intellectual property. While the

1. S.B. 352, 2005 Leg., Reg. Sess. (Wis. 2006).
2. *See* WIS. STAT § 114.62(6) (2015–16).

cause of such broad language is left to speculation, the remedy to prevent such an action can lie in other states' aerospace authority statutes, such as the Alaska Aerospace Corporation and the New Mexico Regional Spaceport District.[3] This Comment will address the broad language of the Wisconsin statute that allows for intellectual property acquisition, focusing particularly on patents, the history of the antitrust law applied to state-owned entities, the circumstances needed for intellectual property acquisition to violate antitrust law, and the potential remedies.

The problem with addressing these issues is that the issues are unique and rarely occur. While state-owned entities are no stranger to intellectual property acquisition,[4] my research was unable to locate any state-owned entity acquiring any intellectual property through anticompetitive behavior. Furthermore, my research uncovered only one article into potential state antitrust behavior in acquiring intellectual property, albeit, on a federal level.[5] And while trade secret misappropriation has resulted in patent applications, which have subsequently been denied, the very notion of state antitrust behavior seems contrary to the nature of private research, invention, and patent application imbued into the America Invents Act.[6] This Comment will first address the Wisconsin laws and the history of antitrust laws applied to state-owned entities. Next, part two will address how Wisconsin could violate those antitrust laws in their independent research and invention for a potential patent, and how that violation could preempt state common law. Part three will then address potential remedies, including, but not limited to patent sharing, broad oversight, and revision of those laws. Part four suggests revisions to the current laws to prevent state antitrust activity.

II. CONSTRUING THE LAW

Imagine this scenario: the WAA enters into an exclusive contract with the Astronautics Corporation of America (ACA), based in Milwaukee, to launch rockets from Spaceport Sheboygan to test new equipment the ACA is developing for the new Orion spacecraft. This new equipment, if proven

3. *See* ALASKA STAT. § 26.27 (2014); *see also* N.M. STAT. ANN. § 5–16 (2010).

4. *See About Us*, BERKELEY IPIRA, http://ipira.berkeley.edu/about-us [https://perma.cc/5RK4-LEG6] (last visited Mar. 28, 2016). At the University of Wisconsin, all patents are held by the Wisconsin Alumni Research Foundation, a private, nonprofit company that handles all patents and licensing. *See About Us*, WARF, http://www.warf.org/about-us/about-us.cmsx [https://perma.cc/TUP9-VK47] (last visited Mar. 28, 2016). However, the University of Wisconsin can and does maintain other forms of intellectual property, such as copyrights, trademarks, and trade secrets. *See* W, Registration No. 4,591,526.

5. *See infra* note 40.

6. *See* 35 U.S.C. § 119 (2012).

through these tests, will allow for better aeronautic measurements than GPS, which, if mass produced, could eventually be put into every new manufactured airplane as well. One provision in this contract allows the WAA a partial ownership in any patents acquired by testing this equipment, since the WAA was integral in its creation, as it manages the only spaceport in the entire Midwest that is licensed for the launching of spacecraft. However, since the WAA has a monopoly over Midwestern space launches (and since there are no other Midwestern spaceports), such an exclusive contract could be challenged by Orbital Technologies, a competing aerospace engineering company out of Madison, as violating antitrust laws. This challenge could result in state contract law being preempted by federal law. If that law is preempted and found to violate federal antitrust law, then those specific provisions of the Wisconsin statutes that allowed the WAA to acquire intellectual property rights would be void.

A. The Powers of the Wisconsin Aerospace Authority

This may seem like a farfetched idea, but it will be a reality because of the specific statutory language. Wisconsin statute section 114.62 states, "the authority may . . . [m]ake and execute contracts and other legal instruments necessary or convenient for the conduct of its business or to the exercise of its powers."[7] Additionally, the statute states

> the authority may . . . [a]cquire, own, lease, construct, develop, plan, design, establish, create, improve, enlarge, reconstruct, equip, finance, operate, manage, and maintain . . . [a]ny spaceport [and] [a]ny intangible property right, including any patent . . . copyright . . . or other right acquired under federal or state law, common law, or the law of any foreign country.[8]

Under this provision, the WAA can enter into a contract to acquire a patent through an exclusive contract to test an invention at Spaceport Sheboygan. This is because of the lack of limiting language in the statute. It basically gives limitless authority to the WAA to enter into any contract and acquire virtually any intellectual property rights through those contracts so long as they are "convenient for the conduct of business" or are an "exercise of its powers,"[9] of which includes the acquisition of intellectual property rights. The problem with this broad authority granted to the WAA is it violates antitrust laws if the state

7. WIS. STAT. § 114.62(7) (2015–16).
8. *Id.*
9. *Id.*

enters such contract.

B. The Principles of Antitrust Law

The applicability of antitrust laws to state-owned entities is outlined in the landmark case *Parker v. Brown*.[10] The California Agricultural Prorate Act (CAPA) was challenged by the Department of Agriculture under the antitrust laws of the Sherman Act, the Agricultural Marketing Agreement Act of 1937, and the Commerce Clause.[11] The Supreme Court found that the Sherman Act did not necessarily prohibit any legislative act of states, nor did the CAPA violate any other federal laws.[12] However, in evaluating the application of the Sherman Act, the Supreme Court stated that the state must "exercise[] its legislative authority in making the regulation and in prescribing the conditions of its application."[13] This created a two-part test: first, the state must clearly state an affirmative policy to allow anticompetitive conduct, and second, it must provide active supervision of that anticompetitive conduct.[14]

While the CAPA did not violate antitrust laws, when the two-part test has been applied to other state entities, the Court has found otherwise. In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the Court found that a non-sovereign entity is not entitled to immunity, stating "active market participants cannot be allowed to regulate their own markets free from antitrust accountability."[15] In other words, an entity cannot engage in anticompetitive activities unless the state law specifically allows them to do so. Additionally, in *Federal Trade Commission v. Ticor Title Insurance*, the Court found that the state must actively supervise, stating "mere potential for state supervision is not an adequate substitute for a decision by the State."[16] Thus, for a state-owned entity to be exempt under the Parker Doctrine, the state must explicitly provide that the entity can engage in antitrust activity, and the state must actively monitor that activity.

C. Preemption of State Contract Law

If the WAA does engage in antitrust behavior, the second issue with the Act creating the WAA is the federal preemption of state contract law. Beginning with jurisdiction, section 1338 of Title 28 of the U.S. Code grants federal courts

10. Parker v. Brown, 317 U.S. 341 (1943).
11. *Id*. at 344.
12. *Id.* at 350–351, 358, 368.
13. *Id.* at 352.
14. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).
15. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1111 (2015).
16. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992).

original jurisdiction of any civil claim relating to patents and copyrights.[17] Additionally, section 1338(b) states that district courts will have jurisdiction of civil actions that assert "a claim of unfair competition when joined with a substantial and related claim under the copyright [or] patent laws."[18] Black's Law Dictionary defines "unfair competition" as "[t]he body of law encompassing various business and privacy torts, all generally based on deceitful trade practices, including passing off, false advertising, commercial disparagement, and misappropriation."[19] Thus, jurisdiction is based upon how substantial the claim addresses patent and copyright law, and additionally, whether that claim can be tied to unfair competition, including misappropriation.

However, courts have held that if there is an extra element in a contract claim that is purely the jurisdiction of the state, the state will maintain jurisdiction in that case. The Sixth Circuit in the famous case of *Wrench v. Taco Bell* found that this extra element prevented preemption of intellectual property claims under section 106 of the Copyright Act, namely, the promise to pay. The court stated "[a] cause of action for unjust enrichment could be assimilable to a cause of action sounding in contract, for it would then contain an essential element not envisioned by Section 106."[20] Additionally, in *Cover v. Hydramatic Packing Company*, the Court of Appeals for the Federal Circuit found that patent law does not necessarily preempt state commercial contract law.[21] The court held that "[t]here is simply nothing on the face of [federal patent law] that pertains to anyone but the infringer and the patentee. At issue, therefore, is the legal relationship between two contracting parties, and it is [state law] which defines this relationship."[22] However, if no extra element of commercial activity is claimed, and the contract, as a whole, falls under antitrust laws, or is a patenting license agreement, then federal law would preempt state law. Thus, Wisconsin would have to defend the actions of the WAA in federal court under federal law, not in their own courts under their own contract law.

17. 28 U.S.C. § 1338(a) (2012).

18. *Id.* § 1338(b).

19. *Unfair Competition*, BLACK'S LAW DICTIONARY (10th ed. 2014).

20. Wrench LLC v. Taco Bell Corp., 256 F.3d 446, 459 (6th Cir. 2001) (quoting Del Madera Props. v. Rhodes & Gardner, Inc., 820 F.2d 973 (9th Cir. 1987)). *See also* Laws v. Sony Music Entm't, Inc., 448 F.3d 1134 (9th Cir. 2006); eScholar, LLC v. Otis Educ. Sys., Inc., 387 F. Supp. 2d 329 (S.D.N.Y. 2005).

21. Cover v. Hydramatic Packing Co., 83 F.3d 1390, 1392 (Fed. Cir. 1996).

22. *Id.* at 1394.

III. WISCONSIN AEROSPACE AUTHORITY PREEMPTION

If we were to apply the precedent of antitrust and contract law, there is a possibility that Wisconsin's laws could be preempted based solely upon their construction. Back to our hypothetical, if Astronautics Corporation misappropriated research from Orbital Sciences, and then entered the previously mentioned contract with the WAA, the contract could cause Wisconsin laws to be preempted by federal laws, and those laws would violate federal antitrust laws. This is even more likely if a researcher employed by Orbital Sciences discovered a new way of measuring altitude, but left Astronautics Corporation for Orbital Sciences. Further, it is even more likely given how lucrative such contract would be for the WAA.

A. Wisconsin Aerospace Authority Violates Antitrust Laws

Beginning with the *Parker* test, the WAA will violate antitrust laws under the previous hypothetical. In respect to the first prong of the test, the WAA does not explicitly state that it is allowing anticompetitive activity. While the enumerated powers allows for the WAA to create and maintain a spaceport and acquire intellectual property, it does not explicitly state that the WAA can or will engage anti-competitive authority to do so.[23] Furthermore, the duties of the Authority are to promote and recommend actions taken by the state in the aerospace industry and to "[a]dvertise and promote . . . the development and utilization of spaceport facilities . . . and aerospace services of the authority [and to] develop, promote, attract, and maintain space-related businesses in this state."[24] That language is actually the opposite of engaging in antitrust behavior; the WAA should engage with multiple businesses with their authority, not exclude.[25] Nowhere in this language is the WAA granted exclusive authority to exercise anti-competitive behavior. Even further, the limiting language of "aerospace services of the authority" implies that the state will compete with other non-state actors in the aerospace service industry.[26] However, being the only authorized Wisconsin spaceport allows for anticompetitive behavior since an exclusive contract with the only spaceport would prevent any other competitive behavior. Thus, conforming to the holding of *North Carolina State Board of Dental Examiners v. Federal Trade*

23. WIS. STAT. § 114.62 (2015–16).

24. *Id.*

25. *Id.*

26. This language implies that there will be other public or private organizations that require the services of the authority, and are seeking the authority over seeking services elsewhere, which could include, but is not limited to private authorities, public corporation, or other state-owned entities from other states. *See infra* notes 51, 53, 57.

Commission, the first prong of the test fails due to a lack of explicit language.[27]

The second prong of the test is not so easily passed, because the WAA allows for supervision of the anti-competitive conduct. According to the statute, the WAA board members are composed of six individuals nominated by the governor, one member of the senate, one member of the assembly, and the director of the Wisconsin Space Grant Consortium.[28] The Wisconsin Space Grant Consortium is authorized under federal law regulating NASA's efforts to encourage state participation in development of local aerospace industries, and thus would not be required to ensure supervision of state conduct. Additionally, the statute does not require the six appointed members to ensure that such conduct would conform to state standards. However, the senator and assemblyperson would be required to do so, based upon their duties as legislators, and their oaths of office and standards of conduct.[29] Thus, anticompetitive activities would pass the second prong because the WAA would be actively supervised, as outlined in *Federal Trade Commission v. Ticor Title Insurance*.[30] However, such supervision presumes that the entity would be authorized to engage in anticompetitive activity, which is to be not explicitly stated, as discussed earlier Thus, regardless of any supervision, the state would fail the *Parker* Test, and would be found to be in violation of federal antitrust law.

B. The WAA Would Be Preempted

Back to the hypothetical, if the WAA executed a contract to gain partial ownership of a patent derived from the misappropriated altitude measuring device, naturally the claim of patent misappropriation would be preempted by federal law. Beginning with the language of the federal laws, section 1338(a) of Title 28 of the U.S. Code states that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents [and] copyrights."[31] Further, when a patent is the result of misappropriation, the patent is unenforceable and invalid under the laws governing patent applications.[32] Even further, section 1338(b) clearly states that federal jurisdiction will be given to a claim that asserts "unfair competition

27. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1111.

28. WIS. STAT. § 114.61.

29. *See* WIS. STAT. §§ 19.01, 19.45. Section 19.01 states that the senator must uphold the constitution of the State of Wisconsin, while Section 19.45 states that the senator must not engage in unlawful conduct.

30. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992).

31. 28 U.S.C. § 1338(a) (2012).

32. *See* Timely Prod. Corp. v. Arron, 523 F.2d 288, 298 (2d Cir. 1975).

when joined with a substantial and related claim under . . . patent" law.[33] And since unfair competition includes misappropriation as well as mere anticompetitive behavior, a claim that asserts misappropriation and anticompetitive behavior through contract would be under federal jurisdiction. Applying this to our hypothetical, the claim of misappropriation would be preempted by federal law if the claim is strictly based upon the patent that results in the misappropriation.

Combined, the contract to acquire a patent and the misappropriation that allowed the device to be created and patented would result in the laws that created a state-owned entity to be found in violation of antitrust laws. Any state contract law would be preempted by federal law since the purpose of contract was to acquire a patent. Additionally, state misappropriation law would be preempted for the same reason. This would remove claims on the contract to federal court under antitrust laws, rather than in state courts under state contract law. Once antitrust laws are applied under the *Parker* test, as explained, the laws that enable the state-owned agency would be found to violate antitrust laws.

In our hypothetical, if the WAA was not diligent in researching how Astronautic Corporation of America developed its invention, they could be liable once they become part owner of the patent.[34] If they were part owner, then jurisdiction could fall under the federal courts after the patent was issued, pursuant to sections 1338(a) and 1338(b), regardless of the contract. That is to say, while the contract allowed the WAA to become implicit in the misappropriation, and challenges to a contract would normally fall under the jurisdiction of the state, such challenges would fall under federal jurisdiction because it is misappropriation and joined with a substantial and related patent claim. In other words, it would fall under federal jurisdiction because it is misappropriation, regardless of the fact that the misappropriation was through contract. Thus, the WAA's contract itself would allow for the preemption of state laws if the validity of the patent was ever challenged through a claim of unfair competition.

C. Combining to a Void

Generally, if any action were to be brought against the WAA, it would most likely be pursued under state law, and thus, the state laws that allowed the misappropriation would probably still be upheld. But if a plaintiff could show

33. 28 U.S.C. 1338(b) (2012).

34. *See* 35 U.S.C. § 116(a) (2012) for an explanation of a tenancy in common of patent ownership.

that the primary reason for the misappropriation was a result of antitrust activities to acquire a patent, then those laws that allowed the patent acquisition could also be in question because of those antitrust activities.

The problem in this hypothetical is combining federal preemption with antitrust laws to show that the laws themselves created the antitrust activity. In *North Carolina State Board of Dental Examiners*, the Supreme Court held that the board's actions in preventing non-license-required dental whitening violated antitrust laws.[35] Additionally, in *Ticor Title*, the Court held that Wisconsin's price fixing of insurance rates was in violation of antitrust laws, even though such price fixing was allowed by statute.[36] However, in *324 Liquor Corporation v. Duffy*, the Court held that New York state laws that fixed liquor prices violated Sherman Act antitrust laws.[37] Through each of these cases, regulatory schemes are shown to violate antitrust laws, but in *324 Liquor,* state laws themselves can violate federal antitrust laws. In *324 Liquor*, the law itself dictated the anticompetitive activity and thus, the law was held to be void. Wisconsin laws, however, do not directly state that the WAA can perform antitrust activity when acquiring intellectual property.

Wisconsin statute section 114.62 does not explicitly allow for antitrust activity. Rather, it gives the WAA the authority to acquire patents. But, under Wisconsin statute section 114.63, the WAA must "[a]ct as a central clearinghouse and source of information in this state for spaceports, spaceport facilities, spaceport services, aerospace facilities, and aerospace services, including furnishing such information to [the government], educational institutions, and the general public."[38] Additionally, the WAA must "[a]ssist any state agency, municipality, or other governmental unit, upon its request, in the development of any spaceport or spaceport facility."[39] This presents the problem that the WAA controls all information in the development of spaceports, as well, as helps create them. In turn, this means that the WAA is the only authority in the state that could allow for any spaceport development through its clearinghouse and facilitation duties. Thus, the state, in enacting this law, gives the authority to develop any future spaceport to solely to the WAA.

In effect, the WAA is the sole authority in the state that controls all spaceports, regardless of whether they are run by the WAA or any other public

35. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1111.

36. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992). The law, as written allowed for explicit anticompetitive activity, but the actual activity was not supervised properly, thus violating the second prong of the Parker Doctrine.

37. *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987).

38. WIS. STAT. § 114.63(8) (2015–16).

39. *Id.*

or private entity. Under the precedent in *Ticor Title*, as well as *North Carolina Board of Dental Examiners*, this statute itself would not be subject to antitrust activity. Section 114.63 constructively allows for antitrust activity when all spaceport regulation and information must be channeled through the WAA's clearinghouse.[40] However, Section 114.62 does not provide for any antitrust activity, regardless of construction.[41] Rather, it merely allows for the WAA to acquire patents, not to engage in antitrust activity.

D. Wisconsin Intellectual Property Acquisition

To connect these Wisconsin laws back to patent misappropriation, a claimant must show that the WAA engaged in antitrust activity to acquire that patent. But this creates the problem that the antitrust activity must be rooted in section 114.63 for the antitrust activity to be allowed. However, this is where an exclusive contract would create problems. If the contract required the WAA to temporarily prevent spaceport authorization in exchange for partial ownership in any new acquired patents, the antitrust activity would be rooted in the contract, not section 114.63, even though section 114.63 dictates the antitrust activity. Since the acquisition is rooted in a contract that creates antitrust activity, the law that allowed intellectual property acquisition—section 114.62—would be subject to federal antitrust laws, not 114.63—the section that allows antitrust activity. To summarize, intellectual property acquisition by the WAA could be held in violation of antitrust law because the law that allowed the contract for the acquisition allowed anticompetitive behavior. And since the federal laws preempt the state laws, the contract itself is not in question, but rather the laws themselves.

But such voiding of these intellectual property laws requires many steps and severe negligence on the part of the WAA. First, Astronautics Corporation would have to misappropriate the research from Orbital Sciences. Next, Astronautics Corporation would have to enter an exclusive contract with the WAA. That contract would have to grant partial ownership of any patent to the WAA; the contract would have to ensure that the WAA does not assist in the development of any other similar patents, and the contract would have to ensure that the WAA does not allow the creation of any other spaceport or dissemination of any information. Furthermore, after the patent is acquired, Orbital Technologies must claim the following: the information was misappropriated, the federal jurisdiction is appropriate, the WAA can engage

40. Interestingly enough, technically speaking, since this comment is an academic endeavor, it is in violation of this provision, since the majority of information on this spaceport comes from sources not originally the WAA.

41. WIS. STAT. § 114.62.

in anticompetitive activity through its clearinghouse, and the WAA did so through its enabled power of exclusive contracting and its acquisition of patents. Finally, the WAA would have to neglect researching the creation of the invention, as well as contract into anticompetitive activity.

While these chain of events are hard to imagine, it is less hard to imagine once the financial benefits are realized. If the patent proves lucrative enough, and the contract is for such a short period of time, such as the two to three years for development and acquisition of a patent, it might prove to be worthwhile of the WAA. This is particularly so, considering the cost of creating a new spaceport, and the lack of its current use. These costs could be high if Astronautics Corporation was either negligent in revealing the nature of the device, or the employee was negligent in revealing his previous research. Nonetheless, two to three years is too short a time to develop a new spaceport, and short enough to assume a corporate secret will remain secret to prevent others from experimenting on the same development.

However, voiding these laws hinges on how the court would apply the law to this hypothetical. In terms of the misappropriation, the law is clear that the claim falls under federal jurisdiction, and the trade secret was misappropriated or the patent was granted under unfair competition. On the other hand, the court has a variety of ways to address the antitrust application to the misappropriation. First, it could hold the anticompetitive activity created by the contract to be a violation, without touching the actual state laws that allowed that activity. Second, it could hold that the antitrust activity is rooted in the clearinghouse duties of section 114.63, and thus those laws are in violation of federal antitrust laws. Third, it could hold that while section 114.63 allows for the antitrust activity, the actual antitrust activity was in the WAA's enumerated power to create exclusive contracts, and thus that section is in violation. Fourth, it could hold that because Wisconsin law that enumerates the power of intellectual property acquisition (section 114.61) is virtually unbound, it allowed for the anticompetitive activity and thus was in violation, and is void. Fifth, the court could hold that given the virtually limitless power in each of these sections, they are all in violation because they allow anticompetitive behavior without explicitly stating so. Sixth, because each of these allows behavior, but does not necessarily require it, none are in violation, but rather, the lack of state supervision in entering the contract was the violation. And finally, the court could merely decide that the language in section 114.63 does allow for anticompetitive activity, and there was adequate oversight, and thus no law is in violation. However, given the ambiguity of the law, and the conflict of the WAA's exclusive control through the clearinghouse and its duty to assist in development of other spaceports, it will most likely find that there is no explicit anticompetitive provision.

Nonetheless, if the WAA acquires a patent through another's misappropriation and through an exclusive non-compete contract, they could violate antitrust law, and the section that allows that acquisition could be void.

IV. RESOLUTION

The primary issue at hand here is the breadth of the law that has been created. Both the provision allowing the WAA to acquire intellectual property rights and contract are virtually limitless, allowing for those provisions to be subject to a variety of preempting laws—particularly, federal patent and antitrust laws. However, such antitrust activity is not unknown to the space industry. This is evidenced in what René Joseph Rey calls the LAF Boycott: the boycott of large aerospace firms by small aerospace firms because of the federal government's antitrust-like activity in withholding intellectual property.[42] In creating exclusive contracts with the four largest contractors, NASA effectively engaged in antitrust activity to the exclusion of many space companies, which compromised their access to any intellectual property licensing. However, unlike NASA, the potential for antitrust activity of the WAA is not necessarily rooted in contracts, but rather in the construction of the empowering laws. One way of preventing this antitrust activity would be to introduce limiting language into how intellectual property is acquired, similar to the language in the statutes that empowered the Alaska Aerospace Corporation. Other options, such as appointing an official whose sole purpose is to prevent intellectual property abuse or removing that power from the WAA, could also be viable. Nonetheless, the sole solution is to reform the law that allows for virtually unfettered intellectual property acquisition.

Intellectual property acquisitions in aerospace industries do not necessarily have to exist in a bubble. Rey addressed this when he suggested a similar aerospace program to the National Advisory Committee for Aeronautics, which allowed for the licensing and sharing of various intellectual properties to boost the aircraft industry, particularly during World War I.[43] He argues that because the weight of NASA programs were for government, military, and defense purposes, rather than commercial exploitation of space, the government effectively prevented new space companies from entering the market. "[T]he government, acting in collusion with the large aerospace firms through exclusive contracting practices, has created a de facto Federal monopoly on all

42. *See* René Joseph Rey, *Regulatory Challenges, Antitrust Hurdles, Intellectual Property Incentives, and the Collective Development of Aerospace Vehicle-Enabling Technologies and Standards: Creating an Industry Foundation*, 35 J. SPACE L. 75, 93 (2009).

43. *Id.* at 77. NACA was founded in 1915, however, its intellectual property sharing agreement began in 1917. NACA was eventually absorbed into NASA in 1958 and its authority essentially dissolved.

AV technology development activities."[44] This antitrust activity was challenged by Space Exploration Technologies (SpaceX) when they sued Boeing and Lockheed-Martin from creating their joint venture, the United Launch Alliance (ULA).[45] However, the court ruled against SpaceX due to ripeness and standing, since SpaceX had no competing contracts and the ULA had not yet been awarded one.[46] Nonetheless, Rey suggests that such antitrust activity could be resolved with a patent licensing program similar to the one under NACA that would allow new space companies to participate in the commercialization of space.[47]

However, while the space industry is not new to antitrust activity in its patent licensing, antitrust activity in patent acquisition requires a different approach when that acquisition is authorized by statute. SpaceX was denied its claim based upon ineligibility to compete for contracts.[48] Additionally, Rey addresses the creation of antitrust activity under which space technologies are patented. However, he admits that it is through the contracts themselves that antitrust-like activity is conducted, not the laws that empower NASA to acquire patents.[49] But, according to our hypothetical, the contract itself might not be the issue, but rather the laws that enable the WAA to obtain patents. In those NASA contracts, the contractor may retain any intellectual property,[50] whereas the WAA is empowered to obtain intellectual property rights, and could do so through exclusive contracts.

So, if the statutes themselves allow for intellectual property acquisition through antitrust behavior, the easy answer is to fix the statute, so that it will not. However, that is easier said than done. Eleanor M. Fox and Deborah Healey suggest that in order to combat antitrust behavior "the law should integrate free movement, state restraint and competition principles along lines drawn by the European Union."[51] Additionally, D. Daniel Sokol suggests "to

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44. *Id.* at 121–22.

45. Space Expl. Techs. Corp. v. Boeing Co., No. CV 05-07533 FMC MANX, 2006 WL 7136649 (C.D. Cal. May 12, 2006) aff'd, 281 F. App'x 769 (9th Cir. 2008) (unpublished). SpaceX claimed antitrust and unfair business practices, and violation of the Racketeer Influenced and Corrupt Organizations Act.

46. *Id.* at 5.

47. Rey, *supra* note 42 at 144.

48. Space Expl., 2006 WL 7136649, at *6.

49. Rey, *supra* note 42 at 121.

50. *Id.* at 123, (*citing* Island One Society, *A Cooperative Agreement Notice: Reusable Launch Vehicle (RLV) Advanced Technology Demonstrator X-3*3 (Jan. 1995), available at http://www.islandone.org/Launch/X33-CAN.html [https://perma.cc/Y3LZ-Z7S2].

51. Eleanor M. Fox & Deborah Healey, *When the State Harms Competition-the Role for Competition Law*, 79 ANTITRUST L.J. 769, 814 (2014). In their article, the authors note that the European Union effectively prevents anticompetitive behavior that could prevent competition. *Id.* at 793.

forbid the [state-owned entity] to compete in the non-regulated related field."[52] He suggests that the laws prevent the antitrust activity to occur in the first place.[53] While these suggestions are for federally-owned entities, they could easily apply to Wisconsin. Additionally, while patents themselves are heavily regulated, the authorship of patents is not explicitly regulated to non-state-owned entities, and thus could protect government and non-government entities from application abuse and unnecessary litigation.

But the question remains: how could such provisions be applied? Looking to other states, the easy answer is to limit the language of the statute. The Alaska Aerospace Corporation is a state-owned entity, which manages the Pacific Spaceport Complex, and has thus far completed seventeen launches to date.[54] In creating the AAC, the state legislature only authorized the corporation to "apply for and hold *in the name of the corporation* patents, copyrights, and other intellectual property."[55] In limiting its intellectual property acquisition to the name of the corporation, the law could be construed to prevent joint ownership, as in our example, or prevent any other type of acquisition, such as licensing, technology transfers, or march-in rights. However, this depends on how the law would be tested, should there ever be a challenge to it. Additionally, this does not necessarily exclude any antitrust activity in creating an invention whose sole patent owner is the AAC. Nonetheless, it does limit the AAC to a very specific method of patent acquisition; it must be in the name of the corporation.

Another option would be to remove that authority all together. New Mexico has not granted their spaceport any authority to acquire any intellectual property.[56] ln the powers granted to the New Mexico Regional Spaceport District, no language is included to enumerate the power to acquire any intellectual property. Rather, they only have the authority to create and operate a spaceport similar to any regional airport.[57] This is not to say that they could not acquire any intellectual property. New Mexico courts could construe the

52. D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. REV. 1713, 1803 (2009).

53. *Id.*

54. *See* ALASKA STAT. § 26.27.010 (2014); *About Us*, ALASKA AEROSPACE, http://www.akaerospace.com/about-us [https://perma.cc/N9QT-5VXT](last visited Mar. 28, 2016) ; *Launch Manifest*, ALASKA AEROSPACE, http://www.akaerospace.com/about-us/launch-manifest [https://perma.cc/7BG4-SL3B] (last visited Mar. 28, 2016).

55. ALASKA STAT. § 26.27.100(21) (emphasis added). Note that this includes copyright, which could be applied to any manuals, diagrams, educational material, and any other publication they create, which would be useful since AS § 26.27.010 establishes the AAC to work in consort with the University of Alaska in their astrophysical research.

56. *See* N.M. STAT. ANN. § 5-16-6 (2015).

57. *Id. See also* N.M. STAT. ANN. §§ 64-2-1–64-2-2 (2015).

law to allow it since such acquisition is not regulated by their statutes. But since it is a state-owned entity, and because the statute lists the powers that the Spaceport District has, a court would most likely find that they do not have such powers.

Nonetheless, the remedy for Wisconsin is to change the statute to prevent intellectual property acquisition through antitrust activity. The law currently limits the WAA to any intellectual property "acquired under federal or state law, common law, or the law of any foreign country."[58] This could be the limiting language already needed. In our hypothetical, because the acquisition is based upon trade secret misappropriation, that acquisition would already be invalid. However, the claim could still hold if the WAA still engaged in antitrust activity without the misappropriation, albeit, on a state level, rather than a federal one. And since the law is not explicit in allowing antitrust activity in intellectual property acquisition, only the courts could decide if that acquisition was in violation of the law. Thus, the state would still have to defend against litigation, and could still be held liable.

But, additionally, it could be that the WAA would never engage in such activity. The Virginia Commercial Space Flight Authority, which operates the Mid-Atlantic Regional Spaceport, has similar language in their statute, allowing for unfettered intellectual property acquisition.[59] But, the Authority has yet to engage in any antitrust activity to acquire patents, and has thus far completed nine launches.[60] If this is the case, no change would be necessary. However, we do not live in a perfect world, and a lucrative contract could help the WAA. One option would be to create a new board position that oversees any potential conflicts, particularly those that could be construed as antitrust activities. But this would not solve the problem of the ambiguous language of the statute. Thus, the best option is to revise the law to limit the WAA's intellectual property acquisition by preventing it from entering exclusive contracts that grant any intellectual property, and that effectively prohibit competition. This would allow for competitors to test their similar inventions, if not identical inventions, and the state would be absolved of any potential antitrust litigation.

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58. WIS. STAT. § 114.62(10)(d) (2015–16).

59. *See* VA. CODE ANN. § 2.2-2204 (2012).

60. *See* Virginia Commercial Space Flight Authority "History of MARS," http://www.vaspace.org/index.php/about-virginia-space/overview [https://perma.cc/DB62-GC72] (last visited Mar. 28, 2016).

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