

U.S. Patent Utility's Jon Ellenthal

Scott Graham, The Recorder

July 7, 2014



Jon Ellenthal, CEO of [Patent Properties](#), wants to create ASCAP for patents. Just as the song-licensing entity generates ongoing royalties for musicians, Patent Properties is setting up the United States Patent Utility, which aims to generate a large volume of low-cost licenses for patents that aren't worth litigating, but that still have economic value. The exchange, set to launch later this year, will machine-read all 2.1 million active U.S. patents and match small and mid-size businesses with the 100 patents most statistically relevant to their product or service. For \$1,000 a month, the Patent Utility will obtain licenses for some of those 100 while offering insurance on others, plus intelligence about new applications and grants. The idea was conceived by company chairman Jay Walker, known as the founder of Priceline.com, and chairman of [Walker Digital](#) and Patent Properties. We sat down with Ellenthal to talk about the company's plans.

Q. Explain the thinking behind the patent utility.

A. We are working on a really interesting economic problem. That is how we are going to get many more of the two-plus million patents that are active in the U.S. into the economy. Sixty percent of patents are owned by research labs, universities, independent inventors, small companies, yet they get less than 1 percent of all of the revenue that's collected.

Everybody is debating what to do about the 50,000 most valuable patents and how to optimize litigation and how to best split the pie. That's fine, but the real answer here comes from figuring out a voluntary and affordable way for the mass market of patent owners and users of patented technology to do business in a commercially sensible way.

Q. And how do you propose to do that?

A. We'll use natural language processing, semantic search, machine learning to tease out relationships between specifications of a product and the details of particular patents. We're going to determine the top 100 patents [for that product] and package them up into what we call a no-fault package. No-fault reflects the fact that it's simply too expensive to argue about this stuff. Let's figure out a standard that we're both OK with. Let's price for it and let's see if we can provide a solution that will scale to the mass market.

Jay [Walker] has a lot of experience with business systems that embrace uncertainty in a way that allows things to happen. Priceline, while it looked like a new type of online consumer travel agency, from an economic standpoint it really was a product and pricing mechanism for

perishable inventory. Airlines were looking to move their otherwise unsold airline seats in a way that was not destructive to their public pricing point. The consumer placed price above all else, so they gave up control over what airline carrier and even aspects of their itinerary. So embracing uncertainty in that way was vital to protecting the core business and retail pricing of the airlines.

Q. How is that relevant to patents?

A. We're recognizing that we have a patent licensing system that primarily trades on a standard of legal certainty. Are you infringing or are you not infringing? For better or worse, the only place that you can mete that out is in federal court. That's wonderful if you happen to have a really high value patent, a grand slam or a home run patent. But if you have a patent that is less valuable—not zero value but less valuable than the high transaction costs of going to court—then what do you do? You really have no place to go. So along comes an alternative, frankly an inferior alternative, but one that is better than they have right now, which is nothing.

Q. Will this lead to more lawsuits?

A. This is a completely neutral platform, it will never sue anybody. In fact, it won't have standing to sue anybody because patent owners will keep control and ownership of their asset. They're just giving us a right of agency.

Q. There are a lot of law firms willing to represent small inventors or non-practicing entities, and the complaint from the perspective of the accused infringer is, 'These aren't quality patents, but because of the threat of litigation we're going to settle out for a few thousand dollars.' So why doesn't that model serve these inventors?

A. It does. Those patents that generate a return, that's one of the ways they've been able to generate a return. There are two million [other] patents that are completely outside the economy. ... If you have a litigation-or-bust patent licensing environment it may mean you sue, it may mean you just threaten to sue. That works against patent owners who can't afford that path. It also works against operating companies who frankly can't afford to defend themselves even if the merits are completely on their side. We are trying to address that specific problem.

Q. Whom do you expect to be your typical customers?

A. On the patent owner side, we believe there is a portion of every patent portfolio that is suitable for listing in our patent utility. There are non-core patents, there are patents that don't justify the attention of someone in the tech-transfer office of a university, there are very large tech companies that have lots of patents that they don't have licensing plans or options for and we can be a solution for them too.

Q. How is what you'll be doing different from a company like RPX?

A. The first difference is in what customer we're seeking to serve. RPX is for big companies. We have sort of a private jet-only marketplace [for patents]. So the only way to travel is by private jet. If you can afford that, you're good with that. We need a Southwest Airlines option for all of those for whom private jet travel isn't an option. [And] we don't buy patents. They're a defensive consortium. We're in the middle.

Q. There's no threat of litigation on your part, and the people who own the patents don't have the wherewithal to litigate. Doesn't there need to be some kind of stick to persuade

companies to buy the licenses?

A. You're correct that we've removed the stick from the patent licensing dynamic and it's fair to ask how that plays out. The only reason someone's going to subscribe to our services is they conclude it puts their business in a better position—whether that means they can get access to licenses that are teachings they can learn from or if that means they feel better about how they're managing risk out there. Because even though a patent is owned today by a company that can't afford to enforce it, that doesn't mean that that patent might not change hands.

Q. In your own materials you talk about patents often being deliberately written in a vague way. How is software going to cut through deliberate vagueness and obfuscation?

A. Yes, it's hard. It's hard for a human to do as well. Especially since you have to wait for a judge to tell you what all that claim language means. Advances in data, science and machine learning are incredible. This is not going to be a keyword search where the word "coding" shows up in product line and patent and you have a match.

Q. If the service becomes popular, would there be a concern that people would start trying to draft patents to the software, trying to game the software to get in that top 100?

A. That would be a high class problem if we got to that point. We're a long way off from even knowing what that behavior would look like.

Q. It sounds like ultimately you'd have algorithms replacing patent lawyers.

A. I can't imagine that's the case. Our system doesn't have a natural enemy. This is not going to take away any litigation. This is actually going to create more demand for patents, not less. Once we can demonstrate that at least there is some income—perhaps enough to fund the ongoing maintenance fees and more—then I think this is actually going to lead to more [patent applications]. I think patent lawyers are going to like this very much. I think general counsels at small companies will like having a way to understand and manage risk when it comes to patents, and I think inventors will be thrilled to get their first dollars of patent licensing revenue.

Contact the reporter at sgraham@alm.com.