CORPORATE COUNSEL

Priceline Founder Has a Plan for the US Patent System

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By Jay Walker

The time has come for the U.S. to take back its patent system and put it to work again creating new jobs, new products and competitive advantage for companies of all sizes—not just the very largest ones.

The largest Fortune 500 companies, after all, have dedicated patent teams to help them navigate the rocky shoals of our increasingly litigious patent licensing system. They have the financial and legal clout needed to wage high-stakes patent wars with competitors. And they have the expert knowledge and resources required to exploit the often-invaluable technical information contained in patents and put it to use to enhance their product and service offerings.

But what about the rest of American businesses? What about the vast majority of mid-size and smaller companies for which patents unfortunately represent not a treasure trove of new technical knowledge but a growing source of litigation risk and executive distraction? These firms largely are excluded from the patent system's benefits, and are stuck with its perils instead.

So, after two years of product development and testing, I have developed a market-based alternative to today's failed licensing system—

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one that I believe finally will make the benefits of patents available to a much broader universe of mid-size and smaller companies. But before I describe it, let's quickly review the scope of the problem.

More than 28 percent of corporate counsel say that patent litigation has become a major concern for their companies, according to a Norton Rose Fulbright litigation trends survey. That's a 50 percent increase in the percentage of counsel who cited major patent worries just one year earlier. And 34 percent of these anxious counsel work at companies with less than $1 billion in revenues, indicating that patent litigation worries are hardly exclusive to the largest organizations.

Interestingly, the biggest uptick in patent concerns comes from the manufacturing sector, where 49 percent of counsel reported that patents have become a major worry—double the previous year's 25 percent. Within the tech and communications industries, however, a whopping 65 percent of corporate counsel say patent cases are their greatest litigation concern.

It's not hard to see why. Ten years ago, patent litigation was a form of competitive combat waged only by the largest patent-rich companies. But with 80 percent of corporate value now residing in intellectual assets such as patents and other IP, the patent wars nowadays have reached deep down into the ranks of mid-size and smaller companies. Indeed, firms with less than $100 million in revenues now account for an astonishing 61 percent of defendants in patent infringement cases, according to a 2013 patent litigation study from RPX Corp. It's enough to make corporate counsel reach for their Rolaids.

If it's any comfort to counsel, today's patent licensing system isn't working any better for the vast majority of patent owners, either. More than 95 percent of patentees never see their technical advances put to use in new products or services—and never earn a dime for all their inventive efforts. They, too, are locked out of our exclusionary patent licensing system, which in most cases requires the financial and legal resources to credibly threaten a multimillion-dollar patent suit in order to secure a successful licensing deal.

Let's face it: A patent licensing system that does all its deals in federal court is not in good shape. The result is that the vast majority of patented discoveries in the U.S. lie dormant, unused in new products, and unable to foster job creation and overall economic growth.

It's time for a new approach—one that unfreezes the patent system so we can put the $5 trillion in untapped R&D embodied in the nation's 2 million active but unused patents to work in creating new products and services and in growing the economy. Just as important, American companies need an economically sensible way to mitigate their infringement risk without the exorbitant costs of the "litigation or bust" licensing system they have to endure today.

In the next couple of months, my company will launch a new, voluntary, no-fault patent licensing system called the United States Patent Utility. For a monthly fee of roughly $1,000—less than the cost of meeting with an outside patent attorney to discuss an infringement suit—subscribers will get up to 50 licenses in a package of patents that most directly relate to their products and services. They also will get legal fee warranty coverage to all 2.3 million active patents in the U.S. (The legal fee warranty covers $100,000 of the first $250,000 in legal defense fees for any subscriber. It can be used five times, for a maximum warranty benefit of $500,000.)

The price of a no-fault package of patents is so low because companies will be buying probability, not legal certainty as decided by a federal court after the expenditure of thousands of billable attorney hours. Statistical analysis of a firm's product lines, matched against millions of patent claims, will establish which patents are most relevant to a company and, therefore, have a probability of needing a license.

Put simply, probability costs less than certainty. But, as the insurance industry knows, probability is a commercially sensible basis upon which to do business.

Along with the no-fault license and warranty coverage, companies will also receive a suite of information services. Each subscribing

firm will get quarterly reports on the patent landscape surrounding their products, updates on the patent filings of competitors, and alerts about new patents and patent litigation most relevant to their product lines. Subscribers also will receive a free semiannual litigation check-up by a top litigator, and discounted flat-rate pricing on patent prosecution services for companies that want to strengthen their own portfolios.

But here's the real kicker: Not only will subscribers greatly reduce their infringement risk (and resulting legal costs), they also will gain access for the first time to the rich reservoir of technical know-how contained in those packages of patents. In effect, companies will now be able to inexpensively "crowd-source" the R&D they need to make major product improvements.

This is no small matter—not when you consider that up to 80 percent of the world's current technological knowledge is found only in patent documents, according to some estimates. Yet U.S. companies often are discouraged from reading and learning from patents for fear of the legal risk of willful infringement and treble damages. This despite the fact that no company has ever been convicted of willful infringement simply for reading others' patents. As a top litigator noted, that's because willfulness requires not merely *knowledge* of a patent, but also that the accused *acted* (e.g., used a patented technology in its products) even though it knew or should have known that there was an objectively high likelihood that its actions constituted infringement.

In fact, the whole purpose of the patent system is to disclose and share new discoveries so that others may learn from and build upon these to create even more advances. In 1886, for example, the inventor Elias E. Reis reported that when he read a patent issued to Elihu Thomson for a new method of electric welding, "there immediately opened up to my mind a field of new applications to which I saw I could apply my system of producing heat in large quantities." Thomas Edison also was known to frequent the patent office and study other inventors' patents to spark ideas of his own. And even in my own case, many of my 719 issued and pending patents certainly owe a debt to the ingenuity of inventors who came before me.

That's how the invention process is supposed to work, and it's a popular misconception that patents block research and development by others. Recent research, for example, shows that Thomas Edison's seminal 1880 incandescent lamp patent (No. 223,898) actually "stimulated downstream development work" that resulted in "new technologies of commercial significance [including] the Tesla coil, hermetically sealed connectors, chemical vapor deposition process, tungsten lamp filaments and phosphorescent lighting that led to today's fluorescent lamps."

The need for change is great. As no less an authority than Judge Paul Michel, retired chief judge of the U.S. Court of Appeals for the Federal Circuit (the main court for patent appeals), recently noted, "Sooner or later we must develop a commercialization alternative to litigation. The courts simply can't handle it all. They are too expensive, too slow and cumbersome, too uncertain, too inefficient, and too adversarial to be able to serve the vast majority of patent owners and businesses."

Sixteen years ago, I founded Priceline, the "name your own price" hotel and airline reservation system that revolutionized the travel industry. Many scoffed at us at first, but thanks to the innovations we made in

the pricing of perishable airline and hotel inventory, Priceline and its affiliated brands today book $40 billion in travel reservations annually, and we are a recognized world leader in travel accommodations.

My new goal is to transform patents from ticking time bombs into rich R&D assets for companies. The only way to do that, however, is to upend our exclusionary licensing system with a new one that serves the majority of patent owners and users.

Who knows—the U.S. Patent Utility may even help the patent system again become the most effective instrument of knowledge-sharing and technology transfer ever devised by man.

Jay Walker is executive chairman of Patent Properties Inc., which will launch its new no-fault patent licensing system this year. He is the founder of Priceline.com and the world's 11th most-prolific living inventor and patentee.