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Meeting a Company's Competitive Needs: New Roles for In-House Counsel

ACC Webinar Transcript



The United States
Patent Utility™



MATT KABAK

Hello everyone. Welcome to today's webcast. My name is Matt Kabak, and I am with the Association of Corporate Counsel. And now for today's moderator, Alyssa Harvey Dawson, Vice President of Global Intellectual Property and Licensing with Harman International.

ALYSSA HARVEY DAWSON

Thank you very much, Matt. It is a very lively session here in Stamford. I am at Patent Properties and this webinar is about the role for in-house counsel as strategic leaders and the partnering and value found in third party R&D. The people organizations and information that can leverage significantly your company's R&D efforts and help you address your most significant business problems and also provide your company the opportunity to be competitive today and into the future. I am very happy to be here because I am obviously an in-house counsel. I am in charge of our intellectual property and innovation strategy and work closely with my CTO and our business leaders making sure that innovation is a key part of our company's considerations and how we manage our assets. And I think, especially since my background actually as a corporate generalist, who came in-house and then learned about the importance of technology and how it impacts business. It is important for all attorneys to hear about this and to figure out how they can help their businesses. And to do that, joined with me today is attorney Gene Quinn, and many of you may know Gene from IPWatchdog.com. And then there is Jay Walker and Jon Ellenthal of Patent Properties. And as I said, I am really excited to be here to share with you how your roles can help meet your companies' competitive needs. Now for full disclosure, I am in the offices of Patent Properties Inc. and Harman is also a customer of Patent Properties and their new service, The United States Patent Utility, which is something we will learn more about during our discussion today. And one of the reasons that a company like Harman joined is because we are, as I said, always trying to manage risk and get the best value from our IP. And The Utility seemed to have an interesting model for us to explore. I want to thank ACC for focusing on this issue and the value of inside counsel partnering with their colleagues to identify faster and more efficient ways to innovate and to identify new channels that leverage and require their legally expertise.

A week or so ago, the ACC hosted the general counsel of Google for a webinar and their participants learned how the legal operations of Google manage patents to better inform the company. The Utility states that its mission is to take this several steps further so that any company can be aware and comprehend the innovation relevant to them and translate this into action that impacts positively on the bottom line. So with all of that done, let us get some background on our panels and get started with what I know will be a lively discussion. So as I said, we have Gene Quinn and he is a patent attorney and the founder of IPWatchdog.com. And if you guys have not read it or gone to the blog, you absolutely should because it is a fascinating read. Gene started the widely popular blog and website in 1999 and since it has become a, if not the, leading IP law blog on the internet. It is recognized multiple times by the ABA as the top 100



legal blog and has three times been voted the top IP blog by the ABA, and was inducted into the ABA Blog Hall of Fame, which I did not even know existed. So congratulations, Gene.

GENE QUINN

Thank you.

ALYSSA HARVEY DAWSON

We also have Jon Ellenthal and he is the Chief Executive Officer of Patent Properties. And he previously was the CEO of Synapse, which is a direct marketing subsidiary of Time Warner responsible for more than 30,000,000 customers and 2,000,000,000 pieces of consumer promotion each year. And then finally but by no means intended to be last – we actually leave the most important person for last. We have Jay Walker. And Jay Walker, if you guys do not know, he founded Priceline, which I am sure many of us use to this day, and several other successful companies that serve tens of millions of customers. And he is also an inventor with over 700 issued U.S. patents. And he has been about solving large commercial problems since he started innovating. So since I ended on Jay, I am actually going to start with Jay, start the first question with him. Can you provide us some insight into the innovation process? Is it all about that one breakthrough in thinking or is innovation more evolutionary or a combination?

JAY WALKER

Well, I think you would have to say – first of all, thank you for that very kind introduction. I think you would have to say that innovation is such a broadly used term that it has probably been reduced to like love and quality, words we all want to have but mean different things to every single person. So I like to think about innovation as basically problem solving. Ultimately, if you can solve a problem by taking the answer out of a book or off a shelf, you do not need to innovate. If the answer to a problem is not readily available and you have to come up with it on your own or with some help, then you are going to need to innovate. Or to put it another way, you are going to need to solve problems in a useful, economically efficient manner. Every business solves problems small and large. Some problems are quite small. They can be a simple manufacturing problem or a simple marketing problem. Some problems are incredibly complex. What is the correct legal strategy for the firm as it relates to intellectual property? What is the correct strategy with manufacturing or outsourcing? What is the correct new product development pathway in light of competitive changing dynamics? These are complex problems. All of them fit under the rubric of innovation. But at the end of the day, I think it is only useful to talk about problem solving within fairly narrow and contextually defined ways. And I think when most people talk about innovation today they are often talking about new product development. That has become the more common code word, which is we need to innovate around here, which means we need to create some new products or we need to improve the products we have. What is our strategy to innovate? Do we build or buy? And lawyers deal with the build or buy question very frequently because somebody might turn to counsel at a firm and say listen. We know there are some people out there that have



technologies that might reduce our time to market. Might reduce R&D out of pocket expense. Could we possibly engage in some kind of transaction, whether that is a licensing, a joint venture, some sort of sharing transaction, knowledge-sharing transaction? And attorneys are faced with an endless series of requests about well how much will it cost us? How long will it take us? And, of course, like everything else, the attorney responds well, it all depends. It depends on who we are talking to and how big a license, or how big a relationship, for how long a period of time with how much guarantees. So I know I have not been terribly helpful –

ALYSSA HARVEY DAWSON

Have you been in my office because you just described a large chunk of my day.

JAY WALKER

Yes, well, the problem when you have customers and whether those are internal customers like inside counsel people have all day long who can come into your office and do not have to spend any money asking you questions, is you have no governor on the number of crazy dumb questions you are going to get. Which is can you arrange answers to all my problems for free tomorrow. And if there is no cost in asking the question, why do I not just ask? So I feel for inside IP counsel because at least outside counsel has the meter running. Inside counsel pretty much has an open door saying all right. Tell me your problem and I am supposed to see if I can help you.

ALYSSA HARVEY DAWSON

Right. What I find interesting and what I try to keep into perspective when I get these varied questions is people are doing it because they are ultimately trying to help the bottom line, trying to move the company forward. So I am going to try to give them the benefit of my time as best I can so that we can get to an answer that is better for the overall company. But Gene, as a patent attorney, what are your thoughts on this process of innovation and how in house counsel plays a role in it for companies? And how can companies leverage IP as part of an innovation strategy?

GENE QUINN

Well, I think it is a complex question that in some ways has to start with a discussion about culture. I think that once upon a time there was this in house culture where if it was not invented domestically within the company, then it was just not interesting. Companies were not going to take a license. They did not really want to accept submissions, etcetera, etcetera. And I think then you saw during a period of time, and this would be during the pre dot.com era that a lot of big companies started just gobbling up high tech companies. It was not maybe that they were going outside. It was they were actually acquiring and assimilating companies. And I guess a lot of people were okay with that. And for a lot of reasons that kind of ended at least in a big way. You see it a little bit here and there. But I think over the last few years certainly more and more companies are coming to the realization that they do not have a monopoly on all good ideas. And that sometimes means that you need to go outside your walls to pull those ideas in. And I think in this



economy particularly, the innovation economy that we are in, and where there are so many patents and there are so many people pursuing this. That those companies that are still afraid to do that are just not going to succeed. So the first question has to be one about culture. Are you comfortable doing this or are you going to be going really the way of the dinosaur like so many large tech companies have gone over the years. They just have not kept up with the change. And innovation changes so fast. I mean just look at your smart phone. It is hard to believe that these things, which we would call this current version of the smart phone, only started in late 2007. And the models you have right now look nothing like what they did in 2007. So innovation moves so fast you have to leverage any opportunity that presents itself.

ALYSSA HARVEY DAWSON

So Gene, that definitely resonates. As you know, I work for a company that makes infotainment systems, which now are a collection, which used to be car radios. And car radios have become navigation systems, connectivity networking. And so it is much more complex. And I have seen at my company, there are varying degrees, obviously, of experience and understanding about IP and how it fits into the ultimate model. How would you help or what advice would you give for companies, and especially their counsel, on how to get knowledgeable about IP and patents? Because they can tend to be very complex and this other worldly thing that a lot of people might not even realize they understand or should be understanding. How would you get them familiar with it so that they can help their companies utilize these in the best way?

GENE QUINN

Well the first thing is if they are not reading IPWatchdog, they should. So there is the self-promotion part.

ALYSSA HARVEY DAWSON

So self-blog promotion.

GENE QUINN

But seriously, there is a lot of good stuff going on out there that is being written. We do not have a monopoly on all the good writing in this area. There is a lot of it. You see The Wall Street Journal, and New York Times, and major papers, The Washington Post, write about patents frequently. Now to some extent, some of that information may or may not actually be all that useful or helpful because it is not being written by experts so much. So you do have to be careful of where you consume that information. But one of the things that innovative companies probably want to think about or inquire about is whether or not the USPTO is going to be having any kind of partnership meetings in the area where they work. And PTO has partnership meetings on software, biotechnology and green technology, all different kinds of things where companies in the states are invited to come to the PTOs. Sometimes it is a roadshow where the PTO comes out to a location and they will have a meeting about this is what the technology is. This is what the law is. These are the struggles that we are having. And it really is just intended to bring the people together



so they can engage in a dialogue. So that is one way that I think you definitely want to get involved. Certainly going to conferences are good. There are some really good conferences in this space that are very informative but I do think you have to try and become as educated as you possibly can. The more information you know, the better the decisions are going to be that you make.

ALYSSA HARVEY DAWSON

So now Jon, you hire in-house counsel to help out with your business. From a CEO perspective, what do you expect of your in-house counsel and how do you want them to care or think about the issue of innovation?

JON ELLENTHAL

So that is an interesting question, Alyssa. I think what I have always looked for in the GCs I have hired is first and foremost, someone who is trying to help me and the rest of the business create the best business outcome, as opposed to purely the best legal outcome. Ultimately, a business decision is an amalgam of lots of different inputs. There are technology issues, competitive issues, financial issues, legal issues, etcetera, strategic issues. And they all have to be balanced into a business decision. And a decision is a set of tradeoffs. So the first thing I look for in in house counsel is someone who can help me create a business outcome, not the best possible legal outcome, because the best possible legal outcome may not be the best possible business outcome.

ALYSSA HARVEY DAWSON

True.

JON ELLENTHAL

Can I pick up on one of the things that Gene said?

ALYSSA HARVEY DAWSON

Absolutely.

JON ELLENTHAL

About the role, and I will answer the second part of your question about the role of counsel in innovation. I think counsel has an enormous role and a more important role than ever before. Gene mentioned that no company has a monopoly on all of the good ideas and especially in this economy where technology and knowledge is moving faster than any business could possibly hope to keep up. How well a company connects with what is outside the boundaries of their business that is relevant to their business is probably going to determine how well that company performs. There is something called Joy's Law, which I think codifies this really well. Bill Joy was one of the cofounders of Sun Microsystems and he had a set of beliefs that have now been turned into this principle. I am sure you have read about it on IPWatchdog at some point, Gene, or written about it, Gene. The basic premise is that no matter how smart you are, the smartest people actually work for somebody else. And we have reached the point where it is no longer feasible to meet all of your customers' needs by relying singularly on in house resources. So your job now is



to really cultivate an entire ecosystem of resources around your business because in an information economy, it is much more important what you can access than what you can own. So where counsel comes into this, Gene mentioned correctly that there are great places to read about patents. But everything you read about patents is largely through a legal lens only, which scares most business people, which is why there is a long line of people outside your door wanting to talk to you. So we have a view of the U.S. Patent system as, you know, we have a relatively narrow view of the U.S. Patent system as a bunch of legal issues. And while property rights are obviously intrinsic and central to the role of the patent database, there is a great deal more information inside the patent database that can help companies make better decisions, create better outcomes. And it is a terribly efficient way, in our view, to access all sorts of relevant third party ideas, people and organizations that may have the capability or an insight that could help you solve an internal problem faster, better or cheaper. So where counsel comes in is I think we need to demystify patents for business people because most business people are afraid to go near them. It is as if we have created a high voltage fence around them. So we need to figure out how patents can be less scary because only a tiny fraction of the inventors' expertise is reflected in that patent. The balance lives in his or her head and in his or her organization. So we believe strongly that this is a massively underutilized asset, the U.S. Patent database. That if we can figure out using all sorts of new big data tools to find a relevant third party stuff that can help solve an internal problem faster than a competitor that businesses will benefit a great deal.

ALYSSA HARVEY DAWSON

So I think Jon has answered this question but I am going to ask it anyway of Jay. Is that why you have launched The U.S. Patent Utility?

JAY WALKER

It is one of the reasons. We felt from the start that there needs to be a place that is positively focused on helping create more solutions to problems of which the patent system is part of that answer. Right? If you want to weaponize patents, and that is the only way you want to think about them, which is easy to do if you are an attorney constantly being threatened or having to threaten others because you are trying to protect your own company's rights. It is easy to adopt this idea that well, nuclear energy is good for making nuclear bombs. That is what it is good for. But the fact is nuclear energy is good for a lot of things. And if we do not build a positive sense of values and we do not demonstrate to companies hey. There are smart ways to use the U.S. Patent system and the database specifically, to find the kind of people that you might never have found before to solve problems. Or to find ideas you would never have found before because now there is big data mining tools that allow us to read 100,000,000 pages of spec to find inventors in countries or places you would have never looked in industries you would have never considered. And so the irony is the more we weaponized patents, the farther away we are from the reason that we created them to begin with, which is to create a stimulus for invention and inventive improvement



JON ELLENTHAL And information sharing.

JAY WALKER Yeah. It is true.

JON ELLENTHAL I mean it really is the greatest mechanism of information sharing and technology transfer ever created by man. We are currently not in a moment in time where that is deeply appreciated, but I think we have a choice and I think counsel plays a huge role. Do we want to look at the U.S. Patent database, which is the result of trillions of dollars of R&D spending by companies and governments? Do we want to look at it as a pile of legal rights and legal risks? Or do we want to look at it as the largest collection of technical information and technology experts in the world by far? That is a choice that we can make and that is a choice that I think we can help our organizations make.

JAY WALKER Which is why we call it a utility. The reason we call it a utility is because a utility is a common resource shared by everybody where the fixed cost infrastructure is not borne by the user, where the user pays a small metered or some flat fee in return for accessing the larger function. And utilities were made to serve the greater good. So we very clearly chose the term utility because our mission is how do we serve a greater good here? Which does not mean that we do not think the court system is an appropriate place to have an argument if you have a multi-million dollar dispute with somebody. We are not trying to say that that is not a good idea or that is not a useful place to argue it. It is just not the place where 99 percent of the patent holders are going to find any economic return on their invention investment. There is going to have to be other mechanisms and so we are going to need some kind of no fault system. We are going to need some kind of access system that does not necessarily trade ownership rights or trade high level patents, but allows for a friction reduction so people can use voluntarily licensed in bulk at very low cost.

ALYSSA HARVEY DAWSON **So Gene, you follow very closely all of the activities that are going on in Congress and the different camps that companies have in terms of the current views of patents. When you hear Jon and Jay talk about sort of the value of this utility and this company, how do you juxtapose that with what appears to be the current position of patents in our marketplace today?**

GENE QUINN Oh God, I almost do not know what to say and that is pretty rare. And the reason is because there is seemingly this disconnect. The people who are urging Congress to reform the system are largely doing so for their own personal benefit, which I do not think that there is anything necessarily wrong with that. I mean you have the right to lobby. You have the right to take positions that benefit your company and ask for them. The problem becomes is where pretty soon you are going to wind up having a patent system that is good for about 20 or so of the largest tech companies in Silicon Valley and not very good



for everybody else. And that historically is not the way that the U.S. Patent system was set up or has strived to create the innovation economy that we have. And then on the other side are the people who are saying well do not reform this drastic way but let us do something about what the problems are, which is abusive patent litigation. Which Jay talked about the weaponizing of patents and there is some real nefarious actors out there. There are fewer than what the public is led to believe, largely because the term patent troll has become synonymous with whoever is suing me. And that cannot be right. I mean people have put a lot of time, money and energy into innovating. They protect it with a patent and the fact that somebody is infringing cannot mean that the patent owner is a bad player in all of this. But that is really what we have. We have sort of in Congress, you have people on one side trying to say that the problems are much worse than I think that they really are. And the fixes are going to really upset the apple cart and not lead to the innovation that we want, which is I think very problematic because it is going to tilt the balance of the incentive structure to innovate in the first place. Now one of the things that, if you really had a no fault licensing regime or more of a licensing regime period, however that may be, or any kind of a marketplace. I think what it does is it would get some of these bad actors out and get them off to the periphery because I think that they are the ones that are clouding all of these issues. And what that does is it makes it bad for innovators because the people have legitimate rights and because the bad actors have been so vilified, the value of their own patents is in jeopardy.

JAY WALKER

Gene, I think there is another issue, too. Ironically, it does not get talked about, which is almost all of the Congressmen and women are attorneys. Okay? And very few of them are inventors or business people by career. So as a result, they tend to look at the world through a legal lens and when they see a legal error being made in that some bad actors are suing. You know, 500 companies buy a \$200 patent or whatever. They as lawyers say okay. I can see how we have to fix the legal system problem here, and they do not appreciate the secondary and in many cases primary business purposes that got people to take a patent in the first place because they have never been an inventor. They have never been a patent holder. They have never had to license technology that kept everybody in their factory working, as opposed to firing everybody because your technology could not be improved and so you had to fire everybody. And I think that in house lawyers deal with this issue all the time because they are forced to deal with real business people face to face. In house counsel really understands look, if it does not make sense for the business, the fact that it makes sense in some legal abstract context is all very nice, but not terribly useful. And I think that is a giant disconnect that is taking place in Congress. They are fixing sort of a high profile, highly exaggerated but nonetheless real exploitation problem, but they are taking the baby and the bathwater and throwing it right out. And saying you know what, I am not quite sure what the rest of these arguments are, but I am not a businessperson and I am not an inventor.



ALYSSA HARVEY DAWSON So you know that you understand that backdrop –

GENE QUINN Can I jump in and say something?

ALYSSA HARVEY DAWSON Yes, absolutely.

GENE QUINN Can I jump in? Because I think there is only one member of Congress who is a patent attorney or former patent attorney and that is Senator Coons. And I think that that is exactly why what you see – and he worked for Dupont, I believe, you know, a big innovator that needs to protect their innovations. And his positions on patent reform are more nuanced and you really get it. And he understands what this is all about. And I think that Jay hits the nail directly on the head when you talk about a lot of these members of Congress just they do not understand innovation and they do not fundamentally understand why it is that these rights are so necessary. So it is not accidental that the one person in Congress who has played an integral role in the innovation process for a major company gets it and is trying to advocate very different reforms that would actually be pro innovator.

ALYSSA HARVEY DAWSON So that is the backdrop. The reality is, as Jay said, you are going to be – we live in a system where people are not going to have the same level of information and understanding as you have. And especially you have been dealing with the patent world for a very long time. And as a patent attorney, you have, too. But I think about some of my clients. They are engineers or business people. They have a P&L. They do not really have an interest, nor should they, in delving into all of the details. They just know that when I present or they get presented with a patent that they find to be problematic to their business, they want to know how we are going to resolve this problem because I do not have time and resources and money in dealing with this. And so those are the things that are going to bubble up to the top of any business because those are the things that are going to impact their ability, they think, to move forward. How in this climate and understanding this, can you address and what can maybe your company do to help address and show business people who are not going to learn more about patents than they absolutely need to, that there is something else that they can look to, to help them to move forward with innovation?

UNIDENTIFIED MALE Well, I think the first thing we are going to have to do is get business people at some level in your organization to see how patents can help them, not simply how they can get in the way. And most people think about a patent as an ownership right in an organization. So if you are in house counsel and you talk to the head of R&D or to the head of new product development and you say look. I know this sounds a little counterintuitive, but there may be ways to use the patent database and the patent system to actually speed innovation in



our shop. Usually what a person is going to say is really? I had no idea. I thought patents were legal instruments. What do you mean you can speed innovation? And so there are many tools in the marketplace. We are one of many and I believe there will be dozens of new tools in the next few years, where companies can turn to third party organizations and say show us how we might innovate faster. And I think in house counsel could become a gatekeeper for some of that functionality because in house counsel is in the best position to weigh both the benefits and the risks, because in house counsel's first reaction is uh oh. If I have them reading some other patent device, I am setting myself up for willful treble damages and all the rest of it, which, of course, is an issue. But on the other hand, you cannot make progress. It used to be all great inventors read every patent. If you did not read the patent literature, you were not an engineer.

JAY WALKER

Yes, Einstein talked quite a bit about how his greatest theories were influenced by his time in the Swiss Patent Office reading a bunch of patents. But all the practical inventors, Bell, Edison, they all read patents as a matter of regular course. In fact, the bargain with society was that patents were a teaching in return for a period of limited exclusivity. So to avoid reading patents as a legal barrier and saying I have issued an edict that nobody in this company is to read a patent without permission from me is, I think, highly counterproductive. The number of treble damages victories is near nil and the fact is you need to read the patent literature. And in fact, you need to read the patent literature smarter than trying to read a claim chart. That is not what it is about. You need to keep up and tools are being created to do that.

ALYSSA HARVEY DAWSON

So help counsel out because I come from a background, I worked in Silicon Valley for a while. And I am not saying all companies have this edict but it was generally known that people said no. Do not read when engineers suggested I know about some literature. I know about these patents. I want to understand how that affects my ability to develop the next thing I am trying to do. Because of the concern about litigation, treble damages and people's ability to really understand what the patent covers, counsel did put a bar on it. So how to help counsel out, especially those counsel who are maybe not as filled in in understanding patent law. Or even patent attorneys, how to help them get to a different level of understanding. What do you guys propose?

JON ELLENTHAL

Gene, how many people have prevailed in trebling of damages in the last few years? Has it happened more than once?

GENE QUINN

I do not know that it has. I mean I do not think that you see those kinds of awards. I have a suspicion that moving forward we may see more of those, but it has kind of gone away.

JON ELLENTHAL

Yeah, I think – sorry Gene, please continue.



GENE QUINN

The question about how do you get them to see what is going on. I think the struggle is about the bottom line. If they can understand how this is going to affect the bottom line, then they are going to get it. Now you have one major problem here, I think, is the way that patents are accounted for. It does not seem to bear any relationship to reality as far as I am concerned. Because a patent is not, you know, you acquire a license. That is not a cost. That is a benefit. And so many of these companies just see that as a tax that they have to pay for and that is just a mistake. It is you are getting something for that. You are getting the rights to technology and more importantly, as you have said, all of the information that goes along with that, much of which has never been put in the first place. But I think you have to get them to understand what they are getting. And the life cycle of innovation now is just so fast and if you are not looking for ways to continually make your product or service better, than you are going to lose market share. You are going to become irrelevant. And I for the life of me cannot understand why in house folks have not seen this sooner. Maybe one of the big problems is I was at the Inventors Hall of Fame earlier this week when the inductees were inducted at the Smithsonian. And one of the living members of the Hall of Fame told me something that was just profound. If your vision of the future of your innovative company is only three to five years, you cannot possibly hope to succeed. You have to have a long-term view so that you will make better business decisions. The corporation is supposed to live a long time. And if you are constantly looking to maximize this quarter or next quarter, you are going to lose. You have to look at this with a long view and that requires you to innovate and maybe spend some money now in order to be among the leaders later.

JON ELLENTHAL

Yes, so what I would add to that, Gene, actually to put a fine point on Gene's comments about the risk of rapid obsolescence of not innovating. I just read a recent statistic. I think it may have been put out by the Kauffman Foundation. That the average tenure of a company on the S&P 500 since 1960 has gone from 60 years to fewer than 20 years. So I think everyone understands that companies are under tremendous performance pressure these days. So to your question of help inside counsel out, I do not believe there is a risk free decision. It would be nice if there were 100 zeros but there are plenty of 90/10s, 80/20s, where the 10 or 20 because it is legal risk, is easy to be inflated in the business person's mind because legal risk is really scary. So I think there is a huge role for inside counsel to play in making patents and the information in patents more accessible. Again, if the goal is to eliminate risk, do not look at them. If the goal is to make sure that the business continues to grow and thrive and compete and change as it needs to, then I think there is a vital role for in house counsel to play. The EPO did an analysis and they determined that 80 percent of the world's current technical information is contained only in patent documents. So whether that is right or wrong, it is a big number and companies have to decide whether they want to ignore all of the ideas, experts, insight, potential consultants, potential vendors, that are in that database or are really advertised by the patent and make them accessible to the business or not. And I think it is a little bit scary for lawyers. I think it is a lot scary for business people. But the choice is to ignore a massive



innovation asset that can have a material impact on the performance of any business. So I think it has to get balanced.

ALYSSA HARVEY DAWSON

So what has been the reaction to the legal community and to business folks about your company, what you guys are trying to do with The U.S. Patent Utility?

JAY WALKER

Well it is different. The legal community tends to look at patents through a legal lens. And they basically say look. If you cannot sue, why would anybody ever license a patent? So when we talk about no fault licenses being built into a very low fee service, they go well why would anybody want a license to something that nobody could ever sue me on. Well, because those licenses could lead to good things. They could actually lead to a lot better things in all kinds of relationship driven ways. The only reason to take a license is not because you are being potentially served with a summons. But that is a very difficult proposition for attorneys who have been trained in sword fighting to basically say wow. You can use these swords for other things. Who knew? And so I am not criticizing. It is just the nature of an education and an endless process of every time I see one of these patents, it is hitting me in the head.

JON ELLENTHAL

Yes, actually it reminds me of an analogy I have heard you use, Jay, and that is I know kitchen knives can be dangerous, just like patents can be dangerous, if not used properly and responsibly. But without kitchen knives, there are a lot of very positive benefits of kitchen knives, as you cannot tell through this phone from my stomach. But I think there is a fundamental refraining that we have to be willing to make.

JAY WALKER

But that is on the lawyers' side. The CEOs' side feels very differently. The CEOs' sides are basically saying to us wow. I am looking for ways to manage my R&D costs and I am looking for ways to innovate faster. You have one that is inexpensive. Tell me about it because how many people knock on the CEO's door of a small and mid-size company and say hey. You know that R&D budget. Bet you it is not big enough. I bet you wish you could get twice the punch for it. And the CEO goes oh my God. Why is there not a long line of people out my door saying that all day long, given the pressure I am under both from cost and time? And so I think the reaction that CEOs give to us, and I think to other people who will follow us, which is look. We need smarter ways to figure out how to access the innovations outside our area. Leave out the word patent entirely. We just need smarter ways to access innovation, whether they are trade secrets, whether they are patents. I really do not care. I just have to get at it faster, and I have to get at it without geography. I cannot just look at the people within 100 miles of my place, or even the people in my state or even the people in my country. Half the patent applications, of course, are from non-U.S. entities. So it is like if there is a company in Belgium that is working in my field, but I did not realize they are in an adjacent field, who is going to tell me about that company? Who is



going to show me what they are doing? The legal rights are put of the business deal that will need to be struck if you want to import that technology and use it. So my point is that you get two very different reactions. The lawyers are naturally skeptical. There are no lawsuits. What do you mean? Do you not take people to court? So they are always naturally reluctant and they tend to look at the down side. That is their business. The CEOs, on the other hand, are saying how can you help me. For the amount of money you are going to charge, that is not material. Talk to me how you can help me. And that is where we are seeing not only just a lot of positive response, but we are seeing a lot of people saying oh. Now that I understand what you are talking about, here are five features I wish you could do for me. Or can you do this for me? Can you do this for me? And so, of course, when we are a start-up and a young company, it is very difficult to tailor it. We are not a consultancy and, of course, there are consultants who will be consultancy for you. So we are trying to create a utility that has enough usefulness for everybody, even though any one person might say gee, I wish you had this and I wish you had that.

ALYSSA HARVEY DAWSON

Right.

JON ELLENTHAL

And I think this, while we have The Utility and that is great, I think this is much less about us and much more about the fact that there is a giant underutilized asset that is already paid for sitting waiting there for businesses to benefit from it. But for a variety of reasons, we do not. And Jay was talking about the CEO reaction. I think CEOs respond in numbers and math pretty well. And I think it is a fair statement to say that for any dollar your company, Alyssa, is spending on R&D, the world is spending some number of thousands of dollars on the same or similar technologies. So can you leverage your R&D investment by tapping into the world's R&D budget in areas that you care about so that you can get to cost savings faster or get to new revenues faster. And most CEOs, that is pretty much what they care about.

ALYSSA HARVEY DAWSON

One of the things that I see at my company and other counsel who are on the call might also see is my team in particular works very closely with product development. And like I said, our technology organization, and people will come to us wanting to move into new areas and they want information. They want help. They want guidance. They do their own research but product development also is looking to understand what is the other part of that landscape. And how can you help me as a legal department understand that landscape? So that we can make and build the best products that we can understanding all of the different factors. And so when I think about a company like yours or other options that are out there in the market, that is one thing that I think sort of in house counsel can sort of help their business tap into. Is this information can help them once again to innovate faster and more efficiently.



JON ELLENTHAL

I agree. It gets back to the notion that organizations need to be the center of a very rich and deep network so that you can access what you need when you need it. Because you know it is there and you have a path to it. But there is no question that – I lost my train of thought.

JAY WALKER

So here is something new, though, that I think in house counsel can really benefit from. The world of big data software is changing so fast that what seemed impractical or almost science fiction five years ago. Imagine searching 200,000,000 pages of patent specifications using a semantic search engine that took the idea behind something and searched across every industry to see who else was working on that same idea. That is science fiction to most attorneys and yet it is happening in big data software today. So attorneys are about to become the gatekeepers of a completely new resource for corporations. And the resource is the data finding resource because it turns out that the best data finding is going to be inside of legal literature in many cases called patents, as well as technical literature, but legal literature. And it turns out that data finding also creates some level of risk if you misappropriate data you find. I mean you can plagiarize, you can copy. You can do all kinds of things. You can infringe on copyrights. So ultimately, the data, the information flow is about to go up by an order of three or four magnitudes, a thousand to ten thousand times more information is going to be accessible, manageable, processed. And because of its legalistic nature in part, the in house legal counsel is going to be involved in that stream.

JON ELLENTHAL

Yes, it needs to be. Thank you for picking up where I, because I lost my train of thought. What I wanted to add about semantic search. We have all heard the term big data. And I think people have an appreciation that you can now search massive piles of information, tease out useful commercial relationships, and that is wonderful. But I think when people hear search, for very good reason they think of Google and keyword search. And Google, which is shockingly only 18 years old, has been transformational and it is something that we all use all day long. But it is keyword search, which is a truly wonderful thing. But it does have some limitations. The definition of keyword search is that the word has to appear in the search query to be in the search finding, the result. And that is great, but I did find out recently that there are 645 discrete definitions of the word run in the English language. We are going to have another one of these calls to actually see how many we can name. But semantics search actually deals with context and meaning so it abstracts a word into an idea or a concept. And then it compares that against the pile of information. So what you are much more able to find today is not things that are in your area of practice or in your product area, but find things in completely unrelated areas that a human could have never spent the time to suss out. So what semantic search can do is really give you a 360-degree search and find things in places you would never have otherwise found. Do you want to give an example of a semantic search versus?



JAY WALKER

Well, yes. Let us just say you are looking for a coatings technology and you need it operating. It needs to work in the cold. And so you do a search in some coatings field of use or you are looking in your area of expertise. But you do not realize – and you are in a materials or metals field. You do not realize that somebody in the baby carriage field has already developed an inexpensive coating for a bunch of baby carriage ball bearings that may be perfectly appropriate for what you are doing, incredibly inexpensive, and the person in the baby carriage field filed a patent on this part of their baby carriage. And you are just not going to find that. And they did not describe it using your technical term. They described it using some other technology or some adjacent technology. So the idea of an omniscient searcher is about to become reality. And that means that companies, which were very inwardly focused on their R&D new product development, can start to figure out, as Jon made a mention earlier, how to build networks of resources. How to go outside to both universities and other companies and build not just a supply chain, which we all understand now today is a global thing, but actually a knowledge chain and an expertise chain. And that these giant haystacks, if you will, of information, you are going to be able to find the needles in with these new tools. And the in house counsel are the people that can vet those tools quickly and say wow. I was using that tool for this but our guys over at R&D could use this big time.

JON ELLENTHAL

Yes. Someone told me, here is a real world example of this. Coca Cola has a new beverage dispenser called the freestyle machine, where you can under one dispenser, the user can determine any one of 120 different flavors. And the big barrier to bringing this choice to the consumer was each flavor historically is a big box of syrup. So to have 120 big boxes, you were going to have a tower of a beverage dispenser. But they actually identified a technology that had been developed in the medical sphere in microdosing. They basically found a microdosing invention from medical application and it became, as it has been explained to me, the big enabler to bring this product to market. So technology is horizontal. And everybody is a technology company today, whether you think of yourself like that or not. Certainly Harman does. But The Wall Street Journal changed the name of its Marketplace Section last month from the Marketplace Section to Tech and Business. And their rationale was pretty much we did this because today every company is a technology company. So if you acknowledge the horizontality of technology, you need tools that can find new materials, new technologies, new approaches anywhere as long as they are relevant to what you are working on. And that is the world we live in now.

JAY WALKER

It would be as if LexisNexis suddenly became a product development tool. Every attorney knows LexisNexis backwards and forwards. They go wow. If I could use LexisNexis, if my R&D department could use LexisNexis, that would be great.

ALYSSA HARVEY DAWSON

Right. Right.



JAY WALKER Well that it essentially what is starting to happen but not just LexisNexis in the narrow way LexisNexis is used. But LexisNexis almost in a magic carpet way, where you can literally have a discussion with LexisNexis. Say let us just talk about the legal principle here. I want to search this principle. I do not want to search these words or this statement. I want to search the entire legal principle here. Well, LexisNexis currently does not allow you to search whole legal principles or at least adjacent ones. It looks at what you say.

JON ELLENTHAL So the word seal means something very different in an engine than it does on the California coast.

JAY WALKER Yes, or it does in a document.

ALYSSA HARVEY DAWSON Yes.

ALYSSA HARVEY DAWSON **So one of the things that I was saying because you guys are talking about tools and I wanted to bring Gene in a little bit. There are other tools in the marketplace that people are talking about to more efficiently help people commercialize innovation or manage this risk. And so they fall in different parts of the spectrum. You have a company like an RPX, which is out there proposing to help companies. You have a new crowdsourcing model, like Quirky that is out there to sort of also help to more efficiently do innovation. Gene, what, if anything, do you know about these tools and what would you sort of tell attorneys in terms of how to help them think about them. And how some of those tools might also be used to help companies help with their innovation strategy?**

GENE QUINN Well, the one that I am probably most familiar with is Innography's suite of tools that does some patent and data analytics and stuff. And it is really remarkably powerful but these tools have come a long way in not a very long period of time. So whatever you as an attorney were working with in law school, assuming you are a certain age and experience, the tools that are out there today are going to boggle your mind almost like science fiction. So you can do these searches and semantic searches in a number of places that have that. But one of the great things is by doing it with that kind of semantic search, as Jay and Jon were talking about, you do not have to hit the nail on the head with a keyword. You are going to get a lot of things that are describing the same thing but using terribly different language. And you can identify all kinds of competitors that you did not even know that you had, a lot of them start-up companies. They have small growing portfolios so even if you are trying to keep your eye on some of your major competitors, let us face it. The innovation is happening best at the small level. Whether you are an independent inventor or entrepreneur or whether you are a funded start-up company. The fewer cooks that are in the kitchen, the better the output is going to be. So these very nimble smaller companies that are funded and are building on maybe university technologies or some



cutting edge technologies that the inventors come up with themselves offer all kinds of possibilities, both in terms of licensing what they have. Maybe just acquiring the company outright if the portfolio is attractive enough, or partnering with them. But the first thing you have to do is you have to know they exist. And two, in order to know they exist, you have to lose your fear of reading patents. It boggles my mind.

GENE QUINN

And then the other thing with patents, I think one of the things in-house attorneys have to think through that is letting their clients know that hey, yeah, it would be great to be a monopoly and own the patent rights ourselves and not have to share them with anybody else. But you know what? Our monopolies make an awful lot of money, too. So if we need to share and share alike and partner with other innovative companies, and they are making money, who cares whether they are making money if we are making money too. I think a lot of times through history you look at companies that have tried the monopoly pursuit and it never goes well.

JON ELLENTHAL

Yeah, it is tough to win in a bunker. I mean Marshall Phelps tells the story when he was at IBM starting their licensing program. Lou Gerstner came in and he found out that Marshall was licensing IBM's patents and he said what are you doing? He said you have 24 hours to explain to me why this is good for IBM. And what Marshall and his team did was they cracked open an IBM laptop, started placing little flags down on the components of that laptop that had been licensed by third party competitors. And they were a couple of hundred flags. He went to Gerstner, presented the laptop and I think things made a lot more sense in terms of the interdependencies of a technology driven business.

ALYSSA HARVEY DAWSON

And I definitely think that more and more companies are becoming wise to this. And as somebody said, companies who fail to see this are probably not going to be the ones around.

JON ELLENTHAL

Well there is a real opportunity for in-house counsel here. I mean it really is. And for better or worse, most CEOs think of in-house counsel as a cost center. It is like how do I keep my costs down and when counsel shows up at the door, it is never good news. It is always all right. Why is counsel here? Right?

ALYSSA HARVEY DAWSON

Yes.

JON ELLENTHAL

So it is not personal. It is just the nature of going to the dentist. So when counsel can show up and say hey, there are somethings happening in my area that might help the company reduce costs and get product to market faster. There is actually some new tools that are showing up in my area to help me understand patent risk that turn out to help R&D



engineering a new product development. That is the first time the CEO is hearing those kinds of words out of counsel, especially out of patent counsel. And so I think there is a giant opportunity here for counsel to put points on the board as part of the cost reduction corporate success. Where somebody comes later on, a year, and are going you know that thing, that tool you brought us. We found somebody who created an entirely new product class for us that saved us a year getting it to market. We would have never found that company in Indiana, Belgium. You pick it. Thank you. That was really heads up baseball in bringing that to our attention. You know, our prior counsel would have never done that. They would have had their head down looking at the legal implications only. So you heard it here. Counsel can make real profits for the company by understanding these new changes. And it is not just us. There are other people, too, that says I have new tools to increase speed to market and reduce the R&D costs.

JAY WALKER

And I think Gene said lose the fear. I think in-house counsel plays a huge role in reducing the fear around the legal issues to make them more useable, make them more accessible. I said earlier I think that how well a company connects with the outside world is going to determine how well that company performs. And in house counsel is going to be in the middle of any changes.

JON ELLENTHAL

Yes, and in any of those relationships because ultimately they have to have the business and legal relationship.

ALYSSA HARVEY DAWSON

Exactly.

JON ELLENTHAL

So you guys are right smack in the middle of that if that is how you choose to play it.

ALYSSA HARVEY DAWSON

Yes, and I definitely have direct experience with that because I have had those conversations with my CEO and part of my charter is an IP monetization building business values planning an IP strategy. And the conversation is absolutely welcome and we have been able to do different things with our technologies and arenas that we were not playing in just by unearthing this. And so that is definitely the case.

JON ELLENTHAL

You guys have a particularly progressive culture. I think Gene mentioned the importance of culture at the outset. You guys are known to be particularly progressive.

GENE QUINN

Can I just follow up one?

ALYSSA HARVEY DAWSON

Oh, go ahead Gene.



GENE QUINN

The one thing there that I want to just also stress, too, is I think that the reason that CEOs and other leaders in the company just cringe when the in-house attorneys show up is because so often attorneys on all levels are what I would call red light attorneys. You want to be a green light attorney. Do not tell me what it is that I cannot do. Tell me what it is I can do.

ALYSSA HARVEY DAWSON

Tell me what I can. Yes.

GENE QUINN

How can I do this? And if you take that philosophical approach and look at the culture as well, then I think you can turn the ship. None of these are going to be turning on a dime. It is going to take some time. But the information is out there for you to help your company succeed. And once you do that, then you are going to be looked at very differently and things are going to change.

ALYSSA HARVEY DAWSON

All right. We are ending now.

JAY WALKER

Good. Well, I think that if I could just sort of wrap it up. The way I would wrap this up is the world is changing faster every year. So the slope of the curve is still accelerating. The nature of patents, which are a 225 or 235 year old institution, are also changing dramatically, in part because the winds have blown in a whole new direction for a variety of reasons. That means that any patent strategy that you had two or three years ago needs to be completely reexamined. There are many people who believe that for the vast majority of inventors today, filing a patent makes no commercial sense anymore if you have no intention of spending millions of dollars to enforce it. And trade secrets may be the only minimal protection, depending on whether or not your product can be reverse engineered quickly or not. So there is clearly as counsel a very new world on the legal side and there is a very new world on the innovation speed side. And there is equally a new world on the information side. Your ability to find things in the global economy that can matter in material and immediate ways. So you have almost three earthquakes going on. You have a legal earthquake going on. You have a speed to market earthquake going on. And then you have an information earthquake going on. And all three of those things are going, passing through the hands of inside counsel, especially if it is IP counsel. So like it or not, you need to take a clean sheet of paper and say all right. What do all these mean to my company? How am I going to defend against new threats, whatever those are? But more likely, how can I seize the advantage over prior periods of time where I did not have some advantages. Where I could not bring things of value to the corporation. Where I simply was an executional resource for licenses or an executional resource for responding to summonses or threatening letters. You have to get out of the executional resource mindset, which is not to say do not do it. Of course, that is a part of your job. And you have to say hey. The advantage of massively changing times is that people who embrace it



smart win. And that is where market share is really gained. That is where companies get ascendant. That is where people come out of left field, and suddenly are in a new business or have a product suddenly that has way more scale than they thought. So it is a great moment. Yeah, it has a lot of problems, especially if your company was relying on the patents of your own products. Good luck on that. All right. So many companies, of course, say wow. At least we have a good portfolio. No, you do not. You cannot enforce your portfolio either. I have bad news for you. So at the end of the day, this is a time of giant change. I think that the good in this is that inside counsel is in a position to be a real winner in that game, as opposed to simply part of the change.

ALYSSA HARVEY DAWSON

Right.

JAY WALKER

And I think Gene sees the difference when he talks to counsel who inside counsel really gets it and goes oh yeah. The counsel of that company is really going to drive change in that place. So I think that is good news if you are a counsel who wants to make a name for yourself and really improve the bottom line of your company. You have not had that opportunity nearly as much in the past as you do today.

JON ELLENTHAL

Yes, and just my two cents to that, Jay. I mean a company and its competitors are pretty much facing the same headwinds. So if you do the same thing as your competitors, you are going to deal with the wind just as well or just as poorly. But if you take a different tack, your chance to really get ahead dramatically changes.

ALYSSA HARVEY DAWSON

Well, thank you all very much.

GENE QUINN

If I could just add something on that point.

ALYSSA HARVEY DAWSON

Gene, yes.

GENE QUINN

Is just to wrap up. I always ask companies why would you ever follow the model of other companies that are struggling and/or have failed. Why would you not look at what the companies that are succeeding, the companies that you claim you want to be like do? And the companies in the tech space innovation space that succeed over a long period of time, they engage both in their own in-house innovation and patenting, and they engage in licensing out those patents that they have acquired to others. And they engage in licensing and patents. And what do they not engage in? They do not engage in litigation because litigation from the company's perspective is really a zero sum game at best. The people that win in litigation are the patent attorneys. So if you look at what successful tech companies do, follow them. Do not follow the companies that are failing or that have gone



out of business. And the pathway of Wall Street is littered with companies that made bad mistakes. And right now, there are so many strategic ways that you can advise your client based on the ever-changing landscape. And you need to really take a hard look at that and the rewards will be great, I think.

ALYSSA HARVEY DAWSON

Well this has been a wonderful discussion. And I think you guys have all given counsel on the phone a lot to think about and maybe some things to do differently when they go back to what they do for a living. So thank you Jay, John and Gene. I really appreciate it. And this wraps up our session.

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