The Real Patent Crisis Is Stifling Innovation

Daniel Fisher , Forbes Staff . I cover finance, the law, and how the two interact.

Guest post written by **Jay Walker**

Jay Walker is executive chairman of Patent Properties Inc.. and most widely known for co-founding Priceline.com

The U.S. Senate's recent decision to shelve patent reform legislation for the remainder of the year was met with both criticism and fanfare. But it would be a very positive outcome if this respite provides an opportunity for all sides in the debate to take a fresh look and realize the extent to which the conversation around this highly contentious issue is actually focused on the wrong problem.

While there are changes that clearly should be made to the system for granting or litigating patents, the real patent crisis in America is one of licensing, or more accurately, the lack of patent licensing.

The term patent wasn't always synonymous with "lawsuit" or "corporate greed" or "troll." It's only in recent years that "patent" has become a dirty word. Somewhere along the way, the original intent of the American patent system – to serve as a catalyst and a conduit for innovation – has been lost.

But the purpose of a patent in 2014 is no different than when the patent system was enshrined in the U.S. Constitution in 1787. Patents were intended as instruments to spread knowledge that would be good for the free market, good for society and good for the nation. It isn't the invention process leading to patents that's failing us; it's the system for licensing patents and creating value through their teaching and commercialization.

Of today's 2.1 million active patents, 95 percent fail to be licensed or commercialized. These unlicensed patents include over 50,000 high-quality patented inventions developed by universities. More than $5 trillion has been spent in the U.S. alone on research and development over the past 20 years, much of which went to create the very patents that remain unlicensed. According to Forrester Research, "U.S. firms annually waste $1 trillion in underused intellectual property assets by failing to extract the full value of that property through partnerships." In other words, we're pouring money – and productivity – down the drain.

The problem with our current patent licensing system is that there is no commercially sensible way to diffuse innovation through the economy and deal with the uncertainty over what a particular patent covers and whether it is being used. Instead, the lawsuit has become the de facto mechanism for the resolution of patent disputes, a regrettably necessary precursor to any sort of patent negotiation. Requiring a federal judge, as we now do, to determine exactly what each and every patent covers is a very expensive way to do business. That may work for a few deep-pocketed companies, but the multi-million dollar cost of asserting or defending a lawsuit effectively freezes out most patent owners and users. It also defeats the purpose of America's patent system, which, uniquely among all nations prior to its creation, was designed to stimulate the ingenuity of the common man. This key ingredient in our patent system helped power American competitive success from the industrial age through today's digital discoveries.

The consequences of this exclusion is twofold: first, rather than leveraging America's patent database for useful ideas that could be licensed and turned to profit, U.S. businesses and their R&D teams are actually *incentivized* to avert their eyes to potentially helpful innovations. Prior knowledge of a patent could result in increased penalties if companies are later deemed to be

infringing that patent. So they ignore a goldmine of technologies, products and processes that could launch entirely new industries, generate trillions of dollars in new wealth, create millions of jobs and strengthen U.S. economic vibrancy and competitiveness, all in the name of reducing litigation risk.

Second, patent owners – America's inventors, entrepreneurs, research labs, universities and major companies – aren't profiting from their inventions. As recently as two decades ago, licensing was the principle way in which inventions were financed and commercialized. Licensing was a low-cost way of steering resources back to the inventor as opposed to the lawyer. And the process of diffusing knowledge was envisioned as a way to allow all Americans with an idea to test them in the marketplace.

As long as our efforts to fix this problem continue to be aimed at what lawsuits can be filed, who can file them, how they are resolved and who pays for them we are missing the proverbial boat. In order to fix what ails our patent licensing system, we need to find, or more realistically, create a solution that bypasses the courtroom entirely. We need a solution that restores U.S. businesses' access to America's most valuable repository of innovation and earns inventors a return on their investment. And we need an innovative solution that still works within the framework of today's patent environment.

That isn't to say we should rid ourselves of the patent lawsuit completely; there will always be certain circumstances where litigation is necessary and where the high stakes justify the time and cost. But we must develop an affordable and voluntary alternative that facilitates licensing for the vast majority of patents at fair, market-based prices, benefitting both sides of the patent equation. And it is safe to say that Congress is not the right place to go for this solution.

For too long, private enterprise has looked to others to fix our patent licensing problem. But as inventors, business owners, entrepreneurs, and technology leaders, this is our battle to fight: we're the ones who lose out if nothing gets done, and the ones who benefit most if a solution is found. As captains of innovation, we are well-versed in rethinking and re-envisioning fundamental challenges. What we're essentially faced with is a challenge of commercializing innovation.

The patent licensing system, as it currently stands, is a barrier to American economic success. It is inefficient, wasteful and deprives our economy of valuable innovation that fuels growth, job creation and global competitiveness. The time has come to innovate innovation – and we must be the ones to do it.