

## **To Patent or Not to Patent**

The following presentation is a clip from a panel event, “Intellectual Property and Entrepreneurship in Canada” hosted on March 23, 2021 by the University of Toronto Munk School of Global Affairs and Public Policy.

**SHIRI:** So there's a question here saying, some companies have claimed that they are operating in a sort of post-patent paradigm where they have been explicit about how their innovation strategy is to compete on product rather than IP. So they argue that it's rather, than worrying about protecting an invention, it's more materials to spend your energy turning that invention into the best product you can as quickly as you can. Is this a trend you're observing? Is it more applicable in certain sectors? Does it favor certain types of companies over others?

Ryan, I see you're unmuted so...

**RYAN:** Yeah, I can probably speak to that a little bit.

And there's probably a couple of reasons for this. In particular in the U.S. which is where a lot of patent litigation happens. It has not been a great time to have a lot of software patents for the past eight, nine years because of some case law that came out that made it easier to challenge those patents. And without getting into the legal weeds, that pendulum will shift back and forth over time.

And so as I said, best to be looking at things with not, what is the value of this now, but what is my value and it gonna be in the future. I think it is a strategic consideration whether you're gonna put all of your energy into developing the product and competing or whether you're going to file patents.

And I think this is a harder discussion and a harder consideration in some industries like software for example, than others where I think in biological sciences and pharma, the trend is more so to try and patent. So, it's a consideration you're going to have.

And whether it's a trend, I think it has been a trend, I don't know if that's going to stay a trend. And so I would be careful about chasing things just cause they're trends and I would instead focus on what you think is right for your company and where you think the value is.

And I would also say that just because that might be a philosophy that you and your company has, consider what might happen if another company out there has made the opposite consideration and does have same IP that at least on its face is registered and valid and how you are going to defend yourself if that person comes knocking.

Just because, some folks I know like to make the analogy and so I will borrow it from them that, and I think it plays well here, that you can play a skills game in hockey and you can be very fast and you can shoot and pass excellently and be perfectly pristine, but someday you are going to get checked. And so, checking is part of the game and similarly IP enforcement is part of

competing in a global environment. And so, even if you make a decision that you are gonna compete on product rather than IP, be aware that other people will not have made that decision and be prepared to encounter those people and have a plan for when that happens.

**SHIRI:** Graeme, do you wanna add anything?

**GRAEME:** Yeah. I think I'll echo Ryan's point. This may be the case in software that we're in some aspects of software businesses that moving away from patents is a particular strategy. It's certainly not the case in hardware and even big tech. Often you'll see sort of product roadmap revelations through patent filings from the very biggest tech companies.

So, in hardware tech I would argue that there's probably an accelerating rate of patenting and that it's certainly not slowing down. And if you're not paying attention to what people are patenting out there, eventually you're going to get body check to Ryan's analogy. If you have competition and you have no patents and you're actually driving, you're an innovation-driven company that's doing lots of process innovation or developing new and improving new technologies, you have to get that. You don't have to patent it. But it has to get out there as prior art if you wanna be protected from eventual conflict with competitors.

**SERAY:** I can add to that point. In addition to that, we are a fast growing startup. We do both. We have the benefit to also innovate and also think about the IP. It doesn't take too much resources. I can understand that some companies might be cash strapped. There are ways to look into that. The fact that you are hitting one roadblock doesn't mean you need to totally ignore them.

In addition to what had been already said, you might not be filing your IP but guess what? Somebody will take your product, make a small improvement and file a patent on the improvement. And now, you cannot do that improvement and the other person can sell a better product that was based on your thing.

So, you can't ignore IP. Even if you do it or not, you have to monitor the space, you have to understand what's going on in the field.

\*\*\*

Many thanks to the speakers:

- *Shiri Breznitz (Moderator)*—Director, Master of Global Affairs Program and Associate Professor, Munk School of Global Affairs & Public Policy, University of Toronto
- *Seray Çiçek*—Co-Founder & CEO, LSK Technologies Inc.
- *Ryan Hubbard*—Senior Counsel, IP Litigation, Shopify
- *Graeme Moffat*—Chief Scientist and Co-Founder, System 2 Neurotechnology and Senior Fellow, Munk School of Global Affairs & Public Policy, University of Toronto