Knobbe IP+
PODCAST

Generative AI and Patent Protection

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LB *COLD OPEN - INTRODUCTION*

So the interesting question is "Patents or no patents at the age of generative AI?" Well, folks, it's been interesting. I recall the day recently where I was in three consecutive meetings with VCs. In the morning, one VC said, "Patents are completely unimportant in the age of generative AI. I don't think it's a game changer in funding." In my early afternoon meeting, one VC said, "Patents and gen AI are going to be completely nondefendable, therefore they don't matter." And my third meeting of the day said, "Absolutely patents are important but hard to get in gen AI." So I closed my day wondering, "Patents or no patents at the age of generative AI?"

MU Welcome to this episode of Knobbe IP+. I'm your host of today's episode, Mauricio Uribe, a partner at the law firm of Knobbe Martens. Today I'll be speaking with Linda Bernardi, current CEO and Co-Founder of XdMind, an emerging AI-based technology company based on curating a music service for customers. The topic of our conversation today will be funding strategies in the generative AI world, and why patents still matter to investors. So Linda, welcome. I'm glad to have you on our show. It's my pleasure to have this conversation with you.

LB Hello Mauricio. It's my pleasure to be here and I'm looking forward to a very provocative conversation.

MU Me, too. Linda and I have known each other for a number of years and have had a number of these conversations so we're really excited to share our normal interaction with each other as part of this podcast. So let's just jump into it. Linda, your resume is so impressive – former Chief Innovation Officer of IBM, Senior Vice President and Head of Operations at Element AI in Montreal. But what I liked the most about that is how you refer yourself. You refer to yourself as an author, a futurist, a technology provocateur, investor, CEO, inventor, a lecturer, an entrepreneur. The list goes on and on. Is there one of those that you like the most?

LB Thank you very much. It's still a work in progress, Mauricio. Lots to be done but I would say that probably fundamentally, I'm a disruptor, innovator, beyond anything. Because

in everything that I've done in my career, there's always been an element of disruption. So I started my career out of grad school at BBN, Bolt Beranek and Newman, a think tank where we had roughly 6-7,000 researchers. Which by the way, that's where I got my feet wet in patents because that's what researchers do. They come up with ideas and inventions and patents. From there I had my first startup, the world's first internet of things, IOT company where it was a huge disruption. 2001-2005, talking to alarm companies and banks and shipping about things on the internet, onto multiple other startups. Then really entering IBM in a role of disruption as IBM began changing how we worked with our customers and AI. And then onto AI roles, crypto, blockchain and now XdMind, which is an AI company and music tech company. So the fundamental basis, the books that I write, the lectures that I give, the courses that I teach, are all based on if there's anything in the world that's going to change, it has to first be disrupted. And of course that means invention. That means patents and what has brought you and I together.

MU Fantastic. Thank you, Linda. It's amazing and I think today's answers and today's conversations, you can tell will be brought from all those experiences. Not only in your current role but certainly everything that lead you up to this. And I think that's what makes such a valuable conversation. Turning to XdMind in particular, I think you're kind of in this unique role because you're both an inventor, you are the CEO, you're the disruptor. So when we're thinking about the concept of investments and financing, how do you defend technology? Do you look at it from the perspective as an inventor with, "I came up with something, I have a lot of pride in what I do." Are you kind of the CEO and saying, "our invention, our technology is just an asset for the company." How do you leverage this? How important is it? Where does it fit in the bigger scheme of things?

LB Absolutely. And I also would like to add on talking a little about how investors' view because, in addition, I have also been an investor. And depending on what role you play, you look at patents in a different way.

I would say the most important – so yes, my role is that of CEO, Co-Founder, and also kind of an innovator/inventor – but to me, in all the patent applications that I've been in, or the inventions that I've been involved in, what the thought of patent brings is that of discipline. You have to become very disciplined in putting your thoughts on paper. If you don't do that, you really don't know what it is that you're building. Patents to me is what formalizes an idea into a product versus leaving it as an idea. So that discipline then begins to validate your idea. You've got to test it because before you go to apply for the patent, is this thing that you think is going to work, going to work? So you have to build prototypes. Then you start thinking about who else in the market is doing it? Am I differentiated? And eventually you go for your patent. You wait for the patent approval, during which you learn a lot more about what's happening in the world. And then you effectually have it and that's the value of what was an idea, and now it's a pure invention. It's a product. It's something that you can own.

And interestingly, whether you're a CEO, you look at that as the value of basically formalizing your ideas. If you're an entrepreneur, it really puts you to a test. Because let's remember, if you're an entrepreneur and you don't go through this process, you haven't done the discipline, the testing, the validation. You just have an idea. And if you're an investor, and I hope we'll get into this discussion more, interestingly, views are changing these days, right? Somehow this incredibly important thing that is a formal validation of your idea into a product is being debated. So I would say I look at it from all the lenses, depending on what role I'm playing.

MU Perfect. So many things to unpack there but let's dig in a little bit because I know that this is something that is very well in line with what you're currently doing. In the context of generative AI, you're building on perhaps other technology. So how do you correlate that what you have as innovation as a company versus the technology that you're leveraging, versus what you're protecting in IP assets? Of all that stuff that you're doing, where do you choose that, or how do you balance that out, especially in the generative AI world where so many people rely on a fairly large underlying technology?

LB Absolutely. So this is a really good question. And what we're doing at XdMind ,as a music tech company, we have developed and are developing all of our core technologies. So we don't have that dependency at all on generative AI tools. But let's unpack what you just said. What "generative AI tools" means is that in the past, before these tools were commercially available, companies had to develop these things. So the likes of Meta, Google, Apple, they've developed their own generative AI tools and they own all that proprietary technology. But with the advent of, say, ChatGPT coming out in 2023, Bard coming out and other ones popping up, somebody else is developing all the AI capability. And what current generative AI companies are doing or enterprises are doing, are building stuff around somebody else's product, which is not only the core AI technology, but also all the machine learning that's been done by another company that you're relying on. So the issue become really complicated because if I have generative AI technology today that I'm trying to patent and I'm relying on somebody else's machine learning, somebody else's gen AI technology, the question then becomes what do I just have? Do I have a wrapper around somebody else? It leads into a lot of other questions of responsibility.

At XdMind we're building everything so we're going to be responsible for all the core technology. But if you build your product on top of somebody else, the question is what does that patent look like? And secondly, who's responsible for it? Is it you or is it ChatGPT?

MU Great, and that was the exact question I was going to ask you. Do you reach the point where IP, if you are in that situation of just a wrapper style solution, does it change the point where you just say, maybe patents don't matter and maybe that's some of the change we've seen in the industry?

LB I think that's very much the case because if you think about in the history of technology, there's never been a case of what happened between January 2023 and January 2024. The rise in the use of gen AI predicated primarily by ChatGPT and OpenAI is at a scale

that's been unprecedented. We have never had any technology growth happen. What that means is thousands, tens of thousands of companies, have emerged by putting a wrapper and doing something specific right? So that becomes very difficult to differentiate between what that company is and the other.

And I think you're very right because I'm seeing this dismissive attitude towards patents when it comes to gen AI where venture will say, "Does it really matter? It doesn't really matter." Well it does because at the end of day, when you're a startup or if you're an investor into a startup, ultimately all that investment and everything is going to sit until there's a transaction. And when there's a transaction, i.e., an IPO or selling the company – which most likely today is the latter, less and less IPOs – what is the one thing that everybody looks at is, the IP. Because can somebody come and put another wrapper and do what you're doing? And so I think I'm calling this a latent realization of the value of patents because there's so much euphoria with "Oh my god, look what I can do," that people forget, "Hey, what is it that I have?" Sooner or later they will. The problem is if you figure it out too late and well into building your product, later on you decide you want to get a patent, it's a little bit too little, too late.

MU That's a great term and I'm so happy you shared that. It's a great way of doing it. But following up on that, you've talked about the change, you've talked about some of the technology circumstances. Have you found the language that you communicate with investors or potential founders or even within the company, has that had to change given the new circumstances? Is there a new way of talking about patents and AI solutions and where you sit?

LB You know for the most part right now, patents don't even come up in the initial discussion. IP doesn't even come up. But let's differentiate two things: patent is the formalization of your intellectual property. But let's take a step back. Let's talk about IP. What is IP? That dialogue is even changing. Because there's maybe an assumption that somebody else's IP is already good enough, maybe ChatGPT is good enough – "Now I'm only building on top of ChatGPT." Over the last 12-14 months, I've seen a real degradation and change in the attitude of how investors view intellectual property. Founders usually always stay away because the process is cumbersome, expensive, takes a long time, so they would much rather go and raise the money and then worry about patents later.

But in the world, let's face it, generative AI is AI. AI resources are not just in the U.S. Big hubs of AI are China, Japan, Canada, Europe, India, which means that anyone could start putting a wrapper over any gen AI tool and build something super similar to what you're building. So this conversation now is even more important than before because a big chunk of what people are using comes from a commonly open source available to everybody else. But yes, there's a complete change in that dialogue. I'm curious to see where it ends and maybe it will end with a different way of looking at patents for generative AI products.

MU Yes, I think – one of the key things that you've said is, look in the last year from January 2023 to January 2024, it's unprecedented, and maybe add on that the three previous

years, everything that you didn't think was possible could happen, happened. And so many dynamics. I read a study a couple months ago and it was an interesting track. It's a few years old but it said, in times of maybe a downtrend in the economy, assuming people had predicted over this time frame that we're entering—I'm not sure if it was realized the way that they predicted it—but one of the net effects on VC firms is that there's a decrease in funding of innovation. It's either to service existing portfolio companies or preserve capital, especially when there was some uncertainty. And so we talked about the change in tech, the rise of generative AI – how much do you think some of the effect you had also was contributed by the fact that we're in one of these downturn cycles and VCs naturally regress in terms, especially for innovation?

LB Absolutely. So first of all let's talk about when we've had a downturn like this. The only other time that I've seen a downturn like this was when the internet bubble burst and that was the year 2000 and 2001, which ironically was when I was starting my first startup so I remember it really well. There was a difference between then and the current downturn because then capital was really crunched. Too much money had gone into anything with an internet word in it like "band lines" – we all remember that – and dotcom basically burned through a lot of cash. So there was really an issue then where cash was less available.

Today, over the last few years, what has happened is we've had a number of very rapidly rising yet unclear technologies. For example, cryptocurrency right? Or platforms that are going to manage cryptocurrency. Those are all great technologies for the future, Mauricio, but we're trying to figure it out. So, over the course of 2021 and part of 2022, there were some really big returns. A lot of investments were made and in those technologies that still need time to grow, and then came generative AI. Quite suddenly, right? Quite suddenly. And then suddenly it was like, let's put money in that. The difference is that, generally speaking, there's a lot more what is called "dry powder" or cash. But also a lot of investments were made prematurely in technologies not only that aren't patented but it is unclear where they're going to head.

Look, I'm all for this. This is how change happens – disruption happens— but what we're seeing now is 2023 was one of the worst years. There is still a lot of capital. Not as much as people thought because investors are pulling money out. But it's particularly difficult because over the course of a few years, a few investments have been made that are unclear. With gen AI, there's a lot of money going in there but then we have to really step back and say "What are we developing?" So yes, I would say right now is a fairly difficult climate.

MU A reminder, listeners – I'm Mauricio Uribe, partner with Knobbe Martens, and we're here today talking with Linda Bernardi with XdMind. Our topic today is funding strategies in a generative AI world. Coming back, Linda, I'm going to play a little rapid fire true or false game. I'm going to give you a couple of statements and you can answer in your position whether they're true/false and you provide some context.

AI is a technology.

LB True.

MU AI is an asset.

LB True.

MU Patents on AI are an asset.

LB Very true.

MU Patents on AI can be measured on the technology that drives your company.

LB Very true.

MU Patents on AI can be measured on the monetization opportunities that can impact your competitors

LB True.

MU So how do they all fit together?

LB You know, it's interesting because we notice how much we spend time today in the world talking about AI. I want to make sure that our listeners are aware that AI is actually 78 years old. It started effectively with a mathematician, Turing, asking the question, "Can a computer think like a human?" Then we went through what was called decades of AI freeze. So we want to come back and ask ourselves a question, why AI is so hot right now. And the reason is that we have more data, more things happening that we can no longer use the standard computer capabilities. And if it weren't for the advent of certain technologies becoming available—let's imagine a world without Bard, without ChatGPT, without all the technologies—then you would need to have each company build its own native AI applications. It would be a lot slower. So, suddenly AI's become the thing in investment. It's become the thing that generates value. It's the thing everybody wants to do. But a recent study that I heard is that, relatively speaking, enterprises are still not doing – converting— to AI. So right now it's that height. It's that buzz. And let's face it, venture community invests in buzz. That's what has given rise to so much technology. And AI is one piece of that buzz that has to work.

Look, we've got to make sure all the stuff that we're developing using gen AI that actually changes the world becomes monetized. How are we going to know they've become monetized? They have to be used. And generally speaking, to me what patents do is they formalize. They let me see what the company is trying to do. So, as an investor, more and more are coming – I'm coming across companies that have ideas built around gen AI and when I ask the entrepreneur "Do you have – are you filing for patents – let me look at IP" they're like "Well we don't need to do that right now – it works just fine." So that's really the question that we need, and I think that's the exciting question to talk about.

MU Sure, sure and kind of on that line, we've mentioned that now, a couple of times, the term monetization and IP monetization, and the conversation with investors. There was a paper, again, I found a couple of months ago that was really saying from the VC

perspective, they were looking at IP as something that can turn competitors into customers based on your ability to monetize it. And they reference the term "platform IP" which said that each iteration of an IP license is part of that platform, and once you get one, then you get the next one, and you get the next one, just builds on itself. And that is the aspect that's attractive to the VC. So how do you experience that? Is it more about what XdMind can do with their patents, vis-à-vis themselves and whether it enables their technology, or is the conversation more of what XdMind and their IP can do to form these platform IPs and monetize it in that way? Or is it both?

LB Probably it's both. If we think about what is monetization— making money out of something. So before I talk about XdMind, let me sort of talk about my experience as an entrepreneur. You build something, and you bring investment in and, ideally, your dream is that you're going to form partnerships with the right partners, whatever your business is and your product's going to be used and you're going to bring in revenue, hopefully never having to raise money again. That's one form of monetization. And investors see the valuation of the company growing. Or you build the IP, the technology, because you're going to license it straight up to a company. They're going to use it. Or you're going to sell your license. Or the fourth way of monetization that we're seeing less and less of is going IPO, which is very difficult, and I think it's really the first three where you're hoping, basically, to put your product in use.

At XdMind what we're building is music technology that, via AI, understands video, whether it's video or gaming, goes and finds the music across tens of millions of songs, brings it back adapted to the scene, really enhancing the experience of the end user. Monetization to us would be working with our gaming partners, working with the mobile and gaming devices, or working with tech companies that are very much getting into it. But the concept of platform tech means we want to make it become core, necessary technology that other things hang off of. At a crude level, you can think of operating systems having been platform technologies because your OS was everything – you know, can you run anything without an OS ? No. There's got to be an OS somewhere. So all of us aspire, as entrepreneurs, we want to get our stuff to be the core to be able to monetize it.

MU Perfect. And one question I have. When you think of startups and you hear their stories sometimes, they talk about technology and then they pivot. Sometimes they're targeting a specific market and their tech was developed with that and then they realize there's other functionality and you hear startups pivoting and saying "Well we had a solution for X, and now it turns out our solution works very well for Y, and as a company we made that strategic decision." Does the same apply for IP strategy? Have you seen that? You talk about the four different things, right? And along the way you start on a certain path of why you filed for patents and what you're trying to pursue and what you're trying to do. But then if you're having a conversation with one of these partners or perhaps an investor and they're looking at it from a different perspective, do you pivot on your IP strategy to align yourself with them, or do you kind of keep along the way because long-term that's what you chose your IP strategy to meet your needs?

LB Hey look, just to be a little funny, IP isn't like a hangman where it's going to go hang you and you're going to die because you got a patent for A, B, and C and therefore that's it – that's all you do. To the contrary, what an initial patent on your IP is is kind of the place you get started. And then from there, those pivots that you mentioned are growths. Now once you have your initial patent and you can kind of go to any partner, tech company, others and explain why you're unique – it doesn't mean others aren't going to come up eventually – but for a period of time, you know you have that lead. That's where your core is. That's your foundation. Generally speaking, all pivots happen off of the foundation and use the foundation. Which means that you're using that initial IP – the patent you have. But then you might file 50 other patents because you got the other areas of business. And I think the misconception is sometimes people think a patent is one thing - that's all it does and I can never do anything other than that – whereas it's the starting point. It's the foundation.

Now the discipline is because of the following: if you go down a road and you do the wrong thing and then decide you want to change, then you haven't had that discipline to sit there. And for entrepreneurs, I mean we're idea junkies, right? It's really hard to settle us down. To force us to think about what it is that we need to do. And I think once we do that then we think - my advice to entrepreneurs or investors or anyone is think of those initial IPs as your foundation, which is even more important today in the world of generative AI because we're going to see a lot less and less of these happen. And those companies that do get the patents do become differentiated. And fact still holds that ultimately a patent will allow you to defend your technology. Without it, it's still an idea.

MU And so, Linda, I'll ask – call it a million dollar - maybe it's a billion dollar question today – you've described this such an unusual event that happened – tailing off from yet another incredibly unusual event with the pandemic. Are we going to, in your perspective, hit more of that steady state – back to normal – fundamentals come back up? Are we going to experience yet another run that we've seen - this impact of technology growth? Do we just not know? How do you view that – the future?

LB Well I think one of the fundamental changes that generative AI has caused – remembering that AI has been around for a very long time, and the question is why the last 14 months happened – is because a couple of companies took a couple of really hard things to do and did it and made it available, which is going to change the landscape of what we develop in the future. And with it has come this very relaxed mode of – "Eh, patents, IP, I don't know, is it important – is it not?" Ultimately it will be because we will pass this euphoria stage, and we're going to have to see all these investments going into gen AI companies – what are they costing? Now, whether it's the new trend of a little bit more relaxed and – "Ah it's okay" – because remember about 10 years ago the only choice you had is you could go to GitHub, pick a little piece of something, and then you have to declare you're building on top of it. Now you can get the core completely from somebody else and develop a wrap around it, call it a product.

But sooner or later, when investment goes into companies, it is going to be imperative to know the differentiation because ultimately you have to remain competitive. And so, I think we'll go through this more relaxed phase right now in gen AI. There's excitement about "Well I'm going to develop this thing that's going to have all these millions of customers." Well, yeah but who else is doing that? But I think eventually we will normalize. But perhaps we will do it a little bit differently because the Biden administration issued new guidelines to the U.S. Patent Office.

The U.S. Patent Office –- you know better than anyone – is struggling because there's now all this new IP coming that is super hard to figure out what is Company X's IP versus somebody else's IP. But I think what will happen is we will normalize, and it's possible we will have different flavors of patents. I also think that we're going to need to carefully think about where responsibility lies. If I'm solely using somebody's else's product on top of which I am building, who ultimately is the owner or builder of the product? All of this I think is going to get us into, perhaps, a new generation of patents which is a function of a new generation of technology.

MU Linda, that is a fabulous answer and will lead us, I think, to many future podcasts there. But I think we're out of time for today. So that will wrap up today's episode. Great big thanks to you, Linda, for joining us today. Just absolutely enjoyed your insight. For our listeners, be sure to visit us at knobbe.com to listen or view the written transcript of this conversation, and check out some of our other episodes at Knobbe IP+. Until next time, I'm Mauricio Uribe. Thanks so much. Thanks, Linda.

LB Thank you. Thanks, everyone.

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