

First I thought I would call my speech PI-IP in the mirror of justice, for Intellectual Property Rights which are essentially creatures of law, structured to protect and reward creativity, innovativeness and hard work, must be seen with the eye of public interest. You hold one in front of the mirror of justice and you will see the other. Then it was, “The life of PI.” I was chuffed beyond measure at what I thought was a wow! Believe me, it was before the Oscars, Peter will bear me out!! I truly believe that the storms, Richard Parkers, meerkats and hyenas notwithstanding, PI will survive in this field of law. In quite another context, the US Supreme court made a stunningly apposite comment that private interest “would not be allowed to defeat an obvious public gain.” But, tarry awhile; I will disclose the context and the case at the end of my speech.

Art 27 of the Universal Declaration of Human Rights, 1948 declares that the right to one’s creation is a human right. However once the idea, the invention or the brand-name is formulated by one, it is simply ‘used’ by another because it is easy to copy without putting in any effort. The rights-owner is thus threatened – should he leave his property unfenced, others will freely “pick the apples”. If he keeps it private, the purpose of his work is defeated. IPRs were a solution to this malady – rules have been drawn for preventing misappropriation or invasion of the rights and profits of the creator. The owner of an Intellectual Property is granted a *right in rem* against the whole world and not a *right in personam* alone. Exclusive rights allow economic returns. As Milton Friedmann famously said- the only social responsibility of business is to make money, and as ABBA sang long long ago, “It is a rich man’s world”, so the rights owners really need not be concerned with public welfare. The exclusive rights enable the owner to reap economic and moral returns from the intellectual property and to ensure that another person neither misappropriates the same nor makes easy money out of it.

The creation of the intellectual property is itself in public interest and we only have to imagine a world without the patented inventions and the copyrighted works of literature and art, and the Brand names that signify quality and perhaps Champagne. It is also in public interest to define the extent of ownership strictly, so that neither will the rights owner get more than he deserves, nor will the commons occupant constantly have to worry if he is trespassing. We have the oft quoted case of Vazir Sultan where the Supreme Court demarcated the goods to which the mark ‘Char Minar’ applied. But now before you, the reference to public interest will be the general interest of the public, the “public interest” that was in the mind of the Parliament when it referred to “dissemination of technology” or

“public health” or “socio-economic development” etc in the Chapter on Compulsory licensing in the Patents Act; or the words “deceive the public” or “cause confusion on the part of the public” in the Trade marks Act and so on. The reference is to “us the people”, or you may say that “We, the People”, are concerned if the incentive to innovation, enterprise, or creativity is at the cost of justice. . The presence of limited term monopolies, compulsory licensing, fair use, maintaining the purity of a register, avoidance of squatting and clogging are evidence of Public Interest in the Intellectual Property Rights space. And everyone concerned with Intellectual Property Rights jurisdiction, the owners, the challengers, the lawyers, the deciders and the public must factor in the element of Public Interest and can ill afford to ignore it. So when these property rights run counter to the welfare of the people the State steps in or the Judicial Authority steps in.

Why did the inventor, creator, artist, or artisan spend his time and energy to claim rights over the intellectual property? Not just to make money, that too for sure. It is also to see the excellence of what he has done and to win universal acclaim. Even before these rights were created there were inventions, compositions etc. Few of us are proof against the lure of applause. Mahatma Gandhi said “Applause comes without a welcome and goes without a farewell”. We are not of such stuff as the Mahatma was made of, and there is also gratification per se when we create the intellectual property. In India intellectual property ownership was known not in the present form but it was implicit in the exclusivity of knowledge that existed in a wide variety of crafts, arts and sciences, and the unique knowledge was passed on by inheritance or to special communities. This was an unlegislated rights-creation. Ideally knowledge should be available to all, but we do not live in an ideal world and the statutes governing intellectual property rights try to balance the inventor’s rights with public welfare. While on the one hand, Human Rights documents promise to protect the rights of creators, on the other hand, these very instruments ask to make the resultant successes from these protected rights available for the betterment of human beings world over. There is an apparent conflict between the right to control information and the right to use it to handle and meet crises.¹ **Dreyfuss Rochelle**

¹ Dreyfuss, Rochelle, —Patents and Human Rights: Where is the Paradox?!, Molengrafica Series, Forthcoming; New York University, Law and Economics Research Paper No. 06-38; New York University Law School, Public Law Research Paper No. 06-29.

Patent Law

Patent Rights were created “not in the interest of the inventor but in the interest of the national economy” The Ayyangar Report quotes this from Michel on Principal National Patent Systems. The Report also quotes from the Patent and Designs Amendment bill, which says that the monopoly is granted, to benefit trade and industry and to enlist the co-operation of the capitalist in this endeavour to bring in new invention. Public good is the real object for granting patents, the grant of monopoly is only the incentive. The Code of Federal Regulations (U.S) says that “A patent by its very nature is affected with a public interest>” This is true of all IPRs

With his exclusive cache of rights, the patentee is free to reap economic benefits. Meanwhile, society can use the knowledge to build on it and improvise it. Compulsory licenses may be imposed on patented inventions in keeping with greater good. Doomsday may be upon us sooner than we think and retaining an exclusive monopoly over a drug which is the only cure for a galloping super-virus may not only be destructive to the fabric of social progress, but also defeat the purpose of such an invention. But we must encourage the inventive genius for the public benefits from inventions and further the commons become richer after the time of the patent is over. There are inventions which have changed our lives forever. Breakthroughs in medicine help cure diseases that were otherwise deemed incurable. And yet, and yet... the exclusive control over the reins of the invention must not ride as an adversary to affordability and availability. Patent Law systems have their own checks and balances in this regard.

The true value that patent law provides society lies in stimulating original and ingenious activity, motivating the development and commercialization of inventions, encouraging disclosure of information, and allowing for more efficient exploration of prospective inventions.² We constantly hear the warning that if there is no economic incentive then people will not experiment and innovate.

“But few industries resemble pharmaceuticals in the respects that I've just described. In most, the cost of invention is low; or just being first confers a durable competitive advantage because consumers associate the inventing company's brand name with the product itself; or just being first gives the first company in the market a head start in reducing its costs as it

² Roberto Mazzoleni & Richard R. Nelson, —The Benefits and Costs of Strong Patent Protection: A Contribution to the Current Debate”, 27 RES. POL'Y, pp. 273, 274–300 (1998).

becomes more experienced at producing and marketing the product; or the product will be superseded soon anyway, so there's no point to a patent monopoly that will last 20 years; or some or all of these factors are present. Most industries could get along fine without patent protection.”³ Posner

In Yahoo v.Rediff decision it was noted that, ” The exclusion of competition may really be counter-productive to the technological prosperity of the society” and it quoted from Bilski where the US Supreme Court said that “The primary concern is that patents on business methods may prohibit a wide swath of legitimate competition and innovation.” This too is public interest.

The provision relating to compulsory licensing in the Indian Patents Act is an example of the balanced approach. The grant of a CL for the first time in India caused a huge furore. We wondered whether the heavens had fallen. A patent should not impede the protection of public health and nutrition and should, instead, act as an instrument to promote public interest especially in sectors of vital importance for socio-economic and technological development of India. So if one asks Shylock-like “Is that the law?” The answer must be a Portia-affirmative. Besides this, we have. S.3 (d), the provision that gave rise to much fuming and fretting. In the Novartis case decided by the Madras High Court this aspect of the matter was dealt with and the Court referred to the Parliamentary Debates concerning “evergreening”. We have the verboten signpost that no patent is allowed for a new use of a known drug or substance, that is to say, mere discovery of a new form, use, property, process, and the like, of a known substance. The Exception carves out a right in this bar. If you have to look at anything to see the delicate balance between the individual rights and public interest, it is S.3 (d). The entire S.3 is concerned with what is not patentable. This subsection(d) alone has an Exception, which says that if there is a significant enhancement of efficacy the 3(d)bar is lifted.

Trademark Law

Trademarks offer protection to the insignia, symbols, nomenclature and any such kinds of works to protect the identity of those running businesses under distinctive signs to identify for consumers that the products or services designated for a specific market to distinguish its

³“Why There Are Too Many Patents in America”:By Richard A. Posner .The Atlantic July 12 2012

products or services from those of other entities. Trademark law is also designed to fulfil the element of public interest. Trademarks allow the easy identification of products and services that meet consumer expectations in terms of quality and other attributes. Trademarks incentivize manufacturers to consistently provide quality products or services to maintain their business reputation. Legal systems concerning Trademarks are built on the foundations of purity of the register and protection of the public from confusion and deception. Squatting and clogging of the register are practices that are frowned upon. Trans-border reputation is recognised judicially to discourage unscrupulous trading on the back of mighty reputations of entities overseas. A strong IP regime is the best bulwark against piracy and smuggling which are anti-thetical to public interest. So public interest is not an antonym for private rights. It just means public interest. Trade mark right is about the source and the track to the source. Sometimes the track to the source has gotten so obliterated with indiscriminate use by others that the ownership rights die. This is because the public has used the mark as of right and it would not be in public interest to draw afresh the obliterated track.

The acquisition of patents over traditional knowledge is another cause for concern - the uses of a product which are common knowledge in one country but unknown in another country are patented in these other countries. Bio-prospecting is another space where the two wrestlers IP and PI fight out. The developing countries and the less developed countries are the ones which are bio-diversity rich, and they are the ones which are money-wise not rich and therefore vulnerable to exploitation. Shall the field be open then to the market forces to play for supremacy pushing the public good to the margin? The State Countries cannot sing the Abba chorus, and that is where the TRIPS flexibilities come in. I have referred to only the two IPRs, the trademarks and the patents. But the PI presence is the same in all IPRs. In the area of traditional knowledge protection is important to preserve the knowledge relevant to agriculture, ecological preservation, medicine etc. By fostering a relationship based on trust and respect between traditional knowledge holders and say pharmaceutical companies, new products will be developed and the knowledge will be preserved without exploiting the rights owners,

IP in Litigation

Procedurally too, the issue of public interest raises its head, and a distinction between civil and common law systems is in order. Common law courts rely on following an adversarial system. Two opposing sides present their cases to a neutral judge who adjudicates upon the

dispute after evaluating the case. In civil law systems, an inquisitorial system colours the proceedings, where an examining magistrate serves two roles by developing the evidence and arguments for one and the other side during the investigation phase. Following this, a detailed report with the findings present will be sent to the President of the Bench – who will then adjudicate on the case if they deem it necessary to conduct a trial.

In common law systems, while a judge may adhere to the notions of *audi alteram partem*, there is no active involvement in pursuing the matter till the end – to ensure that due justice is not only done, but seen to be done. It is a possibility that the extra mile may be forged, in a petition filed in public interest, or an IPR issue through a writ petition – otherwise judicial initiative may not kick in. In instances of this kind, the civil law aspect might just come in handy, to handle IPR issues. Therefore a sui generis mechanism to handle the modus operandi of IPR disputes would make the most sense and in this regard the Indian law gives a great deal of flexibility to the IPAB. We need not be hemmed in by procedural barriers it is enough if we ensure that fair play and natural justice govern our proceedings.

The IPAB in India has expressed its position regarding public interest and has held that the words "person aggrieved" should be construed liberally under the Trademarks Act, and that the primary duty of the Court is towards the public and the maintenance of the purity of the register. It has also held that the definition of the words "person interested" in the Patents Act is inclusive and therefore extensive and not restrictive. And that it is as much against public interest to have unjustified attacks on a deserving patent as it is to allow an unworthy patent to remain on the register. The Public interest is a persistent presence in intellectual property law and will neither melt nor dissolve into thin air.

In *Lear, Inc. v. Adkins*, [395 U.S. 653 (1969)], while dealing with licensee estoppels, the U.S. Supreme Court held that "in the accommodation of the common law of contract and the federal law of patents requiring that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent, the technical requirements of contract doctrine must yield to the demands of the public interest" This then is the key, individual interests give way to public interest when the situation demands it, and sometimes the power of eminent domain moves in to protect public purpose or public welfare.

Two practical problems arise in the course of pending cases dealing with intellectual property rights. Both these problems are issues of public interest. One is the dilemma that is posed when a challenger to a patent or a trademark or a GI withdraws his

challenge. Then what is the role of the Judge? Shall she shut her eyes to the apparent illegality in the registration or in the grant and say Rectification petition is dismissed for default or revocation petition is dismissed default. Or shall she pursue the matter suo motu? Here the common law mode may have to be tweaked a little. Once it is accepted that these are rights granted against the whole world, should or should not the Judge or the Board protect public interest no matter that the individual who moved the proceedings loses interest may be even for extraneous reasons. It will be interesting to watch the direction in which the law develops in this regard. Next, we have the requests for interim orders in Original Applications for staying the registration or for staying the grant. It is contended that the law in India has not provided for it. But what if the person seeking stay alleges fraud and is able to show evidence for it. Fraud avoids all, said Edward Coke. Then, is there a brooding omnipresence that helps us past the statutory fetters? For to allow an IP right obtained by fraud is against public interest too.

Next I will touch upon the equitable conduct of the IP applicant. In Trademarks cases, the “clean hands” concept is invoked by the challengers of a mark. In Patents too, the right to an exclusive monopoly does not come easily, the Law expects the owner to deserve it and lapse in compliance with S.8 requirements which relates to the patentee’s conduct results in revocation of the patent. There is a view that insistence on S.8 will be heaping coals on our head, it will discourage foreign industries. It is an arguable point as our Supreme Court is fond of saying. CFR says Public interest is best served by full and frank disclosure. Our law too says so. No entity which intends to do business globally can afford to ignore India and her burgeoning market. That is why Mr. Ang Lee said Namaste. India can stand on her IP laws firmly, the patentee overseas will comply with our law believe me. There can be no compromise on ethics in IP practice, it is in public interest.

So we have seen Pi’s presence in this jurisdiction, in the substantive law, in the procedural law and in the field of discretion! You may ask me who is the hyena, the storm, the Richard Parker or the meerkat. I will allow you to make your guesses.

And I come to the end. Yes, I remember I have to tell you the case and the context of that quote. In his brilliant “Free Software”, Lawrence Lessig refers to United States v. Causby, where a farmer objected to the planes flying over his land, “ The Court acknowledged that “it is ancient doctrine that common law ownership of the land extended to the periphery of the universe.” But Justice Douglas had no patience for ancient doctrine. In a single paragraph,

hundreds of years of property law were erased. As he wrote for the Court, “[The] doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways.” So “private interest” was not allowed to defeat an obvious public gain. Thus what was a well-entrenched common-law doctrine changed. That is the beauty of law, it changes. Just visualize knowledge as the air above and the IP owners as the farmers Causby. Interesting times are ahead. Pi is very alive and very kicking!