

## INTELLECTUAL PROPERTY UPDATE

NOVEMBER 2013

The Director General of the Intellectual Property Office recently issued the Rules and Regulations on the visitation powers of IPOPHL following the amendment of Section 7 of the Intellectual Property Code on July 23, 2013. The amended IP Code gives the Director General and his agents the authority to “conduct visits during reasonable hours to establishments and businesses” to determine whether violations of the IP Code are being committed based on reports or complaints received by the IPOPHL.

On its face, the amended IP Code appears to violate the constitutional right of persons to be protected against unreasonable searches given that only judges can issue warrants allowing the search of private property based on a finding that a crime is probably being committed therein.

A presumption of validity of the amended IP Code and the implementing Rules, however, exists. So until the Supreme Court strikes down the amendment or the implementing Rules for being

## IPOPHL VISITORIAL ORDER: 5 THINGS BUSINESS OWNERS SHOULD DO TO PREVENT DISRUPTION

unconstitutional, the public will have to learn how to live under this new regime.

Below are some of the things that business establishment owners can do in order to prepare for the implementation of the visitation powers of the Director General and avoid any disruption in their business operations:

**Clean-up your inventory.** Under the implementing Rules, a visitorial order can be issued by the IPOPHL based on a verified complaint but without prior notice to the owner of the business establishment subject of said order. A business establishment owner will have no way of knowing beforehand that the Director General’s agents will pay him a visit. The best way to prepare for this eventuality is for the business owner to conduct an inventory and remove all goods that may have been sourced

from unlicensed distributors. It does not make any sense to prolong a disruption of business activity at any given day by being caught in plain view selling counterfeit goods.

**Clean-up your hardware.** It may be prudent also for the business owner to inspect the computer hardware of all personnel to make sure that the operating systems being used are all licensed. Established OS manufacturers usually give a 30-day trial period for new computers. After the lapse of the trial period, users are required to buy the licensed version to continue using the OS. Owners are well-advised to look at each of their computer units and not rely on the say-so of their IT guy. The liability for using pirated software is carried by the business owner and not the IT guy.

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Intellectual Property  
Practice Group  
Key Lawyers:

Philip Sigfrid A. Fortun  
Roderick R.C. Salazar III  
Bayani B. Loste  
Walter Robin C. Go  
Albert Lee G. Angeles  
Rianne M. Picar-Danao  
Asisclo A. Castañeda III  
Vanessa J. Gumban  
Lou Bryan R. Macabodbod  
Ana Theresa D. Singcol

**Separate your home from your office/business outlet.** Under the amended IP Code and the implementing Rules, only business establishments are subject of visitatorial orders. For businesses located in residences, it may be sensible to move the operations out of these homes to minimize the possibility of unnecessary invasion of privacy. The business owner may also have his articles of incorporation amended (if a corporation or a registered partnership) or Department of Trade and Industry registration revised (if a single proprietorship). For their business permit renewals this coming January 2014, these changes should also be reflected in the applications.

**Take time to train the receptionist/office attendant.** The receptionist or office attendant is the only line of defense of the business owner against the improper implementation of a visitation order coming from the IPOPHL assuming he is not around when the IPOPHL agents drop by for a visit.

Under the implementing Rules, the IPOPHL agents enforcing the visitation order are required to:

- 1) identify themselves as agents of IPOPHL;
- 2) present the visitation order; and
- 3) explain the nature of the visitation order and complained IP right violation reportedly being committed by the establishment.

If the subject of the IP right violation reported is in plain view of the IPOPHL agents and they have reasonable ground to believe that the business establishment is complicit in the commission of said violation, the agents will notify the business owner or his employee/representative about their findings.

The business owner is allowed to object to the findings of the IPOPHL agents and the objection will become part of the post-operations report to be prepared by the agents to their superiors.

Even granting that the supposed counterfeit or pirated goods are in plain sight of the agents, they are not allowed to seize these from the premises of the business establishment. However, because the IPOPHL agents' determination of the commission of IP rights violation carries the presumption of validity, it is incumbent upon the business owner to put in his

objection to the agents' determination and present a contrary argument.

If the business owner is absent during the implementation of the visitation order, his receptionist or office attendant should be sufficiently knowledgeable in putting down any and all objections to the findings of the IPOPHL agents.

### **Report violations of the implementation of the visitation order.**

To guard against any possible abuse that agents deputized by the IPOPHL may commit, wittingly or unwittingly, the business owner or his representative may do well to take a video to document the visit. A videographer breathing down the neck of a government agent has a deterrent effect against any improper behavior. A more prepared business owner may also invest in CCTV equipment for the same purpose.

A PDF copy of the implementing Rules may be downloaded directly from the IPOPHL's website at [here](#). LF© November 12, 2013.

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