

FRUIT OF THE POISONOUS TREE?: A DISCUSSION ON THE CONSTITUTIONALITY OF CIVIL SEARCH AND SEIZURE*

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I. INTRODUCTION

With the advent of advanced technology and globalization, Intellectual Property Rights ("IPR") Law has become a very popular and widely used field of law. In recent times, the Philippines has become a haven for IPR Violators. A *Manila Times* special report entitled *Loose Rules Make CD Pirates Feel at Home Here* stated that syndicates producing optical media containing illegally copied software, music, computer games, and other copyrighted materials have moved their underground production lines into the country, making the Philippines a producer as well as exporter of pirated copyright products. Optical media include compact discs, video compact discs, digital versatile discs and CD-ROM's. Taking advantage of the country's porous borders, the CD pirates from Hong Kong, Thailand, Singapore, Taiwan, and Malaysia have relocated to the Philippines where IPR enforcement is weaker to escape tighter enforcement in their own countries.¹

Given the difficult circumstances and limited funding, Philippine law enforcers claim to do the best they can. However, soon after a raid by law enforcers, infringing vendors whose goods have been confiscated are usually back in the business the following day.²

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¹ Dave Llorito, *Loose Rules Make CD Pirates Feel at Home Here*, MANILA TIMES, Jan. 3, 2003.

² Dave Llorito & Kristine Payuan, *Intellectual Piracy a P9-Billion Headache for Law Enforcers*, MANILA TIMES, Jan. 3, 2003.

Indeed, IPR violations are a serious problem in this country. To make matters worse, most citizens adopt an ambivalent attitude towards the dire state of IPR. They do not realize that letting IPR infringements go unchecked means that income for artists and distributors, taxes that should accrue to the government and thousands of jobs are being lost each day.³

International Intellectual Property Alliance, a Washington-based lobby group, published data showing that, in the last five years, total trade losses suffered by the copyright industries operating in the Philippines consisting of motion pictures, music and sound recordings, business software, entertainment and books have amounted to PHP6-9 billion each year. These numbers represent estimates based on displaced sales, and do not yet include tax losses nor the potential revenue of legitimate distributors.⁴

These IPR violations have not gone unnoticed in the international arena. The Philippines is being pressured to improve on Intellectual Property Rights protection. This pressure is most acutely felt from the United States. The United States Trade Representative ("USTR") retained the Philippines in its Priority Watch List because of persistent serious problems with IPR defense. The year 2003 is the second year that the Philippines has been listed as a grave IPR violator. In 2002, the USTR placed the Philippines in the Special 301 Watch List, a list that names significant IPR violators.

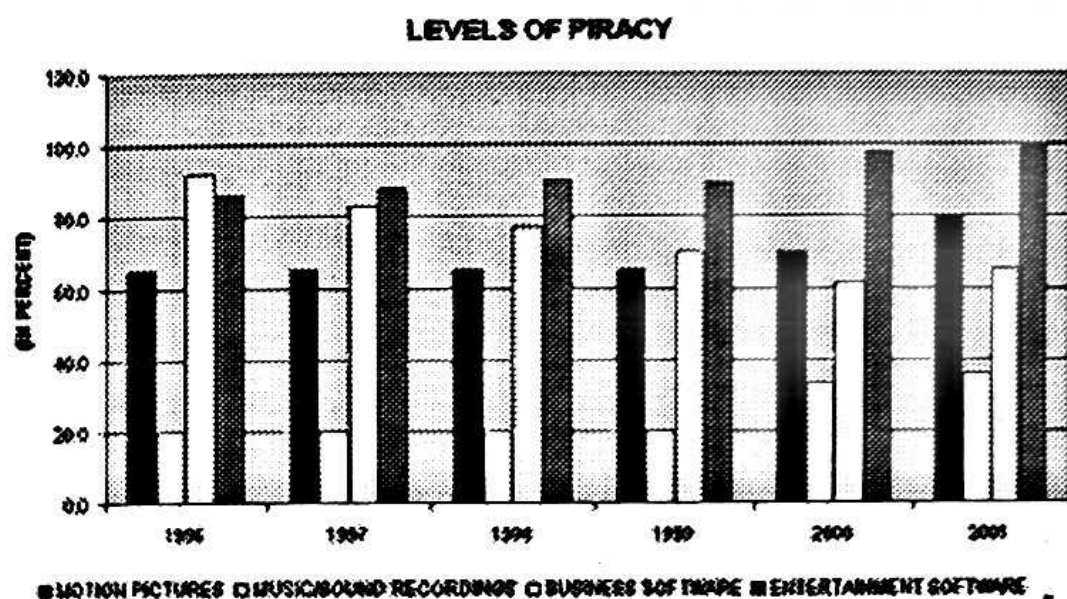
**Figure 1: Trade Losses Due to Piracy from
1996 to 2001 (in Millions of US Dollars)**

	1996	1997	1998	1999	2000	2001
Motion Pictures	22.0	18.0	18.0	18.0	25.0	28.0
Music/Sound Recordings	3.0	4.0	3.0	2.0	1.4	23.9
Business Software	58.7	36.0	25.4	26.7	21.8	24.2
Entertainment Software	26.0	21.3	24.7	23.8	41.0	---
Books	70.0	50.0	39.0	44.0	44.0	44.0
Total	177.7	129.3	110.1	114.5	133.2	120.1

³ *Id.*

⁴ *Id.*

Figure 2: Levels of Piracy in the Philippines from 1996 to 2001



According to the report, the main problem is the country's slow legislative process in implementing the Trade Related Aspects of Intellectual Property (TRIPS), a requirement for WTO members.⁵ The government is exerting efforts to improve IPR protection and be removed from the Special 301 Watch List since a failure to do so could cause a possible backlash from the United States, the country's biggest trading partner. This would affect about USD700 million worth of Philippine exports. Countries where IPR infringements are flagrant could be hit with trade sanctions.

One of the requirements under the TRIPS agreement was to order effective provisional measures to prevent infringement of intellectual property, and to preserve relevant evidence in regard to alleged infringement. Article 50 of the TRIPS Agreement stated that the judicial authorities have the power to adopt provisional measures *inaudita altera parte* where appropriate, where the delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

Pursuant to this requirement, the Supreme Court issued a Resolution on January 22, 2002 approving the rule on search and seizure in civil actions for infringement of intellectual property rights. The resolution provides for civil *ex parte* search capabilities in the Philippines, which would

⁵ Lee Chipongian, *Philippines Remains in US List of Top IPR Violators*, MANILA TIMES, May 7, 2002.

enable firms, particularly software companies, to take civil action against end-users of pirated materials. The Business Software Alliance, an international association, was said to have aggressively lobbied for the *ex parte* search capabilities.⁶

The Rule, which took effect on February 15, 2002, grants intellectual property rights holders the right to apply to the courts for provisional seizure and impounding of documents and articles in both pending and intended civil actions for the purpose of preventing infringement and preserving evidence of alleged infringement. The availment of the writ of search and seizure under the Rule does not prevent the applicant from resorting to other provisional measures or remedies provided in existing laws and procedural rules.⁷

Prior to the Rule, intellectual property rights holders were only able to apply for a search warrant under the Rules on Criminal Procedure in connection with a criminal action for infringement. If the intellectual property rights holder pursued a civil action, only the provisional remedy of an injunction was available to him. This enjoined the alleged infringing defendant from continuing his infringing acts but he remained in possession of his infringing materials. This is the first time in this jurisdiction that a search and seizure warrant is available for civil, not criminal cases.

II. THE RULE ON CIVIL SEARCH WARRANTS IN INFRINGEMENT CASES

A. COVERAGE OF THE RULE

The Rule on Civil Search Warrants in Infringement Cases provides for the provisional seizure and impounding of documents and articles in pending and intended civil actions for the purpose of preventing infringement and preserving relevant evidence in regard to alleged infringement under the Intellectual Property Code and article 50 of TRIPS.⁸ The latter states that the judicial authorities shall have the authority to order effective provisional measures to prevent infringement of intellectual property, and to preserve relevant evidence in regard to alleged infringement. They also have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where the delay is likely to

⁶ *Id.*

⁷ See www.asialaw.com/directories/ipprofiles2002/philippines/Default.

⁸ A.M. No. 02-1-06-SC, § 1 (2002).

cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.⁹

B. SALIENT FEATURES OF THE RULE

Under the Rule, an intellectual property rights holder or his duly authorized representative in a pending or intended civil action for infringement, may apply *ex parte* for the issuance of a writ of search and seizure where: (a) any delay is likely to cause irreparable harm to the intellectual property right holder; or (b) where there is demonstrable risk of evidence being destroyed in a pending civil action for infringement. The writ of search and seizure directs the alleged infringing defendant or expected adverse party to admit into his premises the persons named in the order to allow the search, inspection, copying, photographing, audio and audiovisual recording or seizure of any document and article specified in the order.¹⁰

The Rule specifically provides that the application for a writ of search and seizure shall be filed with any Regional Trial Court of the judicial region designated to try violations of intellectual property rights at the place where the alleged violation occurred or is to occur or the place to be searched, at the election of the applicant, provided, however, that where the complaint for infringement has already been filed, the application shall be made in the court where the case is pending.¹¹ The procedure is initiated by the applicant filing a verified application alleging the ground upon which it is based and the specific description and location of the documents and articles to be searched, inspected, copied or seized and their value. It shall also state the names of the applicant, his representative, witnesses and counsel who will attend the search in the event that the application is granted. The application shall be supported by affidavits of witnesses who personally know the facts and by authenticated and certified documents. The applicant shall also undertake in his application that he will not use any of the documents, articles, or information obtained by reason of the search and seizure for any purpose other than in the action in which the writ is issued.¹² The application shall be acted upon within twenty-four hours from its filing.

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights (Annex 1C, Marrakesh Agreement Establishing the World Trade Organization) (hereinafter "TRIPS"), art. 50, Apr. 15, 1994, available at http://www.wto.org/english/docs_e/legal_e/27-trips.doc.

¹⁰ A.M. No. 02-1-06-SC, § 2 (2002).

¹¹ § 3.

¹² § 4.

The judge must, before issuing the writ, examine in the form of searching questions and answers, in writing and under oath or affirmation, the applicant and the witnesses he may produce on facts personally known to them. The examination of the applicant and his witnesses shall be recorded.¹³

For a writ of search and seizure to issue, the applicant must present evidence to be personally evaluated by the judge that shows:

(a) the applicant is the right holder or his duly authorized representative;

(b) there is probable cause to believe that the applicant's right is being infringed or that such infringement is imminent and there is a *prima facie* case for final relief against the alleged infringing defendant or expected adverse party;

(c) damage, potential or actual, likely to be caused to the applicant is irreparable;

(d) there is demonstrable risk of evidence that the alleged infringing defendant or expected adverse party may destroy, hide or remove the documents or articles before any application *inter partes* can be made; and

(e) the documents and articles to be seized constitute evidence of the alleged infringing defendant's or expected adverse party's infringing activity or that they infringe upon the intellectual property right of the applicant or that they are used or intended to be used as means of infringing the applicant's intellectual property right.¹⁴ A writ of search and seizure shall be issued only upon a finding of probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized. Once a writ of search and seizure is issued, just as in ordinary search warrants, the applicant is required to post a cash bond, surety bond or other equivalent security executed in favor of the alleged infringing defendant or expected adverse party conditioned on the undertaking of the applicant to pay all costs and damages which the latter may sustain by reason of the issuance of the writ.¹⁵

¹³ § 5.

¹⁴ § 6.

¹⁵ § 9.

The manner of enforcing the writ of search and seizure is similar to that of ordinary search warrants. However, unlike ordinary search warrants, the court's sheriff and not a peace officer serves the writ of search and seizure. Furthermore, the court appoints an independent commissioner, who must be a member of the Philippine bar and of proven competence, integrity and probity, to supervise the enforcement thereof. The writ of search and seizure must be enforced within ten days from its issuance.

The rule also provides for the seizure of computer disks or storage devices either: (a) by physical taking; (b) by copying its contents in a suitable device or disk provided by the applicant; or (c) by printing out the contents of the disk or device. When the computer disks or storage devices cannot be readily removed from the computer to which they are fitted, the sheriff may take custody of the subject computer.

The alleged infringing defendant or expected adverse party may file a motion with the court for the discharge of the writ of search and seizure on the following grounds:

- (a) That the writ was improperly or irregularly issued, or excessively enforced;
- (b) That the bond is insufficient;
- (c) That the safeguards provided in the writ have been violated; or
- (d) That the documents and articles seized are not infringing copies or means for making the materials alleged to infringe the intellectual property right of the applicant.

The writ of search and seizure shall also, upon motion of the expected adverse party, be set aside and the seized documents and articles returned to the expected adverse party if no case is filed with the proper court within thirty-one calendar days from the date of its issuance.¹⁶ Where the writ is discharged on any of the grounds provided in the rule, or where it is found after trial that there has been no infringement or threat of infringement of an intellectual property right, the court, upon motion of the alleged infringing defendant and after due hearing, shall order the applicant to compensate the defendant or expected adverse party and after due

¹⁶ § 20.

hearing, shall order the defendant to compensate the defendant or expected adverse party upon the cash bond.¹⁷

After trial, aside from the court's power to order the destruction of seized documents and articles found to be infringing, the Rule allows the court to order their donation to charitable, educational or religious institutions, with the prohibition against bringing the same into channels of commerce. In the latter case, infringing trademarks or trade names found on labels, tags and other portions of the infringing materials shall be removed or defaced before the donation. It also provides that in no case shall the infringing materials be immediately returned to the defendant.¹⁸ Lastly, the Rule provides that a violation of any of the terms and conditions of the order and writ of search and seizure or any provision of the Rule shall constitute contempt of court.¹⁹

III. RIGHTS AFFECTED BY CIVIL SEARCH WARRANT

The use of a search and seizure warrant in a civil case is a novel one in this jurisdiction. Prior to this Rule, warrants were allowed only in criminal cases. A criminal case is imbued with public interest. A crime is an offense against the State, and the criminal case is between the State and an individual who is the accused. A civil case is a case between two private individuals, with private rights at stake. A civil search warrant affects civil liberties and rights, even if the case involves only private parties with private rights.

Aside from the difference in the nature of the case, there are differences in the procedures for availing the Search and Seizure Warrant. In a criminal case, only the complainant is allowed to apply for a Warrant.²⁰ Under the new Rule, an intellectual property rights holder or his duly authorized representative in a pending or intended civil action for infringement may apply for a warrant.²¹ Under the Revised Rules on Criminal Procedure, an application for a search warrant was allowed to be filed in any court within whose territorial jurisdiction the crime was committed or where the warrant was enforced.²² On the other hand, the new Rule specifically provides that the application for a writ of search and

¹⁷ § 21.

¹⁸ § 22.

¹⁹ § 25.

²⁰ RULES OF COURT, Rule 126, § 5.

²¹ A.M. No. 02-1-06-SC, § 2 (2002).

²² § 2.

seizure shall be filed with any Regional Trial Court of the judicial region designated to try violations of intellectual property rights at the place where the alleged violation occurred or is to occur, or the place to be searched.²³ The Revised Rules on Criminal Procedure does not provide a period within which an application for a search warrant must be acted upon; the new Rule provides that an application for a writ of search and seizure must be acted upon within twenty-four hours from its filing.²⁴

Certain rights are indubitably affected with the use of such warrants in civil cases. Most rights in point are found in article III, no less than the Bill of Rights of the 1987 Constitution. Section 1 states: "No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of laws." Since the Civil Search Warrant allows the search, inspection, copying, photographing, audio and audiovisual recording or seizure of any document and article specified in the order, the safeguards of procedural and substantive due process must be met, so that it would not amount to a "taking" without due process of law. A second right that may be affected is the right against unreasonable search. The purpose of this provision is to protect the privacy and sanctity of the person and of his house and other possessions against arbitrary intrusions by State officers.²⁵ It prohibits unreasonable searches and seizures.

Since a civil case for infringement need not be filed for the civil search warrant to issue, possible abuses may arise. Such warrant can be utilized as a tool of oppression and harassment of the alleged offending party without ever having to file a civil or criminal case against him. There is nothing that would stop a competitor, for example, from applying for a civil writ of search and seizure, using only a feigned intention to file a civil complaint for infringement, to vex and harass the competitor by effectively stopping his operations and seizing materials on the guise of imminent infringement.

²³ § 3.

²⁴ § 5.

²⁵ JOAQUIN BERNAS, *THE 1987 PHILIPPINE CONSTITUTION, A REVIEWER-PRIMER* 51 (1987).

IV. DISCUSSION ON THE CONSTITUTIONALITY OF THE RULE

A. THE SUPREME COURT'S RULE-MAKING POWERS UNDER ARTICLE VIII, SECTION 5(5) OF THE CONSTITUTION

The Constitution vests upon the Supreme Court the power to "promulgate rules concerning the protection of and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court."²⁶

Although the Supreme Court is authorized to promulgate rules concerning pleading, practice, and procedure in all courts, the provision also subjects the rule-making powers of the Supreme Court to the following limitations: (1) The rules must be uniform in all courts of the same grade; and (2) The rules shall not diminish, increase, or modify substantive rights.²⁷

It is submitted that the Rule approved and adopted by the Supreme Court pursuant to its rule-making powers in the Constitution is beyond its rule-making powers for it goes beyond the two limitations stated above. A.M. 02-1-06-SC provides for a procedure that is not uniform in all courts of the same grade and it diminishes, increases and modifies substantive rights.

Section 3 of A.M. 02-1-06-SC states:

Where application filed. - The application shall be filed with any of the Regional Trial Courts of the judicial region designated to try violations of intellectual property rights stationed at the place where the alleged violation occurred or is to occur, or the place to be searched, at the election of the applicant. Provided, however, that where the complaint for infringement has already been filed, the application shall be made in the court where the case is pending.²⁸

²⁶ CONST. art. VIII, § 5(5).

²⁷ ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 279 (1998).

²⁸ A.M. 02-1-06 SC, § 3 (2002).

This provision clearly illustrates that the Rule does not apply uniformly for all courts of the same grade because only the Regional Trial Courts "designated to try violations of intellectual property rights" are authorized to hear and rule upon the application and issue the writ. It does not apply uniformly to all Regional Trial Courts.

The concept of "substantive rights" is not uncommon in the Philippines. It is, however, often confused with the concept of "procedural rights." The distinction between these two terms is explained in the case of *Bustos v. Lucero*.²⁹

Substantive law creates substantive rights and the two terms in this respect may be said to be synonymous. Substantive rights is a term which includes those rights which one enjoys under the legal system prior to the disturbance of normal relations. (60 C.J., 980.) Substantive law is that part of the law which creates, defines and regulates rights, or which regulates the rights and duties which give rise to a cause of action; that part of the law which courts are established to administer, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtains redress for their invasion.³⁰

Oftentimes, however, the distinction between substantive and procedural rights is subtle. The test to distinguish the two concepts is laid down in *Fabian v. Desierto*:

The test is whether the rule really regulates procedure, that is the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for a disregard or infraction of them. If the rule takes away a vested right, it is not procedural. If the rule creates a right such as the right to appeal, it may be classified as a substantive matter, but if it operates as a means of implementing an existing right then the rule then the rule deals merely with procedure.³¹

According to this test, a rule may affect a substantive right if it alters or takes away a vested right. A.M. No. 02-1-06-SC allows the "provisional seizure and impounding of documents and articles in pending and intended civil actions"³². Undoubtedly, in applying the abovementioned test, the said

²⁹ No. 2068, 81 Phil. 640, Oct. 20, 1948.

³⁰ JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 970 (2003), citing *Bustos vs Lucero*, 81 Phil. 640 (1948).

³¹ G.R. No. 129742, 295 SCRA 470, September 16, 1998.

³² A.M. No. 02-1-06-SC, § 1 (2002).

rule impacts upon the right of the adverse party to his property which is a substantive right. A.M. 02-1-06-SC also diminishes the substantive Constitutional right of the person subjected to the civil search and seizure to due process and equal protection of the laws³³. These substantive rights are potentially diminished because this rule allows searches and seizures to be used in a civil, not a criminal case. The only civil case it is allowed to be utilized for is a civil action for infringement. Other civil cases do not offer this right to avail of a search and seizure.

In a criminal case, the substantive rights of the people enshrined in the Constitution are allowed to be set aside on the basis of the police power of a state. Criminal cases are, after all, cases between the State and the accused for a violation of its penal laws. In civil cases, however, only private parties are involved, litigating private rights. Police power cannot therefore be used as a justification to impair Constitutional rights, and these rights certainly cannot be impaired by a rule issued by the Supreme Court in excess of their rule-making powers.

A.M. 02-1-06-SC also establishes a new substantive right for the applicant of the writ, that is, a right to apply for and search the premises of alleged violators and seize alleged infringing materials in a pending or intended civil case for infringement. It is a right that was unavailable to anyone in this country prior to this rule. The rule does not merely provide for a procedure or mechanism to implement this right, it creates a new right.

B. DEFINING, PRESCRIBING, AND APPORTIONING JURISDICTION UNDER ARTICLE VIII, SECTION 2 OF THE CONSTITUTION

In addition to its power to create judicially demandable rights, Congress also creates courts and determines which court or courts shall have jurisdiction over various types of controversies.³⁴ Article VIII, section 2 of the Constitution states: "Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts but may not deprive the Supreme Court of its jurisdiction over cases enumerated in section 5 hereof."

Jurisdiction is defined as "the authority by which courts take cognizance of and decide cases, the legal right by which judges exercise their

³³ CONST. art. III, § 1.

³⁴ BERNAS, COMMENTARY, *supra* note 30, at 837.

authority."³⁵ Since Congress has the power to define, prescribe, and apportion the jurisdiction of various courts, section 3 of A.M. No. 02-1-06-SC, which is made by the Supreme Court is unconstitutional. This provision states:

Where application filed. – The application shall be filed with any of the Regional Trial Courts of the judicial region designated to try violations of intellectual property rights stationed at the place where the alleged violation occurred or is to occur, or the place to be searched, at the election of the applicant. Provided, however, that where the complaint for infringement has already been filed, the application shall be made in the court where the case is pending.³⁶

Under the Rules on Criminal Procedure, an application for a search warrant is allowed to be filed in any court within which the territorial jurisdiction the crime was committed or where the warrant was enforced.³⁷ It does not distinguish a special or specific court of the same grade.

The new Rule unduly expands the jurisdiction of the Regional Trial Courts in violation of the Constitution which vests such power exclusively upon Congress.

Jurisdiction is a matter of substantive law to be determined by Congress. The power to prescribe the jurisdiction of various courts belongs to the legislature.³⁸ Section 3 of the provision defines, prescribes, and apportions the jurisdiction to issue civil search warrants to the Regional Trial Courts specifically designated to try violations of intellectual property rights. In effect, the Supreme Court is apportioning the jurisdiction of the courts where the civil search and seizure warrants may be applied, which is proscribed by the mentioned Constitutional provision.

The fact that the civil search warrant may be availed for both pending and intended civil actions would increase the jurisdiction of the mentioned Regional Trial Courts designated to try violations of Intellectual Property Rights. Section 3 is unconstitutional because the Supreme Court is, in effect, defining, prescribing, and apportioning the jurisdiction of the Regional Trial Courts, an act which the Constitution states as solely and mandatorily within the power of Congress.

³⁵ CRUZ, *supra* note 27, at 233.

³⁶ A.M. 02-1-06-SC, § 3 (2002).

³⁷ § 2.

³⁸ *Manitrust Systems, Inc. v. Court of Appeals*, G.R. 86540, 179 SCRA 136, 144 Nov. 6, 1989.

**B. DUE PROCESS AND EQUAL PROTECTION UNDER ARTICLE III,
SECTION 1 OF THE CONSTITUTION**

The Constitution states that no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.³⁹ Due process should be considered because the issuance of a civil writ of search and seizure would deprive the person subjected to the search and seizure of his property:

Due process of law is explained by the Supreme Court in the case of *Lopez v. Director of Lands*:

"By due process of law", as Mr. Daniel Webster said in his arguments before the Supreme Court of the United States in the famous Dartmouth College case, "is more clearly intended the general law, a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of general rules which govern society."⁴⁰

As such, the Constitution proscribes the exercise of arbitrary power even when the power is exercised according to proper forms and procedure.⁴¹ Due process has both a procedural and substantive aspect. As a procedural requirement, it relates chiefly to the mode of procedure which government agencies must follow in the enforcement and application of laws. As a substantive requirement, it is a prohibition of arbitrary laws; because, if all that the due process clause required were proper procedure, then the life, liberty, or property could be destroyed arbitrarily provided proper formalities were observed.⁴²

A.M. 02-1-06-SC which provides for the rule on civil search warrants provides certain safeguards and measures for both procedural and substantive due process. The Rule states that the applicant shall apply for the writ by filing a verified application alleging the ground upon which it is based and the specific description and location of the documents and articles to be searched, inspected, copied or seized and their value. It shall also state the names of the applicant, his representative, witnesses and

³⁹ CONST. art. III, § 1.

⁴⁰ BERNAS, COMMENTARY, *supra* note 30, at 106, *citing* *Lopez vs Director of Lands*, No. 22656, 47 Phil. 23, Dec. 16, 1924.

⁴¹ BERNAS, COMMENTARY, *supra* note 30, at 106.

⁴² II JOAQUIN BERNAS, CONSTITUTIONAL RIGHTS AND SOCIAL DEMANDS: NOTES AND CASES 3-4 (1996).

counsel who will attend the search in the event that the application is granted. The application shall be supported by affidavits of witnesses who personally know the facts and by authenticated and certified documents.⁴³ The judge must also personally examine in the form of searching questions and answers, in writing and under oath or affirmation, the applicant and the witnesses he may produce on facts personally known to them. The examination of the applicant and his witnesses shall be recorded.⁴⁴ If the judge is satisfied with the proof of facts upon which the application is based, he shall issue the writ requiring the search, inspection or copying of the subject documents or articles or commanding the sheriff to take them into his custody subject to the control of the court.⁴⁵ The applicant is also required to post a cash bond in favor of the defendant or expected adverse party for any damage sustained by the writ.

A.M. 02-1-06-SC also provides that the premises of the alleged infringing defendant or expected adverse party may not be searched except in his presence or his representative or the person in charge or in control of the premises or residing or working therein who shall be given the opportunity to read the writ before its enforcement and seek its interpretation from the Commissioner.⁴⁶

On the other hand, the new Rule allows the intellectual property rights holder or his duly authorized representative to apply *ex parte* for the issuance of a writ and seizure.⁴⁷ It does not require the intellectual property rights holder or his duly authorized representative to give notice to the alleged infringing defendant or expected adverse party of the application for a writ of seizure.⁴⁸ The alleged defendant is given no chance to present his evidence or proof to rebut the allegation of the applicant.

Moreover, the intellectual property rights holder or his duly authorized representative may apply for a writ of search and seizure not only in cases where there is already a pending civil action for infringement but also allows the issuance of the writ when he intends to commence such an action. It fails to require that the holder or his duly authorized representative will be able to institute and maintain a *prima facie* case for copyright

⁴³ A.M. 02-1-06 SC, § 4 (2002).

⁴⁴ § 5.

⁴⁵ § 7.

⁴⁶ § 13.

⁴⁷ § 2.

⁴⁸ David Kessler, *Illusion of Privacy: the Use and Abuse of Ex Parte Impoundment in Computer Software Cases*, 7 ALB. L.J. SCI. & TECH. 269 (1997).

infringement against the defendant. Thus, it is highly likely that the issuance of the writ in the latter case would be a mere fishing expedition of evidence against the adverse party. When the holder has no evidence against the defendant for copyright infringement, he may simply invoke that he intends to commence such an action in order to gather evidence to prove his case.

Another problem is the failure to provide a uniform standard among the trial courts for granting an *ex parte* writ of search and seizure. The Rule only states the grounds, which the intellectual property rights holder must satisfy for the issuance of such writ. A dearth of sufficient and clear guidelines would lead to abuse and discrepancies in the procedure of issuance of the writ.

Having mentioned the considerations for and against deprivation of property without due process of law, there remains the issue of equal protection of the law. It can be argued that A.M. 02-1-06-SC violates the provision on equal protection of the laws because a civil search and seizure warrant is not available in all civil cases. Other civil cases such as legal separation, recovery of a sum of money, and annulment do not contain this relief of a civil search and seizure warrant as it is available only in civil cases of infringement.

The equal protection clause is a specific constitutional guarantee of the equality of the person. The equality it guarantees is "legal equality or, as it is put, the equality of all persons before the law. Under it, each individual is dealt with as an equal person in the law, which does not treat the person differently because of what he is or what he possesses. The goddess of justice is portrayed with a blindfold, not because she must be hindered in seeing where the right lies, but that she may not discriminate against suitors before her, dispensing instead an even handed justice to all."⁴⁹

The case of *Ichong vs. Hernandez*⁵⁰ discussed the equal protection clause:

The equal protection of the law clause is against undue favor and individual or class privilege, as well as hostile discrimination or the oppression of inequality. It is not intended to prohibit legislation, which is limited either in the object to which it is directed or by territory within which it is to operate. It does not demand absolute equality among residents; it merely requires that all persons shall be

⁴⁹ II BERNAS, NOTES AND CASES, *supra* note 42, at 58.

⁵⁰ No. 7995, 101 Phil 1155, May 31, 1957.

treated alike, under like circumstances and conditions both as to privileges conferred and liabilities to be enforced. The equal protection clause is not infringed by legislation which applies alike to all persons within such class, and reasonable grounds exist for making a distinction between those who fall within such class and those who do not. (2 Cooley, Constitutional Limitations, 824-825.)⁵¹

The Rule on Civil Search Warrants does not apply to all existing or prospective plaintiffs in all civil cases. It only applies to existing and prospective plaintiffs in civil cases for infringement. It seemingly provides a preference for the plaintiffs solely in civil infringement cases, to the exclusion of plaintiffs or prospective plaintiffs in other civil cases.

The equal protection clause guards against unwarranted partiality or prejudice. To be a valid classification, it should provide for similar treatment to those similarly situated. Although infringement and intellectual rights violations are rampant in this country, it is uncertain whether the partiality given to the party in a civil case for infringement is justified or warranted, especially since the relief of a search and seizure can be availed of by simply filing a criminal case for infringement.

C. THE RIGHT AGAINST UNREASONABLE SEARCH UNDER ARTICLE III, SECTION 2 OF THE CONSTITUTION

The Constitution recognizes the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant and warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized."⁵²

This provision emphasizes the individual's right to privacy. It protects the privacy and sanctity of the person himself. Thus, with this lofty goal in mind, the general rule is that searches and seizures are unreasonable unless authorized by a validly issued search warrant or warrant of arrest.⁵³

⁵¹ *Id.* at 1164

⁵² CONST. art. III, § 2.

⁵³ BERNAS, COMMENTARY, *supra* note 30, at 148.

The purpose of the provision is to safeguard against wanton and unreasonable invasion of the privacy and liberty of a citizen as to his person, papers and effects.⁵⁴ The rationale behind the provision is explained by the Court in *Villanueva v. Querubin*:

It is deference to one's personality that lies at the core of this right, but it could be also looked upon as a recognition of a constitutionally protected area, primarily one's home, but not necessarily thereto confined. What is sought to be guarded is a man's prerogative to choose who is allowed entry to his residence. In what haven of refuge, his individuality can assert itself not only in the choice of who shall be welcome but likewise in the kind of objects he wants around him.⁵⁵

Since the right of the individual against unreasonable search and seizure is basic and fundamental, a statute, rule or situation, which allows exceptions to the requirement of a warrant of arrest or search warrant, must be strictly construed. The Courts cannot liberally consider arrests or seizures without warrant or extend their application beyond the cases specifically provided or allowed by law. To tolerate warrantless searches and seizures beyond the cases specifically provided by law would infringe upon the personal liberty of the individual, which the Constitution strictly protects.

Although it may be argued that the Constitution, as it is worded, does not specifically provide that warrants of search and seizure are peculiar only to criminal cases, it is doubtful that the intention of the framers of the Constitution was to allow the same to be used in civil cases, much less solely to a particular kind of civil case. Search and seizure has been, more often than not applied, to criminal cases.

A search warrant is an order in writing issued in the name of the People of the Philippines, signed by a judge and directed to a peace officer, commanding him to search for personal property described therein and bring it before the court.⁵⁶

As it is issued in the name of the People of the Philippines, a search warrant must perforce pertain to a criminal action wherein the State, in the name of the People of the Philippines prosecutes a violation of its penal

⁵⁴ *People v. Burgos*, G.R. 68955, 144 SCRA 1, Sep. 4, 1986.

⁵⁵ *Id.*, citing *Villanueva v. Querubin*, G.R. 26134, 48 SCRA 345, Sep. 23, 1968.

⁵⁶ RULES OF COURT, Rule 126, § 1.

laws. According to the case of *Washington Distillers, Inc. vs. Court of Appeals*, it is a "special criminal process"⁵⁷.

Moreover, the Rules of Court state that a search warrant shall be issued upon probable cause in connection with one specific offense.⁵⁸ A.M. No. 02-1-06-SC, however, governs pending and intended civil actions for the purpose of preventing infringement and preserving relevant evidence.⁵⁹ This being the case, a search warrant could not be properly issued since it does not relate to a specific offense. An offense is any violation of law for which a penalty is prescribed.⁶⁰ Any statute, rule, or situation, which allows exceptions to the constitutional and statutory requirements of warrants must be strictly construed.⁶¹ Hence, it could not be applied beyond the cases specifically provided or allowed by law.⁶²

A.M. 02-1-06-SC provides that the judge shall personally determine the existence of probable cause under oath or affirmation of the complainant and the witnesses he may produce.⁶³ A writ of search and seizure cannot be issued except upon *probable cause* to believe that the applicant's right is imminent and there is a *prima facie* case for final relief against the alleged infringing defendant or expected adverse party.⁶⁴

The existence of probable cause contemplates the presence of a crime or offense. Thus, in case of *Savage v. Tappin*,⁶⁵ the Supreme Court denied the issuance of the writ of search and seizure to the applicant in the civil case he filed against the petitioners and held that:

In the issuance of search warrants, the Rules of Court requires a finding of probable cause in connection with one specific offense to be determined personally by the judge after examination of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the things to be seized. Hence, since there is no crime to speak of, the search warrant does

⁵⁷ *Washington Distillers, Inc. v. Court of Appeals*, G.R. 118151, 260 SCRA 821, Aug. 22, 1996.

⁵⁸ RULES OF COURT, Rule 126, § 2.

⁵⁹ A.M. 02-1-06 SC, § 1 (2002).

⁶⁰ BARRON'S LAW DICTIONARY 323 (2nd ed. 1984).

⁶¹ *People v. Burgos*, G.R. 68955, 144 SCRA 1, Sep. 4, 1986.

⁶² *People v. Argawanon*, G.R. 89543, 215 SCRA 652, Nov. 13, 1992; *People v. Solangga*, G.R. 100910, 234 SCRA 407, Jul. 25, 1994.

⁶³ A.M. 02-1-06 SC, § 4-5 (2002).

⁶⁴ § 6.

⁶⁵ G. R. No. 134217, 331 SCRA 697, May 11, 2000.

not even begin to fulfill these stringent requirements and is therefore defective on its face. The nullity of the warrant renders moot and academic the other issues raised in petitioners' Motion to Quash and Motion for Reconsideration. Since the assailed search warrant is null and void, all property seized by virtue thereof shall be returned to petitioners in accordance with established jurisprudence.⁶⁶

The Supreme Court upheld the said ruling in the recent case of *Solid Triangle Sales Corp. v. Sheriff*:

Probable cause is defined as the existence of such facts and circumstances which could lead a reasonably discreet and prudent man to believe that an offense has been committed and that the item(s), article(s), or object(s) sought in connection with said offense (emphasis supplied) or subject to seizure and destruction by law is in the place to be searched xxx.

In *Kenneth Roy Savage/ K Angelin Export Trading v. Taysin*, the Court was confronted with a search warrant that was issued purportedly in connection with unfair competition involving design patents. The Court held that the alleged crime is not punishable under Article 189 of the Revised Penal Code, and accordingly, quashed the search warrant issued for the non-existent crime.⁶⁷

Furthermore, although section 216.2 of the Intellectual Property Code provides that "in an infringement action, the court shall also have the power to order the seizure and impounding of any article which may serve as evidence in the court proceedings," however, such action is not criminal in nature. Thus, a writ based on an action not criminal in nature is constitutionally infirm as a writ of search and seizure is based on probable cause.

V. CONCLUSION

A.M. 02-1-06-SC was promulgated in excess of the Supreme Court's rule-making powers. The Supreme Court based its authority to issue such a rule pursuant to article 50 of the TRIPS Agreement. This states that the judicial authorities party to the agreement shall have the authority to order effective provisional measures to prevent infringement of intellectual property, to preserve relevant evidence in regard to alleged infringement, and adopt provisional measures *inaudita altera parte* where appropriate, in particular where the delay is likely to cause irreparable harm to the right

⁶⁶ *Id.* at 705-06

⁶⁷ G.R. No. 14439, 370 SCRA 491, 503, Nov. 23, 2001.

holder, or where there is a demonstrable risk of evidence being destroyed.⁶⁸ However, TRIPS cannot be controlling or considered superior to the Constitution, which is the supreme law of the land.

The discussion above illustrates the various ways in which the Rule issued by the Supreme Court offends the Constitution. The most important being the fact that it was issued in excess of the Supreme Court's rule-making powers. This nullifies the entire rule.

A.M. 02-1-06-SC prescribes and apportions jurisdiction to the Regional Trial Courts designated to try intellectual property rights violations, an act which the Constitution solely vests in the Legislature. It can also be argued that the Rule goes against the due process and equal protection clauses of the Constitution. The notion of a search warrant being issued in civil cases offends the notion that a search warrant is supposed to be issued in a criminal case, where the public good is at stake.

The lofty goal of the Rule is not questioned. It aims to provide a solution to the prevalent problem of intellectual property rights violations in this country and prevent the escalating problem all over the world. It is the validity and Constitutionality of the Rule that is suspect.

VI. RECOMMENDED LEGISLATIVE ACTION

Since the Supreme Court interprets the law and Constitution, they would not likely strike down as unconstitutional a Rule unanimously approved by them. It is Congress that can do so. Congress has plenary legislative power.⁶⁹ Congress is therefore empowered to repeal, alter, or supplement rules issued by the Supreme Court, especially in this case where a certain rule was issued in excess of their powers. Since A.M. 02-1-06-SC contains no separability clause, the entire rule must be struck down as having been issued in excess of their rule-making powers and for being repugnant to the aforementioned Constitutional provisions.

As mentioned in the Introduction, intellectual property rights violations pose a serious problem to the country. The mechanisms in place tasked with the prevention of such violations seem to be inadequate and ineffective. New legislation is needed to address this prevalent problem and eradicate it altogether. A.M. 02-1-06-SC, though noble in purpose, falls short

⁶⁸ TRIPS, art. 50.

⁶⁹ BERNAS, PRIMER, *supra* note 25, at 213.

of the standards set by the Constitution. It is tainted with provisions that offend the Constitution, as discussed above.

Congress should enact new legislation that would effectively deter the problem. This new legislation need not involve the issuance of a civil search and seizure warrant because it is plagued with provisions of doubtful Constitutionality. Moreover, the existing laws and the Rules of Court already provide for a warrant for search and seizure in criminal cases. The issuance of such for a civil case is neither necessary nor desirable since there is another remedy available in the law that is more in consonance with the Constitution and the laws.

It is therefore recommended that Congress pass a law that would repeal A.M. 02-1-06-SC because it was approved in excess of the Supreme Court's rule-making powers. It is also recommended that Congress pass laws that would actively deter the problem of piracy and intellectual rights violations without infringing on rights set forth in the Constitution.

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