

Concerning costs, the procedures differ radically. The Saisie is notably cheap, while discovery is notoriously expensive. Further, while any direct involvement in U.S. litigation usually comes at a high price for all parties, only the losing party in French litigation pays significantly. Of course, in any loser-pay-all system, the incentive to file suit is reduced.

#### D. Duration

Typically, a Saisie is performed only once and takes no more than a day.<sup>294</sup> Accordingly, the order authorizes the bailiff and his team to enter and inspect the defendant's premises on a single occasion specified in the order.<sup>295</sup> Nevertheless, when a bailiff left due to opposition and disrespect from a defendant and returned three days later to continue the Saisie, the court deemed this as a mere extension of the previous Saisie rather than as a new procedure mandating a separate order.<sup>296</sup> Although courts may order multiple Saisies if the plaintiff *needs* these to gather proof, they are reluctant to order several, because then the Saisie tends to lose its evidence-procuring objective and, instead, punishes or exposes the defendant.<sup>297</sup> This constitutes an abuse of Saisie entitling the defendant to damages.<sup>298</sup>

Theoretically, therefore, the entire evidence-gathering procedure – from filing the Saisie request, to conducting the search, to filing suit – can be finished within a few days. Due to the short time frame between performing the Saisie and having to file suit, the parties have little room to delay the proceedings.<sup>299</sup>

Discovery under the Federal Rules, on the other hand, takes several months or even years.<sup>300</sup> In contrast to the Saisie, where narrowness and judicial oversight leave litigants little opportunity to postpone litigation, discovery litigants are much more able to speed up or slow down the evidence-gathering process. The parties' ability to direct the timing and initiation of Rule 34 discovery is subject to the interplay of Rules 16 and 26.<sup>301</sup> Thereafter, the parties largely control the timing of documentary and inspection requests as well as other forms of discovery.<sup>302</sup> United States judges expect proactiveness and cooperation from litigants.<sup>303</sup> Parties should actively and jointly pursue discovery without requesting judicial assistance.<sup>304</sup> Consequently, courts have

294 YVES MARCELLIN, *LA SAISIE-CONTREFACON*, 178 – 179 (3d ed. Cedat 2001); Véron I, *supra* note 157, at 139.

295 MARCELLIN, *supra* note 294, at 179.

296 Paris, 4<sup>e</sup> ch., sect. B, 14 mars 1991, *RD propr. ind.*, n° 35 – 36, 1991.

297 See MARCELLIN, *supra* note 294, at 213 – 214.

298 *Id.*

299 Art. R 615-1 CPI (allowing circa one month).

300 E.g. Véron I, *supra* note 157, at 139.

301 See FED. R. CIV. P. 26 & 16.

302 Valerie Davies & Thomas N. Pieper, *English Disclosure and U.S. Discovery*, in *TRANSATLANTIC COMMERCIAL LITIGATION AND ARBITRATION*, *supra* note 13, at 233, 236. However, the court has wide discretion under Rule 16 to manage and schedule discovery and to restrict the frequency and extent of discovery due to burdensomeness, convenience and cost under Rule 26.

303 *Id.*

304 *Id.*

little sympathy for parties who chose to “sit on their hands.”<sup>305</sup> Depending on the issues’ complexity, courts, generally, permit between three and twenty-four months for discovery.<sup>306</sup>

Accordingly, in terms of timing, the Saisie better accommodates patent litigants, as well as the industries and consumers making use of patented inventions. This is because quick resolutions of infringement issues restores certainty in the market and thereby increases transactions (such as licensing) involving the patent as well as further improvements of the invention it incorporates. This procedural aspect also makes litigation and the enforcement of patents less burdensome to the rightholder and thereby strengthens his right to the full extent permitted by the substantive law.

### E. Extraterritorial Application

Besides Belgium, no other country knows the Saisie as it exists in France.<sup>307</sup> While the Saisie is unique to those two jurisdictions, the United States and Japan remain the only countries litigating significant numbers of patent cases that entirely lack a comparable measure for securing evidence.<sup>308</sup> This absence of such a pre-summons, *ex parte* measure means that infringers can systematically destroy proof of infringement as long as no lawsuit exists, and rightholders may not legally access premises hosting infringing operations to secure such evidence before filing suit.

The laws of Italy and Spain, which generally share significant commonalities with the French legal system, know measures similar to the Saisie.<sup>309</sup> Even the United Kingdom, as well as many of its former colonies following a substantially-similar common law system,<sup>310</sup> permit *ex parte* civil searches for purposes of securing infringement evidence before service of process.<sup>311</sup> The orders permitting such searches, known as *Anton Piller* orders, direct the respondent, who as in the Saisie is often the defendant later, to permit certain people to enter his premises for inspecting, copying, searching and potentially removing certain enumerated items.<sup>312</sup> However, the British practice differs from the Saisie in that it requires more proof by the rightholder before granting

305 *Id.*

306 *Id.* Such a timeframe would be noted in the scheduling order. See FED. R. CIV. P. 16 (b)(1).

307 BIZOLLON ET AL., *supra* note 157, at 3.

308 Interview with Judge Takami Shintaro, Associate Justice, Osaka District Court, Japan, in Munich, Germany (Aug. 26, 2008). All European Member States *had to* adopt such measures under Article 7 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights. Council Directive 2004/48/EC, 2004 O.J. (L 157) 32 (EC) (Enforcement Directive).

309 Bertoni et al., *Forum Shopping Prospers Despite Enforcement Directive*, 69 – 70, Managing IP (July/August 2008).

310 See Daniel S. Drapeau, *Anton Piller Orders: The Latest Word from the Supreme Court, the Federal Court of Appeal and the Federal Court*, 20 INTELL. PROP. J. 39 (2006) (explaining the history of Anton Piller Orders in the U.K. and their adoption by the Canadian judiciary).

311 British Civil Procedure Rules (CPR) 1997, §7. Before being codified, this practice was authorized by case law under *Anton Piller KG v. Manufacturing Processes*, [1976] Ch 55 and its progeny.

312 CPR 1997, §7; Bertoni, *supra* note 309, at 70.