trade secret protection, while the judge or bailiff makes this determination under the French process. Even if the controversy reaches the courts, trade secrets in U.S. litigation have a better chance of being protected *ex ante*. There, the judge balances the interest in disclosing the trade secret in order to avail the plaintiff of infringement-related evidence against guarding the trade secret and thereby potentially denying access to infringement proof. Only after this balancing analysis does the court permit or deny trade secret divulgation.

French courts, on the other hand, always permit divulgation of trade secrets if this also reveals patent infringement proof. French courts merely make an *ex ante* inquiry. That is, they consider a trade secret proprietor's loss in having his secrets divulged *after* divulgation already occurred and, then, may award damages if the seized party establishes that the disclosure actually caused him a financial loss.

Under the Federal Rules, discovery's pre-production consideration of trade secrets better accommodates the vital need to preserve the secrecy of certain information not sufficiently connected to the infringement to merit production. Discovery's sensitivity to trade secrets also deters abuse by ensuring that pre-trial fact-gathering does not become an excursion to spy on competitors. In addition, preliminary evaluations of what trade secrets deserve protection eliminate the need for more costly post-disclosure judicial review and damage assessment.

C. *Costs*

While the complexity of a case ultimately controls its price tag, the Saisie constitutes a relatively inexpensive procedure.[285] The bailiff fees are low because he is employed by the state.[286] Also attorney, patent agent and expert fees are low, because the procedure takes only hours or days.[287] In France, the losing party generally pays the cost of litigation, including attorney's fees.[288] However, the lump sums awarded by the courts usually do not actually cover the expenses incurred.[289]

Generally, under the Federal Rules, each party must bear its own financial cost of complying with discovery.[290] However, courts have the discretion to shift such expenses to the requesting party if the cost allocation would unduly burden the producing party.[291] Increased demand for extensive electronic discovery has skyrocketed discovery expenses.[292] This phenomenon has prompted courts to balance interests and permit cost-shifting in appropriate cases.[293]

285 Paule Drouault-Gardrat, Enforcing Patent in France, ¶ 14, website, Bird & Bird Articles Archive (Aug. 22, 2005), http://www.solutionslab.com/english/publications/books/index.cfm.
286 Philippe Mueller, *supra* note 150, at 32.
287 Véron I, *supra* note 157, at 139.
288 Paule Drouault-Gardrat, *supra* note 285, at ¶ 14.
289 *Id*.
290 Indeed, pursuant to the "American Rule" each party foots its own litigation bill.
291 *See* FED. R. CIV. P. 26(b)(5). Economic theory also supports costs-shifting, because it deters excessive discovery and other abusive discovery practices, such as threatening discovery for its nuisance value, by obliging the requesting party to internalize the cost of discovery. ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 229 – 30 (Foundation Press 2003).
292 *See e.g.* 7 MOORE ET AL., *supra* note 89, at §34.12[3][b], [e].
293 *E.g.* OpenTV v. Liberate Techs., 219 F.R.D. 474, 477 (N.D. Cal. 2003); Zubulake v. USB Warburg LLC, 216 F.R.D. 280, 284 (S.D.N.Y. 2003).

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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.[294] 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.[295] 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.[296] 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.[297] This constitutes an abuse of Saisie entitling the defendant to damages.[298]

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.[299]

Discovery under the Federal Rules, on the other hand, takes several months or even years.[300] 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.[301] Thereafter, the parties largely control the timing of documentary and inspection requests as well as other forms of discovery.[302] United States judges expect proactiveness and cooperation from litigants.[303] Parties should actively and jointly pursue discovery without requesting judicial assistance.[304] 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, 4e ch., sect. B, 14 mars 1991, *RD propr. ind.*, nº 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*.

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