

pounds on his door in order to perform the inspection.<sup>179</sup> Although the seized party may appeal the decision to grant a Saisie, such an appeal lacks suspensive effect.<sup>180</sup> Thus, the seized party has virtually no means to legally prevent the Saisie.<sup>181</sup> While being granted a Saisie is markedly simple for the rightholder, drafting an effective request, which hopefully will become the basis for an order, may prove more challenging.<sup>182</sup> This is so because the Saisie, in contrast to discovery, does not require the parties to cooperate. Put differently, the defendant need not actively support his adversaries' search for evidence.<sup>183</sup> Thus, while the Saisie order grants access to inspect and search the defendant's premises, within the limits set out in the order, such admittance does not make relevant evidence magically appear. Instead, the right-holder must know where to search for evidence of possible infringement and specify so in the request. This task is not simple. After all, the parties are probably competitors and, thus, are unlikely to visit each other regularly so as to have some familiarity with the other's premises and operations.<sup>184</sup>

### B. During the Saisie: Carrying out the Order

In theory, the bailiff (*huissier de justice*) is the only person essential to execute a Saisie.<sup>185</sup> He performs the inspection by way of documenting information and gathering items while others, if present, merely assist.<sup>186</sup> Although the rightholder may choose the bailiff,<sup>187</sup> the bailiff is a public official who acts on behalf of the court. The United States' legal system does not engage a comparable judicial officer. While the bailiff is absolutely essential to performing a Saisie, he has little discretion regarding evidence.<sup>188</sup> This is because the order spells out precisely what he must do.<sup>189</sup> If his actions exceed what the order permits, the Saisie is susceptible to annulment later on.<sup>190</sup>

In practice, a team of technical experts, police and others depending on the demands of the case, accompany the bailiff.<sup>191</sup> Those persons often prove especially vital to the Saisie's success, because the seized party has little obligation to assist the bailiff in locating evidence and the bailiff tends to be unfamiliar with the specific infringement at hand. The rightholder also has a right to select the experts, although he may not

179 Véron I, *supra* note 157, at 136.

180 Cohen & Kohler, *supra* note 159.

181 *Id.*

182 *Id.* ("The real trouble for the patentee might start once the saisie-contrefaçon is granted and [...] the search for evidence is launched at the place of the defendant.")

183 *Id.*

184 *See id.*

185 *See* Art. L 615-5 CPI.

186 *See* Véron I, *supra* note 157, at 137.

187 Art. L 615-5 CPI; BIZOLLO ET AL., *supra* note 157, at 35 – 36 (stating that the plaintiff must not mention the bailiff by name, but can refer to any bailiff authorized to practice in the court's jurisdiction.)

188 BIZOLLO ET AL., *supra* note 157, at 43.

189 *Id.*

190 *See id.*

191 *Id.* at 36 – 37.

simply pick his own employees.<sup>192</sup> Nevertheless, a righholder's patent attorney was held neutral and permitted to advise a Saisie.<sup>193</sup> The experts are, typically, skilled in the domain of the patent and, thus, can efficiently locate evidence of infringement.<sup>194</sup> A police officer, and in some cases<sup>195</sup> an entire police squad, may assist the bailiff in gaining access and preventing an opposition by the seized party.<sup>196</sup> More generally, any person having useful technical skills may assist in the Saisie.<sup>197</sup> Thus, sometimes photographers, accountants and computer experts accompany the bailiff.<sup>198</sup>

While the legislative texts on the Saisie do not expressly forbid the seizing party's participation during the Saisie, most orders now mandate that the seizing party or his employees may not be present. This exclusion of the plaintiff and others closely linked to him roots itself in the French Supreme Court's (*La Cour de cassation*) interpretation of Article 6.1 of the European Convention on Human Rights.<sup>199</sup> Article 6.1 ensures everyone a fair civil trial and allows exclusion of the public "in the interest of morals, ... the protection of the private life of the parties ..., or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."<sup>200</sup> Further, this rule contemplates the inherent risk the presence of the plaintiff or his affiliates poses to the seized party's trade and commercial secrets.<sup>201</sup> Given the patentee's likely absence during the Saisie' performance, it is crucial to prepare ahead of time by carefully drafting detailed yet flexible instructions for the bailiff and experts to follow.<sup>202</sup> Those instructions should direct the bailiff as to what notes to take and information or processes to pay particular attention to while, concurrently, providing coaching as to the collection of items.<sup>203</sup>

Two different types of Saisies exist: The *saisie descriptive* and the *saisie réele*.<sup>204</sup> The *saisie descriptive* consists of the bailiff taking notes and describing infringing pro-

<sup>192</sup> Art. L 615-5 CPI; BIZOLLON ET AL., *supra* note 157, at 36. (stating that "any expert of the requesting party's choice" should be permitted as long as that expert is independent.) (emphasis added) (translation by the author).

<sup>193</sup> TGI Paris, 3<sup>e</sup> ch., 2<sup>e</sup> sect., 12 oct. 2001, *RD proprie. int.* 2002, n<sup>o</sup> 136, p. 34 – TGI Paris, 3<sup>e</sup> ch., 2<sup>e</sup> sect., 23 déc. 2002, *Propri. industr.* 2003, comm. n<sup>o</sup> 58.

<sup>194</sup> Véron I, *supra* note 157, at 137.

<sup>195</sup> A squad is more common for piracy than for run-of-the-mill patent cases, however. *See id.*

<sup>196</sup> *Id.* The bailiff may employ police force when necessary, even if the order does not expressly mention such force. TGI Paris, 3<sup>e</sup> ch., 29 mai 1987, *RIPIA* 1987, 180.

<sup>197</sup> Véron I, *supra* note 157, at 137.

<sup>198</sup> *Id.* Note, that those persons, too, must be mentioned in the order. *See* BIZOLLON ET AL., *supra* note 157, at 35. (instructing, however, that "[t]he request can restrict itself to the categories of persons" and that specifically naming individuals may create difficulties when those persons later turn out to be unavailable). *Id.* (emphasis added) (translation by the author).

<sup>199</sup> Cass. com., 26 avr. 2004, n<sup>o</sup> 02-20.330, *D.* 2004, AJ, p. 1671. Prior to this ruling, courts had sometimes authorized the presence of plaintiffs or their employees, especially in cases concerning models and designs. *See* CA Paris, 4<sup>e</sup> ch., 14 mars 1991, *RD proprie. ind.* 1991, n<sup>o</sup> 34, 20, *PIBD* 1991, n<sup>o</sup> 506, III, 500.

<sup>200</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>201</sup> This risk is naturally greater when the Saisie occurs on the seized party's premises rather than at a public trade show. BIZOLLON ET AL., *supra* note 157, at 37.

<sup>202</sup> Cohen & Kohler, *supra* note 159.

<sup>203</sup> *See id.*

<sup>204</sup> BIZOLLON ET AL., *supra* note 157, at 38.

cesses, products or devices on paper which the plaintiff had previously indicated in the request.<sup>205</sup> Depending on the subject matter of the patent, this usually concerns a product, such as a machine, apparatus, system, device, instrument, or an arrangement of chemical products, or a process in the form of an operating style, a manufacturing, treatment or working process.<sup>206</sup> Those described items and processes remain in the seized party's possession who may freely dispose of them.<sup>207</sup> In practice, it is common for the bailiff to simply write down what the expert says when describing evidence.<sup>208</sup> In case of complex processes or machines, the bailiff may request to have the machine run, opened or otherwise operated so as to discern how it functions.<sup>209</sup> Further, the bailiff may formulate his own questions in order to assist him in procuring evidence.<sup>210</sup> Thus, he can question the seized party's personnel, but he *must* also record the explanations and protests of the seized person regarding the alleged infringement.<sup>211</sup> Nevertheless, the bailiff lacks any investigative or interrogational powers.<sup>212</sup>

The *saisie réelle* constitutes the actual taking away of allegedly infringing copies and samples.<sup>213</sup> In product patent cases, this allows the bailiff to gather products covered by the patent<sup>214</sup> and, in process patent actions, the products made by the process since those are equally covered by the patent.<sup>215</sup> However, the consent to remove *samples* does not extend to the *entire stock* of the infringing products; a limitation which underpins the Saisie's basic purpose as a tool for gathering and preserving evidence and as *not* a preliminary injunction.<sup>216</sup> In fact, the plaintiff must detail when requesting the Saisie how many samples he would like to see.<sup>217</sup> The order, then, spells out an appropriate number, which should suffice for purposes of proof.<sup>218</sup> Most commonly, the plaintiff must pay the seized party for the items seized.<sup>219</sup> The bailiff may also acquire copies containing technical and commercial information including accounting books, which may later help in assessing the extent of infringement and damages.<sup>220</sup> The seized objects are generally stored at the courthouse and saved as proof.<sup>221</sup> Unless expressly authorized by the order, a bailiff may not simply leave the seized items with the plaintiff.<sup>222</sup> The statute also requires that the bailiff furnish the seized party with a copy of his written report.<sup>223</sup> He does not have to do so immediately after the inspec-

205 *Id.*

206 *Id.*

207 *Id.*

208 Véron I, *supra* note 157, at 138.

209 *Id.*

210 BIZOLLON ET AL., *supra* note 157, at 51.

211 *Id.* at 51 – 52.

212 *Id.* at 51.

213 *Id.* at 38.

214 Such as objects, machines, apparatuses. BIZOLLON ET AL., *supra* note 157, at 39.

215 BIZOLLON ET AL., *supra* note 157, at 39.

216 See Cass. Com., 4 janv. 1985, *Dossiers Brevets* 1985, IV, 5, Ann. propr. ind. 1985, 237.

217 BIZOLLON ET AL., *supra* note 157, at 39 & 54.

218 *Id.* at 39.

219 *Id.* at 39 & 54.

220 *Id.* at 53; Véron I, *supra* note 157, at 138.

221 BIZOLLON ET AL., *supra* note 157, at 59.

222 *Id.*

223 *Id.* at 58.

tion, but, rather can finish the statement after the Saisie and send it to the plaintiff within a reasonable time.<sup>224</sup>

### C. After the Saisie: Suit and Possibility for Appeal

Following the Saisie the plaintiff *must* sue and the defendant *may* appeal the Saisie. Art. L 615-5, ¶ 5 CPI mandates that the rightholder file suit for the infringement which he alleged in applying for the Saisie. More precisely, the rightholder has twenty business days or thirty calendar days after the execution of the Saisie, whichever one is longer, to file the complaint.<sup>225</sup> If the plaintiff fails to do this, the Saisie is void and the plaintiff can no longer use the evidence it produced.<sup>226</sup> The relatively quick filing requirement preserves the Saisie's purpose as a means of gathering proof of infringement and not as a measure to intimidate competitors or promote commercial espionage.<sup>227</sup> Although the tribunal where the infringement action is ultimately filed will often be the court having previously ordered the Saisie, this is not always the case.<sup>228</sup>

Appellate review of a Saisie occurs after its performance.<sup>229</sup> Then, several avenues for challenging a Saisie exist. Those potential appeals either attack the legitimacy of the grant of the order or its performance.<sup>230</sup> An appeal based on a grant's legitimacy challenges the decision of the judge having authorized the Saisie. The seized party must, thus, prove that the legal conditions required for issuing a Saisie were not met.<sup>231</sup> If the judge is convinced, he may rescind or limit the order and thereby invalidate the evidence seized under it.<sup>232</sup> The alleged infringer may also ask for an expedited order preventing the seizing party from proceeding with further Saisies. This, however, happens only in extreme cases, where the seizing party has gathered sufficient proof by way of conducting multiple Saisies and essentially abuses his right.<sup>233</sup> The seized party may also appeal the *performance* of the Saisie and ask for its nullity.<sup>234</sup> Those appeals are made to the court adjudicating the infringement action, rather than to the judge having issued the Saisie, based on several grounds generally relating to the seizing party having overstepped the authorizations of the Saisie order.<sup>235</sup>

<sup>224</sup> *Id.*

<sup>225</sup> Art. R 615-1 CPI.

<sup>226</sup> Véron I, at 139.

<sup>227</sup> BIZOLLON ET AL., *supra* note 157, at 62.

<sup>228</sup> *Id.* at 65. The saisie-ordering and adjudicating courts are often the same, because infringement suits are litigated at the place of infringement (or harm). There, too, the evidence and, thus, the saisie tends to be. *Id.*

<sup>229</sup> That is, as opposed to rules in the Intellectual Property Code. See BIZOLLON ET AL., *supra* note 157, at 71.

<sup>230</sup> Véron I, *supra* note 157, at 139.

<sup>231</sup> *Id.*

<sup>232</sup> Art. 496, ¶2, NCPC (translation by the author). Art 497, NCPC expressly allows the judge to modify or retract his order even if the court in the main (infringement) suit has been seized of the matter.

<sup>233</sup> See BIZOLLON ET AL., *supra* note 157, at 73 (elucidating such an "extreme" case where the seizing party had conducted several saisies and the bailiff's reports were already full of incriminating evidence).

<sup>234</sup> Véron I, *supra* note 157, at 139.

<sup>235</sup> *Id.*