

First aid kit in case of saisie-contrefaçon

A. General introduction

The *saisie-contrefaçon* procedure is a Belgian legal procedure designed to enable the holder of an intellectual property right to **collect evidence of possible infringements** of intellectual property rights ('descriptive measures'). In addition to evidence-gathering, the *saisie-contrefaçon* procedure may also be used to impose **protective measures** against the infringer so that the infringer is e.g. prohibited to dispose of, move or alter certain objects ('protective measures').

B. Procedure

01. Unilateral petition

Anyone who has reason to believe that a third party is infringing upon its' intellectual property rights, has the possibility of filing a **unilateral petition** with the President of the Commercial Court to initiate a *saisie-contrefaçon* procedure if the conditions are met.

It is thus necessary that the applicant owns a **(granted) intellectual property right** (e.g. patent, trade mark, design, etc.) that is allegedly infringed. A trade secret, that does not constitute an intellectual property right as such, is not a sufficient basis to obtain a *saisie-contrefaçon*.

Since the *saisie-contrefaçon* starts with a unilateral petition, the alleged infringer is in principle unaware that proceedings are prepared against him. This creates a **surprise effect** that prevents the alleged infringer from having possible evidence removed.

In a *saisie-contrefaçon* procedure, **two types of measures** may be obtained: descriptive measures (pure evidence-gathering measure) and effective protective measures, to preserve the allegedly infringing goods that are found. The **conditions** for obtaining both measures are different:

- **Descriptive measures:**
 - > the applicant must possess an 'apparently valid' intellectual property right;
 - > there must be indications of an (imminent) infringement of the right invoked.
- **Protective measures:**
 - > the applicant must possess an 'apparently valid' intellectual property right;
 - > the infringement of the intellectual property right cannot be reasonably disputed;
 - > after weighing the interests involved, including the public interest, the court must find that the facts and, where appropriate, the documents relied on by the applicant are such as to reasonably justify the *saisie-contrefaçon* - which is intended to protect the right relied upon.

An alleged infringer who suspects that a *saisie-contrefaçon* may be requested against him, may file a **"protective letter"** or **"Schutzschrift"** with the President of the competent Commercial court containing his defence. Protective letters are becoming common practice, although the legal basis is not completely clear.

02. Court Order and notification

Upon receipt of the unilateral petition, the President of the Commercial Court will very quickly (sometimes within 24h!) issue a **court order**. If the petition is granted, the court order will appoint the **court expert** whose task it will be to describe the alleged infringement.

The court order will be notified to the alleged infringer by a bailiff, who will be accompanied by the court expert, a witness and possibly the police and/or a locksmith. They will visit the place(s) where the alleged infringement is suspected.

The court expert will collect all evidence relating to the alleged infringement, including financial data of the alleged infringement and how the alleged infringement originated.² In case protective measures are also granted in the court order, the alleged infringing goods may be sealed during the visit.

During the *saisie-contrefaçon*, it is important to keep the right balance between cooperating and safeguarding your rights. There are usually penalties to force the alleged infringer to cooperate. The scope of the court expert's mission is limited by the court order. The law provides for a certain confidentiality of the collected information.

03. Opposition by the alleged infringer

The potential infringer may oppose the court order within one month of the notification.

In the opposition proceedings, **the President** will examine **whether the legal conditions for *saisie-contrefaçon* are met**:

- If the conditions are **met**, nothing will change.
- If the conditions are **not met or only partially met**, the original order will be (partially) revoked.

04. Expert report

After his visit, the court expert will draw up a **report** with his findings.

This report may **include** information regarding all objects, elements, documents or processes which are of a nature to prove the alleged infringement as well as its origin, destination and extent.

The expert will then **file** this report with the court and send a copy to the parties involved (alleged infringer and the right holder who requested the *saisie*).

The right holder will have the right to rely on the expert report in further proceedings if he **summons** the alleged infringer **on the merits** within a certain period of time after the filing of the expert report with the court. If a summons on the merits is not issued or is issued too late, the order will no longer have any legal effect and the applicant may not use or disclose the contents of the expert report.

05. Costs of procedure

A *saisie-contrefaçon* procedure can sometimes be a **costly** procedure as there are a lot of different actors involved (e.g. **attorneys**, **expert**, **bailliff**).

The **judge on the merits** will decide the faith of the costs of the *saisie-contrefaçon*.

Therefore, in the event that the *saisie-contrefaçon* is **not** followed by a **summons on the merits** within the set time frame, the one who requested the *saisie* will have to bear the costs.

² Often the company accused of an infringement is ordered to give the expert access to its computer systems. The expert may make copies of digital files and documents relevant to establishing the possible infringement. He or she will often also take samples of the infringing products.

06. Tips & tricks

In the event that you are confronted with a *saisie-contrefaçon* it is important to keep a cool head at all times. The following tips & tricks can be helpful:

DO	DO NOT
<ul style="list-style-type: none">✓ Notify the company's management and (specialized) lawyer✓ Read the court order thoroughly✓ Do not give more information than requested by the expert✓ Never leave the attendees alone within your premises✓ Make a time-log of events and take copies of every document/file that is handed to the court expert	<ul style="list-style-type: none">✗ Obstruct the process✗ Destroy or hide documents or emails✗ Give documents that originate from or are intended for a lawyer



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