

RESPONSE BY THE INTELLECTUAL PROPERTY LAWYERS' ASSOCIATION (IPLA) TO THE CONSULTATION BY THE CIVIL PROCEDURE RULE COMMITTEE (CPRC) ON ACCESS TO COURT DOCUMENTS BY NON-PARTIES: PROPOSED NEW CPR 5.4C

A. Introduction to IPLA

This is the response of the Intellectual Property Lawyers' Association (IPLA) to the consultation by the Civil Procedure Rule Committee regarding the proposed new version of CPR 5.4C.

The IPLA represents law firms in the UK which have substantial practices in the field of intellectual property (IP) litigation. Our member firms advise and represent the parties in most of the IP disputes and proceedings in the UK.

Access to Court information regarding ongoing cases is particularly important in the field of IP. IP disputes invariably involve rights which apply as against the world at large, and the outcomes of such disputes are therefore usually of interest not only to the immediate parties to the litigation but also to non-parties, including those undertakings and individuals which are involved in similar areas of industry or commerce. Furthermore, as UK IP rights are typically accompanied by equivalent rights in other territories, decisions in this jurisdiction, and the bases upon which those decisions are reached, are frequently of interest in relation to other jurisdictions.

By way of example, patents relating to pharmaceuticals are likely to be of interest not only to the particular parties to a dispute, but also to other entities who might be contemplating marketing a similar product if the patent in question is found to be invalid or of limited scope. In order to plan their commercial activities appropriately, those other entities should be entitled to make informed decisions as to the likelihood of the patent in question being upheld based on the evidence and arguments which have been placed before the Court.

Similarly, in the area of Standard Essential Patents (SEP(s)), the Courts of England & Wales have become one of the leading jurisdictions worldwide for SEP litigation. This is a rapidly developing area of law, the bounds of which are still being worked out. Much of the law in this area has developed both in trials and in interim decisions, including for example how third party confidential information should be treated in legal proceedings. It is important, therefore, that the rules should apply equally to the production of documents at trial and the documents adduced in support of, or in opposition to, interim applications.

The two examples set out above relate to patents (monopoly rights protecting technical inventions) but similar issues arise in relation to cases involving trade marks (e.g. brand names), copyrights (creative works) and other IP rights (such as designs and database rights).

B. IPLA's Experience of Requests for Access to Court Documents

IP litigation by unrelated parties is of interest to both end-clients and law firms with IP practices.

IPLA member firms are regularly asked by their clients to monitor and obtain detailed information on other ongoing litigations for the reasons outlined above. Frequently those clients do not want the parties to the action to know their identity, as alerting an IP owner to the fact that the client is interested in the outcome of the litigation is likely to invite further scrutiny, and potentially pre-emptive action, from the IP owner.

Separately, IPLA member firms who are interested in a particular area of law will wish to have sight of developments in that area and so will also regularly seek to obtain materials from other cases for their own know-how purposes. This is particularly so in the field of SEP litigation.

Thus members of IPLA have significant experience of dealing with such requests, both as requesting parties and as recipients of those requests.

A recent informal survey among the IPLA member firms revealed significant differences in attitudes to how such requests should be dealt with, and are dealt with, in practice under the current rules. We list some of the major points below as they may provide some context to the Sub-Committee and assist the Sub-Committee in their consideration of the proposed rules following submissions from other stakeholder groups.

1. Requests made in every case, seemingly as a matter of routine

Some law firms make requests for every document in every case dealing with every IP right and for every hearing. It appears to be a routine task assigned to a trainee or paralegal at the firm to request copies of documents for every IP hearing that is listed.

IPLA Comment: Hearings and trials are busy times for the parties and their legal advisers. It can be a hectic and stressful environment where solicitors are focused on supporting their clients, barristers and witnesses. Having to deal with (often multiple) non-party document requests at this critical time is an unwanted distraction, particularly when uncompromising letters of requests are sent demanding immediate attention.

2. Court attendance required

Some law firms only provide documents if the requester can show that they are actually following the trial or hearing, either by physically attending the Court or via remote access.

IPLA Comment: If the hearing or trial is not being live streamed, this practice favours those firms who have offices close to the Courts over those who are further away (e.g. Leeds). This is particularly acute in the area of IP since the vast majority of litigation takes place in London. It also favours larger firms who have more personnel with spare capacity to attend Court hearings.

IPLA would also observe that the fact that a requester may not attend a hearing does not imply that they have a lesser, or less legitimate, interest in the subject matter of the hearing than a requester who was aware of the hearing in advance and was able to attend; for example, any person may obtain a transcript of the proceedings under CPR 39.9(3), subject to payment of the relevant fees. There is no requirement that the requester attended the hearing.

3. Skeleton arguments and evidence treated differently

Some law firms will only provide skeleton arguments "as of right". As regards evidence, they request, or reserve the right to request, reasons for access to the evidence, citing *Cape v Dring*.

IPLA Comment: CPR 32.13 provides that a witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the Court otherwise directs. Cape v Dring was concerned with the circumstances in which access to documents for which there is no express right of access under the CPR should be allowed. Accordingly it is arguable that Cape v Dring did not restrict or qualify the right of access to witness statements under CPR 32.13¹.

¹ See [45] of the SC judgment: "However, although the Court has the power to allow access, the applicant has no right to be granted it (**save to the extent that the rules grant such a right**). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle." (emphasis added).

4. Evidence in trials and hearings treated differently

Some law firms will only provide the witness statements for witnesses called at trial and will not provide witness statements adduced for interim hearings.

IPLA Comment: This distinction arises as a result of CPR 32.13 which refers to "the trial". However, IPLA observes that there is no difference between the level of interest (or the legitimacy of that interest) by non-parties in interim hearings for, as opposed to trials of, IP disputes.

5. Conflict between copyright law and open justice

Skeleton arguments and other written materials are protected by copyright law which prohibits the unlawful reproduction of such works. Further, there is a concern amongst IPLA member firms that documents are being used to train Generative AI models which will provide such firms with a competitive edge. Therefore, some law firms seek undertakings regarding the use of the materials provided; specifically some seek undertakings not to copy the materials provided, or breach the laws of copyright, and not to use the materials other than for the purposes of study and will refuse to provide the materials in question until that undertaking has been provided.

IPLA Comment: IPLA is concerned about the deployment of copyright law to prevent open justice. This includes the requirement of potentially wide-reaching undertakings. IPLA also observes that high legal costs will be incurred by non-parties for advice on the consequences of such undertakings and/or what might or might not be appropriate restrictions on the use of the documents.

6. Costs payment required

Some law firms seek prior agreement to meet the costs of providing copies of the materials, including the costs incurred in redacting confidential material.

IPLA Comment: IPLA observes that whilst this requirement may appear reasonable on its face, in most situations, the costs of providing materials electronically should be minimal. Further, invariably the confidential elements of documents in Court bundles will already be highlighted in order to indicate to the Judge and counsel what may and may not be read out in open Court. Applying redactions to those highlighted sections may be straightforward. However IPLA also recognises that redactions can involve significant additional cost for the parties where there are a very large number of confidential documents to be processed.

7. Temporal limitations on the litigation in question

Some law firms will only provide documents in relation to extant litigation and may restrict the documents to the level of the Court that is hearing the case at the time of the request.

IPLA Comment: It is difficult to decide for how long the obligation to provide materials should endure. On the one hand, if the request is made at the time of the hearing or trial, a party's advisers are fully up to speed on all the issues, including confidentiality, and so can make the materials available relatively easily. By contrast, seeking such materials long after the proceedings have concluded necessarily involves raises additional difficulties – for example, the party's lawyers will have to refamiliarize themselves with the issues so as to determine what can and cannot be provided, and if those originally responsible for the conduct of the case are no longer with the firm, that exercise may have to be undertaken from scratch by others who are entirely unfamiliar with the case.

On the other hand, a non-party may only become aware of a case upon publication of the judgment, at which point it will desire to see the arguments and evidence in order to better understand the reasons for the judgment (and whether the judgment may be vulnerable to appeal, for example). Or further still, a non-party may only have an interest in reviewing the trial documents upon publication of the appeal judgment.

IPLA observes there is no temporal limitation on the ability to obtain a transcript of proceedings under CPR 39.9.

8. Delay in provision of documents and troubling the Court

Compliance with document requests varies considerably. Some firms respond readily to requests for materials. Others are very slow and sometimes ignore such requests altogether. The issue may then be escalated to the Judge hearing the case.

IPLA Comment: The tactic of slow or non-compliance with a request can be effective, as those firms who make routine requests for documents in all IP cases often lose interest and do not take their request any further. However, that means non-party requesters who have a specific/genuine interest are put in the position of having to write to the Judge conducting the hearing or trial pointing out that the materials in question have been requested but not provided and asking the Judge to make the necessary direction ordering compliance. Such a state of affairs is unsatisfactory; Judges should not have to waste their time dealing with such requests.

9. Challenges with confidentiality, redaction and unusual documents

The current CE-File system, perhaps due to its manual nature, does not in practice deal well with confidentiality, redaction or with unusual pleadings (for example statements of case on foreign law, or statements of case on FRAND). Sometimes pleadings are made accidentally available on CE-File despite orders to the contrary under 5.4C(4). In other cases, the redacted versions provided to the Court by the parties are not then made available on CE-File to third parties, on the basis that they are on the file as attachments to an Order. Practice is very variable as to whether unusual pleadings are made available at all on CE-File, even within the same case. This has led some law firms not to file all of their statements of case on CE-File. Further, if a party has redacted certain aspects of their pleadings, that section will be moved to an annex to the pleading, which they then do not file.

IPLA Comment: The IPLA considers that some thought should be given to improving consistency and thus confidence in the CE-File system's ability to deal with these issues.

C. IPLA Comments upon the Revised Proposal for New Draft of CPR Rule 5.4C

We set out below IPLA's comments on particular paragraphs of the Revised Proposal for New Draft of CPR Rule 5.4C. IPLA's comments are limited to the workability of the current draft rather than proposals to address the experiences of our members described above.

Paragraph number	Wording in current draft	IPLA comment
5.4C	Heading: "Supply of documents to a non-party from Court records"	Given paragraph 5.4C covers provision of document from both (a) Court records and (b) the parties, the heading should be: "Supply of documents to a non-party from Court records "
5.4C(1)(a)	"obtain from the Court records a copy of any of the documents..."	IPLA would be grateful if Sub-Committee could confirm if the intention is for the access to the documents from the Court records envisioned by paragraph (1)(a) is to be implemented through CE-File. Alternatively is the Court intending to scan in and retain bundles from hearings? Alternatively, what is the intention if the requested documents are not on CE-File?

5.4C(1)(a) and (b)	"at a hearing"	<p>IPLA notes that in sub-paragraph (b) the words "at a hearing" are present but those words are not present in sub-paragraph (a). This appears to IPLA to impute a temporal limitation to requests made under sub-paragraph (b) i.e. that such documents can only be requested at a hearing (and presumably a trial) but thereafter a request cannot be made. If that was not the Sub-Committee's intention, please could this wording be amended. We are concerned that if a temporal limitation is included, it will encourage every firm to ask for every document at every hearing for fear of missing out on the opportunity to ask later.</p> <p>An alternative option would be to put in place a mechanism to ensure that once any non-party has obtained a document under 5.4C(1)(b), that document permanently forms part of the court records so that any other non-parties can obtain it under 5.4C(1)(a). That could be achieved, for example, by amending 5.4C(10) to add a requirement that, at the same time as providing the copy of the relevant documents to the requesting non-party, the party who filed the skeleton argument or relies on the relevant evidence must also upload a copy of the documents (in identical form with regard to redactions etc.) to CE-File.</p>
5.4C(1)(b)	"skeleton argument or witness statement"	<p>Technical expert reports are common in IP cases and routine in patent cases. Therefore, IPLA suggests these are included so as to be consistent with 5.4C(3). Further, we note that affidavits are missing, thus raising a presumably unintended inconsistency with sub-paragraph 3(e). IPLA suggests:</p> <p>"skeleton argument and/or witness statement and/or affidavit and/or expert report...".</p>
5.4C(3)	"The documents referred to in paragraph (1) are"	<p>IPLA observes a tension between, on the one hand, the documents listed at 5.4C(3)(a) to (c) which are easily obtainable from the Court records (CE-File) and therefore readily available to non-parties under 5.4C(1)(a), and on the other hand, the documents listed at 5.4C(3)(d) to (f) which are rarely filed on CE-File and which are usually sought by making requests to the relevant law firms.</p> <p>Further the interaction between 5.4C(1)(b) and 5.4C(3)(d) to (f) is unclear. Is it intended that the documents at 5.4C(3)(d) to (f) can only be obtained under 5.4C(1)(b)? If that is not what is intended, how will this be addressed? One option would be for it to be left to the Judges to direct such documents are filed on CE-File.</p>
5.4C(3)(f)	"expert reports"	<p>There is an inconsistency as between this sub-paragraph and the one above relating to witness statements and affidavits whereby the exhibits and annexures do not need to be provided. IPLA suggests:</p>

		"(f) expert reports (except for medical reports or where a rule or practice direction provides otherwise) but not any exhibits or annexures to the report. "
5.4C(4)(c)	"edited"	IPLA observes that the possibility to edit may cause some confusion. "Edited" may well be the correct term if the Sub-Committee is intending to cover corrections that the witness makes in the box, or where a witness' allegations are retracted or established to be false, and their repetition or publication would be harmful. However, a more readily understood term is 'redacted'. If that is what the Sub-Committee intended, then IPLA suggests: (c) order that persons or classes of persons may only obtain a copy of such document if it is edited -redacted in accordance with the directions of the Court
5.4C(6)	"or to obtain an unedited copy of it"	IPLA suggests: or to obtain an unedited unredacted copy of it
5.4C(8)	"A non-party who has at or in advance of the hearing requested a copy of a skeleton argument shall be entitled to it at the start of the hearing for which the skeleton argument was filed"	This raises ambiguity because in IPLA's experience skeleton arguments are not filed anywhere. They are lodged with the Court through the Judge's clerk, so we would like to suggest the following amendment: "A non-party who has at or in advance of the hearing requested a copy of a skeleton argument shall be entitled to it at the start of the hearing for which the skeleton argument was filed -lodged"
5.4C(9)	"witness statement"	It is unclear whether this sub-paragraph also applies to affidavits and expert reports. Consistent with other parts of the new rules, it should do so, and this should be expressly stated.
5.4C(9)	"when the relevant witness is called"	This means that three types of evidence do not appear to be covered: (i) witnesses whose evidence is unchallenged and who are therefore not called for cross-examination, (ii) evidence which is relied upon in interim hearings rather than trials, (iii) evidence which is relied upon for applications decided without a hearing i.e. on the papers. As explained above, all these types of evidence are still of importance and interest to non-parties in IP cases. It is also unclear what position is to be taken with regard to evidence which is filed but subsequently not relied upon.
5.4C(8) and (9)	"has at or in advance of the hearing"	We repeat our observations above in relation to "at a hearing". It is also unclear what the Sub-Committee has in mind if a request is made by a non-party after the hearing or trial. Is the non-party completely shut out from requesting documents – even if the request is made at around the same time the Judgment is handed down (at which time a non-party is likely to be more interested in

		seeing the underlying materials)? Or is it intended that the non-party should make an application under 5.4C(4)(d)?
5.4(10)	"to provide a copy"	<p>IPLA is concerned that unless the new rules refer to provision of copies by email or soft copies or similar wording, that other criteria will be added by law firms e.g. physical attendance at Court or at their offices to pick up hard copies.</p> <p>IPLA believes it would be helpful for the new rules to indicate whether or not the non-party must pay the costs incurred by the law firm in providing the documents.</p> <p>Furthermore, as referenced above, IPLA considers that it would be sensible to require a party which provides a document under 5.4C(10) to simultaneously upload the document to CE-File (if it has not already been so uploaded) in the same form as it was provided to the requesting party, unless the Court orders otherwise. This would ensure that a copy would be available to all other third parties under 5.4C(1)(a).</p>
Other	Is there a requirement to identify end-client for non-party's request?	The new rules would be a helpful opportunity to clarify whether or not, in the case of a request for documents made by a law firm on behalf of an end-client, whether (i) that end-client's identity needs be disclosed, and/or (ii) whether any need to identify the end-client depends on whether the request is made under proposed CPR 5.4C(8) and (9), or an application is filed under proposed CPR 5.4C(4)(c) or (d).
Other	No reference to Grounds of Appeal	The proposed new rules do not refer to Grounds of Appeal. It can be hard to follow the arguments on appeal as often arguments are made by reference to the Grounds of Appeal by number (i.e. ground 3) without that ground being read out in full. It would assist the principle of open justice for Grounds of Appeal to be addressed in some way, ideally as an additional document listed under 5.4C(3).
Other	No sanctions for non-compliance	IPLA can foresee that, without a sanction on parties who do not provide documents requested under paragraphs (8) and (9) in a timely manner, there will continue to be disputes between non-parties which may well involve letters to the Judge during hearings/trials which will waste their valuable time. We assume that any sanctions for non-compliance will be a matter for the Judge.

END

8 April 2024