

IP, COMMUNICATIONS & LIFE SCIENCE REPORT 2008: CONVERGING TECHNOLOGIES


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In a period in which many law firm practices may be suffering as a result of the difficulties affecting the Iberian, and wider European, economies, Iberian Lawyer's 2008 IP Communications and Life Sciences Report reveals that the region's specialist lawyers report a commercial and legal environment that is in many ways busier than ever.

The communications sector is seeing continuing investment activity as telecoms companies seek  to build new fibre-optic networks and keep pace with the increasing demands of consumers for broadband and bundled digital services. It is a process that at the same time is also prompting consolidation, convergence and the arrival of new players. Lawyers report an increasing cross over of communications and IT issues, and therefore also of the importance of "traditional" IT companies alongside the incumbent fixed line and mobile telephone companies.

In addition, the increased pressure on companies to maintain and protect revenue streams is also

seeing an emphasis on IP commercialisation and litigation, say lawyers. The latter development is one that is being assisted by the transposition of the EC "Enforcement" Directive into Spanish and more recently Portuguese legislation.

IP is of course also at the core of the life sciences sector, and Spain has in recent months seen a number of high profile product and process patent battles. While, say lawyers, the biotechnology sector is one that both the Portuguese and Spanish governments are also now placing increasing emphasis on.

The pace of change

The IP, communications and life sciences sectors are areas of emphasis in which Iberia's lawyers continue to highlight the need to take both a technical legal and commercial approach to client issues.

As with last year's research, lawyers highlight the rapid pace of technical change impacting on the sectors, but also now the increased emphasis on being able to place developments in the wider commercial context.

"The players in these sectors have to take a very strategic approach to issues, which often extend well beyond individual jurisdictional boundaries. They are continental if not global in scope," says Alejandro Negro, at Cuatrecasas in Madrid.

El reportaje de IP, Communications and Life Sciences de 2008 demuestra de nuevo que estas áreas de la práctica jurídica continúan teniendo una gran demanda por parte del cliente. Ello hace que los despachos busquen incrementar su actividad en estos sectores, y dan la sensación de que si no son inmunes a los acontecimientos de la economía, sí parecen verse mucho menos afectados por éstos. Indeed it is fundamental that lawyers keep up-to-date not only with legal developments, but also with technological and commercial developments both within and beyond Iberia.

"It is not enough to think of issues solely from a national perspective, clients need and expect you to look at things at least with a pan-EU perspective. In any event, European legal developments sooner or later are transposed into national law, agrees Ignacio Temiño at national IP firm Abril Abogados.

The flow of legal and regulatory know how is almost as fluid as technological knowledge, say some. "Legislative developments are indicative of a growing global legal framework as well as a global legal market. Trends like the right to privacy and internet, audio and video content issues are leading to international discussion and the exchange of legal approaches," says Carlos de Almeida Sampaio, IP and communications partner at Gonçalves Pereira Castelo Branco & Associados (GPCB) in Lisbon.

Nonetheless, the speed of commercial innovation inevitably continues to outpace legal frameworks, says Ricardo Henriques at ABBC in Lisbon. "The fast-pace of technological developments is not always followed by simultaneous and accurate legal updates, so it is crucial to keep up with the changes and trends within the fields in order to be able to provide an honest and competent assistance to clients."

Client convergence

Such fluidity is inevitably also prompting a faster flow of commercial operators across borders too say lawyers.

Life sciences: a growth industry

The life sciences sector is one in which lawyers report continuing consolidation, collaborations and

joint ventures and ongoing high profile patent disputes, says Manuel Lobato at Bird & Bird, as well as being an area of growing emphasis by governments as a research and development driver and economic driver.

"Pharmaceutical and biotechnology companies are among those in which we are likely to see real growth over the next year. We feel that there will be many opportunities for acquisitions in these sectors," confirms Marta Plana at Osborne Clarke in Barcelona.

Pablo Olivera at Garrigues in Madrid agrees. "Our understanding is that life science companies, especially within the pharmaceuticals sector, will face a great deal of consolidation and restructuring."

It is also a business sector in which a high level of competition is also driving the research and development led companies to better protect product pipelines and the patent exclusivity of "blockbuster" drugs.

A trend that will likely result is further high profile litigation, suggests María Baylos at niche firm Estudio Jurídico Baylos. "Among the key issues in Spain include the marketing of generic pharmaceutical products, copyright issues around the emergence of new technologies and the continuing battle against counterfeiting."

The pharmaceuticals sector is also one that has seen increasing attention from the European Commission's competition authorities, which is now investigating claims that manufacturers have abused the European court and patent protection processes to restrict the ability of generic manufacturers to launch cheaper rival products.


"In my experience, companies only use litigation when they need to and to some extent the EC is missing the point. Companies are making fair use of the IP rights systems, and a number of recent judicial decisions have shown that at least in Spain the judges are prepared to protect innovation in the sector," says Miguel Montaña, head of IP at Clifford Chance in Barcelona.

Inevitably, there is therefore still a strong division between the law firms that act for the research and development companies and the generic producers, as the Spanish market increases in importance, suggest some. "Pharmaceutical patent litigation has been increasing substantially over the last number of years and it keeps increasing," says Javier Huarte at Grau & Angulo.

But national regulatory bodies are also increasingly involved in such issues, notes Ana Menéres at GPCB in Lisbon, among others, while they are also being asked to assess new technologies and research methodologies, such as pharmacogenetics (see Medicines made to measure p59) says Maria de Lourdes Lopes Dias at Lopes Dias & Associados.

Others nonetheless regard the generic industry as a necessary and equally important player in the pharmaceuticals industry – especially as national health services place greater emphasis on costs.

"The generic industry needs to grow. The behaviour that some patent owners use to maintain the life of their patents, arranging obstacles to stop the launch of new generic products is today the biggest challenge in IP litigation for countries like Portugal," says José Luís Arnaut at Rui Pena, Arnaut & Associados.

Within the communications sector, telecoms companies' services increasingly extend beyond  mere telephony and broadband services, to encompass television and other broadcast media, while in addition international television and media companies are playing an increasingly important role in the telecoms sectors.

"Network convergence, the internet protocol and increasing transmission capacity permit in the provision of any range of new services, such as voice over IP, which compete with more traditional services. Within Europe this now means that companies such as Skype, Google and Microsoft are

increasingly posing threat which the incumbent operators, such as Telefónica in Spain, have to contend with." says Paul Hitchings, communications partner at Cuatrecasas.

Indicative of the cross over in Portugal, says João de Macedo Vitorino of Macedo Vitorino & Associados in Lisbon, was the level of cross-sector interest shown in the spin-off of Portugal Telecom's cable television operations, and the emerging interest among services and consumer companies in opportunities such as mobile virtual network operators (MVNO). "Such developments do not necessarily present companies with highly technical legal issues but they are very highly regulated business sectors. In addition, new market entrants have to adapt not only to new business environments but also to be prepared for future developments, and in a sense to expect the unexpected."

Such a rapidly changing corporate market means that it is inevitable that client conflicts can and frequently do arise for law firms. "The IT and communications sectors are ones in which we faced two major conflicts last year that affected us significantly," says a senior IP and IT lawyer at the Madrid office of a London-based firm.

Communicating change


Indicative of the flow of issues across borders, a key issue for both Spain and Portugal's communications sectors continues to be the bundling of telecoms, media and digital television and other services by providers, and the development of new technology platforms.

"The biggest current challenges for the communications sector is the emergence of the next generation networks, covering backbone networks into all IP networks and replacing traditional copper wire access networks primarily with fiber- optic cable, although also with new broadband wireless technologies." says Paul Hitchings at Cuatrecasas.

These networks require huge investment and this is posing some difficult regulatory, political and commercial questions which industry, government and regulators alike are battling to address in different ways all over the world.

"The Portuguese Government has expressed significant enthusiasm over next generation networks and a public consultation has now been conducted by the Daniel Reis at PLMJ.

Lawyers report however that the emerging Iberian legal framework for much of this activity is heavily influenced by developments both across Europe as well as the US. Likewise there is the increasing intervention and involvement of regulators in sector developments.

"Within Portugal, the National Authority for the Communication – ANACOM – seems more active and the media operators are being more proactive in entering into codes of conduct, namely regarding product placement. The recent modification of the TV Directive and the need to implement these modifications in Portugal will also lead to some additional challenges in this area," says Sampoia at GPCB. 

Further growth

Such dynamism means that law firms increasingly regard the IP, communications and life sciences sectors as presenting significant practice development opportunities, say many lawyers. Anti or even non-cyclical in nature, the sectors continue to generate competition, regulation and disputes issues, while consolidation continues as companies seek immunity from any potential localised economic downturns.

"Given the specificity of the areas of IP, communications and life sciences, the current Iberian economic situation may only indirectly affect clients' strategic plans," says César Bessa Monteiro at

ABBC.

In addition, the communications, IT and life sciences sectors are increasingly regarded by regional governments as important drivers of local knowledge economies, and lawyers report an upturn in interest in the development of technology business "clusters".

Enforcing the Enforcement Directive

Among the most fundamental developments in the IP framework of both Spain and Portugal in recent years, say lawyers, has been the increased emphasis on the protection afforded IP owners and their ability to target unlicensed use and counterfeiting. The transposition of the IP Rights Enforcement Directive (2004/48/EC) in Spain in 2006, and in Portugal earlier this year, has brought new legal mechanisms and enhanced the judicial enforceability of rights, say many.

"The Directive has been applied very successfully and is one of the main regulatory developments we have seen. There has been a vigorous application of the new laws," says Miguel Montaña, head of IP at Clifford Chance in Barcelona.

The transposition of the Directive has inevitably also helped to reinforce the importance of the commercial courts in Spain, add some. "The Directive was implemented in Spain this year but we have had courts specialised in IP (Mercantile Courts) since September 2004, and since when they have become much more respectful of these rights. The enforcement of IP rights in Spain is now certainly comparable with our European counterparts," says Antonio Castán, head of litigation at Elzaburu.

A similar sentiment is felt by some in Portugal where the transposing law (16/2008) was published at the start of April.

"This will be the most important local issue over the coming months. With the new law Portugal has turned the page on its ambiguous past. The new framework offers IP owners much better protection not only through more effective measures and respect for IP rights, but also in defining new strong and clear criteria with regard to compensation for damages," says Manuel Lopes Rocha at PLMJ.

The changes also bring the creation of dedicated IP courts and a new arbitration centre (ARBITRARE) with competence in patents, trade marks, domain name and company name issues. António de Magalhães Cardoso welcomes efforts to improve matters, but highlights nonetheless the continuing backlog of cases in the Commercial Courts, and the practicality of the proposed district IP courts which will only run on an experimental basis until 2010.

Others caution also that it will therefore remain the case that the same Commercial Courts are dealing with both IP and insolvency issues, and with the declining Iberian economy there are growing concerns over the ability of judges to effectively manage their workloads.

For law firms such developments nonetheless present new practice opportunities, and "anti-cyclical" business drivers. "As companies' financial difficulties increase, litigation will certainly be a growing area of work. In addition we sense that many investors will walk away from the real estate market and seek opportunities in other industries, including the IP and media sector," believes Pedro Alemán Laín of Pedro Alemán Abogados.

Barcelona has seen the launch of [a business](#) "incubator", with the support of Microsoft, Barcelona Activa and Osborne Clarke, Spain. Likewise the June acquisition of MobiComp by Microsoft has put Lisbon at the centre of the company's global mobile telephone research and development activities, while Cisco and Siemens have also established research and development centres in Portugal, and the government's Magellan schools computer project is attracting interest from as far apart as the UK and Venezuela.

"We believe that these are growing markets which are continuously developing. Thus, clients demand law firms to not only have a strong practice in these areas but increasingly also to help clients understand how and where to invest," says Marta Plana, Head of IT at Osborne Clarke in Barcelona.

But the increasing evolution and convergence of technologies and of industry players means that clients and their law firm advisers are continually facing new legal challenges.

Significant, say many, is the growing importance of data protection regulation across all businesses. "We expect to see a relevant increase in work in the following months, with new solutions for international transfers of personal data within multinational groups – eg the use of Binding Corporate Rules – becoming increasingly popular," says Gonzalo F. Gállego IP and IT partner at Lovells.

Hugo Écija at Écija Abogados in Madrid agrees that the issue is one that companies cannot afford to ignore. "Privacy and data protection are among the biggest challenges of our society worldwide. Both the private and the public sectors will be very active on security and data privacy issues and the growth for law firms in IT and telecom issues will be very significant in the next few years."

Of growing importance also is outsourcing, says Almudena Arpón de Mendivil, head of telecoms, and Gónzalo de Ulloa, head of IP, at Gómez-Acebo & Pombo, as companies seek better cost controls and management. "We are seeing an increasing number of outsourcing deals, but also the increasing complexity of regulations affecting certain industries, such as the financial sector," agrees Jose Ramon Morales, Head of IT at Garrigues.

Indicative also, says Fernando Resina da Silva at Vieira de Almeida, has been the launch of the Portugal Outsourcing Association (POA) and the emergence of a national market already estimated as worth €561m.



Building a consensus

- Community Patent

Within Iberia's intellectual property (IP) community among the issues that continue to provoke considerable debate is the relevance of the proposed European Community Patent.

For some lawyers, including Ignacio Marqués at Baker & McKenzie, such a development is overdue. "The creation of a unitary Community Patent system is a long-felt need, provided it follows the guidelines established by the Community Trademark and the Community Design regulations," he says.

The commercialisation of technologies across Europe makes it necessary to be able to validate and enforce the same patents across the EU, say many.

"Such a process clearly presents significant benefits to clients who wish to take a pan-European approach, and those law firms that operate internationally should support such a trend," says João Paulo Miranda de Sousa, head of international IP at Garrigues, and until recently Director of General Affairs and External Relations at the European Trademarks Office.

Antonio Castán at leading Madrid IP firm Elzaburu notes the emphasis being given to the proposal by the French administration during its Presidency of the EU, but is nonetheless among those who question its ultimate viability.

In any event, some believe that it may still be some time before the issue is resolved. "Given the difficulties that the Community Patent has faced and the different interests surrounding it, we do not

believe that it will be a viable instrument in the near future," says César Bessa Monteiro Jr at ABBC.

Also significant is the potential impact of the European Patent Litigation Agreement (EPLA), say lawyers, and which would be the court of first instance on a European level to deal with patent disputes between private parties. But such a development while positive on many levels may though prove prejudicial, say some, as it will only operate in English.

"This is followed with reservations in view of the constitutional and linguistic implications of the judicial system that EPLA sets forth," says Ricardo Henriques at ABBC. "If and when this agreement becomes effective, it is most likely that Portuguese Courts will lose competence to decide on patent matters."

For Carlos Costa e Silva at Barrocas Sarmento Neves in Lisbon, such reservations mean that progress on the EPLA is effectively at a standstill. "It is a legal instrument that is not often mentioned or relied upon and of limited relevance and applicability in our jurisdiction," he says.

A similar perception is held also across the border. "According to our information, Spain, at the moment is not among the group of States wishing to accelerate this project," says Castan at Elzaburu.

Also significant, say lawyers, is the potential for increases in litigation at all levels. "Within the telecoms sector we are anticipating an upturn in competition disputes, with the current disputes between Vodafone and Telefónica – over alleged abuse of dominant position and a failure to open its fibre-optic loop – as indicative of what we see as an emerging trend," says one Madrid lawyer.

It is however across the IP arena in which many firms report the greatest expectation – patent, copyright and trademark protection, agreements and licensing being fundamental to the operation and value of companies across the communications, IT and life sciences sectors.

"The demand for IP expertise will expand in line with technological, audio and video developments and to reflect new ways of communication," says Carlos de Almeida Sampaio at GPCB.

"Some companies are now turning to their IP portfolios to seek additional revenue streams and to protect investment and market shares," says Sergio Miralles at Freshfields Bruckhaus Deringer. "Generally it is felt that basic and fundamental need products (such as hygiene products) will tend to suffer less – or at least less quickly – than 'nice to have products'."

Notable legal market developments in the past year include the merger of US firm Howrey with Madrid's Martinez Lage, and the subsequent recruitment of a team of lawyers from Gómez-Acebo & Pombo, and Lisbon-based Abreu Advogados' integration of dedicated IP firm Chastre & Associados.

Some specialist lawyers do however see the prevailing economic environment as impacting on the most sophisticated clients, as they look to get further value from their in-house legal departments. "Already inhouse lawyers do most of the regulatory work within telecoms companies," says Javier Marzo, IT partner at Garrigues in Madrid.

But even with greater emphasis on internal expertise many law firms nonetheless continue to predict growing demand for highly specialist and dedicated expertise. "Only the most sophisticated advice is externalised to law firms such as ours. This allows us to focus on cutting edge matters, which is something which will enrich our practice and lawyers," says Gonzalo F. Gállego at Lovells.

The same belief clearly runs through both Iberia's large and small firms: "We predict growing business for small and mid-size specialist firms provided that they are capable of offering high quality services at a reasonable price. Firms must combine quality and flexibility to meet the clients' needs," says Pedro Alemán Laín of boutique media and IP firm Pedro Alemán Abogados.