

IP&IT SPECIAL REPORT 2012: DRIVING THE ECONOMY

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Formerly departments that were seen by law firms as ‘nice to have’s’, IP and IT departments are fast becoming the ‘must have’s’. The two sectors are key areas of opportunity in the crisis, say lawyers, especially as today’s economy is being driven by the world of technology.

Los departamentos de Propiedad Intelectual y Nuevas Tecnologías, han pasado de ser un área de apoyo a áreas estratégicas en las firmas de abogados. Las dos áreas de derecho presentan oportunidades en contextos de crisis, afirman los expertos en este reportaje anual, especialmente cuando todo negocio tiende a desarrollarse y a comercializar con herramientas tecnológicas.

If one mentions ‘business’ and ‘drivers’ in the context of today’s global economy, say lawyers, the response is more likely than not, ‘innovation’ and ‘technology’. The corporate world is far more knowledgeable than ever before, and lawyers predict that over the coming years almost every company will have to focus its business on the Internet and new technologies.

The crisis therefore is bringing new opportunities for law firms. This is particularly true in IP, since the economic

foundations of the Iberian market are drastically changing towards innovation, creativity and knowledge, says João Miranda, Head of the IP practice at Garrigues in Spain. This will open new horizons to IP specialists as companies start navigating the waters of a different economy. The same can be said for the IT sector, where lawyers are seeing the steady emergence of new services or ways of delivering existing ones.

IP and IT are therefore firmly at the forefront of driving Europe's ailing economies, say lawyers, coming out of the shadows of the more traditional legal sectors and taking the spotlight. And both sectors are also constantly evolving, no more so than over the past year.

Regulatory round-up

Spain and Portugal have both seen numerous changes in legislation, and the legal market is having a tough time keeping up. According to César Bessa Monteiro, Head of IP/IT department at pbbr, a key international development is the draft EU Regulation on Data Protection – a comprehensive update of the 1995 Directive, identifying the elements of data protection that Member States must transpose into national law. But clients have not welcomed this increase in regulations, says Anna Viladàs, IP Partner at Roca Junyent, as it raises their compliance costs and affects competitiveness.

Lawyers also point to the future EU Unified Patent system as key, in that it will replace national systems and create unitary patent protection and a centralised EU Patent Court. While Portugal has opted in, Spain, along with Italy, has decided not to take part. The huge concern in Spain, says Pedro Merino, Head of IP at Olswang, Spain, is the danger that if it goes ahead it could mean that Spanish businesses cannot rely on their local lawyers to always defend their cases. Spanish law will only govern those patents within its borders.

The failure by the EU to adopt the ACTA treaty (Anti-Counterfeiting Trade Agreement) is also a major setback, says Nuno Cadima Oliveira, IP Partner at F. Castelo Branco & Associados, since this would have provided a global framework to combat IP infringement. Existing but never approved European draft directives are therefore being quickly revisited and revised. (For key domestic changes, please see boxouts.)

Challenging times

It is not only regulations that are changing, and challenging, for the legal sector. "Lawyers are now required to be supermen," says José Miguel Lissén, IP Senior Associate at Gómez-Acebo & Pombo – "technical experts, and very good at everything".

Plus, they need to be 'everywhere'. IP & IT have a clear global scope, and most IP cases involve several jurisdictions. Even a local matter requires knowledge of similar cases in other countries, in particular, in Europe and in the US, says Jorge Llevat, Head of the IP practice at Cuatrecasas, Gonçalves Pereira. "It is a continuous challenge to be up-to-date."

The same applies to IT. Lawyers are seeing new apps, software and technological devices appearing everyday on the market, which bring with them new guidelines and regulations. Access to information has also spiralled out of governments' and companies' control, and they are now in a race to keep up, adds Alejandro Touriño, IT Partner at Ecija. "Across Europe, countries are shifting gears, and we as IP & IT lawyers need to keep on top of developments."

“ We now see companies from all continents looking for opportunities in Brazil. ”
Rafael Dutra,
Partner, Dias Carneiro Advogados



However, you cannot be an expert in high complexity IP matters while at the same time being focused on data protection and TMT, for example, says João Veiga Gomes, Co-Responsible for the IP and IT Practice at Abreu Advogados. The challenge is to create a 'community of practice' within your IP and IT department, and combine the talents of different experts into 'ad hoc' teams.

Litigation is of particular concern in Spain, say lawyers, as the courts are overloaded and it is better to avoid them. Madrid is seen as particularly bad when it comes to backlogs, with around a two-year wait for pre-litigation compared to Barcelona or Alicante where it takes less than a year. Businesses are now far more willing to settle because of the costs involved and the time it takes.

Buoyant sectors

With IP and IT driving the economy it is no surprise that lawyers are seeing a rise in activity. “We have seen a significant increase in IP clients,” says Ignasi Costas, an IP and Public Law Partner at Rousaud Costas Duran, “and they are demanding much more sophisticated approaches and services with a wide and international scope”. This is true, in particular, for those companies providing services or products worldwide over the Internet.

Data protection is becoming a big concern and consequently showing considerable growth in activity. Compliance is the major issue here, and lawyers see much work coming from multinationals worldwide that are imposing their guidelines and systems on their subsidiaries in Iberia. Lawyers are also seeing mounting pressure on clients to comply with an increasing amount of privacy laws, says Paloma Bru, a TMT Associate at Jones Day, Spain, with new legal issues arising, for example, in cloud computing.

Given the current state of its economy, Leonor Chastre, Head of IP and IT at Gómez-Acebo & Pombo, in Lisbon, organisations in Portugal are clearly concentrating on reinforcing their great economic assets – IP and IT.

Key developments – Spain

Earlier this year, Spain's ‘Ley Sinde’ was finally approved in a bid to address online piracy. And while on a domestic level, its approval has been a definitive milestone, says Ignacio Temiño Cenicerros, IP Partner at Abril Abogados, its real impact is still unclear.

A big development has also been ‘private copy compensation’ adopted earlier this year, says José Antonio Suárez, Managing Partner at Suárez de la Dehesa. The Government will now compensate rights owners directly, rather than from the manufacturers or importers.

However, one of the most significant new regulations is the online gambling law, which introduces the first licensing procedure for online gaming activities based on a system of licences and players now moving to ‘dot.es’ websites. But the new law has caused some confusion, say lawyers, with the Spanish Gaming Commission already having issued clarifications regarding the interpretation of various sections of the new law.

As of the start of the year, Barcelona's commercial courts were allocated new IP specialisations – three for Patents and Advertising and two for Trademarks, Designs and Copyright. For IP lawyers, this is another step towards recognising the complexities, and importance, of their sector and the hope is that further courts will follow.

Finally, the Spanish Government passed a law creating a new and unique regulator replacing the CMT (Commission of the Telecommunications Market), the CNE (National Energy Commission) and the CNC (National Competence Commission), says Pablo Mayor, a Partner at Allen & Overy, Spain. “All actors in the TMT sector are very interested in the creation of this new regulator.”

Lawyers are seeing a marked increase in patenting in IT, TMT, renewable energy and nanotechnology, and predict a rise in telecoms activity with the likely privatisation of Portugal Telecom and national television channels RTP 1 and RTP 2. Technology transfer and protection are also likely to undergo a great deal of development, says Antonio Magalhães Cardoso, IP Partner at Vieira de Almeida, which will lead to a rise in corresponding litigation.

The Spanish gaming sector is demanding more IT, e-commerce and data protection-related advice, says Norman Heckh, Director in IT and Communications at Deloitte Abogados, due to new regulations. The same applies to the financial industry, due to the IT development in fields such as electronic money payments. The luxury and retail sectors are also particularly active, says Ignacio Legido, Managing Partner at BDO Abogados, especially in terms of needing advice for marketing departments and Apps developers.

It is no surprise that companies struggling to survive the crisis are becoming much more intolerant over third-party copyright infringements, says Josep Carbonell, Head of the IP Department at Jausas, whereas the trend used to be a more lenient approach. While in Portugal, domestic businesses are also much more aware of the need for a registered trademark or patent, says Tânia Pinheiro, a Senior Associate at Caiado Guerreiro & Associados, to enable them to sell their products and expand their businesses.

The trend now is for IP and IT departments to work more closely together, as their issues are converging, says Blanca

Escribano, TMT Partner at Olswang, Spain. "We are seeing increasing litigations arising from the new platforms of social media over IP rights and the dissemination of information."

And as cost efficiency and increasing competitiveness are paramount for any business in the current environment, lawyers see a difference in the way companies are approaching their external law firms. Especially where IP and IT are their core business, says Raúl Rubio, IT Partner at Baker & McKenzie, Spain, they are integrating us far more within the company as part of their internal legal department.

Opportunities ahead

IP and IT are therefore today an unavoidable and important variable in practically all businesses and sectors, says Ainhoa Veiga, Competition and IP Partner at Araoz & Rueda. And the economic turndown has made companies intent on, for example, enforcing their IP rights in order to retain market share, adds Alejandro Angulo, Managing Partner at IP firm Grau & Angulo.

Firms that invest in IP will be those who best survive the crisis, while the ability to create new products, add value and create differentiation factors from international competitors, says António de Macedo Vitorino, Senior Partner at Macedo Vitorino & Associados.



“ Foreign firms are only permitted to practise international law so new entrants are mainly competing with each other for cross-border matters. ”
Jose Luis Freire, Managing Partner,
TozziniFreire Advogados

There is always an upside in times of hardship, and a very interesting opportunity currently exists, says Daniel Reis, a TMT Senior Associate at PLMJ, namely the attractiveness of the cost saving possibilities of migrating to cloud-based services. "This will be an important selling point for IT companies in the coming year." There is a growing awareness of export opportunities, as

companies grow more confident to invest in new products, services and markets, they search to protect their rights too, says Juan Salmerón, IP Partner at Ecija. "IP lawyers need to understand how to exploit the whole range of IP rights through commercial agreements."

Business process outsourcing is an area that has the potential to be very important in technology and related practices. It has grown over the past two years as companies reorganise to be more efficient, says Vicente Arias, IP & IT Partner at Eversheds Nicea, and the curious thing is the same might be said about law firms. "We need to find ways to make our processes more industrial to respond to the business needs of clients. The question is whether this is where lawyers are actually heading or are we still artisans?"

Key developments – Portugal

Overall, Portugal has seen considerable developments in IP & IT, particularly in the electronic communications sector, says Brito e Abreu at Uría Menéndez - Proença de Carvalho. "The technological development and modernisation of the country has been one of the main objectives of Portuguese governments in recent years, in line with the Lisbon strategy."

A big step has been establishing the first specialised Portuguese IP Court, which will also conduct a review of the legal framework governing the sector. But lawyers have not been very impressed with its performance so far, with IP litigation still paralysed and only one judge presiding over all IP and IT matters. The Court still has to prove that it will be able to fulfil its potential, says Octávio Castelo Paulo, Head of Corporate & TMT at SRS Advogados.

Earlier this year, a new Regulation on '.pt' Domain Registration came into force, liberalising the rules. Domain names directly under '.pt' can be registered on a first come, first served principle, says Brito e Abreu at Uría Menéndez - Proença de Carvalho, but so far, these are only available for companies, public and private institutions, registered business persons, independent professionals and trademark owners.

In the driving seat

As companies are reacting to the globalisation of business by using innovative technology-based business models to market their products and services, says Rafael García del Poyo, Head of the IT department at Osborne Clarke, Madrid, their increasing legal needs are driving law firms to offer faster and more sophisticated services.

IP and IT are areas of opportunity and key to the future of law firms, says Agustín González, IP & IT Partner at Uría

Menéndez, as technology is moving the world of business. “Today, you cannot be an important law firm without an IP or IT department.”

Law firms would therefore be wise to focus their strategies around these key areas, say lawyers, as there is no doubt that these departments will be those sat in the driving seat when we finally emerge from the crisis.