# Kluwer Patent Blog

## If you want to switch horses in the middle of the race, take them to England…

Miquel Montañá (Clifford Chance) · Monday, April 4th, 2016

As a foreign spectator of the litigation between Actavis and Eli Lilly (Alimta®) before the English Patents Court (the Hon. Mr. Justice Arnold), this author was fascinated by the ease with which the Court allowed Actavis to add endless new petitions to its declaratory non-infringement action ("DNA"), particularly taking into account that the DNA was meant to cover the territory of Spain. This extraordinary flexibility contrasts rather sharply with the rigid rules that constrain patent litigation in Spain. As a general rule, the Spanish Civil Procedure Act prevents the parties from modifying the scope of their initial petitions once the litigation has started. According to the "*perpetuatio jurisdictionis*" principle, the facts of the case are meant to be "frozen" on the date when the complaint is filed. From then on, the law only allows the parties to modify minor aspects of their initial petitions.

This rigidity has been recently illustrated by a judgment from the Spanish Supreme Court dated 2 March 2016. The case started with a complaint where the patent owner asked the Court to declare that by manufacturing and marketing a product in Spain, the defendants had infringed a patent and carried out acts of unfair competition. At the so-called "Preliminary Hearing", which is a hearing scheduled for the purpose of trying to narrow down the scope of the dispute and prepare the trial, the complainant added as a "new fact" that the defendants were actually importing the product from abroad. The Court of Appeal, in the judgment that resolved at second instance, considered that this was a "change of complaint" ("*mutatio libelli*") and that, therefore, it was not admissible for the complainant to seek to extend the initial complaint so as to cover acts of "importation" (in addition to manufacturing and marketing acts). The Supreme Court, in the aforementioned judgment of 2 March 2016, has now confirmed this opinion.

The teaching of this judgment, interpreted in the context of the Alimta® litigation, is very clear: if you want to circumvent mandatory Spanish civil procedure norms, take your horses to England…

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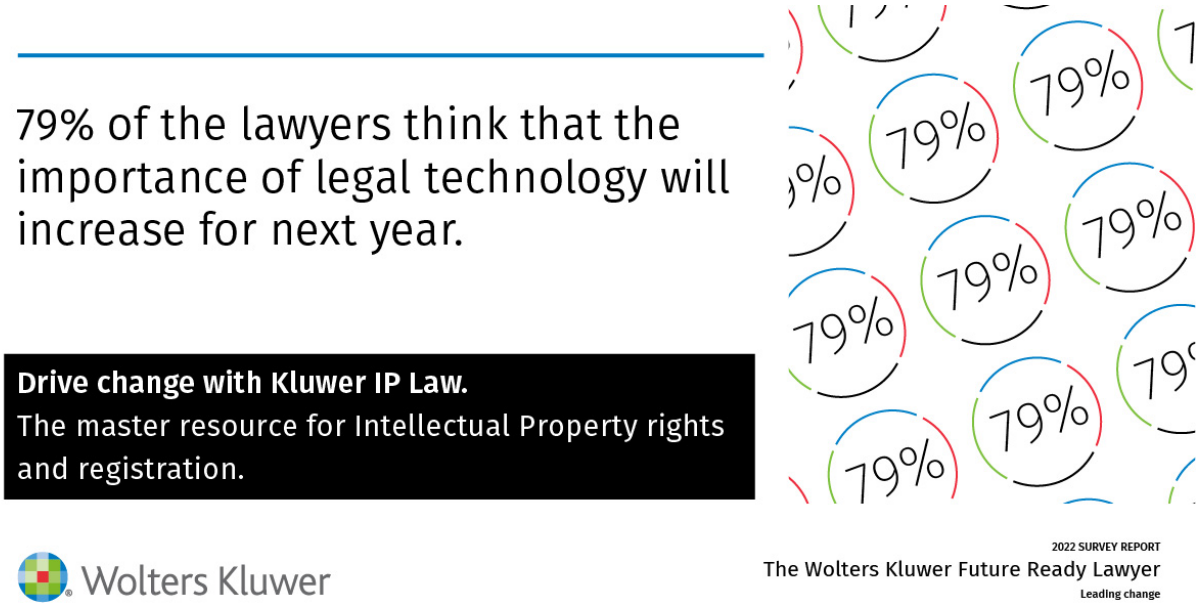


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