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## IP and Competition: flip-sides of the same coin

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# **On the forthcoming WIPO/WTO Book**

**The WIPO/WTO Book “Competition Policy and Intellectual Property in Today's Global Economy” is a by-product of the Development Agenda.**

**This explains: (a) the involvement of WIPO as a co-founder of the project; (b) the inclusive and broad scope of the contributions, reflecting the impartial approach of the project that WIPO carried out during two years and subsequent work until 2015 (see more about this at <[www.wipo.int/ip-competition/en/](http://www.wipo.int/ip-competition/en/)>)**

# **On the state of affairs of the interface between IP and Competition Policy:**

**A note on the border line between unfair competition and  
antitrust**

**Most abusive uses of IP do not reach the quantitative level that trigger the enforcement of antitrust. This leaves honest small entrepreneurs without protection against predatory behavior by dishonest competitors.**

**The language of Article 10*bis* of the Paris Convention does not help. The TRIPS Agreement does not help either.**

## Competition and the market of private restaurants in La Habana, Cuba



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**DECRETO-LEY No. 337, of 2016, art. 2.1.** Any act contrary to honest uses and practices in industry and commerce is an unfair practice in matters of Industrial Property, provided that it produces or may produce **substantial effects (!!!)** in the promotion and offering of products or services in the national market in favour of the doer of the typified practices or of a third party.  
**The answer, therefore, is: just competition.**

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In the market of the *paladares* of La Habana a common practice is for employees of one restaurant to approach tourists who check on the menu of a neighbouring restaurant and try to lure them with promises of better service, cheaper meals

**Is this against fair competition (=IP)? or is this against free competition? Or is this just competition?**

**13<sup>th</sup> century, by-laws of the guilds of Paris organized by Etienne Boileau, Provost of Paris, Title XLIX**

XV. *Item*, that if someone is in front of a Cook's stall or window with the intent of haggling or buying from said kitchens, that if any of the other Cooks calls him before his leaving that stall or window willingly, [the Cook] will be punished in *v sous*: iii for the King and ii for the said masters.

**The answer, therefore, 800 hundred years ago was: unfair competition.**

### One possible approach:

Chile, DECRETO LEY N° 211, of 1973 (as several times amended), art. 3:

The following shall be, among others, deemed as facts, acts or agreements that prevent, restrict or hinder free competition or that tend to produce such effects:  
c) Predatory practices, or of unfair competition, done with the intent of reaching, maintaining or increasing a dominant position.

*In Chile, the common denominator of unfair and of free competition is **predation**. Depending on the quantity of the effects produced, courts will apply either one or the other.*

**“Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods which shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor.”**

**(George Rublee, proponent of the FTC Act, advisor to President Theodore Roosevelt,)**

**In other words, the border line between unfair competition and antitrust could be found by replacing the subjective notion of moral reprehensibility of the conduct with the objective notion of predatory conduct (measured in terms of efficiency)**



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**Thank you!**  
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