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ECONOMIC JUSTIFICATION FOR *SUI GENERIS* DATABASES

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I. INTRODUCTION

The economic justification for *sui generis* databases needs to be reexamined. Unrestricted import and export of goods and services between nations is part of an ideal international trade policy that is subject to the fundamental economic theories of "Demand-Supply" and "Maximization" (comparative advantage). Against the prevailing wisdom that free-flowing commerce would threaten domestic producers, 18th century political economist and philosopher Adam Smith believed that, based upon comparative advantage theory, nations should export what they can produce most efficiently and inexpensively and import "what it will cost them more to make than to buy."[1] In opposition to the concept of free

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1. 4 ADAM SMITH, THE WEALTH OF NATIONS § 2, at 12 (1776) ("If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."). *See also*, Steven Suranovic, *The Theory of Comparative Advantage – Overview* (last visited Sept. 20, 2005) <http://internationalecon.com/v1.0/ch40/40c000.html>.

> The theory of comparative advantage is perhaps the most important concept in international trade theory. It is also one of the most commonly misunderstood principles. There is a popular story told amongst economists that once when an economics skeptic asked Paul Samuelson (a Nobel laureate in economics) to provide a meaningful and non-trivial result from the economics discipline, Samuelson quickly responded with, "comparative advantage." The sources of the misunderstandings are easy to identify. First, the principle of comparative advantage is clearly counter-intuitive. Many results from the formal model are contrary to simple logic. Secondly, the theory is easy to confuse with another notion about advantageous trade, known in trade theory as the theory of absolute advantage. The logic behind absolute advantage is quite intuitive. This confusion between these two concepts leads many people to think that they understand comparative advantage when in fact, what they understand, is absolute advantage. Finally, the theory of

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trade, protectionism continues to be promoted in the interest of defending domestic industries from foreign competition.

The European invention of the *sui generis* system promotes unfair competition. Under the European Database Directive's regime, the economic interest of the European database makers has been satisfied as the protection of factual and data content is granted to them.[2] Not only the duration of protection that creates an unlimited term of protection, but also the requirement of reciprocal treatment combine to create a monopoly for the European database industries,[3] promoting the interest of defending its local industries from foreign competition. Such a protectionist regime produces a number of negative effects, among which are restricting "free competition" and turning one particular region's free trade into another country's economic exploitation; this is especially true in developing countries with fragile economies and limited resources. The system of the free flow of trade, which is championed by Adam Smith's theory of the "invisible hand," the self-interested actions of both consumers and producers to promote an optimal economic and social outcome, should be maintained.[4] Regulating the *sui generis* right is an irresponsible action of the European Union, an attempt to steal knowledge wealth from other countries.

> comparative advantage is all too often presented only in its mathematical form. Using numerical examples or diagrammatic representations are extremely useful in demonstrating the basic results and the deeper implications of the theory. However, it is also easy to see the results mathematically, without ever understanding the basic intuition of the theory.

2. *The Legal Protection of Databases*, WIPO Doc. SCCR/8/8, at 3 (Nov. 4, 2002) (submission by the European Community to the Standing Committee on Copyrights and Related Rights).

> The *sui generis* protection of databases has proven to fulfill the economic expectations. Since the entry into force of the Database Directive, the European CD-ROM and online markets have grown at enormous rates. A large number of new database products have been made available in Europe, many of which have been produced by small and medium-sized enterprises.

3. Council Directive 96/9/EC, arts. 10(3),11(3), 1996 O.J. (L 77) 20 [hereinafter Database Directive].

4. CHRIS ROHMANN, A WORLD OF IDEAS; A DICTIONARY OF IMPORTANT THEORIES, CONCEPTS, BELIEFS AND THINKERS 247 (1999).

> In a free market, prices, quantities, and production methods are governed by the forces of Supply and Demand. When the price of a good is stable because the supply of it matches the demand for it, the market for that good is said to be in *equilibrium*. The invisible hand is not infallible, however; unemployment, inflation, and the adverse unintended consequences of economic activity (know to economists as "negative externalities") are examples of *market failure*. In these situations, government often steps in, creating subsidies, regulations, public-sector industries, taxes, and other mechanisms to correct or avoid the malfunction. Government intervention in free market economies also typically includes antitrust laws, tax incentives to encourage certain kinds of investment, and interest-rate manipulation.

This article explores important economic mechanisms and competition law that have been used to promote the competitiveness of the database industries. Section II explains fundamental economic theories that lead to an understanding of the concept of an efficient and perfect competition within the database industries. Section III analyzes judicial decisions of the two economic parties, the European Union and the United States of America, that apply competition law to create a fair reproduction and dissemination of factual contents and to prevent unfair competition derived from an attempt to dominate the free flow of contents in the market. Section IV examines a concept of extraterritorial jurisdiction that the courts in the E.U. and the U.S. have utilized to assert extraterritorial jurisdiction over activities that are constituted outside their borders. Section V addresses the concept of economic invisible hands and the competition laws that are sufficient to promote market efficiency and a competitive advantage for the worldwide database industry.

II. RELATION OF FUNDAMENTAL ECONOMIC MECHANISM, COMPETITION, AND THE PROTECTION OF *SUI GENERIS* DATABASES

Whatever its choice of economic systems and national policies, a government adopts basic economic principles to promote the competitiveness of its markets, and uses legal measures to support market activities.[5] Generally, there are two fundamental economic theories that the government takes in consideration. One is "Demand-Supply," which explains the concept of price motivation between producers and consumers in the market and the other is "Profit Maximization," which explains the competition between players based on the concept of price motivation.

A. DEMAND-SUPPLY

Together, Demand and Supply motivate market activities. The theory of Demand-Supply is based on the relationship between suppliers and consumers in the market. "Supply" (*ceteris paribus*) is an ability and willingness to sell specific quantities of goods at alternative prices in a given time period.[6] "Demand" (*ceteris paribus*), in contrast, is an ability and willingness to buy specific quantities of goods at alternative prices in a given time period.[7] Both Demand and Supply magnify each other, ren-

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5. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 2 (1962). "Government is necessary to preserve freedom,... Its major function must be to protect our freedom both from the enemies outside our gates and from our fellow citizens: to preserve law and order, to enforce private contracts, to foster competitive markets."

6. BRAD R. SCHILLER, THE ECONOMY TODAY (8th ed., 2000).

7. *Id.*

dering market behavior. If there is high demand by consumers for a specific product in the market, the increase in demand will cause the price of the product to be increased as well. Once the demand is greater than the supply, prices will rise and that price motivation may tempt new suppliers to produce that specific product and move into a market already dominated by a few suppliers. In contrast, if suppliers over-produce a specific product, the supply becomes greater than the demand. Then prices will drop and become more competitive and consumers will benefit from the competition between the suppliers offering that product.

B. PROFIT MAXIMIZATION AND MAXIMIZING BEHAVIOR

Profit Maximization explains the natural market behavior that leads to competition. In a perfect market environment, the Profit Maximization is the most profitable rate of output which is indicated by the intersection of marginal revenue and marginal cost or where marginal revenue equals marginal cost.[8] This means a firm maximizes profit when it could sell a single item of a specific product and gain the profit at the cost of producing it. Consequently, the maximized profit, which becomes profit incentive, stimulates competition in the market. Any firm would want to enter into a market that has already been dominated by the original player. The economists describe this kind of behavior as a "Maximizing Behavior."[9]

Maximizing Behavior applies to all market participants. Consumers come with a limited amount of income to spend.[10] They wish to buy the most desirable goods and services that their limited budgets will permit. However, they cannot afford everything they want, so they must make choices about how to spend their scarce dollars. Their goal is to maximize the utility (satisfaction) they get from their available incomes. Businesses come to the marketplace with a quest to maximize profits.[11] They try to use resources efficiently and lower the cost of production, or even to have legal protections reduced or increased in order to maximize the profit. The public sector also has a maximizing goal called "welfare maximization."[12] Government has to use available resources to serve and maximize the public need. Thus, the resources available for this purpose are finite. Hence local, state, and federal governments must use scarce resources carefully, striving to maximize the general welfare of society.

8. *Id.* at 462.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

C. AN APPLICATION OF ECONOMIC THEORIES TO *SUI GENERIS* DATABASES

The above-mentioned economic theories can be directly applied to market activities of the database industries. In a perfect market environment, the theories of Demand-Supply and Maximizing Behavior act together to explain market behavior in relation to price mechanism. If the prices of database goods and services are not too high, the demand of consumers will increase. The increasing demand, consequently, motivates the database compilers or makers to produce more products or services to supply the market. Price mechanism will motivate subsequent compilers to enter into the market that already has been captured by the original players. This is because the subsequent database makers foresee how they can maximize profit at the cost of producing one additional unit. Some database makers even enter further into their "market opportunity" by developing better and cheaper databases to supply the market. In this sense, the competition flourishes. Vice versa, if the prices increase, the demand of consumers will drop. The consumers will opt out for a product offering with an alternative price.

Every relationship in the market is determined by the price mechanism. The databases, ranging from hard products (CD-ROM or compilations) to soft products (online database services), will be consumed if the costs are not too high for the consumer to afford. At this point, the market price of databases will not rise above or equal the marginal price. This is because no firm may charge more than another; any attempt by a single firm to raise a price would result in a loss of sales as buyers opt for a lower priced product. On the other hand, if the market price drops below a producer's marginal cost, the producer will not gain enough revenue from the sale of a unit to cover his expenses in producing an item. Consequently, he will ultimately be forced to drop out of the competition in the market.

Any subsequent database maker will be tempted to enter into the market that is already dominated by the original databases makers if there is an equal market opportunity. They may use different business strategies to attract consumers, including product improvement and development. However, competition would flourish only if the underlying data is free to the subsequent compilers so they are not forced to start from scratch by doing a survey and rediscovering the same data. Legal measures, if any, should be provided to subsidize competition, but not to eliminate the subsequent compilers from the market or to allow the original database makers to dictate supply and price.

According to D'Amato and Long, copyright protection constitutes a temporary monopoly over reproduction and dissemination of expressive contents.[13] They explained that an author of creative works generally obtains exclusive rights which would create a temporary monopoly by way of a lengthy duration of protection, the author's life plus fifty years.[14] Through a licensing scheme, the consumers pay more than they should for licensing products.[15] The subsequent compilers will be reluctant to incur the costs by starting from scratch and entering a market or absorbing monopolistic prices of copyrighted items.[16] Although they did not mention any applicable economic theory in connection with the factual contents, they appear to support the idea that copyright law maintains a proper balance, providing an incentive to the authors and promoting the public free flow of access to information, by stating: "The limit is important because the purpose of copyright is not solely to reward authors, but rather to induce production at the minimum possible cost to society. The law, by limiting the ownership of data, thus, favors its free movement and therefore contributes to the general progress of society."[17] They emphasized that a government's granting of protection of any kind should neither limit the public access to information nor avail any private entity an absolute monopoly window in information goods and services.

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13. ANTHONY D'AMATO & DORIS ESTELLE LONG, INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY; UNDERLYING THEORIES 54 (1996).

> In a desire to reward the author, and hence encourage production of new works, copyright essentially grants the author a monopoly over the reproduction and dissemination of his creative expression for a limited period of time. Thus, copyright is also a tax to society, because the author may set the price he chooses for the work, though the work faces potential substitution if the price is too high and buyers opt instead for other, similar works."

See also, SCHILLER, *supra* note 6, at 496.

> A "monopoly" situation is when a firm produces the entire market supplies of a particular good and service...Although monopolies simplify the geometry, they complicate the arithmetic of profit maximization. In theory, this special adaptation of the profit-maximizing rule does not work for a monopolist. The demand curve facing a monopolist is downward-sloping. Because of this, marginal revenue is not equal to price for a monopolist. On the contrary, marginal revenue is always less than price in a monopoly, which makes it just a bit more difficult to find the profit-maximizing rate of output.

14. D'AMATO & LONG, *supra* note 13, at 54. "In order to protect the copyright holder while mitigating the burden of his monopoly on his competitors and customers, the protection is limited to creative expression for a specific period of time."

15. *Id.* "Competition is prohibited from copying expressions without the author's consent. To produce new works, competitors must pay to license, or they must start from scratch."

16. *Id.*

17. *Id.* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1014 (1997).

> Copyright protection does not extend to the ideas, facts, or functional elements of a work, but only to the author's original expression of those ideas or elements. Thus, a copyright owner in a database of facts cannot prevent a user from copying the facts themselves from the database. Only the creative effort (if any) that has gone into the selection or organization of material is entitled to protection.

In contrast, the European Union's creation of *sui generis* protection, constitutes a monopoly by means of its perpetual duration of protection. In reference to the Database Directive, it specifies two-tiered protection, one attached to the creative selection and arrangement of the content of databases and the other to the factual or data content.[18] The *sui generis* system provides the database makers an ownership right to prevent the unauthorized extraction and/or reutilization of both creative and factual contents of databases for commercial purposes and unlimited duration of protection if the database makers show that there is substantial change in the databases.[19] This is convincing evidence that the regime of *sui generis* databases is not unjustifiable per se.

D. JUSTIFIABLE ECONOMIC CONCEPT OF COMPETITION

Competition, in an economic context, can be referred to as the actions of two or more rivals in pursuit of the same objective.[20] In the context of markets, the specific objective is either selling goods to buyers or alternatively buying goods from sellers.[21] In a system of perfect competition, there would be a number of sellers, a number of buyers, and perfect market information available to all.[22] The sellers, competing among themselves for business, would be induced to make and provide what their customers want. To do so they would aspire to be inventive and progressive and to minimize costs. The pressures of competition would keep prices near costs.

However, the process of competition may result in one firm dominating the market. Competition between firms may produce a "winner" which dominates the market, or a "national" monopoly may exist on the market.[23] A firm with sustained monopoly power would have an incentive to

18. Database Directive, *supra* note 3, arts. 3 & 7.
19. *Id.* art. 10(3).
20. AREEDA KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 5 (5th ed., 1997).
21. *Id.*
22. *Id.* at 6.

A market economy will be perfectly competitive if the following conditions hold:

> (1) Sellers and buyers are so numerous that no one's action can have a perception impact on the market price, and there is no collusion among buyers and sellers.
> (2) Consumers register their subjective preferences among various goods and services through market transactions at fully known market prices.
> (3) All relevant prices are known to each producer, who also knows of all input combinations technically capable of producing any specific combination of outputs and who makes input-output decisions solely to maximize profits.
> (4) Every producer has equal access to all input markets and there are no artificial barriers to the production of any product.

23. ROHMANN, *supra* note 4, at 71. "The economic theory of competition spans a continuum, from *perfect competition*, in which many sellers offer the same product under the same circumstances, to *monopoly*, in which a product is available from only one source, which therefore has no

act inefficiently, which could involve letting costs rise; to use their power to exploit consumers; and to strike down competitors to preserve its monopoly in the market. Such activities constitute an economic inefficiency in the market and restrain competition. In these situations, it may be necessary for a governmental body to take certain measures to restrain the dominating firms' behavior.

Competition law, therefore, exists to protect the process of competition in a free market economy.[24] Competition law embodies legal measures that the government adopts in accordance with the form of economic organization which brings the greatest benefits to society.[25] To foster diversity and pluralism, competition law seeks to promote effective and undistorted competition in the market. The basis of free competition between firms is believed to deliver efficiency, low prices, and innovation. Competition and competition law that serves the market economy tend to keep markets free and open, thereby providing opportunities for entrepreneurs and their small- and medium-sized enterprises.[26]

In perfect competition, the welfare of consumers should be maximized. Under this perfect competitive environment, the consumers determine the amount of economic resources available, which maximizes the efficiency of the market. The cost of the production of goods and services will be as low as possible because the undertakings need to remain competitive. The prices remain low as a function of the mechanics of supply and demand.

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competition. Both of these model circumstances are rare; more common are *atomistic* and *monopolistic* competition and *oligopoly*."

24. ELEANOR M. FOX, CASES AND MATERIALS ON THE COMPETITION LAW OF THE EUROPEAN UNION 801 (2002).

> Many analysts assume that a system of free enterprise with competition law exists only to obtain a more efficient allocation of resources or only to prevent price rises to consumers and that competition law has exactly and only this goal. Of course, as we have seen, that is not the case. Competition law usually has other goals as well. In the European Union, these goals include market integration, openness, control of dominance, fairness, and competitiveness (the growth of efficient, dynamic and responsive firms for the sake of the European economic strength in world markets).

25. ALISON JONES AND BRENDA SUFRIN, EC COMPETITION LAW: TEXT, CASES, AND MATERIALS 3 (2001).

26. Andrés Guadamuz Gonzáles, *The Impact of Globalization on Competition Law* 6-7 (2002) *at* <http://www.democraciadigital.org/etc/arts/0201global.html>.

> It would appear that the rationale behind competition law is very complex. It exists to protect the consumer, it also protects smaller enterprises from preying practices of powerful undertakings, it protects the economy, and it is also beneficial for the "common good" of society. Whatever reason, it can be argued that the goal of competition policy is to find a balance with a market which no undertaking is allowed to become too dominant.

III. APPLICABILITY OF COMPETITION LAW TO PROMOTE ECONOMIC EFFICIENCY OF *SUI GENERIS* DATABASES

Inasmuch as perfect competition is an ideal set forth by a theory, reality is often different. The reality is that monopolies do occur. Whereas the WIPO Draft Database Treaty, like other intellectual property laws, tends to create a monopoly window for the database makers, giving them an ability to control prices and production, competition law, in a given society in Europe or in the United States, tends to promote market efficiency and competition in the databases industries. There is existing evidence of how the courts in the E.U. and the U.S. apply competition law to support competition in the database industries.

A. THE POSITION OF E.U. COMPETITION LAW

Member States of the European Union have utilized competition law to enhance economic efficiency and social development in their common internal market. Every year the Competition Directorate publishes a report[27] that reexamines the objectives of Community competition policy to be in compliance with Articles 81(ex 85) and 82(ex 86) of the Treaty Establishing the European Community of 1957 (E.C. Treaty).[28] In short, Article 81(1) declares that agreements that distort competition are incompatible with the common market;[29] Article 81(2) declares such

27. FOX, *supra* note 24, 784-787. Referring to the XXXth Report on Competition Policy (2000), ¶ 1 states:

> Competition Policy is one of the pillars of the European Commission's action in the economic field. This action is founded on the principle, enshrined in the Treaty, of "an open market economy with free competition." It acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, in encouraging the optimum allocation of resources and in granting economic agents the appropriate incentives to pursue productive efficiency, quality, and innovation.

See also, TREATY ESTABLISHING THE EUROPEAN COMMUNITY [hereinafter EC Treaty] arts. 81-82 (as amended); the XXIXth Report on Competition Policy (1999) ¶ 2 states: "The First objective of competition policy is the maintenance of competitive markets. Competition policy serves as an instrument to encourage industrial efficiency, the optimal allocation of resources, technical progress and the flexibility to adjust to a changing environment;" and the XXVIth Report on Competition Policy (1996), ¶ 2 states:

> Competition policy is both a Commission policy in its own right and an integral part of a large number of European Union policies and with them seeks to achieve the Community objectives set out in Article 2 of the Treaty, including the promotion of harmonization and balanced development of economic activities, sustainable and non-inflationary growth which respects the environment, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion.

28. EC TREATY, Nov. 10, 1997, O.J. (C 340) 3 (1997).

29. *Id.* art. 81(1).

> The Following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions, by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object

agreements void;[30] and Article 81(3) allows exemption for such agreements or practices that are economically progressive and benefit consumers.[31] Article 82 prohibits abuse of a dominant position.[32] In addition, the European Parliament and its Commission are bound to promote balance and sustain economic and social progress in the Community and in other areas as well: merger control,[33] liberalization and state intervention,[34] and state aid.[35]

In *Radio Telefis Eireann* v. *Commission* (Magill),[36] the European Court of Justice (ECJ) held that a refusal to license copyright in factual con-

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or effect the prevention, restriction or distribution of competition within the common market, and in particular those which:

(a) direct or indirect fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

30. *Id.* art. 81(2). "Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

31. *Id.* art. 81(3).

The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

—any agreement or category of agreements between undertakings;

—any decision or category of decision by associations of undertakings;

—any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

32. *Id.* art. 82.

Any abuse one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse, in particular, consist in:

(a) direct or indirect imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

33. Council Regulation 4064/89 on the Control of Concentrations between Undertakings.

34. EC TREATY arts. 37 & 90.

35. *Id.* arts. 90, 92-94.

36. Case C-241-241/91 P, RTE & ITP v. Commission, 1995 E.C.R. I-743, [1995] 6 C.M.L.R. 718 (1995).

tents infringed Article 82 of the E.C. Treaty. The ECJ upheld the Commission's decision in *Magill TV Guide* v. *Independent Television Publications Ltd.* (ITP), *British Broadcasting Cooperation* (BBC) and *Radio Telefis Eireann Authority* (RTE).[37] The Commission of the European Communities (Commission) held that the policies and practices of ITP, BBC and RTE, respectively, in relation to their individual advance weekly program listings, constituted infringements of Article 82.[38] Each broadcasting organization published weekly listings of its programs in Ireland and North Ireland, gave newspapers its schedule free on a daily basis (according to strictly enforced licensing conditions),[39] and claimed copyright protection over its program listings. Therefore, RTE had statutory monopoly over television broadcasting in Ireland,[40] whereas BBC and ITP had a statutory duopoly in the U.K. (including Northern Ireland).[41] At that time, no composite TV guide existed. An Irish publisher, Magill, started to publish a comprehensive weekly TV guide giving details of all programs available to viewers in Ireland and Northern Ireland. It sought licenses from RTE, BBC and ITP but the licenses were denied.[42] Magill complained to the Commission that the television companies, by refusing to give out reliable advance listings information and protecting their listing by enforcing their copyright, were infringing Article 82.

In the finding, the relevant product market[43] was identified in view of the potential demand for weekly TV guides. The products to be taken into account were the advance weekly listings of ITP and BBC regional program services and those of RTE and also the TV guides in which these

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37. Commission Decision 89/205/EEC, relating to a proceeding under Article 86 of the EEC Treaty (IV/31.851- Magill TV Guide/ITP, BBC and RTE), 1988 O.J. (L 78) 43; [1989] 4 C.M.L.R. 755 (1989).

38. *Id.* art. 1.

39. *Id.* ¶ 15.

40. *Id.* ¶ 2.

41. *Id.* ¶¶ 3-4.

42. *Id.* ¶ 5.

43. Commission Notice on the Definition of the Relevant Market, 1997 O.J. C 372/5 II.

> A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use... The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring areas because the conditions of competition are appreciably different in those areas... The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. The Commission interprets the definitions at paragraph 7 and 8 (which reflects the jurisprudence of the Court of Justice and the Court of First Instance as well as its own decisional practice) according to the orientations defined in this Notice.

listings were published.[44] For a publisher wishing to produce a weekly TV guide for the geographic area, these listings constituted the essential raw materials for any such guide.[45] The individual listings were not interchangeable with one another but instead were complementary to one another, as they concerned different programs.[46] Accordingly, the consumers experienced this difficulty and demanded that this information be contained in a single periodical, that is, a comprehensive guide.[47]

On the other hand, the relevant geographic market was determined by the common characteristic of where the weekly listings could be received and where TV guides containing these listings were distributed.[48] The RTE program service was received in most, if not all, of Ireland and Northern Ireland.[49] The BBC and ITP program services, or at least regional versions of these services, were also received in this area.[50] Any comprehensive weekly TV guide, therefore, would contain at least the weekly listings for these regional services. Consequently, the relevant geographic market was most of Ireland and Northern Ireland, which constituted a substantial part of the common market for the purpose of Article 82.

The Commission provided an analysis of the existence of dominant position. First, the existence of a dominant position was found in accordance with the nature of subject matter in this case.[51] The broadcasting organizations' listings were entitled to national copyright protection of the United Kingdom and Republic of Ireland, which was contrary to the concept of copyright protection elsewhere in the Community.[52] This case appeared to be a battle between intellectual property rights and competition law. Insofar as the dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer a monopoly position.[53] Since the broadcasting organizations legitimately obtained copyright protection on their listings, they had a monopoly over their reproduction and distribution.[54] Any third parties who wished to produce reliable listings for publication in their own TV guide must obtain licenses from the broadcasting organiza-

44. 1988 O.J. (L 78) 43, *supra* note 37, ¶ 20.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* ¶ 21.
49. *Id.*
50. *Id.*
51. *Id.* ¶¶ 8-9.
52. *Id.*
53. *Id.*
54. *Id.* ¶ 23.

tions, resulting in the ability of the license-holding organizations to control competition from third parties in the markets.[55] The broadcasting organizations, thus, were in a position to prevent effective competition in the market of weekly television magazines and, therefore, occupied a dominant position.

Second, the existence of abuse of Article 82 was found in relation to the broadcasting organizations' actual policies and practices.[56] ITP, BBC, and RTE had policies to supply publishers with their advance weekly listings but to limit, by means of the terms of licenses granted, the reproduction of these listings to one or, at most, two days' listings at a time. Another option was to refuse to license altogether.[57] The Commission took a view that these policies and practices were unduly restrictive to the competition by preventing the appearance of a new product for which there was a potential consumer demand.[58] Instead, their conduct reserved the secondary market of weekly TV guides to themselves by excluding competition through the denial of access to the basic information that was the indispensable raw material for the compilation of such guides.[59] In addition, the Commission asserted that such abuse also had effect on trade between Member States because a comprehensive TV guide containing the advance weekly listings of ITP, BBC and RTE would clearly be marketed in both Ireland and Northern Ireland, which would include cross-border trade in such guides.[60] In conclusion, the Commission considered that the practices and policies of broadcasting organizations were prohibited under Article 82 because, in fact, they used copyright as an instrument of abuse, and in a manner that fell outside the scope of the specific subject-matter of that intellectual property right, and by acting in a dominant position to prevent the introduction of a new product, the weekly TV guide, to the market.[61] The Commission's decision was also upheld by the Court of First Instance.[62]

Only RTE and ITP appealed to the ECJ.[63] The ECJ confirmed the finding of abuse but its judgment was strikingly narrow.[64] It concentrated on

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* ¶ 24.
61. *Id.* art. 1.
62. Case T-69/70/89, 76/89, RTE, ITP, BBC v. Commission 1991 E.C.R. II-485, [1991] 4 C.M.L.R. 586 (Ct. First Instance 1991).
63. Case C-241-241/91 P, RTE & ITP v. Commission, 1995 E.C.R. I-743, [1995] 6 C.M.L.R. 718 (1995).
64. *Id.* ¶¶ 46-58.

the specific scenario in issue and eschewed extended discussion about the nature of intellectual property rights and their relationship to the rules of competition.[65] The ECJ stated:

> The appellants—who were, by force of circumstances, the only sources of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide—gave viewers wishing to obtain information on the choice of programmes for the week ahead "no choice" but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.[66]

In conclusion, the ECJ held that the refusal to supply information that was the raw material necessary for the weekly TV listings constituted an abuse under Article 82(b) of the E.C. Treaty by means of preventing the appearance of a new product that the appellants did not offer but for which there was a potential consumer demand.[67]

The Commission had been concerned that dominant undertakings should not hinder competition from producing products and services. The decision in the *Magill* case had proved that a refusal to license intellectual property rights under Article 82 of the E.C. Treaty would affect the competition of the database industry. Pursuant to the Database Directive, recital 47 mentioned:

> Whereas, in the interests of competition between suppliers of information products and services, protection by the *sui generis* right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules.[68]

It raises an important question of how far the *sui generis* right under the Database Directive regime could promote free competition. Inasmuch as it constitutes a property right in the factual contents, the concept of protection directly opposes the copyright rationale of the public free flow of

65. *Id.* ¶ 46.
66. *Id.* ¶ 53.
67. *Id.* ¶ 54.
68. Database Directive, *supra* note 3, at Recital 47.

access to information. Moreover, it violates international treaties to which Member States are parties, especially the Berne Convention and the European Convention on Human Rights and Fundamental Freedoms.[69] The action of institutions applying and enforcing the Community law must respect the general principles of law, in particular, the principles of proportionality, legitimate expectations, and fundamental rights.[70] To this point, it is important that when administering Community law, the Commission must ensure that such law is in compliance with the principles of human rights, rules of natural justice, and "international comity" (living peacefully with other nations in mutual respect and accommodating their interests, the rules of politeness, convenience, and goodwill observed by States in their mutual intercourse without being legally bound by them).[71]

B. THE POSITION OF U.S. ANTITRUST LAW

The first country in which antirust law took a firm legislative foothold was the United States. Since 1890, the U.S. courts have applied the Sherman Act to prohibit the existence of monopolies, conspiracies between companies, and lowering prices to eliminate smaller competitors.[72] Insofar as it concerned a healthy U.S. economy, the Sherman Act was very effective in creating a system of punishment by providing private individuals a way to recover "treble damages" for breaches of the antitrust law.[73] In regard to the compilations of facts and information, the U.S. courts applied the doctrine of "misappropriation" to promote competition of the database industry in addition to the doctrine of "sweat of the brow."

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69. JONES & SUFRIN, *supra* note 25, at 66-67.

The ECJ has developed and introduced a body of unwritten law, the general principles of law, as part of Community law. These are rules, based on national laws of Member States and international treaties, especially the European Convention of Human Rights and Fundamental Freedoms, in accordance with which Community law is interpreted. The principles are important when determining the boundaries of proper and lawful action of the Community and national institutions (when the latter are acting within the sphere of Community law).

70. *Id.*

71. *Id.*

72. 15 U.S.C. §§ 1-7.

73. *Id.*; *see also*, KAPLOW, *supra* note 20, at 106-107.

Although antitrust laws are of general application, covering all industries and virtually all economic activity, several "exemptions" have arisen over the years. We use the quoted term loosely to cover quite different limitations on the reach of the antitrust laws. There are literal exemptions by which statutes expressly allow certain conduct—for example, by agriculture cooperatives or by labor unions—that would otherwise violate the antitrust laws... In addition, the courts have assumed that Congress meant to respect principles of federalism by leaving "state action" outside the antitrust regime. Finally, the federal antitrust laws apply only where interstate and foreign commerce are involved, although applying U.S. law to foreign activity creates special difficulty.

In *International News Service* v. *Associated Press* (INS v. AP),[74] the U.S. Supreme Court applied the doctrine of misappropriation to compilations of facts or data in news. According to the underlying fact, during the First World War, the INS and AP were competitors engaging in the same business conduct, news services.[75] Both gathered and published news about wars from abroad secured from foreign governments.[76] However, AP was barred from sources in some countries and began to pirate its competitor's news from INS's bulletin boards.[77] INS filed the suit, alleging that AP had misappropriated its news and sought for an injunction against its rival agency. The District Court granted the summary judgment in favor of AP and withheld the injunction.[78] On appeal, the Appellate Court reversed the decision, issued the injunction, and restrained AP from taking or gainfully using any of INS's news by means of the commercial value attached to the news.[79] The Supreme Court affirmed the reasoning that INS still had commercial interest in the news it gathered.

Applying the doctrine of misappropriation, Justice Pitney delivered the leading opinion directed to the owner's commercial or economic interest in the commercial data or information. The Court pointed out that gathered information about events of public interest was not "susceptible of ownership or dominion in the absolute sense."[80] The gatherers had no right against the public at large and could not generally prohibit use of the information because news was "common property."[81] Nevertheless, the gatherers could obtain a right to restrain use of such news if there was a commercial rival between the complainant and the defendant. In this sense, the news must be regarded as "quasi-property"[82] that had all attributes necessary to determine a misappropriation. INS, then, could prohibit its competitors from using it "until its commercial value as news has passed away."[83] The Court found that AP's conduct was an endeavor to reap where it had not sown and amounted to an unauthorized interference to INS's legitimate business at the point where its profit was to be

74. International News Service v. Associated Press, 248 U.S. 215, 63 L. Ed. 211, 39 S. Ct. 68 (1918).
75. *Id.* at 217.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 218.
80. *Id.* at 236.
81. *Id.* at 235.
82. *Id.* at 236.
83. *Id.* at 240.

reaped.[84] AP should be prohibited from taking news from the INS bulletin board. Otherwise, no news service could stay in business.

The Court laid down elements central to INS's claim as follows: (1) the plaintiff generated or collected information at some cost or expense;[85] (2) the value of information was highly time-sensitive;[86] (3) defendant's use of information constituted free-riding on the plaintiff's costly efforts to generate or collect it;[87] (4) the defendant's use of information was in direct competition with a product or service offered by the plaintiff;[88] and (5) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[89] AP's conduct would render INS's publication profitless or of so little profit as to in effect cut off the service by rendering the cost prohibitive in comparison with the return.

Further, the Court reasoned that *INS v. AP* was about the protection of property rights in time-sensitive information so that the information could be made available to the public by profit-seeking entrepreneurs. If services like INS were not assured of property rights in the news they pay to collect, they would cease to collect it. The ability of competitors to appropriate their product at only nominal cost and thereby to disseminate a competing product at a lower price would destroy the incentive to collect news in the first place.

It appeared that the Court recognized a property right in such facts and information. However, the Court did not mention that the gathered news was copyrightable, it only referred to the gathered facts and information as "quasi property." Though the news was realized as "common property" belonging to the public, the Court applied the doctrine of misappropriation, reasoning that the gatherer still had a commercial interest in the contents and prevented INS from getting a free ride. The Court's decision responded to the economic significance and interest of the gatherer in gathered facts and information.

In recent developments, the U.S. court appears to be more sophisticated and provides a more satisfactory analysis of the doctrine of misappropriation in relation to databases. In *National Basketball Association* v.

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84. *Id.*
85. *Id.*
86. *Id.* at 231.
87. *Id.* at 239-240.
88. *Id.* at 240.
89. *Id.* at 241.

Motorola, Inc. (NBA v. Motorola),[90] the Second Circuit held that Motorola did not free-ride on NBA's product since it expended its own resources to collect purely factual information. Motorola manufactured and marketed the SportsTrax paging device while Sports Team Analysis and Tracking Systems (STATS) supplied the game information that was transmitted to the pagers, such as the teams that were playing, score changes, and the time remaining in the quarter.[91] NBA filed in the Southern District of New York on the grounds of misappropriation and sought an injunction to bar the sale of a handheld pager that displayed updated scores and statistical information of National Basketball Association games.[92] The District Court found that Motorola and STATS were liable for misappropriation.[93] The Second Circuit reversed the decision.

In its finding, the Second Circuit outlined elements of the doctrine of misappropriation as follows: (1) the subject matter must result from plaintiff's own contribution, expenses, and labor in generating or collecting information; (2) the information was time sensitive; (3) the defendant's use of the information must constitute free-riding status; (4) the defendant's use of the information was in competition with a product or service offered by the plaintiff or likely to be offered by the plaintiff; and (5) the ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that the existence or equality of the product would be substantially threatened.[94] The Second Circuit found that Motorola had not engage in unlawful misappropriation because the information transmitted to SportsTrax was not precisely contemporaneous, but was, in fact, time sensitive.[95] Besides, the NBA failed to show any competitive effect from SportsTrax on the following grounds: first, the product was generating the information by playing the games; second, the product was transmitting live, full descriptions of those games; and third, the product was collecting and retransmitting strictly factual information about the games.[96] The Court also found that the NBA's primary product—producing basketball games with live attendance and licensing copyrighted broadcasts of those games—was not infringed upon nor did it involve a free-ride, inasmuch as Motorola markets SportsTrax as being designed for those times when a person could not be at the arena, watch the game on TV, or listen to it

90. National Basketball Association v. Motorola, Inc., 105 F. 3d 841 (2nd Cir. 1997).
91. *Id.* at 844.
92. *Id.*
93. *Id.*
94. *Id.* at 845.
95. *Id.* at 853.
96. *Id.* at 854.

on the radio. [97] In addition, the Court asserted that the transmitted contents of live events such as baseball games were not copyrightable and, therefore, survived the Copyright Act's preemptive effect.[98] U.S. law extends copyright protection only to an author's creative expressions, not to facts or information.

Evidently, U.S. courts extend antitrust law to constitute a property right in factual contents and to promote market efficiency in the database industry. The decisions in both cases indicate an intention to recognize the economic significance of databases and resolve the problem of free-riding. However, unlike *INS v. AP*, the decision in the *NBA v. Motorola* is based on the fact that there are different relevant markets. Under the *NBA* scenario, the market would be competitive since the underlying information remains free for all to access. On the other hand, the Court in *INS v. AP* utilizes antitrust law to prevent free-riding of the gathered facts and to secure the investment of the gatherer. Under the *INS v. AP* scenario, only a handful of database compilers would remain in the market as they would obtain exclusive owner rights over the factual contents of databases. The subsequent compilers would not have an incentive to start collecting the same data from scratch and enter into a market already dominated by the original players. Consumers would have limited alternatives of product selections. The market would not be freely competitive as the authority's grant would create a temporarily monopoly status to the database industries. Lastly, both cases refer to compiled facts that copyright law does not afford protection over unless there is minimal creativity in the selection and arrangement of the contents. *INS v. AP* refers to this type of work as a quasi property based on labor justifications corresponding to the doctrine of sweat of the brow, whereas *NBA v. Motorola* mentions that compiled facts are not copyrightable corresponding to the true copyright regime that the U.S. ratified in the Berne Convention.

The European approach, on the other hand, seems to be more effective than the U.S. approach. The Court's decision in *Magill* represents an idea to promote the public free flow of access to information, flourishing market competition inasmuch as the European courts consider a refusal to license as an abuse of dominant position. It seems that the European courts eliminate the temporary monopoly that copyright law allows through a licensing scheme, but fail to state that the factual contents are not copyrightable. Unlike the U.S. courts which suggest that the economic significance of the contents to the gatherers is of prime impor-

97. *Id.*
98. *Id.* at 846.

tance, the European courts merely suggest that a refusal to license would impede the free movement of goods and services in the Community.

There are a number of other differences between E.U. and U.S. competition laws that need to be addressed. First, the characteristic of the U.S. antitrust law is national, while the E.U. competition law is regional. Second, the *Magill* case presents a governmental authority to examine an existence of abuse of dominant position, but the U.S. court decisions present infringed parties who brought the claim before the courts on a ground of free-riding.[99] Last, the U.S. courts need not be concerned with distinct copyright law, whereas the European courts must consider the effect of the distinct copyright laws of the Member States and are challenged to solve problems in the national system in a way that would promote economic and social development in the Community as a whole.[100] One similarity they share, however, is that both the U.S. courts and the European courts efficiently utilize competition law to promote competition in the database industries and maximize the public need of free access to information.

IV. EXTRATERRITORIALITY ASPECT OF *SUI GENERIS* PROTECTION

Within the context of competition law, the issue of extraterritoriality has become increasingly important as the "globalization"[101] of the world

99. Martha Neil, *Old Continent, New Deal*, 90 A.B.A.J. 50, 54 (2004). "A 'philosophical gulf' exists between American and European Union antitrust regulators. The U.S. Department of Justice and the Federal Trade Commission routinely focus on potential harm to consumers. EU regulators, on the other hand, are concerned primarily about adverse effects the merger will have on competitors."

100. JONES & SUFRIN, *supra* note 25, at 558.

> Common law notion of copyright emphasizes the right of author to prevent others exploiting his work for commercial gain whereas the civil law emphasizes the right of the creator of a work to be recognized as such and to be normally entitled to protect its integrity. U.K. copyright law, for instance, covers performers' rights and similar rights but in most E.U. countries there is a distinction drawn between "author's right" and "neighboring rights" (those accorded to sound recordings, broadcastings, and performers). Under the U.K. law works created by the "sweat of the brow," such as compilations of information, are accorded copyright protection, whereas civil law systems require a greater degree of creativity.

101. CHARLES W. HILL, INTERNATIONAL BUSINESS: COMPETING IN THE GLOBAL MARKETPLACE 5-14 (2nd ed. 1997).

> The general understanding of the meaning of globalization is that it is a process in which the world is moving from a system of national economies into a trade regime where barriers of different types are disappearing to create one global marketplace. It is believed that this process of globalization is being driven by the fall of trade and investment barriers, the rapid technological advance in transportation and telecommunications, and the increase in direct investment of companies into third markets."

See also ROHMANN, *supra* note 4, at 199.

economy advances. As competition takes place on a global dimension, it becomes more and more difficult to isolate the effects of transactions. For an authority to be able to assert substantive jurisdiction in antitrust matters,[102] the jurisdiction must be one of two types afforded by international law. On the one hand, there is what is variously called prescriptive, legislative, or subject-matter jurisdiction, which is the right of States to make their laws applicable to persons, territories, or situations.[103] On the other hand, there is enforcement jurisdiction, which is the capability to take executive action to enforce compliance with those laws.[104] Thus, competition law primarily concerns how a state would assume its rights to take jurisdiction in respect of conduct that has affected its own territory.[105]

By taking into account the whole panorama of competition law in respect to international law, the E.U. has, by far, the most developed regime of international protection for competition and it sets an example that should be followed.[106] On the other hand, though the United States is the first country in which competition law set a firm legislative foothold in the national legal system, as Judge Wood commented, the strong U.S. antitrust law appears to put U.S. firms at a disadvantage in the competitive battle with their foreign rivals.[107] Thus, both systems share some

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> Although the contemporary political and policy know as *globalism* shares a supranational, nonisolationist outlook with other conceptions of internationalism, it differs from most of them in its emphasis on international power and influence rather than cooperation. The term refers primarily to the U.S. policy of global engagement aimed at expanding its political influence and economic markets, but it was also applied to the Soviet Union's efforts to extend its own sphere of influence during the Cold War. "Globalism" is also applied to the view that some problems, such as ozone depletion and global warming, cannot be effectively dealt with on a local or regional scale but must be attacked globally.

102. JONES & SUFRIN, *supra* note 25, at 1049.

> On general principles, substantive jurisdiction in anti-trust matters should only be taken on the basis of either (a) the territorial principle, or (b) the nationality principle... The territorial principle justifies proceedings against foreigners and foreign companies only in respect of conduct which consists in whole or in part of some activity by them in the territory of the State claiming jurisdiction... The nationality principle justifies proceedings against nationals of the State claiming jurisdiction in respect of their activities abroad only provided that this does not involve interference with the legitimate affairs of other States or cause such nationals to act in a manner which is contrary to the laws of the State in which the activities in question are conducted.

103. *Id.* at 1039.

104. *Id.*

105. *Id.*

106. A. Paul Victor, et al., *Commentary: Antitrust and International Competitiveness in the 1990s*, 58 ANTITRUST L.J. 591 at 4 (1989). "The competition rules of the European Economic Community, set forth in Articles 95 and 86 of the treaty of Rome and implemented by the European Commission, are comprehensive and strong."

107. *Id.* at 2-3. "The message seems inescapable: the United States, or more particularly U.S. firms, have not been winning the competitive battle with their Pacific Rim, European, or other for-

common characteristics in regard to the extraterritorial jurisdiction. The U.S. and the European courts adopt the principle of the effect doctrine to assert extraterritorial jurisdiction by conditions that (1) there are agreement(s) or concerted practice(s) that create a *direct and immediate* restriction of competition; (2) the effect of the conduct must be *reasonably foreseeable*; and (3) that the effect produced on the territory must be *substantial.*[108] Though they lack sufficient evidence of the court's decision in relation to the databases subject-matter, the existing court decisions that present an extension of extraterritorial jurisdiction should be sufficient to prove an efficiency of the effect doctrine applicable to the *sui generis* databases in the global dimension.

A. AN ASPECT OF EXTRATERRITORIALITY IN E.U. COMPETITION LAW

Restrictions on competition and abusive conduct which effect trade between Member States may originate outside the Community. Foreign firms established outside the Community may, for example, fix prices in the Community or divide the common market between them. To assume rights to assert extraterritorial jurisdiction, the ECJ must examine whether such behavior is anti-competitive and has an effect that impedes the free movement of goods and services in the Community. Examples of how the ECJ applies the principle of effect doctrine to assert extraterritorial jurisdiction are demonstrated below.

In *Imperial Chemical Industries Ltd. (ICI)* v. *Commission (Dyestuffs)*,[109] the ECJ upheld the Commission's decision that behavior constituted a converted practice that was prohibited by Article 81(1) of the E.C. Treaty, holding that the Commission did have jurisdiction over the British company.[110] The Commission brought proceedings alleging that enterprises in six Member States and ICI, a company incorporated and having its headquarters in the U.K., which was not at that time a member of the Community, had infringed Article 81(1) by means of engaging in

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eign rivals...Both existence of strong (at least on paper) antitrust law and specific aspects of those laws have often been said to put U.S. firms at a disadvantage."

108. KAPLOW, *supra* note 20, at 145.

> Congress responded in 1982 with the Export Trading Company Act, which leaves little doubt that the concern of the antitrust laws is with U.S. consumers and exporters, not foreign consumers or producers. The Act contains a new §7 making the Sherman Act inapplicable to "conduct involving...commerce (other than import trade...) with foreign nations—unless such conduct has a direct, substantial, and reasonably foreseeable effect [on (1) domestic or import trade or (2)]on export...commerce...of a person...in the United States.

109. Case C-48, 49, 51-57/69, Imperial Chemical Industries Ltd. v. Commission, 1972 E.C.R. 619.

110. *Id.*

fixing prices of dyestuffs and the dye markets.[111] The ECJ reasoned that: first, such behavior had direct and substantial effects in the Community markets as stated:

> Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.[112]

Second, such behavior had reasonably foreseeable effects in the Community market as stated:

> Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules of competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action in relation to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.[113]

Further, the U.K. government adopted the approach that the ECJ had no jurisdiction and that the Commission could not exercise jurisdiction against a foreigner who, or a foreign company which, had committed no act within the Community. The ECJ held that although the subsidiaries within the Community had separate legal personalities, it could not outweigh the unity of their conduct on the market for the purposes of applying the rules of competition.[114] The reality was that the ICI undertaking which had brought the concerted practice into legal question took place within the common market.[115] The issue of lacking jurisdiction raised by the applicants, therefore, was declared to be unfounded.[116] The subsidi-

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111. *Id.*
112. *Id.* ¶ 66.
113. *Id.* ¶118.
114. *Id.* ¶ 140.
115. *Id.* ¶ 141.
116. *Id.* ¶ 142.

aries were merely carrying out the parent's order, so that they appeared as "mere extensions of ICI in the Common Market."[117]

In *A Ahlström Osakeyhtiö* v. *Commission (Woodpulp)*,[118] the ECJ addressed the existence of the effect doctrine in relation to the principles of international law. The Commission investigated alleged price-fixing in the wood pulp industry. It found that a cartel existed, and held that forty-one producers and two trade associations (*Finncell* and *KEA*) had engaged in concerted practices contrary to Article 81(1). All producers and trade associations had their registered offices outside the Community, but most, if not all, of the producers had branches, subsidiaries, agencies or other establishments within the Community. The Commission adopted the effect doctrine and extended the territorial scope of Article 81 to undertakings whose registered offices were situated outside the Community because the agreements to fix prices had affected trade between Member States and restricted competition in the Common Market.[119]

Many of the addressees appealed on two grounds that: (1) the Commission had no jurisdiction to apply its competition law to the addressees; and (2) they had not participated in concerted practices. The ECJ asserted that although the main sources of supply of wood pulp were outside the Community, in Canada, the United States, Sweden, and Finland, the producers established in those countries sold directly to purchasers established in the Community and engaged in practices for the purpose of winning orders from those countries; this constituted competition within the Common Market.[120] It followed that the producers acted in concert on the prices to be charged to their customers in the Community and created an effect by selling at prices which were actually coordinated, therefore taking part in a concerted effort which had the object and effect of restricting competition within the common market within the meaning of Article 81(1).[121] Therefore, the Commission had not infringed Article 81 by applying the competition rules to the individual undertakings.

In addition, the applicants submitted that the Commission's decision was incompatible with public international law on the grounds that the use of the competition rules in this case was based exclusively on the economic repercussion within the common market. The ECJ noted that an in-

117. *Id.*
118. Case C-89, 104, 114, 116-117, 125-129/85, A Ahlström Osakeyhtiö v. Commission, 1993 E.C.R. I-1307.
119. *Id.*
120. *Id.* ¶ 12.
121. *Id.* ¶ 13.

fringement of Article 81 consisted of conduct made up of two elements, the formation of the agreement, decision, and concerted practices; and the "implementation."[122] It found the producers implemented their pricing agreement within the common market. The Community's jurisdiction to apply its competition rules to such conduct was covered by the territoriality principle as universally recognized in public international law.[123]

Further, the applicants argued on issues of the infringement of the principles of non-interference and international comity. The ECJ asserted that there was no need to enquire into the existence of such a rule in international law since it was sufficient to observe that the conditions for its application were, in any event, not satisfied.[124] The U.S. antitrust law did not require export cartels to be entered into, but merely tolerated them.[125] In addition, the United States authorities had not raised any objection regarding any conflict of jurisdiction when consulted by the Commission pursuant to the OECD Council Recommendation of 25 October 1979 concerning Co-operation between Member Countries on Restrictive Business Practices affecting International Trade.[126] Accordingly, the ECJ rejected the argument relating to the disregard of international comity raised by the applicants.[127]

It appears that the ECJ avoided mentioning the effect doctrine. Instead, the ECJ used the term "implementation" which meant to cover "direct sales" to Community purchasers and does not depend on the sellers establishing some form of marketing organization within the Community.[128] The extraterritorial jurisdiction is taken simply because of sales into the Community giving an impression that the "implementation" is similar to the effect doctrine.

B. AN ASPECT OF EXTRATERRITORIALITY IN U.S. ANTIRUST LAW

The U.S. courts confirmed that there is some extraterritorial jurisdiction under the Sherman Act. In *United States* v. *Aluminum Co. of America*

122. *Id.* ¶ 16.
123. *Id.* ¶ 18.
124. *Id.* ¶ 20.
125. *Id.*
126. *Id.* ¶ 21.
127. *Id.* ¶ 23.
128. JONES & SUFRIN, *supra* note 25, at 1055. "Significantly, this judgment avoided talking about 'effects'. Given the terms in which the Commission decision, the arguments before the Court, and the Advocate General's opinion had been concluded, this avoidance of specific reference to the effects doctrine must have been deliberated. Instead, the Court talked about 'implementation.'"

(Alcoa),[129] the Court laid down the principle of the effect doctrine to determine agreements concluded outside the U.S. This case concerned a Canadian corporation which violated Section 1 of the Sherman Act in its agreement with European aluminum producers to stay out of the United States market. Judge Learned Hand stated that a "state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends"[130] at least where those effects were intended. The Second Circuit held that the Sherman Act applied to a Canadian company which had participated in a cartel intended to affect U.S. importation inasmuch as there was *direct, substantial, and reasonably foreseeable* effect on the U.S. commerce.[131] However, there is no clear narration of how far the extraterritorial jurisdiction under the Sherman Act could extend to international commerce.[132] The effect test in this case was incomplete because it failed to consider the other nation's interests.

In *Timberland Lumber Co.* v. *Bank of America*,[133] the Ninth Circuit Court of Appeals recognized the effect doctrine by imposing additional consideration of balancing interests in regard to the notion of "international comity."[134] This case concerned an action by a U.S. company alleging that the defendants in Honduras had conspired to exclude it from the Honduran lumber market, from where it planned to export to the U.S. The Court laid down a tripartite analysis: first, the federal courts may legitimately exercise subject-matter jurisdiction under those statutes; second, a greater showing of burden or restraint may be necessary to demonstrate that the effect was sufficiently large to present cognizable injury to the plaintiffs and therefore a civil violation of the antitrust law; and third, there was the additional question, which was unique to the international setting, of whether the interest of and links to the United States, including the magnitude of the effect on American commerce, were sufficiently strong, *vis-à-vis* those of other nations, to justify an assertion on extraterritorial authority[135] as stated:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business or corporations,

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129. United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945).
130. *Id.* at 443.
131. *Id.*.
132. KAPLOW, *supra* note 20, at 146. "The Sherman Act is presumably not intended to run the commercial world, yet to say that only significant effects on United States foreign commerce are covered does not identify the threshold of significance."
133. Timberland Lumber Co. v. Bank of America, 549 F 2d 597 (9th Cir. 1976).
134. *Id.* at 615.
135. *Id.* at 613.

> the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.[136]

It appears that the Court did not deny jurisdiction but merely suggested that it should not be exercised where the interests of the U.S. in asserting jurisdiction were outweighed by the interests of international comity. The Court concluded that subject matter jurisdiction was established upon a showing of some actual or intended effect. Additional effects might be necessary to establish the violation. Even then, the Court insisted, it may refrain from asserting "extraterritorial authority" unless the magnitude of effects in United States commerce was sufficiently strong in light of: (1) the several parties' nationality, allegiance, or principal locations; (2) the relative importance of domestic and foreign conduct in the alleged violation; (3) the relative effects on the several countries involved; (4) the clarity of foreseeability of a purpose to affect or harm U.S. commerce; (5) foreign law or policy and degree of conflict with our policy or law; and (6) compliance problems.[137]

In comparison, both the U.S. courts and the E.U. courts share some common characteristics. Both the U.S. and E.U. courts have demonstrated their interests to assert extraterritorial jurisdiction because there is an economic effect to commerce within their borders. Second, the principle used in consideration was that such activity must constitute *direct, substantial, and reasonably foreseeable* effect on their commerce. Thus, it can be observed that both the U.S. and the E.U. courts have addressed the notion of "international comity" by means of living peacefully with other nations in mutual respect and accommodating their interests, the rules of politeness, convenience, and goodwill. In reference to the applicability of the effect doctrine to the *sui generis* databases, although there was no evidence of the courts' decision in this matter, both the E.U. and the U.S. courts have satisfactorily demonstrated that the effect doctrine could provide a sufficient mechanism for the courts to assert extraterritorial jurisdiction. Other countries or regions, despite sometimes touching upon intellectual property right questions in their competition policy legislation, have limited experience in this area. There are a number of

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136. *Id.* at 615.

137. Timberland Lumber Co. v. Bank of America, 749 F 2d 1378 (9th Cir. 1984), *cert. denied,* 472 U.S. 1032 (1985).

bilateral and multilateral co-operative bodies that have undertaken the creation of international competition law, such as the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD). These bodies aim at strengthening the effectiveness and efficiency of the member countries' enforcement of their competition laws against such cartels as discussed above.[138]

V. CONCLUSION

The economic mechanisms and competition law already in place prove to be sufficient to promote competition of the database industries. However, the WIPO Draft Database Treaty tends to constitute a monopoly in the database industries.[139] In contrast, the courts in the U.S. and the E.U. have tended to apply competition law to promote competition in the database industries rather than to support monopoly. To assert extraterritorial jurisdiction, the courts have applied the effect doctrine to an activity that created *direct, substantial, and reasonably foreseeable* effect to the

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138. JONES & SUFRIN, *supra* note 25, at 1067-1073; *see also* Andrés Guadamuz Gonzáles, *supra* note 26, at 12.

> The Organization for Economic Co-operation and Development (OECD), which is made up by the 25 most developed nations, has issued several recommendations on the issue of competition policy. Many other international organizations have issued recommendations on the issue of trade, globalization and competition, such as the United Nations Conference on Restrictive Business Practices, and the United Nations Conference on Trade and development (UNCTAD).

See also, Competition Policy and the Exercise of Intellectual Property Rights, Fourth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Report of the UNCTAD Secretariat, U.N. ESCOR, Provisional Agenda Item 6 (b), at 19, U.N. Doc. TD/RBP/CONF.5/6 (2000).

> The competition policy rules applied to IPRs in developed countries or regions nowadays are broadly similar, despite some variation in the scope of exemptions granted in this area. These rules are based upon the premise that competition policy and the IPRs system are complementary, because IPRs promote innovation and its dissemination and commercialization, which enhances dynamic efficiency and welfare, outweighing any static allocative efficiency losses adversely affecting prices and quantities of products... There is therefore a need for effects to promote mutual understanding and confidence-building in this area. In this respect, it has been suggested that the deliberations of the WTO Working Group on this subject provide and analytical basis for further work on fostering common approaches to competition enforcement policies in this area among WTO member countries and that, taking into account these deliberations as well as related economic literature and national enforcement policies, future work in this area might cover the following issues: comparative approaches to the treatment of licensing arrangements; the role of IP in networks industries; the emergence of new strategies for the exercise of market power through the acquisition of IPRs and the use of patent infringement suits to deter the entry of competitors; the concept of "innovation markets" and the implications of the territorial divisibility of IPRs and the case for applying the doctrine of exhausting of IPRs in international trade.

139. *Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference*, WIPO Doc. CRNR/DC/6 (Aug. 3, 1996) [hereinafter *WIPO Draft Database Treaty*].

free movement of goods and services in the territories and addressed the importance of the consideration of international comity and other principles of international law. Further, it appears that the governmental bodies of the U.S. and the E.U. understand the economic mechanisms of Demand-Supply and Maximizing Behavior and utilize competition law to support them. The public benefits are maximized inasmuch as there is a free flow of access to factual contents and information and competition flourishes.

An important question remains regarding the implementation of systems. Could economic mechanisms and systems similar to those in developed countries work in developing and least developed countries? In order to sustain national economic and social infrastructure, in particular human resource development, developing and least developed countries need a free flow of access to information. De Soto explains that the increasingly integrated global economic system has produced important efficiency gains, but the new system's market dynamic is still not fully understood. Citizens in developing and least developed countries cannot understand how to convert their property into capital, and lawyers and legislatures are busy studying the legal-economic system in developed countries instead of trying to more deeply understand their fundamental national interests.[140] His statement reveals that no matter how far the global economic system has been integrated and the foreign advanced technology has been transferred and available to them, the citizens in developing and least developed countries could hardly ever apply the same logic of legal and economic standards, such as how to convert their intellectual assets into a balance sheet.[141] Amidst the privatization boom, and the need to maximize profit - which is having a growing impact on the concept of new mechanisms for controlling the use and dissemination of undeveloped compilations and collections of information in the Third World countries - the wealth of knowledge has moved freely from generation to generation. In addition, Goldstein comments that, in regard to an enforcement of intellectual property rights, taking U.S. standards as the basis for analysis tends to highlight a large number of enforcement inadequacies that exist in developing countries.[142] Problems often men-

140. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 153-206 (2000).

141. *Id.*

142. PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW; CASES AND MATERIALS 67 (2001). Developing countries have significantly changed attitudes toward foreign investments and technology transfer in the 1980s. The foreign debt crisis, decreasing private capital flows to developing countries, negative experiences with the regulatory approach, outward-oriented development strategies, and the ongoing "technological revolution" are some of the possible explanations for the more liberal posture adopted by many developing countries on intellectual property.

tioned include: the slowness of the enforcement process; discrimination against foreigners; biased court decisions; inadequate civil and criminal remedies; and corruption.[143] The enforcement component of a "mature" intellectual property rights system is not always easily emulated in developing countries. If databases were recognized as "a vital element in the development of a global information infrastructure and an essential tool for promoting economic, cultural and technological advancement,"[144] the concept of the public free flow of access to information should be realized for the purpose of human resource development and the vital global economy.

Yet for a developing country the economic implications of the trade-off between static and dynamic aspects of the production and allocation of knowledge remain open to debate.

143. *Id.*

144. *WIPO Draft Database Treaty*, *supra* note 139, at Preamble Clause.