

Judicial Definition of Unfair Competition in Data Capture

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Abstract: At present, resource competition in the Internet environment is increasingly concentrated on users and traffic. Some Internet operators rely on their business to rely on Internet media operation platforms with high user traffic, resulting in frequent data infringement incidents. What kind of data capture is permitted by law, and what kind of data capture constitutes unfair competition. This question has become a new problem that needs to be solved urgently at this stage. This thesis will start from a series of Sina Weibo cases to explore the court's rules of judgment for such cases: the addition of "Internet Special Articles" in the Anti-Unfair Competition Law does not include unfair competition behaviors involved in data capture among them, the court can only rely on "general clauses" to regulate this behavior. The Supreme People's Court has made detailed regulations on the specific application of the general terms, and believes that the standard for proper conduct lies in compliance with the principle of good faith and recognized business ethics. By sorting out the rules of judgment in such cases, and then perfecting the competition relationship determination of unfair competition cases in data capture and the judging standards for unfair competition behavior, it provides feasible suggestions for China's legal regulation.

1. Questions Raised

In 2017, the "Anti-Unfair Competition Law" was revised to meet the needs of social development. The newly revised "Anti-Unfair Competition Law" added Article 12 "Internet Special Articles" as a response to the need for regulation of competition in the Internet field. There are mainly three types of legitimate competition behaviors: one is the behavior of inserting links and forcibly jumping to the target; the second is the behavior of deceiving and forcing users to use legal network products or services; and the third is the behavior of maliciously treating legal network products or services. Implement incompatible behavior. Competition in the Internet field is changing with each passing day, and new types of Internet competition behaviors continue to emerge. The types of behaviors listed in Article 12 of the revised Competition Law are very limited, failing to cover all the new types of unfair competition behaviors on the Internet. There is no express provision for acts involving unfair competition, so that the courts can only make judgments in accordance with the general provisions of Article 2 of the Anti-Unfair Competition Law when trying such disputes. However, because the unfair competition behavior involved in data capture is not a competitive behavior expressly prohibited by the Anti-Unfair Competition Law, there are many problems in directly using general terms to regulate unfair competition behavior in data capture, especially when there is no When specific laws and regulations directly provide for unfair competition in data capture. Therefore, how the courts identify unfair competition relationships and competitive behaviors in data capture to protect the competitive interests of operators, and what ideas and standards are adopted to review them have become the focus of this article. Through the introduction of judicial practices involving unfair competition in data capture, it analyzes the trial of the case and reads the court's thinking on unfair competition in data capture; and on this basis, explores the implementation of the court in data capture The competition has unfair basis, with a

view to further guiding the identification and handling of unfair competition in data capture in practice.

2. Brief Introduction and Focus of Controversy on Sina Weibo Series of Cases

As Internet companies' demand for the number of users continues to increase, leading to frequent cases involving data competition among Internet companies, Sina Weibo, as an important Internet operating platform, has strong user resources and is extremely vulnerable to other online platforms. Analyzing the new types of unfair competition cases involved in Sina Weibo and summarizing the court's judgment ideas for such cases will have very important reference significance for the trial and regulation of similar cases in the future.

2.1. Summary of the Case

The factual determination and application of law in data capture cases involving unfair competition disputes are different from those in traditional unfair competition cases. In addition, the complex nature of the Internet industry makes it more difficult to identify such cases. The decided cases of typical cases involving unfair competition disputes in data capture have very important guiding significance for the handling of such cases. Therefore, this paper selects typical cases involving unfair competition in data capture as the entry point for analysis.

2.1.1. Sina Weibo Sued Maimai Case

Sina Weibo is an important social media platform of Weimeng. Users can register as Sina Weibo users through their mobile phone number or email address. Users can choose to make their personal information public or not. Maimai is a product of Taoyou. Its function is to help users find new friends based on a certain database and promote mutual connection. After that, Taoyou Company and Weimeng Company signed the "Developer Agreement", which stipulates that when a third party obtains data from Weibo users, it must obtain the user's consent and delete Weibo user information in a timely manner after the cooperation is terminated. During the cooperation period, Maimai illegally captured Weibo user information in violation of the agreement and continued to use Weibo user information after the cooperation was suspended. So far, Weibo has accused Maimaifang of unfair competition. In the end, the court determined that Maimai violated the principle of honesty and credit and the business ethics of the Internet industry constituted unfair competition in accordance with Article 2 of the Anti-Unfair Competition Law.

2.1.2. Sina Weibo Sued "Fanyou" APP Case

The plaintiff is also Sina Weibo, a media and social platform of Weimeng. The defendant, Shanghai Fuyu Culture Communication Co., Ltd., set up a Weibo topic in the star account of the "Fanyou" APP operated by it, and embedded a detailed Weibo interface link. Among them, the user can directly browse the Weibo topics nested within it without registering as a Sina Weibo user. The software not only displays all the information of the celebrity Weibo, but also maliciously blocks some functions of Weibo and adds its own functions. The behavior caused the loss of potential users of Weibo. So far, the Weibo party has accused the "Fanyou" APP of unfair competition. The court found that the behavior of "Fanyou" APP users directly browsing Weibo topics without registration affects the Sina Weibo user agreement, which is a substantive replacement of some of the Sina Weibo content, and that this behavior violates the principle of good faith and recognized business Ethics constitutes unfair competition.

2.2. Controversy

In the two cases, whether there is a competitive relationship between Weimeng and Taoyou, Weimeng and Fuyu, and how to determine unfair competition has become the focus of disputes in the two cases. Judging from the results, the court affirmed the competitive relationship between Weimeng and Taoyou, Weimeng and Fuyu, and determined that the data scraping behavior of Taoyou and Fuyu constituted unfair competition.

2.2.1. The Issue of Identification of Competitive Relationship

The legal provisions for the determination of the competition relationship only indicate that the competition relationship exists between the business operators by "damaging the legitimate rights and interests of other business operators," without detailed regulations. In real life, due to the complexity and particularity of the Internet industry, the competitive relationship between Internet operators is no longer confined to specific areas. The determination of the competitive relationship between operators must not only consider business service areas, product services, etc. For areas such as objects, also refer to audience groups. Therefore, in the trial of the Sina Weibo v. Maimai case, although the court held that Sina Weibo and Maimai operate different types of products and services, there is overlap in their businesses, overlapping audiences, and competing interests between the two parties. There is a competitive relationship between them. In the Sina Weibo v. "Fanyou" case, the "Fanyou" APP inserted links to nested Weibo topics without Sina Weibo's consent, even though it was justified to argue that its behavior was to set up links. However, this behavior resulted in the loss of a large number of Weibo users during the trial. It is undoubtedly an act of competition for the user group and ultimately resulting in the loss of competitive interests. Therefore, the two parties also have a competitive relationship.

2.2.2. The Identification of Competitive Behavior

From the case of Sina Weibo suing Maimai for illegally grabbing information to Sina Weibo suing the "Fanyou" APP for unfair competition disputes, with the increasing number of data grabbing samples, how to deal with unfair competition behaviors in data grabbing. Defining has become a hot issue discussed in academic and practical circles. The revised "Anti-Unfair Competition Law" responds to new problems in the Internet industry, but the added regulatory categories have not yet included unfair competition in data capture. Faced with typified clauses and Internet patents. Due to the limitations of the provisions, further solutions to such problems need to follow the general provisions in the Anti-Unfair Competition Law. The Supreme People's Court has made detailed regulations on the specific application of the general terms, and believes that the standard for proper conduct lies in compliance with the principle of good faith and recognized business ethics. After combing through the above cases, it is not difficult to find that the court's determination of whether data scraping constitutes unfair competition is based on whether it violates the principle of good faith and recognized business ethics.

3. Competitive Relationship Determination in Unfair Competition Cases in Data Capture

In the field of data competition, the fight for competitive interests is the core of the determination of the competitive relationship, and the fight for competitive interests is actually a fight for user groups. The following specifically analyzes the issue of competition relationship determination in unfair competition cases in data capture from three perspectives: law, theory, and practice.

3.1. The Determination of Competition in the Law

Article 2 of China's Anti-Unfair Competition Law defines the act of unfair competition straightforwardly, which is an act that disrupts market order and harms the legitimate rights and interests of other operators and consumers. The clause points out that acts of unfair competition occur between business operators and consumers, and the existence of a competitive relationship between participating entities is a prerequisite, and it will cause harm to other business operators and consumers. This means that when applying the general provisions of the competition law to regulate unfair competition in data capture, the preconditions for the existence of a competitive relationship between the data capture party and the captured party. [1]

3.2. The Determination of Competitive Relations in Theory

In the ever-changing environment of competition in the Internet field, business model changes are accelerating, and business interweaving is diversified. In particular, the platform business model

emerging within the Internet industry can better reflect the characteristics of this business model. Internet companies compete for user traffic and data resources. Have promoted diversified business forms. Under the traditional model, the "business type" is used as the criterion for determining whether a competitive relationship exists, and a single determination model is far from satisfying the Internet industry's determination of competitive relationship. Coupled with the variability of data competition among Internet companies, it has once again intensified the difficulty of identifying competitive relationships. To cope with this practical problem, some scholars believe that we need to start from a new perspective based on the characteristics of the Internet industry. On the one hand, the competition relationship can no longer be limited to competitors in the same industry; on the other hand, the competition between Internet companies is ultimately based on the number of users. Users are the cornerstone of the development and profitability of various enterprises. In this case, competitive interests can be used as the basis for judging whether there is a competitive relationship between operators. Therefore, in the Internet industry, it is necessary to consider competitive interests as a factor in the determination of competitive relations. The determination of competitive interests among operators cannot simply consider factors such as business types and service targets, but to analyze whether there are conflicts between them. Competition for user resources. [2] Only in this way can we make an accurate determination of whether there is a competitive relationship between operators

3.3. Determination of Competitive Relationship in Judicial Practice

In Chinese judicial practice, there is no doubt that the determination of unfair competition in data capture requires competitive relations as a precondition. In order to analyze the review and judgment of the "competitive relationship" by the court in judicial practice, the two typical cases of "Sina Weibo v. Maimai" and "Sina Weibo v. Fanyou" in practice are cited for analysis. It can be concluded that the court has Ideas for determining the competitive relationship. In the "Sina Weibo v. Maimai case", the court held that the types of products and services offered by Sina Weibo and Maimai are different, but this difference in form does not affect the substance. From the perspective of service content, Sina Weibo and Maimai both provide Internet social services and their business methods and scopes overlap; from the perspective of service targets, the service groups of both parties overlap. The court held that due to the contention between the two parties for user resources, Maimai had a substantial impact on the competing interests of Sina Weibo, and therefore determined that the two parties had a competitive relationship. In the "Sina Weibo v. 'Fanyou' APP" case, the "Fanyou" APP nested Weibo topics without the consent of Sina Weibo, allowing users to directly browse related content on Weibo topics without registering a Weibo account, Which directly led to the loss of Weibo users and traffic. The essence of this practice was the act of violating the competition and interests of the other party through competition for the user group. Based on this, it was determined that the plaintiff Sina Weibo and the defendant "fanyou" APP were between There is a competitive relationship.

Through the above analysis, the Internet economy is a kind of "attention economy." [3] In the field of Internet data competition, the core factor in determining the competitive relationship is competitive interests, and the competition for competitive interests is essentially a competition for user groups. As long as the two parties compete for the same network user group, it can be regarded as a competitive relationship [4]. In the "Sina Weibo v. Maimai case", Maimai illegally captured and used its user data without the consent of Sina Weibo. Its ultimate goal was to obtain more user resources. In the "Sina Weibo v. Fanyou Case", the "Fanyou" APP grabbed and used platform information for customers without the consent of Sina Weibo, causing Sina Weibo to lose a lot of potential user resources. This kind of competition for user resources is essentially a competition for the interests of Internet companies. In actual judicial practice, the courts are not limited to the literal meaning of the law to conduct trials, but comprehensively consider specific cases. Therefore, it is not inappropriate for the court to use competitive interests as the entry point to determine the competitive relationship.

4. Judgment of Competition Behavior in Unfair Competition Cases in Data Capture

Whether the competition in data capture constitutes unfair competition is the key to the application of the Anti-Unfair Competition Law. When determining the competition in the case of unfair competition in data capture, the characteristics of the Internet platform should be integrated. Consider various factors.

4.1. The Legal Determination of Unfair Competition in Data Capture

In recent years, China has implemented legislative protections on two core issues in the Internet field-information security and e-commerce transactions. China implemented the "Cyber Security Law of the People's Republic of China" on June 1, 2017, and implemented on January 1, 2019 "The Electronic Commerce Law of the People's Republic of China." The above two laws are separate legislation in the Internet field. The main content of the "Network Security Law of the People's Republic of China" involves national sovereignty issues, social public interests, and personal information protection, but it is not closely related to the regulation of unfair competition in the Internet field. Association: The "E-Commerce Law of the People's Republic of China" mainly regulates the establishment, modification, and elimination of personal or property relations between equal entities through electronic conduct, and does not clearly regulate unfair competition in the Internet field. Even though the "E-commerce Law of the People's Republic of China (Draft)" enumerates unfair competition in e-commerce activities, data scraping is not included. The "E-commerce Law of the People's Republic of China" which was formally implemented later also no longer explicitly listed unfair competition behaviors in e-commerce activities, but included them in the "Anti-Unfair Competition Law" for regulation. The revised "Although the 12 Internet articles of the Anti-Unfair Competition Law do not exhaustively cover new types of unfair competition on the Internet, they can still be regulated by the "flexibility" of the general provisions of the Anti-Unfair Competition Law in judicial practice.

4.2. In Practice, the Identification of Unfair Competition in Data Capture

Some scholars have analyzed and integrated the Internet unfair competition cases heard by Beijing courts, and summarized the applicable provisions of 48 cases involving Internet unfair competition. Among them, 40 cases applied general provisions, accounting for 83%. [5] Under the complex and changeable background of online competition, the general provisions of the Anti-Unfair Competition Law have become the final choice for most courts to hear cases.

4.2.1. The General Terms Define Data Capture Involving Unfair Competition Behavior

In judicial practice, courts mostly adopt the general provisions of the Anti-Unfair Competition Law to identify unfair competition behaviors in data capture. The Supreme People's Court has made detailed explanations on the specific application of the general provisions of the Anti-Unfair Competition Law: First, the law has not yet provided detailed provisions on this type of behavior; second, the legitimate rights and interests of other business operators are subject to actual competition due to this type of competition. Damage; Third, this type of competitive behavior violates the basic principles of the general terms and business ethics is indeed improper or liable. This judgment comes from the civil ruling of the Supreme People's Court [see Civil Ruling of the Supreme People's Court (2009) Minshen Zi No. 1065.]; the judgment point of view has also been further emphasized and reiterated in point 25 of the "Annual Report on Intellectual Property Cases of the Supreme People's Court (2010)" (Abstract). The general provisions of the Anti-Unfair Competition Law can be applied only when the above three points are met at the same time. Therefore, unfair competition in data capture also requires the above three points to be legal.

4.2.2. The Application of the General Terms to Data Capture Involving Unfair Competition

The law in the first element not only refers to the Anti-Unfair Competition Law, but also includes all other laws and regulations. In the "Sina Weibo v. Maimai" case, the court's legality judgment was based on the "Developer Agreement" signed between Sina and Maimai. Maimai illegally grabbing Sina data beyond the scope of the agreement is not an act expressly prohibited by

law. ; Similarly, in the “Sina Weibo v. Fanyou APP” case, the copying and capturing of Sina Weibo information by Fuyu Company is not a behavior expressly prohibited by law. The second requirement first requires that the main body is other operators rather than consumers, and secondly the operators must suffer actual damage, and finally, there must be a causal relationship between the unfair competition behavior and the actual damage result. In the case of “Sina Weibo v. Maimai”, Sina and Maimai are Internet business platforms, and Maimai's illegal capture and use of Sina data directly caused the loss of Sina users' interests; “Sina Weibo v. Fanyou APP” In the case, Fuyu Company nested Weibo topic links for customers to use without the consent of Sina Weibo, which directly caused Sina Weibo to lose a large amount of user resources. When the court adopted the first element and the second element to determine the legitimacy of data scraping, there was no dispute.

The Supreme People's Court believes that the legitimacy of competitive behavior lies in whether the behavior violates the principle of good faith and recognized business ethics. It is not difficult to find that the third element is an important factor for the court to determine unfair competition behavior in data capture. When applied to the real world, the connotation of “recognized business ethics” in specific behaviors has not yet been clearly explained. Although the “Anti-Unfair Competition Law” does not clearly define the principle of good faith and recognized business ethics, in the “Kelp Quota Case” [see Supreme People's Court (2009) Minshen Zi No. 1065 Civil Ruling.] The Supreme People's Court explained the relationship and application of the principle of good faith and recognized business ethics. The court held that in the field of competition law, recognized business ethics is a concrete manifestation of the principle of good faith and recognized business ethics can only be generally recognized by market entities can be used as a market transaction criterion. [6] The determination of generally recognized business ethics lacked objective and fair judgment standards and relied more on the discretion of judges. Since then, Article 34 of the Beijing Higher People's Court “Guidelines for the Trial of Internet Intellectual Property Cases” has dealt with generally recognized business ethics. Ethics are refined. The guide believes that the recognition of recognized business ethics should be explained in terms of industry practices, practice norms or self-discipline conventions [see Beijing Higher People's Court “Guidelines for Trial of Internet Intellectual Property Cases” No. 34 Article.]. From 2002 to 2012, China successively promulgated the “China Internet Industry Self-Regulation Convention”, “Internet Terminal Software Service Industry Self-Regulation Convention”, and “Regulations on Regulating Internet Information Service Market Order”. The above self-regulation conventions and information service regulations are honest Principles and recognized business ethics are provided for reference. [7] In the case of Tencent Company v. 360 for an unfair competition dispute [see Supreme People's Court (2013) Min San Zhong Zi No. 5 Civil Judgment.], the Supreme People's Court affirmed the validity of the “Internet Terminal Software Service Industry Self-Discipline Convention” and held that the self-discipline convention was signed by the operators on a voluntary basis, and the court can regard it as an industry practice and a universally applicable business rule. [8]

Based on the analysis of the specific cases listed in this article, in the “Sina Weibo v. Maimai” case, Maimai Software's unauthorized addition of non-users as friends is not an industry practice. This is because even though most Internet social platforms allow users to add friends by uploading address books, the added friends must also be users of the social platform and cannot add non-user friends. Not only that, Maimai illegally captured and used Sina data beyond the scope of the agreement during the duration of the agreement, and failed to properly handle the termination of the contract after the contract was terminated. Its behavior had violated the principle of good faith and was ultimately determined to lack legitimacy based on the above reasons. In the “Sina Weibo v. Fanyou APP” case, the behavior of the “Fanyou” APP has broken industry rules. Although Sina Weibo and Fuyu have not signed an agreement, Fuyu allows users of its “Fanyou” APP to browse related content on Sina Weibo without registration, breaking the rules for displaying Sina Weibo data. The behavior constitutes a de facto substantive substitution, which violates the recognized

business ethics within the industry, and the court found that its behavior lacks legitimacy.

5. Conclusion

The prosperity of the Internet economy has caused Internet operators to shift the core of competition to the data field. At the same time, data competition is also facing huge challenges. Unfair competition among Internet operators involving data capture frequently occurs. Regulating the unfair competition behaviors involved in data capture in the Internet field from the perspective of the Anti-Unfair Competition Law provides new ideas for resolving such cases. This article believes that the determination of the competition relationship in unfair competition cases in data capture and the criteria for determining unfair competition behavior should be based on the general provisions of the Anti-Unfair Competition Law, but the general provisions are not required. Such as Gui Jian. In addition, in order to adapt to the changing technology of the times, it is necessary to comprehensively discuss the application conditions and identification ideas of the general terms in various aspects such as business types, audiences, whether it violates the principle of good faith and recognized business ethics. From the perspective of anti-unfair competition law, analyze the data scraping behavior involved in the Internet, in order to provide reference for similar incidents in the future.

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Appendix

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Please refer to the civil judgment of Beijing Intellectual Property Court (2016) J73 Minzhong 588.

Please refer to Beijing Haidian District People's Court (2019) J73 Minzhong 2799.

Please refer to the people's Court of Pudong New Area (2015) pmsz No. 528.

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See the Supreme People's Court (2011) Yue Gao FA min San Chu Zi No. 1.

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See the civil ruling of the Supreme People's Court (2009) minshenzi No. 1065.

Refer to Article 34 of the guidelines for trial of cases involving network intellectual property rights issued by Beijing Higher People's court.

Refer to the civil judgment of the Supreme People's Court (2013) mszz No.5.