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Study on the Legal Regulation of Unfair Competitive Behavior of Commercial Data

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Abstract

Unfair competition in commercial data manifests itself in the form of data capture, data blocking, traffic hijacking, malicious interference, etc., and shows a trend of diversification and dynamization in the form of manifestation. In judicial practice, the applicable basis for adjudicating disputes over unfair competition of commercial data is mainly Article 2 (general provisions) or Article 12 (Internet-specific provisions) of the Anti-Unfair Competition Law. There is no lack of conflict between the abstract nature of the "general provisions" of the Anti-Unfair Competition Law and the certainty of specific cases, and at the same time, it also reveals the unclear boundaries between the provisions of the norms and the improper determination of "unfair competition relationship". For this reason, in order to strengthen the legal regulation of unfair competition in commercial data, the identification standard of unfair competition in commercial data should be clarified, and the application of the anti-unfair competition law should be regulated through the unification of the standard; the "competitive relationship" should be clarified as the premise of judicial application, and the protection of multiple interests should be emphasized in a dynamic balance; the scope of protection of interests should be coordinated among different legal departments, and a structure conducive to the protection of interests should be constructed. The scope of protection of interests between different legal departments should be coordinated, so as to build a diversified rule of law system conducive to guiding the reasonable utilization of commercial data.

Keywords

Commercial data; Unfair competition behavior; Anti-unfair competition law.

1. Introduction

In the era of big data, commercial data has become a strategic resource for operators to compete with each other. Some operators have even adopted unfair competition behaviors that infringe on other operators' data resources in order to gain more competitive advantages, and these behaviors not only infringe on the interests of other operators and online consumers, but also seriously affect the development of the industry and even the digital economy. Therefore, in order to promote the healthy and sustainable development of the digital economy, China stipulated "data" in the Civil Code of the People's Republic of China (hereinafter referred to as the "Civil Code") in the chapter of civil rights, and made principle provisions.20 On June 10, 2021, China introduced the Data Security Law of the People's Republic of China (hereinafter referred to as the "Data Security Law"), in which data security is regulated. On June 10, 2021, China promulgated the Data Security Law of the People's Republic of China (hereinafter referred to as the "Data Security Law"), which contains detailed provisions on data processing, data security, and the exploitation and utilization of data. In addition, the Law of the People's Republic of China on the Protection of Personal Information and other relevant laws regulate issues related to the acquisition and utilization of data and the protection of personal information. A series of laws and regulations, such as the Civil Code, the Data Security Law, and

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the Personal Information Protection Law, have responded to the issues of personal information protection and data security respectively, while there are no explicit provisions on unfair competition of commercial data.

As a result, many unfair competition disputes over commercial data in judicial practice are often resolved through the Anti-Unfair Competition Law. The Anti-Unfair Competition Law usually has three regulatory paths to protect the legitimate competition of commercial data, including the regulation of general provisions, the regulation of trade secret provisions, and the regulation of the "Internet Special Provisions", but it is worth noting that neither the general provisions, the Internet Special Provisions, nor the Trade Secret Provisions are directly stipulated for the regulation of the behavior of the unfair competition of commercial data, and there are still many shortcomings in the effectiveness of the application. However, it is worth noting that neither the general provisions, nor the Internet provisions, nor the commercial secret provisions, are direct provisions for the regulation of unfair competition in commercial data, and there are still many deficiencies in the effectiveness of their application.2022 In November, the General Administration of Market Supervision published the Draft Revision of the Anti-competitive Law, which added Article 18, "Special Provisions on Commercial Data," to make principled provisions on the order of competition in commercial data, but from the point of view of the effectiveness of the legislation, there are still some omissions and shortcomings. However, in terms of legislative effect, there are still some omissions and shortcomings. As the number of disputes arising from unfair competition in commercial data is increasing year by year, it is extremely urgent to improve the legal regulation of unfair competition in commercial data.

2. Overview of Unfair Competitive Behavior in Business Data

The authority of legal provisions relies to a certain extent on accurate terminology and standardized expressions, and thus the starting point for studying the legal regulation of unfair competition in commercial data should be to clarify the scope of commercial data and sort out the basic types of commercial data utilization behaviors.

2.1. Meaning and characterization of unfair competition in commercial data

2.1.1. The meaning of unfair competition in commercial data

With the continuous development of the digital economy, new acts of unfair competition other than the typified acts of unfair competition stipulated in Chapter II of the Anti-Unfair Competition Law continue to emerge, in which the utilization of commercial data has gradually become the norm among Internet operators, and the resulting disputes over unfair competition are also rampant[1].

"In the case of Jieyin v. Chuangrui, Chuangrui, without authorization, used the technical means of network crawlers to capture a large number of short videos and related comments of Jieyin APP, and displayed them on another client in order to compete for the flow of traffic, which caused Jieyin's loss of users, harmed Jieyin's lawful interests, violated the principle of honesty and good faith, and was found to constitute an act of unfair competition. unfair competition behavior. "In the case of Transparent Label v. Beauty Cultivation, Beauty Cultivation used without authorization a large number of cosmetic pictures and ingredient information from the Transparent Label APP on its main Beauty Cultivation APP, without being able to prove its lawful origin, which violated the principle of honesty and good faith, and harmed the lawful interests of Transparent Life, and was found to constitute an act of unfair competition. unfair competition. "In 360 v. Baidu, Baidu's targeted and discriminatory restriction of access to data on the 360 search engine harmed the legitimate interests of the 360 search engine and the interests of relevant consumers, violated the principle of fair competition, and therefore

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constituted unfair competition. Based on the results of these judicial practices, it is possible to preliminarily categorize unfair competition in commercial data as acts of commercial data use that violate the provisions of the Anti-Unfair Competition Law and harm the legitimate interests of the operator, the interests of the consumer and the order of fair competition, including improper access, use and restriction.

2.1.2. Characteristics of Unfair Competitive Behavior in Business Data

(1) Highly technical

In the context of the Internet era, the most typical characteristic of unfair competition in commercial data is its highly technical nature. For example, crawling behavior may involve both rich types of web crawler technology and different open interface modes, while anti-crawling behavior includes robots protocols and more targeted technical measures. These technologies are not ipso facto perverse, which is why many defendants raise the defense of "technological neutrality". In fact, the use of commercial data is a necessary way to generate value from commercial data, which objectively helps to weaken the risk of data monopolization by the head enterprise and helps to maintain free competition, but in the process, it may also violate the rights and interests of the relevant subjects, such as the right to personal information, the right to privacy, and the legitimate interests of the operators, and even the social public interest, which may jeopardize the fair competition. In this regard, it is necessary to make a clearer measure of interests for the determination of the impropriety of the relevant behaviors[2].

(2) High concealment

High technicality also brings about high concealment. Compared with other acts of unfair competition, the use of commercial data is more covert, and market players are more inclined to choose the "decentralized" mode of utilization, and the traces of the acts are more difficult to trace, which makes it difficult for the operators to prove the unfair competition committed by the competitors. As in the case of Transparent Label v. Beauty Practice, the plaintiff, Transparent Life, could only prove that the defendant, Beauty Practice, had copied the pictures and related data with its watermark information, but it was difficult to prove the process of obtaining the data, which obviously brought obstacles to the identification and regulation of unfair competition in commercial data. On the other hand, the effects of unfair competition in commercial data are also more insidious. Sometimes it is positive on the surface, but behind the scenes, it embodies a strong competitive purpose of grabbing. For example, the front-end data capture behavior is manifested as repeated filtering of information, etc., but through the back-end effects can be analyzed to derive the competitive purpose of improperly stealing the fruits of other people's labor. Therefore, the identification of the competitive purpose of commercial data utilization behavior should be dissected from the substantive level.

2.2. The significance of laws regulating unfair competition in business data

2.2.1. Maintaining order in competitive markets

The generation of commercial data relies on a large amount of the operator's human costs and capital, and thus commercial data often contains great commercial value and can bring the operator a competitive advantage that cannot be easily replaced. However, in the context of the continuous development of emerging technologies and the Internet economy, the highly technical and hidden nature of the utilization of commercial data, as well as the easy spread of damages, make it extremely easy for unfair competition in commercial data to cause large losses to operators. If the law does not regulate the unfair competition of commercial data that is improperly misappropriated or destroys the competitive advantage of others, it will undoubtedly disrupt the order of fair competition.

Given that the value of commercial data lies in its free flow, a large amount of commercial data is naturally the main object of capture and exploitation by other operators. The third-party

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operator who directly obtains the data does not pay the corresponding consideration to the operator who creates higher commercial value, but can "stand on the shoulders of giants" to provide better quality and cheaper services, which weakens the original competitive advantage of the operator and deprives the operator of the possibility of obtaining commercial value by authorizing the use of the commercial data by others, thus undermining fair competition. This is detrimental to fair competition. At this point, when the operator's huge investment is difficult to get relief through self-reliance and lack of legal protection, its subjective willingness to continue to engage in data production will be greatly reduced, which is not conducive to the public interest in the long run. Therefore, in order to promote the subsequent development and utilization of commercial data and to maximize the interests of society as a whole, it is necessary to legally regulate unfair competition in commercial data.

2.2.2. Protection of operators' interests

The juxtaposition of "data" and "virtual property" in article 127 of China's Civil Code has, for the first time, confirmed the property attributes of data at the legislative level. While there is still controversy among academics as to whether commercial data should be regarded as the object of property rights in civil law, a consensus has basically been reached on the fact that commercial data has certain property interests. The labor property theory is the most widely argued basis for the legitimacy of legal protection of property interests. The theory, proposed by Locke, asserts that people have property rights in things that incorporate labor. According to the labor property theory, "he who sows, reaps", the labor of commercial data operators increases the value of resources, so the fruits of commercial data should be protected.

In practice, the weak protection of property rights and interests in commercial data through the regulation of unfair competition in commercial data has been widely recognized. In the cases of Sina Weibo v. Pulse and Tencent v. Juktong, the courts affirmed the economic value of raw data such as user accounts, friend chains, and behavioral records, and held that they are commercial resources that can bring corresponding competitive advantages to the enterprises concerned. "In Taobao v. Meijing, the Court also recognized that enterprises could realize certain commercial benefits based on their control of the derivative data in question.

From a comparative law perspective, the U.S. Supreme Court in Ruckelshaus v. Monsanto Co. found that experimental data could not be covered by traditional intellectual property law, but took into account the plaintiff's significant investment of money and time and affirmed the plaintiff's legal rights and interests, enabling it to prevent unauthorized use and disclosure by others[3].

3. Existing Dilemmas in the Legal Regulation of Unfair Competitive Behavior of Commercial Data

3.1. Legislative attempts face controversy

China has not yet enacted specific legislation on the protection of commercial data, but in order to meet the need to maintain the order of competition and to promote the maximization of social benefits, there is a considerable need to incorporate the legitimate interests of operators in respect of commercial data into the scope of legal protection. In recent years, discussions on the legislative level of commercial data have focused mainly on whether it can be incorporated into the existing legal framework by way of interpretation and how specialized legislation should be enacted[4].

Firstly, the traditional property right protection model is not compatible with the protection of commercial data. On the one hand, commercial data is stored in binary form, which is different from the tangible objects in the theory of property right, and cannot be directly perceived by people, let alone exclusively possessed, which is incompatible with many characteristics of

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objects, and therefore cannot be included in the scope of protection of property right. On the other hand, although commercial data that meets the requirements of originality in selection and arrangement may be protected by copyright law as compilation works, compilation works do not cover commercial data, and the "intellectual property rights" of commercial data is likely to have a major impact on the existing legal system.

Immediately thereafter, the establishment of commercial data property rights through legislation has become the focus of discussion in the academic community. The first thing to be solved for empowerment and protection is the ownership relationship of data. However, it is still difficult to clarify the relationship between the distribution of benefits of data, and if we rush to empower commercial data, not only will it not help to reduce transaction costs, but it is also likely to lead to the monopolization of commercial data by a few large-scale enterprises due to the absoluteness of the right. In addition, the development of the data market is not entirely dependent on the creation of property rights, and the effect of promoting the development of the data industry through empowerment and protection may be limited.

Aganst this background, the Anti-Unfair Competition Law can achieve timely protection of legitimate interests without harming the maximization of social interests by regulating unfair competition in commercial data. The legislative trend in China in the past two years also shows that the legislature is trying to build corresponding rules in the field of the Anti-Unfair Competition Law for disputes related to commercial data[5].

3.1.1. Failure to incorporate Internet-specific regulations

The "Internet Article" refers to the new Anti-Unfair Competition Law of 2017, which is based on the experience of judicial practice, and adds provisions specifically designed to regulate unfair competition on the Internet. However, the behavior pointed to by this article is mostly a compilation and generalization of other typical cases in the past, and it is usually considered difficult to directly cover the behavior of unfair competition of commercial data. Nevertheless, in order to avoid escaping to the general provisions, the court is still inclined to invoke the Internet-specific article to regulate unfair commercial data behavior.

In this context, on August 17, 2021, Article 20 of the Provisions on Prohibition of Unfair Competition on the Internet (Public Consultation Draft) (hereinafter referred to as the Draft Provisions on Unfair Competition on the Internet) drafted by the General Administration of Market Supervision (GAMS) had attempted to regulate the behavior of data capture, which applies to "the use of technical means", The expressions "using technical means" and "obstructing or destroying the normal operation of network products or services lawfully provided by other operators" clearly correspond to the Internet-specific articles, thus including the illegal acquisition and use of data into the scope of unfair competition on the Internet[6].

On August 18 of the same year, the Supreme People's Court issued the "Interpretation of Certain Issues Concerning the Application of the Law of the People's Republic of China on the Prevention of Unfair Competition (Draft for Opinion)" (hereinafter referred to as the "Draft Judicial Interpretation of the Anti-Law"). Article 26 of the Opinion Draft of the Judicial Interpretation specifically sets up the "data dispute rules", but also explicitly provides that disputes over unfair competition of specific commercial data can be subject to the underpinning provisions of the Internet Special Article. However, the provision also limits the scope of data regulated by the provision, i.e., data "collected with the consent of users, in accordance with the law, and with commercial value". In addition, the provision supplements other factors for the determination of unfair competition of commercial data, including "unauthorized use", "sufficiently substantial substitution", "violation of the principle of good faith and business ethics" and "damage to the principle of good faith and business ethics". "and "jeopardizing the market order of fair competition". Among them, the qualification of data, "unauthorized use" and "sufficiently substantial substitution" actually constitute the basis for typology judgment of

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unfair competition of commercial data, "violating the principle of good faith and business ethics" and "harming fair competition market order". The terms "violating the principle of good faith and business ethics" and "jeopardizing the market order of fair competition" are, from a textual point of view, restatements of the general provisions.

3.1.2. Obstacles to the establishment of specialized provisions on commercial data

The "Special Article on Commercial Data" of the Draft Anti-Competition Law limits the data subject to unfair competition in commercial data regulated by the Anti-Unfair Competition Law in terms of constituent elements, stipulating that the protected commercial data, in addition to being of commercial value, should be collected by the operator in accordance with the law and corresponding technical management measures should be taken. However, there is still a big controversy on how to reasonably interpret the specific requirements of the three elements. Among them, commercial value is the source of life of data rights and interests, which is not only manifested in the value of the data itself and the competitive advantage it brings to the operator, but also implied in the hard work of the operator in producing, collecting and managing the data. However, how the commercial value should be recognized has not been clarified. Secondly, collection in accordance with the law is the cornerstone of the legitimacy of the source of data rights and interests[7]. From "seeking the consent of the user" in the Draft Judicial Interpretation of the Anti-counterfeiting Law to "collection in accordance with the law" in the Draft Anti-counterfeiting Law, this actually raises the requirement of proof for the interests of the operator and the legislation. It also points to the provisions of the Personal Information Protection Law on the collection of personal data. As for the constituent element of "corresponding technical management measures", it seems to imply that the operator certainly enjoys legal rights and interests due to the control of commercial data, which is not appropriate in the author's view. Moreover, the term "technical" is questionable, as it is often the case that both parties indicate the data controller's willingness to protect the data through non-technical measures such as agreements or Robots. More critical is that the technical management measures, should be differentiated from the confidentiality measures stipulated in the trade secret provisions, otherwise this paragraph will be hollowed out the trade secret provisions of the suspicion.

In addition, the exclusion of "information that can be utilized without compensation" from the scope of commercial data in the field of competition law is somewhat arbitrary. Because some data can only be provided to the public free of charge by nature, such as reviews on major takeaway, travel and hotel platforms, or weather information, which is generally provided to the public free of charge, if public data is excluded from commercial data in advance, it will not be conducive to encouraging operators to collect and analyze the same data as information that the public can use free of charge to benefit the public interest.

3.2. The question of the relationship between the application of Internet-specific and general provisions

At this stage, in the absence of specialized legislation, the Anti-Unfair Competition Law has become the mainstay of judicial practice in resolving data disputes between enterprises. The author to "unfair competition disputes" as the cause of the case, to "business", "data" as the key words in the Beida Law treasure network "judicial cases Searching and analyzing in the "Judicial Cases" section of Beida Law Treasure Network with the keywords of "commerce" and "data", it was found that in the disputes over unfair competition of commercial data, the legal basis applied by the court was mostly Article 2, Article 9 and Article 12. Among them, Article 2 is the general provision, which is a principle provision; Article 9 is applicable to the protection of trade secrets, so it can also be called the "trade secrets provision"; Article 12 regulates the unfair competition behavior on the Internet, which is the "Internet special provision"[8]. However, the application of the Trade Secrets Clause in disputes over unfair competition of

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commercial data is more limited and not compatible in nature. Therefore, in disputes over unfair competition in commercial data, the main legal basis is actually the Internet Special Provisions and the General Provisions, but the rules of application of the two are highly controversial.

3.2.1. Stand-alone application of Internet-specific articles

A search of relevant judicial cases reveals that unfair competition involving commercial data rights and interests is mainly concentrated in the Internet area. In the past judicial practice, the specific types of behavior enumerated in Chapter 2 of the Anti-Unfair Competition Law are difficult to be applied to most of the new types of unfair competition on the Internet, and therefore judges often adopt the general provisions of Article 2 as the principle for adjudication.In 2017, China's Anti-Unfair Competition Law introduced a special article on the Internet, which is based on the legislative model of "Generalization + Enumeration + Underlying " legislative model, enumerating typified internet unfair competition behaviors including traffic hijacking, induced uninstallation, malicious incompatibility, etc., and establishing a fourth underpinning provision.

The special article on the Internet provides a basis for the determination of new types of unfair competition on the Internet and realizes the typology of legislation that scholars have long called for. However, the enumerated provisions of the Article are too specific, which makes it difficult to classify the unfair competition of commercial data into the scope of behaviors enumerated in these provisions from the textual point of view. The incompatibility of the enumerated provisions has made the application of the Internet special article touting provisions the norm. In Tencent v. Juktong, for example, the court invoked Article 12(2)(4) to find that the defendant company's breach of WeChat's technical measures to monitor and store WeChat's data impeded the plaintiff's legitimate business operations, and constituted an act of unfair competition on the Internet. "In Jitterbug v. Zucchini, the court also found that the defendant's act of capturing Jitterbug's business data in a way that undermined technical measures and caused damage to Jitterbug's business constituted an act of unfair competition on the Internet. In Sina Weibo v. Super Star Rice Group, the court held that Yun Zhilian's actions were unfair because the company damaged or bypassed the access rights to capture the data, which increased the plaintiff's operational burden and even caused potential security risks. It is precisely because of the widespread application of the Internet Special Provisions in disputes over unfair competition over commercial data that the relevant legislation mentioned above attempts to directly categorize unfair competition over commercial data into the scope of regulation by the Internet Special Provisions[9].

3.2.2. Simultaneous application of Internet-specific and general provisions

However, the application of the Internet monopoly clause has caused major problems. First of all, the judicial practice of "technical means" such as the definition is not uniform, and its unlawfulness can not be generalized. Secondly, taking "obstructing the normal operation of network products or services lawfully provided by the operator" as an element, paying excessive attention to the interests of the operator, deepening the suspicion of infringing inflexible thinking, and not conforming to the multi-dimensional legislative objectives of the anti-unfair competition law. Therefore, the application of the Internet Special Article often has to invoke the standard of "the principle of good faith and business ethics" in the general provisions to assist the argumentation at the same time. The original intention of the establishment of the Internet special article is to avoid escaping to the general provisions, but in practice, the court in the application of the Internet special article of the bottom of the provisions, usually also need to rely on the general provisions, which makes the Internet special article in fact more embodied in the significance of the declaration. What is more embarrassing is that, instead of combining the spirit of the general provisions of the interpretation of the

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unspecified specific provisions, the judge is more willing to directly apply the general provisions.

In recent years, disputes over unfair competition in commercial data have become increasingly aggravated, and there is an unavoidable lag in the enactment of laws, with general provisions providing space for the regulation of such new types of competitive behavior and the application of anti-unfair competition laws to protect the rights and interests of commercial data. However, the extensive application of the general provisions as the basis for the right to claim will result in laxity in legal thinking, which will lead to legal practitioners neglecting value judgment, existing specific norms and methods of legal interpretation. In judicial practice, the principle of applying general provisions can be chosen to break through specific provisions only when non-application will jeopardize the justice of individual cases or the order that the law should protect[10]. To sum up, in the dispute of unfair competition of commercial data, the enumerated provisions in the Internet special article are difficult to be compatible, and the underlining provisions have to be applied at the same time with the general provisions, which, to a certain extent, has caused the generalization of the application of the general provisions, and therefore it is necessary to clarify the rules of the application of the Internet special article as well as the general provisions at the present stage.

4. Improvement of the legal regulation of unfair competition in commercial data

4.1. Maintaining the "modesty" of legislation

4.1.1. Prudent and expansive interpretation of Internet-specific articles

Both the Draft Provisions on Unfair Competition on the Internet and the Draft Opinions on Judicial Interpretation of the Anti-Law have attempted to bring unfair competition in commercial data into the scope of regulation of the Internet-specific articles, both of which are essentially equivalent to the addition of specific behaviors enumerated in the Internet-specific articles. However, the two attempts were not retained in the end, which can be seen in reality face greater obstacles. In the author's view, a large part of the reason for this is that there are many problems with the Internet article itself.

As the specific sums of Internet-specific provisions cannot meet the needs of practice, touting clauses are widely used in the judicial practice of disputes over unfair competition in commercial data. However, the underpinning clause has a strong uncertainty, and in the long run, it is not conducive to the incentives of operators to carry out commercial and technological innovations. For example, the behavior of "obstructing or destroying" in this paragraph seems to overlap, and how it should be interpreted is a big problem. Moreover, in the market competition, "obstruction" behavior is common and unavoidable, "sabotage" behavior is not of course improper, not to mention that the difference between the two and the definition of the standard is also very vague. In practice, judges have seldom provided a detailed textual interpretation of "obstruction" and "sabotage" in this provision, or a restrictive or expansive interpretation that is consistent with the purpose of the legislation[11].

As a result, although the inclusion of unfair competition in commercial data in the special article on the Internet can formally respond to the concerns of many parties and provide a clear legal basis for the handling of disputes over unfair competition in commercial data, in practice, it cannot really solve the problem of regulation. What's more, the expansion of the interpretation of the connotation of the Internet special article through the form of legislation is actually tantamount to simply categorizing some new types of unfair competition behaviors into the category of Internet unfair competition behaviors, which is likely to damage the certainty and authority of the law.

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4.1.2. Prudence in establishing specialized provisions for commercial data

The "special article on commercial data" in the Draft Law on Anti-counterfeiting clearly draws on the legislative technique of the trade secret provisions, both in terms of the constituent elements of the protected objects and the enumeration of acts. However, such a special article may override the trade secret provisions, and it is also suspected of over-protecting the interests of operators.

First, examining the characteristics of trade secrets, it can be found that some of the non-public commercial data may indeed meet the elements of value, secrecy and confidentiality of trade secrets. In judicial practice, some courts have also recognized some of the non-public commercial data as trade secrets. For example, in Quzhou Wanlian Company v. Zhou Huimin, the court held that the database formed by Wanlian Company in the course of operating its website could be protected as a trade secret. However, it is difficult for more commercial data to meet the elements of trade secrets. Because the vitality and value of the vast majority of commercial data stems from the circulation and sharing, while the data in trade secrets, as the core resources of the business, will not be traded easily, so there is a certain degree of crossover between the two, but they are not compatible. In this context, if we draw on the provisions of trade secrets to set up a special article on commercial data, in fact, it is a higher threshold for the determination of the legitimate interests of commercial data operators. Moreover, the special article on commercial data specifically excludes public data "information that is available to the public without compensation", which will also exacerbate the hollowing-out effect of the article on the trade secret provisions[12].

Secondly, the provisions of this article on unfair competition in respect of commercial data are also very similar to those of the trade secret provisions, but it is doubtful whether such a formulation can cover all forms of unfair competition in respect of commercial data. Trade secret provisions are more like a "class rights provisions", for the rights and interests of trade secrets attached to a stronger protection, mainly reflected in the unauthorized access to trade secrets itself constitutes an act of unfair competition. With the infringement of trade secrets itself is culpable, unauthorized access to commercial data is the most typical use of commercial data, this behavior is not necessarily unfair, need to be combined with the impact of the act on the interests of a comprehensive analysis. Therefore, the special article on commercial data is suspected of prioritizing the protection of private interests through the competition law by establishing constitutive elements, which is not in line with the legislative objective of the competition law to focus on the "measurement of multiple interests".

More critically, the essence of establishing special provisions on commercial data is to typify the unfair competition of commercial data. However, the form of disputes caused by data technology and application modes is variable and highly specialized, which has higher requirements for legislators, and the adventurous typology legislation on acts may lead to the stagnation of market development, and the awkwardness of the application of the above Internet-specific provisions is a lesson learned from the past. New Internet unfair competition behavior will be born at any time, although the typological legislation has a strong focus, but also therefore the regulation of the behavior of a narrower scope, the variability is insufficient. In this regard, it should be prudent to set up special provisions on commercial data, uphold the concept of market to market, and rationally measure in individual cases to regulate unfair competition in commercial data that clearly causes an imbalance of interests.

4.2. Clarifying the rules applicable to Internet-specific and general provisions

The application of the general provisions should follow the spirit of the new Judicial Interpretation of the Anti-Law, maintain considerable modesty, and only when the order that should be protected by the law will be jeopardized can the application of the typed provisions be broken through. However, the Internet special article of the bottom clause due to the

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expression is too brief, the lack of identifiable factors, resulting in the court had to apply the general provisions at the same time, appearing "in the name of the Internet special article, in practice, the general provisions of the" tendency. In this regard, the legislature has also attempted to clarify the conditions for obstructing and destroying the normal operation of network products or services provided by other operators, in order to improve the applicability and operability of the underpinning provisions, such as Article 25 of the previous "Judicial Interpretation of the Anti-Law on the Exposure Draft" for the application of the Internet-specific provisions of the interpretation of the requirements of the behavior at the same time with the following elements: "(a) the use of network technical means; (ii) against the will of other operators and causing the network products or services they legally provide to be unable to operate normally; (iii) contrary to the principle of good faith and business ethics; (iv) disrupting the order of market competition and jeopardizing the lawful rights and interests of consumers; and (v) lacking in reasonable grounds". However, the Judicial Interpretation of the Anti-Law issued later deleted this provision. The possible reason for this is that the provisions of this article are still abstract and vague in practice. Moreover, compared with the application of the general provisions, the behavioral elements examined in this article are obviously a higher threshold, which in practice inevitably leads to the adjudicator to escape to the general provisions[13].

In fact, the general provisions have the dual attributes of principles and rules, and can be applied as rules of judgment while playing the role of principles. If a competitive act meets the constitutive elements stipulated in the specific provisions, it must also constitute an act of unfair competition recognized by the general provisions. In other words, the application of the general provisions actually represents the general logic of unfair competition. Therefore, the following section will study the paradigm for the determination of unfair competition in commercial data, fully consider the diversified interests in the assessment of market effects, and introduce a more objective mechanism for judging and evaluating competitive behaviors, so as to alleviate the shortcomings of the uncertainty of the general provisions.

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