

Research on the Legal Regulation of New Unfair Competition Behavior of Network Platform

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Abstract

With the deep integration of network technology and real economy, the network platform economy built by Internet technology plays an increasingly important role in the whole social and economic development. At the same time, with the intensification of the economic competition of the network platform, a large number of new unfair competition behaviors also continue to emerge, such as traffic hijacking, video network shielding, improper data capture, malicious incompatibility and other obstructions, destructive behaviors. New types of unfair competition on network platforms are emerging with the characteristics of high technology, overlapping fields, strong concealment and complex infringement, seriously infringing on the legitimate rights and interests of operators and consumers, and disrupting the normal competition order of the Internet market. The rapid development of the Internet economy has not only brought rapid economic development, but also put forward new requirements for the anti-unfair competition legal system to better apply the new unfair competition behaviors on the Internet platform.

Keywords

Network platform; Unfair competition; Anti-unfair competition law; Balance of interests.

1. Introduction

In the process of the rapid development of the Internet economy, unfair competition in online platforms often occurs, which has a negative impact on the construction of fair and harmonious competition. The Anti-Unfair Competition Law promulgated in 2018 (amended in 2019) is a legal regulation of unfair competition on Internet platforms. However, it is difficult for the original legislation to cope with the new problem of unfair competition, and the "benchmark" - the Internet special article is powerless due to the lack of typed clauses and too single backstop clauses. [1] Although the Supreme People's Court has made some interpretations of the Anti-Unfair Competition Law in 2022, there are still some inadequacies in the Anti-Unfair Competition Law from the two solicitations of the Regulations on Prohibiting Acts of Unfair Competition on the Internet (Draft for Public Comment) and the Anti-Unfair Competition Law (Draft for Public Comment for Revision). At the same time, it also shows China's determination to crack down on illegal and criminal online unfair competition.

2. The Types of New Acts of Unfair Competition on Online Platforms

2.1. Traffic hijacking

The term "traffic hijacking" was first proposed in the Anti-Unfair Competition Law, which was amended in 2017. Traffic hijacking can be divided into two categories. One is that when users voluntarily log in to a specified website, malicious competitors will use plug-ins to modify it, enforce the pop-up dialog box displayed on the user terminal, disrupt the user's original login interface, and lure or force the user to log in to other sites. The second case is that when the user downloads a security software, the security software will quietly bundle the plug-in, so

that the user's home page or search page can be locked, so that the user's traffic is hijacked to a website or a web page, so that the user's traffic can be increased, improve their market share, improve their competitiveness, In order to obtain a superior market competitive position. The essence of traffic hijacking is to forcibly transfer the network traffic originally belonging to a certain platform to another specific target platform through technical means, so that other target platforms can get more attention, thus providing more business opportunities, in order to strive for interests, which is a more common Internet platform unfair competition behavior.

2.2. Video advertising shielding

This type of unfair competition behavior is mainly aimed at the online video industry. The operation model of the video website platform mainly includes two kinds, one is "membership fee + advertising free video", the main income is membership fee income; The other is "free video + advertising", its source of income is advertising revenue. [2] In view of the second operation model, when users watch the website videos, most of them hope to watch the video content for free, and avoid watching advertisements. In order to meet this actual need, some illegal software developers have developed software that can watch videos without watching advertisements. For the video operation platform, if the advertisement is blocked, the viewing amount of the advertisement will decline, and the publicity effect will become worse, resulting in the advertisers reducing the capital investment in the video platform, and the advertising income of the platform operators will be greatly reduced. At the same time, this will also make paying users deterred by advertisements, will not buy members, but watch through the blocked ads, so that the platform operators lose part of the revenue.

2.3. Improper data capture

In the era of "big data", as long as there is enough data, you can infer the interests of the other party from the data, personality characteristics, etc., and when the operator will get the results of these analyses, you can recommend targeted products and services for different target groups, so as to improve the probability of transaction. [3] In order to collect users' data, platform operators spend a lot of time and capital and other upfront costs. At the same time, in order to obtain greater competitive advantage and market position, data owners will protect data through various new technical means, thus forming data transactions between platforms. Operators who quickly obtain data resources by signing contracts are justified, but when producers infringe others' science and technology by illegal means and steal others' achievements for their own use, it will frustrate the enthusiasm of economic input and production development, and destroy the normal market competition order, which will be regulated by law.

2.4. Malicious incompatibility

First of all, the software developed on different platforms is not compatible, if used at the same time, it is easy to produce contradictions, such as installing one kind of software, and have to remove another, the two are not compatible. The subjective intentions of software makers can be divided into malicious intentions and good intentions. Contradictions arising from subjective good intentions cannot be included in the scope of legal regulation. Malicious software conflict refers to tampering with, intercepting or forcing the other party's software to uninstall the other party's software without prompting or permission, which has the characteristics of strong concealment and not easy to detect. This kind of behavior often appears in security service software. Secondly, for the Internet platform, whether the "two choices" behavior is compatible is essentially an open or closed issue. In order to maintain the order of the platform and the rights and interests of the users, the Internet platform usually adopts an open or closed way according to its own needs to establish a platform ecology that suits its own needs. The

essence of "two choices" is a kind of free choice of operators or consumers on the platform and the exclusion of other competitors, which has a strong exclusivity.

2.5. Other acts of obstruction or destruction

Article 12 of the revised Anti-Unfair Competition Law makes it clear that acts of unfair competition also include other acts that hinder or undermine the lawful operation of other business operators. From the content level, this provision is actually a backstop clause. [4] The reason for this is that the first three clauses of paragraph 2 of this article mainly focus on typical acts of unfair competition in the Internet field. However, these listed types of acts are relatively limited, and most of them are summarized based on cases that occurred frequently in the past. These acts tend to occur in phases, but as the market environment continues to evolve, they may gradually decrease in frequency or even disappear. Therefore, the existence of this backstop provision is crucial to ensure that the law can adapt to various new acts of unfair competition that may appear in the future, so as to effectively maintain the fair competition order of the market. It is difficult to accurately describe or define the existing acts of unfair competition or the new ones in the legislative process. In addition, with the rapid development of information technology, business models, means and channels in the Internet economy are also emerging, which further increases the difficulty of accurately defining acts of unfair competition. Therefore, we must rely on the backstop regulations to carry out comprehensive coverage of unfair competition to ensure that the law can keep up with the pace of market changes and maintain the healthy and orderly development of the market. Before the revision of the Law against Unfair Competition, the second general provision of the law played the role of a backstop provision. However, it must be pointed out that although Article 12 of the revised Anti-Unfair Competition Law also has the nature of a backstop, its formulation is too broad and lacks specific orientation content and description of constituent elements, so it is difficult to provide strong support in judicial practice. [5] Since market competition itself is often accompanied by harmful market behaviors, the acts of nuisance and destruction are the norm to some extent, and these behaviors themselves are not necessarily unjust. Therefore, if we only rely on Article 12 to identify acts of unfair competition, the scope may be too broad, and even cover some acts of legitimate competition. For a more accurate understanding and application of this provision, it is best to consider it as an indicative blanket provision. It is intended to inform and instruct us that in addition to the enumerated acts of unfair competition on the Internet, there may be other unenumerated acts of unfair competition. However, since the provisions of the Article on the constituent elements are not complete, we need to combine the constituent elements and judgment paradigm of the general provisions of Article 2 of the Act to specifically identify these acts of unfair competition. Specifically, "other acts that hinder or destroy the normal operation of network products or services legally provided by other operators" can be identified as acts of unfair competition only when they also comply with the relevant provisions of Article 2 of the Anti-Unfair Competition Law. In this way, we can ensure that the determination of unfair competition acts is both accurate and reasonable.

3. The Research Status of The New Unfair Competition Law of China's Online Platforms

3.1. Regulation process of anti-unfair competition law

Since the reform and opening up, China's market economy has developed rapidly, and competition among enterprises has become increasingly fierce. Competition has injected vitality into economic life and promoted the sustainable development of social production, but it has also produced unfair competition. In order to regulate unfair competition effectively, the Anti-Unfair Competition Law promulgated and implemented since 1993 has played a great role

in promoting the work of anti-unfair competition in our country. With the rapid development of Internet technology, especially since the 1990s, Internet technology has been highly integrated with the economy and developed at a high speed, resulting in new business and profit models. At the same time, the competition in the field of network is becoming more and more fierce. In order to obtain the maximum traffic, enterprises have adopted a set of very complex technical methods to carry out various competitions, and there have been many new unfair competition behaviors. [6]

After 14 years of amendments to the Anti-Unfair Competition Law, the Law came into effect in 2018 and was partially revised and improved in 2019. The introduction of the new Anti-Unfair Competition Law has made competition regulations more sound, which is conducive to maintaining the order of market competition and promoting the healthy development of social economy.

3.2. The latest judicial interpretation of the Anti-Unfair Competition Law

On the basis of reflecting on the quality of legislation, we adopted reasonable legal interpretations to make up for and overcome the defects in legal provisions, which is an important measure to improve the Anti-Unfair Competition Law. The Interpretation on Several Issues concerning the Application of the Anti-Unfair Competition Law (hereinafter referred to as the "Judicial Interpretation") of the Supreme People's Law, which was recently promulgated and implemented in 2022, has timely responded to the core issues of widespread concern to all parties in the current market competition, and has provided a more detailed interpretation of the provisions of the new Anti-Unfair Competition Law. [7] Among them, the provisions on the new acts of unfair competition on online platforms are particularly prominent, which are mainly reflected in the following two aspects: First, the judicial interpretation further clarifies the criteria for determining "business ethics". When there is no recognized business ethics in a specific business field, the court can determine business ethics according to the generally followed and recognized code of conduct, while fully considering multiple factors such as industry rules, consumer wishes, and protection of multiple interests. Secondly, the judicial interpretation further refines some of the provisions of the network special article. Article 21 makes clear provisions for the situation in which the target jump needs to be started by the user's choice, requiring the court to comprehensively consider various factors such as the way of inserting the link and the damage to interests when determining whether it is illegal, so as to avoid simple determination. Article 22 supplements and improves the relevant contents of the new anti-law network special article. On the one hand, on the basis of the three acts of "modify, shut down and uninstall" previously listed, the word "etc." is added to cover more forms of unfair competition on platforms; On the other hand, it emphasizes that platform operators must clearly prompt users and obtain their consent before implementing relevant acts, otherwise it will be regarded as an illegal act. The article also clarifies the illegal purpose of such acts, which is to "maliciously interfere with or destroy" other operators' normal business activities. Taking video advertising blocking as an example, as one of the difficulties in judicial practice, according to the relevant provisions of judicial interpretation, online platform enterprises must clearly inform users of the existence of blocking behavior when designing browsers or software advertising blocking functions, and provide users with consent switches to ensure that users' right to know and choice are fully protected. [8] At the same time, enterprises also need to avoid maliciously interfering with the normal business activities of other operators. Only when an enterprise's behavior meets the above requirements can it be identified as an act of fair competition.

4. The Deficiencies of The Current Legal Status of New Unfair Competition Acts on Online Platforms

In recent years, the new unfair competition behaviors of some online platforms have a relatively obvious problem of "blurred boundaries". Take advertising blocking as an example, some enterprises have developed browser software programs that can block ads in response to users' general aversion to online advertising. While this may cater to consumer demand, it may also infringe on the principle of fair competition and thus be subject to the law. In addition, in some online unfair competition disputes, both parties often use the Internet to over-hype before and after the lawsuit to influence the direction of public opinion, which not only escalates the economic dispute into a social problem, but also may create public opinion pressure on the adjudicator. Even some network operators know that their actions are illegal, but they still take risks. These phenomena reflect that China's anti-unfair competition legal system needs to be further improved, especially in the new competition behavior legislation lags behind.

4.1. Incomplete implementation of the concept of "diversified interests" protection

The enactment of the "Anti-Unfair Competition Law" is aimed at maintaining the healthy and orderly competition order of the market, and it is a progress in legislative thinking from the "unitary" competition protection to the coordinated and balanced protection of the "diversified" interests of operators, consumers and the public. However, the new Anti-Unfair Competition Law only mentions the protection of consumers' rights and interests in the general provisions, and does not provide special relief for consumers. Such protection is still at the declarative level, and the concept of judicial institutions' protection of consumers' rights and interests needs to be implemented in the implementation process of the new Anti-Unfair Competition Law. Therefore, when adjudicating the new unfair competition disputes on the Internet platform, although some judges take the rights and interests of consumers as the basis for judgment, there is still a habit of thinking that the interests of operators as the final factor of decision. In the specific case, it should be considered comprehensively from the three levels of competitors, consumers and the public, and a unified interest measurement path should be established. [9]

4.2. Excessive application of general provisions

Before the introduction of the network clauses, general clauses played an important role in adjudicating various competition disputes on network platforms, and showed a tendency toward general clauses to a certain extent. After the implementation of the new Anti-Unfair Competition Law, the general clauses have indeed played an important role in the trial of new unfair competition disputes involving platforms. However, through empirical investigation, we find that in judicial practice, general clauses are still the most commonly applied clauses in cases of unfair competition on the Internet. The network specific clause should be in a priority position in adjudicating network competition disputes. However, in judicial practice, due to the narrow scope of enumerated clauses, the setting of elements in the backstop clause is too simple, and there are no detailed provisions on how to apply the law, the judicial organs will still directly apply the general clauses when trying individual difficult cases of unfair competition disputes on network platforms. As a result, the abuse of general clauses has not been fundamentally contained. Due to the lack of clear constituent elements of general provisions, judges have greater discretion in the application of individual cases, and there is no unified standard for the implementation of laws. In practice, the same case is often judged differently, resulting in the reduction of judicial credibility.

4.3. Overlapping regulatory responsibilities of departments

First, the subject of law enforcement is unclear. In the context of the digital economy, the role of anti-unfair competition law enforcement departments, characterized by their flexibility and timeliness, has become increasingly prominent. China's "Anti-Unfair Competition Law" has clear laws and regulations on Internet competition, but also clearly states that other departments should be responsible for the investigation, in accordance with its relevant provisions. In addition to the market supervision department, the Ministry of Industry and Information Technology, the Network Information Office is also one of them, are the "supervision and inspection department" category, which leads to the "multi-head supervision" of the regulator, which is not conducive to regulating the unfair competition behavior of the network platform. [10]

Secondly, with the deep development of the digital economy, many new professional network technologies such as big data, cloud computing, and the Internet of Things have also constantly challenged regulatory law enforcement personnel. From the perspective of development trend, compared with judicial procedures, regulatory law enforcement has significant advantages of timeliness and efficiency. The market supervision attribute of anti-unfair competition law is becoming more and more prominent, and law enforcement departments have great responsibilities in regulating acts of unfair competition on the Internet, and the technical level requirements of network law enforcement personnel are constantly increasing. In the process of practice, the effectiveness of law enforcement is affected by the uneven level of law enforcement personnel and the lack of law enforcement experience. Therefore, it is necessary to establish a regular training system, increase the intensity of training, comprehensively enhance the level of law enforcement personnel's network technology and law enforcement business, and effectively crack down on illegal competition in the Internet field.

5. The Breakthrough of The Legal Status Quo Dilemma of New Unfair Competition Behaviors on Online Platforms

5.1. Timely revision and improvement of the revised draft

At the end of 2022, the State Administration for Market Regulation issued a new draft amendment to the Anti-Unfair Competition Law for comment, which has made more comprehensive revisions in the types of behavior, interest measurement and legal liability, further categorize new types of unfair competition on online platforms, and give specific provisions for some problems arising in actual situations. This is also timely to keep pace with The Times. To enhance the credibility of the law. [11] Therefore, the revised draft should be revised and improved in a timely manner to better regulate the anti-unfair competition behavior of online platforms.

In the online market environment, due to the imperfect laws and regulations, the legitimate rights and interests of network operators cannot be fully and effectively protected, and the order of the online market is difficult to be stable. In view of the increasingly rampant behavior of unfair competition in the online market, providing perfect legal protection for market economic activities in the Internet environment has become an inevitable requirement to ensure the principles of free, efficient, open and fair Internet economy. However, the Internet market is changing rapidly, and the market regulation mechanism is often difficult to play a full role, so it needs to be properly intervened and guided through legal means. There are various forms of unfair competition behavior in the Internet market, and the phenomenon is not uncommon. Therefore, the Supreme People's Court and Supreme People's Procuratorate should pay close attention to market dynamics and formulate and update relevant judicial interpretations in a timely manner to cope with emerging new situations and problems. With the strong momentum of online development, the number of cases involving unfair competition

will also keep increasing. In order to effectively solve the problems in the application of the law in these cases and ensure that there is a law to follow during the trial process, the "two highs" should formulate and constantly improve relevant judicial interpretations in light of the current actual situation. In addition, the self-discipline of the network market industry also plays an important role in supplementing and standardizing the implementation of the law. By strengthening the self-discipline of the industry, it can effectively promote the healthy development of the network market economy, reduce the occurrence of unfair competition behavior, and maintain the market order and fair competition environment. Therefore, improving laws and regulations, strengthening the interpretation and application of laws, promoting industry self-discipline and other measures can effectively deal with the problem of unfair competition in the network market and ensure the sustainable, stable and healthy development of the network economy.

5.2. Intensify punishment and introduce an open punishment mechanism when appropriate

Increasing the severity of punishment can be divided into four specific aspects. First, increasing the amount of punishment to avoid insufficient punishment; The second is to implement an open punishment mechanism, does not stipulate a fixed penalty ceiling, can use a certain proportion of the turnover or other indicators reflecting real income to calculate the amount of punishment; Third, for seriously disrupting the order of competition, especially serious violations of the law can be implemented higher than the statutory maximum limit of punitive damages, so that infringers due to huge compensation and mandatory increase more heavy economic burden, reduce the possibility of repeating the law. At the same time, it is more to deter others from giving up the idea of implementing acts of unfair competition out of fear of the consequences of the illegal act; The fourth is to violate the order of fair competition can implement the market ban rules, such as listed in the list of dishonest, revoked business license and so on. [12]

5.3. Strengthen the cooperation of regulatory bodies and give full play to the advantages of industry self-regulatory organizations

It takes some time to determine whether the competition behavior between online platforms is legitimate or not. However, the target of the platform is the broad public, and the interests of the public need to be quickly responded, otherwise it is easy to ferment into social problems. Therefore, when regulating online competition, supervision and management departments, law enforcement departments and judicial organs should give full play to their respective characteristics and advantages, further improve the cooperation mechanism among departments, and form positive interactions among departments. Compared with strict and cumbersome judicial procedures, self-discipline management of the industry has the advantages of high flexibility and high efficiency. Judicial procedures from prosecution to the final judgment needs a series of standardized processes, the process is often relatively long, and the development of the network economy is changing with each passing day, the time cost for the competition is very high, the self-regulation of industry organizations, as the code of conduct commonly recognized by enterprises in the industry, represents the business ethics standards generally observed in the industry. [13] Its implementation procedures are flexible and convenient, can quickly respond to various situations, effectively reduce the reaction time, and then reduce the possible loss. This specification plays an important role in ensuring the healthy and orderly development of the industry. In short, judicial and executive supervision departments as well as industry self-regulatory organizations should manage and regulate the competitive behavior of online platforms in their respective fields, actively communicate and complement each other, and cooperate and win win-win cooperation in purifying the competitive environment of the Internet.

5.4. Promote platform autonomy under the government supervision model

In addition to assuming the role of operators, platform operators also have the functions of managers, who are responsible for guiding and regulating the competitive behavior of operators on the platform, so as to maintain a good competition order within the platform. First of all, platform operators should give full play to their management functions, formulate fair and legal platform rules, aimed at promoting fair competition within the platform, and ensure that the legitimate rights and interests of merchants and third-party partners are not infringed. At the same time, in view of the increasingly serious problem of user information leakage, platform operators have the responsibility to strengthen technical protection of data security, strictly protect the privacy of users' personal information, and severely crack down on acts that infringe on consumers' rights and interests such as the disclosure of user information. Secondly, government management departments should intensify efforts to improve the system of regulations and policies, and further strengthen the supervision of digital empowerment platforms, so as to promote the healthy and sustainable development of platform economy. Taking Zhejiang Province, where the platform economy is developing rapidly, as an example, the province took the lead in formulating competition compliance management norms for platform enterprises in the country in July 2022, providing a powerful example for guiding platform enterprises to compete fairly. In addition, the draft anti-law amendments also added provisions on platform management, clearly requiring platform operators to clarify fair competition rules within the platform, and actively advocate fair competition, which not only reflects the importance of platform rules in the network economy, but also gives the platform a corresponding legal status. However, while fulfilling the legal responsibility of formulating platform rules, platform enterprises should also undertake corresponding regulatory obligations and responsibilities to jointly promote the healthy development of platform economy.

6. Conclusion

With the deep integration of the Internet and the real economy, the platform economy has shown stronger vitality, which has had a profound impact on our production and life, but the new unfair competition problems such as data grabbing that have emerged during its development are closely related to not only the operators' lack of legal awareness, but also the defects of the legal system against unfair competition. The "network special Article" is a breakthrough in China's "Anti-Unfair Competition Law". It has been five years, from the initial overapplication of general provisions to the current mass use, which shows that there are still many problems and defects in the design and practice of its legal provisions, which need further research and discussion. Although there are still some defects in the regulation of the competition behavior of Internet platforms in the Anti-Unfair Competition Law, on the whole, it is consistent with the economic development of our country, and it plays a vital role in promoting the sustainable and healthy development of the economy. In the future, the theory will be more mature and the judicial practice will be more abundant. It can better serve the development of society and economy.

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