



Featured Article

Exploring Data Rights and Interests: Safeguarding Enterprise Data Under the Chinese Anti-Unfair Competition Law

Introduction

In the era of data economy, data has become the “new oil” and a fundamental component of enterprises’ core competitiveness. The competition for data among Internet companies is becoming increasingly fierce, resulting in a growing number of unfair competition cases arising from data usage. Such cases are primarily regulated under either the General Provisions (Article 2) or the Internet Provisions (Article 12) of the Anti- Unfair Competition Law. Among them, establishing the basis of an enterprise's data rights and interests is a pivotal aspect of employing anti-unfair competition laws to protect enterprise data.

This article, by examining two typical data-related unfair competition cases, explores the boundaries of the data rights and interests owned by enterprises. It takes a data categorization perspective to provide a understanding of the rights and interests foundation of enterprise data protection under the Chinese Anti- unfair Competition Law, before discussing other problems that may arise following such protection.

I. Introduction to typical judicial cases involving data

a. Taobao v. Meijing Case¹

【Basic case facts】

"Business Consultant" is a retail e-commerce data product developed and operated by Taobao (China) Software Co., Ltd. (hereinafter referred to as Taobao Company). The "Business Consultant" product records and collects behavioral traces left by users in activities such as browsing, searching, collecting, purchasing, and trading on the Taobao e-commerce platform, and conducts in-depth analysis, filtering, refining and integration, and anonymization and desensitization on the basis of the massive raw data formed, and finally forms predictive, exponential, and statistical derivative data that can provide reference for Taobao merchants' operating stores. The "Gugu Mutual Aid Platform" software and the "Gugu Business Consultant Crowdfunding" website, which developed and operated by Anhui Meijing Information Technology Co., Ltd. (hereinafter referred to as Meijing Company), solicit, organize, and help others obtain "business consultants" by providing remote login services. The price for customers to purchase the above data products from Meijing is only half of what Taobao charges. Taobao Company believed that Meijing Company's actions

constituted unfair competition and brought it to the Hangzhou Railway Transport Court (hereinafter referred to as the Hangzhou Railway Court). The Hangzhou Railway Court held that network operators should enjoy their own independent property rights for the big data products they develop. Meijing Company did not put any effort into creation and directly used the "Business Consultant" data product as a tool to obtain commercial interests. This kind of free-riding behavior is contrary to business ethics and constitutes unfair competition.

The Hangzhou Railway Court ruled that the actions of Meijing Company constituted unfair competition. Meijing Company disagreed with the judgment of first instance and filed an appeal with Hangzhou Intermediate People's Court. Hangzhou Intermediate People's Court ruled to reject the appeal and uphold the original judgment.

Three-dimensional division of data - network user information, original network data and derived data

The Hangzhou Railway Court divided data into three categories based on types, namely network user information, original network data and derived data, and determined the boundary of data rights and interests enjoyed by network users and network operators.

¹ Hangzhou Railway Transport Court (2017) Zhejiang 8601 Minchu No. 4034 Civil Judgment; Hangzhou Intermediate

People's Court (2018) Zhejiang 01 Minzhong No. 7312 Civil Judgment.

Network user information is information provided by network users to network operators in order to obtain relevant network services. This information is usually used alone and does not automatically have direct economic value. In the absence of legal provisions or special provisions in contracts, network users do not have independent property rights to the limited value and fragmented user information they provide to network operators; For the sake of user privacy protection, network operators need to obtain the consent of users to collect user information and have security obligations for this.

Original network data is a digital record of network user information, and the data content does not deviate from the scope of the original network user information. Although network operators have put in a certain amount of labor in the formation of original network data, the original network data should still be subject to the control of network users over the user over the user information it provides, and the network operator cannot enjoy independent rights, but can only enjoy the right to use the original network data in accordance with its agreement with the network user.

Derived data is independent of network user information and original network data, and has no direct correspondence with the two. Derived data originates from network user information and is presented to users

after a large amount of intellectual labor investment by network operators. After in-depth development and system integration, network operators have independent property rights in it. Network big data products developed based on derived data are an important source of market competitive advantage and core competitiveness for network operators, and can also bring corresponding business benefits. It should be emphasized that the Hangzhou Railway Court, based on the principle of “legal property rights”, did not confirm that network operators therefore enjoy property ownership of network big data products.

b. WeChat v. Juketong group control case²

【Basic case facts】

WeChat software is developed by Tencent Technology (Shenzhen) Co., Ltd. (hereinafter referred to as Tencent Technology Company) and jointly operated by Tencent Technology Company and Shenzhen Tencent Computer Systems Co., Ltd. (hereinafter referred to as Tencent Computer Company) to provide consumers with instant social communication services. Zhejiang Soudao Network Technology Co., Ltd. (hereinafter referred to as Soudao Company) and Hangzhou Juketong Technology Co., Ltd. (hereinafter referred to as Juketong Company) develop and operate Juketong "WeChat Management System" group control software, using

² Hangzhou Railway Transport Court (2019) Zhejiang Minchu No. 1987 Civil Judgment; Beijing Intellectual

Property Court (2019) Jing 73 Minzhong No. 3789 Civil Judgment.

Xposed plug-in technology to automate and batch operation of WeChat on the "Juke Genius" and "Juketong" group control software, monitor and store WeChat, and provide assistance to the subjects who purchase the software to carry out commercial marketing and business management activities in WeChat software. Tencent Technology Company and Tencent Computer Company claimed that Soudao Company and Juketong Company obtained and used WeChat data without authorization, which constituted unfair competition, so they brought them to the Hangzhou Railway Transportation Court (hereinafter referred to as the Hangzhou Railway Court). Hangzhou Railway Court held that Tencent Technology Company and Tencent Computer Company have legitimate rights and interests in WeChat product data resources, and the acts of Soudao Company and Juketong Company had endangered the data security of WeChat products,, which not only violated the relevant laws and regulations, but also obviously violated business ethics by making destructive use of other operators' business resources to enrich themselves at others' expense and constituted unfair competition.

The Hangzhou Railway Court ruled in the first instance that the acts of Soudao Company and Juketong Company constituted unfair competition. Soudao Company and Juketong Company were disagreed with the judgment of first instance and appealed to the Hangzhou Intermediate People's Court for withdraw

the appeal. Therefore, the court approved the withdrawal of appeal.

Two-dimensional division of data - data resource as a whole and single data entity

The Hangzhou Railway Court has divided the data in the network platform into two categories according to the data form, namely the overall data resource and the single data individual. The network platform enjoys different data rights and interests for the two.

The network platform enjoys competitive rights and interests over the data resources as a whole. The data resource as a whole is formed by the data resource holder investing a lot of manpower and material resources and conducting legal operations. The data resource as a whole can bring commercial interests and competitive advantages to the data resource holder, and also provides the opportunity space for the data resource holders to develop derivative products based on the data resources as a whole to obtain value-added profits. Therefore, as a data resource holder, the network platform should enjoy competitive rights and interests over the data resources as a whole.

The ownership of the rights and interests of single data entity does not depend on who controls or enjoys it. Network platforms only have limited rights to use a single data entity. Single data entity is only the original data formed by digitally recording user information,

and its value contribution to society is still not separated from the information content contained in the user information. Although the data collection subject has put in a certain amount of labor in this process, it has not improved the quality of the user's information. In other words, it has not provided creative labor results. Therefore, the data collection subject only has the right to enjoy the value added by its labor rather than the full value of the original data, and the network platform as the data collection subject can only rely on the user's personal information rights and interests, and enjoy the limited right to use the original data according to its agreement with the user. Due to the "sharing" nature of network resources, the use of user data controlled by others should generally not be recognized as an infringement as long as it does not violate the principle of "legal, legitimate, necessary, not excessive, and obtaining user consent".

II. Enterprises obtain anti-unfair competition law protection based on different types of data rights and interests

Dividing data types helps define the boundaries of enterprise data rights. Data generation includes multiple links such as data collection, collection and storage, analysis and processing, etc. It is a complex

mapping of multiple subjects and multiple attributions such as individuals, enterprises, and organizations.³ According to the generation method and degree of processing of data, it can be divided into network user information, original network data and derived data; according to the form of data, data can be divided into data resources as a whole and single data entity. By reasonably dividing data types, it will help break through the correlation characteristics of big data in judicial practice and provide guidance for clarifying the boundaries of corporate data rights and interests.

Through legal operations, enterprises invest varying degrees of labor and enjoy corresponding competitive rights and interests in data. Locke's theory of labor property holds that "*anyone has ownership rights to his or her body that are unavailable to others. Anyone who removes an object from its original state through labor can enjoy the benefits brought by his own labor.*"⁴ This theory provides rational support for enterprises to enjoy data rights and interests. In judicial practice, there is also a trend of recognizing that enterprises have corresponding property rights and interests in data obtained by investing varying degrees of labor. For derived data and data resources as a whole, the basis for the rights and interests of these two types of enterprise data to be protected by the

³ Mei Hong: "On Data Governance", Renmin University of China Press, 2020 edition, page 65 .

⁴ See Locke : " *Treatise of Government* ", translated by Ye

Qifang and Zhai Junong , Commercial Press 2009 edition, pp. 17-19 .

anti-unfair competition law lies in the legitimate collection behavior of the enterprise and the large amount of manpower, material resources, intellectual and other labor expended in the collection process; for the original network data and single data entity, the enterprises have also put in a certain amount of labor in the process of collecting and processing the above data., but because the data content is not separated from the user's original information and is not independent, the enterprise enjoys the added value of its labor but not the full value, so the enterprise only enjoys limited rights to use such data in accordance with the agreement with the user; for network user information that has not been digitalized, neither the enterprise nor the user has any property rights unless there are special circumstances.⁵

III. Other legal issues arising from defining the basis of enterprise data rights and interests through data classification

Enterprise data right is not a legal right. In judicial practice, in the process of handling individual cases, it is generally necessary to accurately define the basis of enterprise data rights and interests based on multiple factors such as the specific content and

attributes of the data involved, the data formation process, and the contribution of the data owner to the generation of the data. In judicial practice, most courts believe that enterprises have competitive rights and interests in derivative data. However, in such cases, the defendant usually defends on the grounds that the collection and use of original data by the plaintiff company violates legal provisions, and the resulting derived data or data resources as a whole do not belong to the legitimate rights and interests that should be protected by the Anti-Unfair Competition Law.⁶ In this regard, there are different views in the industry on whether the legality of the acquisition, collection and use of raw data is a prerequisite for the protection of enterprise derivative data to obtain the protection of the anti-unfair competition law, and whether the enterprise loses the protection of the anti-unfair competition law due to the unfairness of the collection of derived data based on illegally obtained raw data.

The first view is that the source of data is not legal and the fruit of the poisonous tree should not be protected by law. The prerequisite for enterprises to obtain anti-unfair competition law protection for their derived data is to meet the legality requirements in all aspects of original data collection, processing, and use. For raw data obtained directly, the source and

⁵ See Kong Xiangjun: "Commercial Data Rights: New Industrial Property Rights in the Digital Era – Three Principles of Classification and Ownership Definition of Industrial Property Rights", pages 88 and 98 .

⁶ Hangzhou Railway Transport Court (2017) Zhejiang 8601 Minchu No. 4034 Civil Judgment; Hangzhou Intermediate People' s Court (2018) Zhejiang 01 Minzhong No. 7312 Civil Judgment.

method of acquisition must be legitimate and legal; for data obtained indirectly, the method of acquisition must meet the triple authorization principle. If the source of the original data and other aspects are not legal, the derivative data derived therefrom shall certainly not be protected on the basis of the "unclean hands principle".

Another view is that the protection rules on "illegally derivative works" in the Copyright Law can be used to recognize the basis of an enterprise's right to stop unfair competition by others over derived data and data resources as a whole. That is to say, although the work illegally deduced is an infringing work as compared to the prior copyright owner, the second creator shall still enjoy the copyright for the deduction part on the basis of the original efforts made by the second creator, and the second creator shall be entitled to investigate the tort liability of the later infringer. According to the latter view, illegally derived data can obviously be protected.⁷ However, by applying the above protection model, it cannot be automatically concluded that an enterprise has the basis of rights for its illegally derived data to be protected by the anti-unfair competition law. Multiple factors must also be considered. For example, there are differences in the degree of

participation of enterprises in the process of generating derivative data, and derivative data with creative input and derivative data without creative input should be discussed differently.

Article 2 of the anti-unfair competition law clearly regulates behaviors that harm the legitimate rights and interests of other operators. Therefore, under the path of anti-unfair competition law protection that focuses on behavioral regulation, whether the requirement for the "legitimacy" of original data acquisition will inevitably extend to the basic definition of derived data rights and interests is worthy of further thinking and discussion.

From the practice perspective, in order to avoid possible disputes, an enterprise shall try its best to meet the requirements of legality in each step of the collection, processing and utilization of primary data. At the data collection stage, on the one hand, enterprises shall not violate the robots agreement of the platform or website where the information is located to obtain data, or avoid or destroy the technical measures of the website to obtain information by bypassing IP restrictions, cracking encryption algorithms or otherwise.⁸ On the other hand, enterprises may obtain users' consent and

7 See Su Zhifu : " *Path Selection and Rule Construction for Commercial Data Protection in the Data Element Era* ", published in " *Information and Communication Technology and Policy* " , Issue 336(06), 2022, Page 22 ; Tao Qian, Li Yanze : " *On the Development of Derived Data* " *Intellectual Property Protection Model* ", published in "

Journal of Dalian University of Technology (Social Science Edition) " , Issue 44(04), 2023 , page 98 .

8 See Duan Zhichao, " *Data Protection Path under the Draft Anti-Unfair Competition Law* ", published on the WeChat public platform of CBLJ.

authorization for data collection by entering into user agreements with users or otherwise. During the data possession and use stage, the enterprise shall take corresponding technical management and

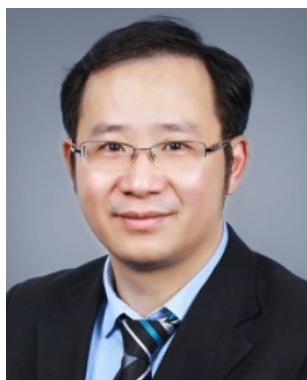
protection measures, and define the data use authority to ensure data security so as to safeguard the competitive rights and interests of the enterprise over the derivative data.

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Mr. Xing Kang has expertise in patent invalidity proceedings, administrative litigation, patent infringement litigation, patent strategy planning, legal opinions relating to patent infringement and freedom-to-operate, as well as patent prosecution in the fields of semiconductor, electronics, machinery, computer science and communications. Mr. Kang has rich working experiences as patent examiner, patent attorney and attorney at law, which give him a better perspectives for the handling of patent examination, patent invalidation and patent litigation.

Mr. Kang has represented clients in many influential cases before Courts and CNIPA Patent Reexamination and Invalidation Department, among which a patent administrative case he handled was written in Patent Litigation Report 2017 by Beijing IP Court, a patent invalidity case he handled was selected as one of the Top 10 cases of the Patent Reexamination Board of the China National Intellectual Property Administration in 2019, and a litigation case that he was involved was selected by the Supreme People's Court of China as typical cases in 2020. Mr. Kang joined Lung Tin in April 2014, and is well recognized for his excellence in services by many influential clients.

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