

The Dilemma of Commercial Data Protection from the Perspective of Anti-Unfair Competition Law and the Improvement of the Way Forward

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Abstract: With the current rapid development of big data technology, the importance of data has become increasingly prominent. However, commercial data, as the core resource of the data factor market, faces protection difficulties in the process of frequent flow, access and use. Based on the protection mode of the Anti-Unfair Competition Law, this article firstly analyzes the problems of the protection of “general provisions”, “Internet special provisions” and “trade secret provisions” under this mode in judicial practice. Firstly, it analyzes the problems that exist in the judicial practice of the protection of “general provisions”, “Internet special provisions” and “trade secret provisions” under this model, namely, the uncertainty of the identification of competitive behaviors and the evaluation of business ethics, the limitations of the content of the provisions and the judicial practice, and the tendency to fall into the protection of private interests and excessive interference in the competitive order. Then, while reflecting on the specific practice in China, this article draws on the experience of Japan and the United States in the protection of commercial data. Finally, the three principles of proportionality, limitation and modesty are proposed to improve the problems of the above provisions, with a view to improving the protection of commercial data by identifying unfair competition, clarifying the target of regulation, and optimizing the path of legal regulation, so as to promote the benign circulation and utilization of data, and thus promote the prosperity of China's market economy.

Keywords: commercial data, unfair competition in data, general provisions, Internet special provisions, trade secret provisions

1. Introduction

1.1. Background and significance of the selected topic

With the rapid development of the era of big data and artificial intelligence, data, as one of the production factors in the era of digital economy, has increasingly become a strategic resource as important as oil. Commercial data, as a collection of user data collected, analyzed, or processed by new technologies, is more scarce and of high commercial value than ordinary data. However, in recent years, disputes have arisen around commercial data, such as Taobao v. Meijing and Tencent v.

Joyo. How to protect commercial data, a variety of views, different scholars from the basic theory of civil law, intellectual property law, economic law and other perspectives to put forward their own views. Based on the current legal system, this paper studies the current dilemma of commercial data protection and the improvement of its way forward from the perspective of the Anti-Unfair Competition Law. On the one hand, this paper combines domestic and foreign legislative attempts and judicial practice to put forward three principles-oriented optimization measures for commercial data protection; on the other hand, following the line of thought of “raising problems - analyzing problems - solving problems”, it analyzes the mode of commercial data protection by using the Anti-Unfair Competition Law with a view to promoting the solution of the problem of unresolved commercial data. On the other hand, it follows the line of “posing problems-analyzing problems-solving problems” to analyze the model of commercial data protection by applying the Anti-Unfair Competition Law, with a view to contributing to the solution of the outstanding problems of reasonable protection and effective utilization of commercial data.

1.2. Literature review

Nowadays, commercial data dispute cases emerge one after another, and many scholars conduct in-depth research on commercial data protection from different perspectives, and these research results provide a strong theoretical basis for improving the regulatory path of commercial data protection.

On the choice of path for commercial data protection. Scholars have divergent views and have yet to reach a final conclusion. Feng Xiaoqing and other scholars believe that although the object of commercial data has similarities with intellectual property rights, it also has independent characteristics, and a new type of rights should be created for commercial data, rather than simply being categorized into the existing types of intellectual property protection [1]. Zhu Yanyan and other scholars, based on the right of property, advocate that commercial data should be given exclusive rights to realize the full protection of commercial data [2]. On the other hand, scholars such as Liu Jiancheng hold the opposite view that empowering commercial data brings data exclusivity, which is not conducive to the dissemination and exchange of data in the digital era, and advocate the formation of a corresponding data protection paradigm under the regulation of the Anti-Unfair Competition Law [3].

On the specific application of the Anti-Unfair Competition Law. At present, the general provisions of the Anti-Unfair Competition Law of the People's Republic of China (hereinafter referred to as the “Anti-Unfair Competition Law”), the Internet-specific provisions, and the commercial secret provisions provide references for the application of the protection of commercial data in judicial practice. However, Deng Shemin and other scholars believe that these provisions are not specifically designed for the protection of commercial data, and that there are problems such as low utility and strong subjectivity in their application, and that the existing regulations should be optimized at multiple levels to better protect legitimate commercial data rights and interests [4]. Wu Guide scholars proposed a “three-tier, five-step” path to protect commercial data by integrating intellectual property law and civil law and using the Anti-Unfair Competition Law as a backing [5].

In summary, although the importance of commercial data is increasing day by day, it has not been transformed into a perfect theoretical system and mature judicial practice. Regarding the choice of the path of commercial data protection, as well as the specific protection mode after the choice, a consensus has not yet been formed, and more in-depth research is urgently needed.

2. Existing dilemmas of competition law protection of business data

In recent years, as the importance of data has become more and more prominent, research on data protection has flourished, but no specialized laws and unified judicial protection rules have been formed. In view of this, in actual judicial practice, most courts have considered invoking the Anti-Unfair Competition Law, in particular Articles 2, 9 and 12, to resolve commercial data disputes. Article 2, i.e. the general provisions, is a principle provision; Article 9 is the protection of trade secrets, also known as the “Trade Secrets Article”; and Article 12 regulates unfair competition on the Internet, i.e. the “Internet Specific Article”. To a certain extent, these provisions have protected the interests of the interested parties and alleviated the urgent needs of the judiciary in the absence of specialized legislation. However, their adjustment is not perfect, and in the process of practical application, there are problems of uncertainty, limitation and the danger of excessive intervention, which deserve attention and deep thoughts.

2.1. Uncertainty in the Determination of Competitive Behavior and the Evaluation of Business Ethics under the Protection of General Clauses

Compared with other provisions, the general provisions of the Anti-Unfair Competition Law are characterized by inclusiveness and openness, the application of which has greatly broadened the scope of protection of commercial data, and has therefore become a common practice in judicial practice. For example, in the well-known case of Taobao v. Anhui Meijing Company and the case of Sina Weibo v. Pulse, the general provisions were invoked to adjudicate. In the process of specific application, courts at all levels often in accordance with the supreme people's court “damage + violation of the principle of good faith and recognized business ethics” standard for adjudication, this standard reflects the maintenance of the benign market order and the legitimacy of the competitive behavior of the emphasis. However, the limitations of this standard in terms of specific connotations make it easy to bring about inconsistent application of the law and the dilemma of “different judgments in the same case”, which is attributed to two main reasons.

On the one hand, the determination of competitive behavior is excessively tied to the concept of morality. The lack of refined criteria under macro standards and the specificity of each case have led courts to rely on morality to evaluate competitive behavior. Morality, as an ancient standard of judgment, is highly subjective and uncertain, leading to a diversification of judgment results. In order to solve this problem, judicial practice often relies on industry practices to assist in the determination of unfair competition, but because the development of the industry is still in its early stages, no recognized practices have been formed, resulting in the difficulty of clarifying unfair competition with business ethics.

On the other hand, the scope of adjustment is too broad. It is true that the general provisions can cover all kinds of new types of unfair competition, but it also means that the workload of the court in determining competition behavior is increasing. At the same time, the ambiguity of the criteria for determining acts of unfair competition has greatly increased the possibility of determining normal competitive behavior as acts of unfair competition, which will seriously dampen the competitive enthusiasm of unspecified market players and static competition, thus not conducive to giving full play to the vitality of the market.

2.2. Limitations of the Content of the Provisions and Judicial Practice under the Protection of Internet Treaties

To address the problem of uncertainty in the protection of the general provisions, the special Internet article has provided a certain degree of clarity. The first three subparagraphs of paragraph 2 list three typical types of unfair competition, namely, traffic hijacking, interference and malicious

incompatibility. Meanwhile, paragraph 2 (4) also reserves space for the regulation of unfair competition behaviors that may appear in the future, which is regarded as an underpinning provision. However, it is worth noting that in the actual judicial practice, few cases invoke the Internet special article as the basis for judgment, and often end up returning to the general provisions. The reasons for this are mainly related to the limitations of the content of the provisions and the unsatisfactory effect of judicial application.

Although the invocation of the Internet Special Article has helped to resolve some cases such as “Dianping v. Love Help” and “Dianping v. Baidu Maps”, it is difficult to cover all of them with only three unfair competition behaviors. However, in today's rapid development of the Internet, the related competitive behaviors are endless, and it is difficult to cover all of them by only stipulating three kinds of unfair competition behaviors. In addition, some of the provisions, such as affecting the user's choice of the role of competition on the determination of inaccuracy and lack of logic, making the scope of the application of Internet-specific articles is greatly reduced.

Judicial practice has also shown that the application of Internet-specific provisions has fallen far short of expectations. Compared with the general provisions on the legitimacy of competitive behavior, the special Internet article pays more attention to the technical means used in competition. The technical means itself is specialized and abstract, which undoubtedly increases the difficulty of determining unfair competition. At the same time, the lack of clarity of the provisions and the lack of corresponding legal interpretations in reality have further hindered the application of the Internet Special Provisions in judicial practice.

2.3. The dangers of lapsing into private interest protection and excessive interference with the competitive order under trade secret protection

The trade secret clause reflects the selection and limitation of the objects of data protection in commercial data protection. Data must meet the criteria of “secrecy,” “value,” and “confidentiality” in order to be protected under this clause. In fact, the limitation of the data protected by this provision is largely based on the delineation of the scope of data protected by the “Data Provision Limitation Clause” of the Unfair Competition Law of Japan. In its application, it also better meets the real needs of enterprises to protect commercial data, but it is easy to fall into the dilemma of private interest protection and excessive interference in the order of competition.

In contrast to the general and Internet-specific provisions in the Anti-Unfair Competition Law, the trade secret provision restricts commercial data by requiring the fulfillment of three specific elements to be protected. On the surface, it excludes interference with non-secret data and enhances the autonomy of market players to carry out various activities.

In fact, however, ordinary data, such as data assembled from mere access to the public domain, often do not need to be kept secret, while data that can realize the value of the data as a factor of production often meet the requirements for protection. In addition, the trade secret protection model prohibits unauthorized disclosure and use of data by imposing tort liability. This is undoubtedly treating specific key commercial data as an entitlement and reinforcing the possession and control of the data owner, which often tends to bring about the privatization and rightsizing of data, and is not conducive to the flow of data and the long-term development of the data market.

3. Judicial Practice and Extraterritorial Reference in the Protection of Commercial Data against Unfair Competition

At this stage, commercial data plays an increasingly important role in the digital economy. Against this background, countries around the world are also vigorously promoting commercial data protection strategies. From the perspective of “empowerment”, the EU provides special rights

protection for databases through the enactment of the Database Directive. China, Japan, and the United States mainly provide protection from the anti-unfair competition mode, such as: China's revised Anti-Unfair Competition Law in 2017 specifically provides for the "Special Article on the Internet", and in the "Law of the People's Republic of China on Anti-Unfair Competition (Draft Revision for Opinion Solicitation)" (2022) it mentions that "Japan's newly amended Unfair Competition Law proposes a "data provision limitation clause", while the United States adopts the "principle of prohibition of misappropriation" to regulate the capture and utilization of commercial data. The U.S. has adopted the "Doctrine of Prohibition of Misappropriation" to regulate commercial data capture and utilization. These provisions can be borrowed from different countries to enrich the theoretical research on commercial data under the anti-unfair competition model, and are also conducive to guiding the actual judicial practice. However, it is worth noting that these provisions are not perfect, and attention should be paid to the problems that exist.

3.1. China: Application and Reflection on the Anti-Unfair Competition Law

As mentioned above, most courts in China tend to consider invoking Articles 2, 9 and 12 of the Anti-Unfair Competition Law when resolving disputes over commercial data. These articles play a fundamental role in judicial practice. For example, in Tencent Technology (Shenzhen) Co. Ltd. v. Guangzhou Heju Education Consulting Co. Ltd. unfair competition dispute, the People's Court of Yuexiu District, Guangzhou City, Guangdong Province, based on the fact that the Defendant Guangzhou Heju's act of "transplanting" WeChat public number articles would materially substitute for the services operated by the Plaintiff, which in turn would affect the Plaintiff's commercial advertisement revenue The District People's Court of Guangzhou found that the Defendant's behavior constituted unfair competition in accordance with the general provisions of the Anti-Unfair Competition Law, which stipulates that there is a causal relationship between the competitive behavior and the operator's loss. In the case of Aqiyi v. Feiyi, the Shanghai Xuhui District People's Court held that the Defendant Feiyi's behavior of using multiple domain names and constantly changing the IP addresses to access the videos on Aqiyi's website, thus increasing the number of video visits, satisfied the requirements of the "Internet Special Provisions" under the "Use of Technical Means to Obstruct and Destroy Other Operators". The Defendant Feiyi was found to have engaged in unfair competition by utilizing technical means to obstruct or damage the normal operation of network products or services provided by other operators under the "Internet monopoly".

However, the current Anti-Unfair Competition Law still has a lot of problems and cannot fully meet the urgency of judicial practice. On the one hand, it is the limitation of the Anti-Unfair Competition Law itself that it relies too much on the determination of unfair competition, and on the other hand, it is the research of the theoretical system is still out of touch with the real practice. However, with the continuous improvement of the Anti-Unfair Competition Law and the in-depth study of the relevant theoretical system, these problems are expected to be solved.

3.2. Japan: Review of Business Data Protection under the Data Availability Clause

The core of the Japanese Limited Availability of Data Clause is the limitation of the scope of protected data. Specifically, data can be protected only if it meets six requirements, namely, "limited availability, considerable accumulation, electromagnetic management, belonging to technical or business information, except for data managed as secret, and except for the same data as information that can be utilized by the public without compensation". To a certain extent, this provision restricts the State's protection of and intervention in commercial data, which is conducive

to giving more play to the regulatory role of the market and promoting the circulation and utilization of data.

However, the Japanese model of commercial data protection also has its drawbacks. From the point of view of the limitation of the scope of protected data in the limited provision of data clause, many of the requirements are duplicated with the identification of trade secrets in the protection of trade secrets, for example, “limited availability” is undoubtedly similar to the “non-publicity” of trade secrets. The “considerable accumulation” is also strongly related to the “value” of trade secrets. The overlap of these provisions is likely to increase the difficulty of judicial application and reduce judicial efficiency.

For China, It is feasible to learn from Japan's Unfair Competition Prevention Act, which has clearer and more specific provisions regulating the acquisition, utilization and disclosure of data, so as to reduce the difficulty of identifying unfair competition in judicial practice and alleviate the problem of “inconsistent standards of judgment”. However, at the same time, it should be noted that when setting the scope of data protection, it is not advisable to raise the protection threshold excessively, which may conflict with other models.

3.3. United States: Exploring Commercial Data Protection under the Misappropriation Doctrine

The principle of misappropriation in the United States refers to the fact that commercial competitors gain an unfair competitive advantage through the act of “free-riding” in the competition, which in turn harms the legitimate rights and interests of the market and other subjects [6]. Nowadays, the principle of misappropriation is gradually tried in the field of hot news and financial information. Specifically to the judicial practice, in the case of *NBA v. Motorola*, the plaintiff NBA considered that the defendant, without authorization, used the broadcasting of the event to collect data and synchronize it to the user's telecommunication machine, which was in line with the “principle of misappropriation”, and should be recognized as unfair competition. The United States Court of Appeals for the Second Circuit, however, held that since the information was already in the public domain and the defendant had paid for its own resources to collect it, it did not constitute unfair competition and was not applicable to the doctrine of misappropriation, and accordingly proposed five “additional criteria” for applying the doctrine of misappropriation of hot news.

It can be seen that the theory of misappropriation has, to a certain extent, provided a standard reference for the determination of unfair competition, which is conducive to reducing the infringement of the legitimate rights and interests of competitors by “unearned gains” and realizing relief. However, the theory of misappropriation is not omnipotent, and still has its limitations in terms of the determination standard and the scope of determination.

Generally speaking, the United States principle of “prohibition of misappropriation” is of reference significance to the improvement of China's Anti-Unfair Competition Law. In terms of the attitude towards the determination of unfair competition, the “Principle of Prohibition of Misappropriation” imposes strict requirements on the quantity and quality of the damage caused by the behavior, which can maintain a good order of market competition and at the same time reduce excessive intervention. From the perspective of competition, the Principle of Prohibition of Misappropriation protects the subjective status of consumer interests from the perspective of dynamic behavioral identification rather than specific rights restriction, which is conducive to incentivizing the innovation of business models [7].

4. Improvement of the way forward for the protection of commercial data against unfair competition

Currently, the “General Provisions”, “Internet Specific Provisions” and “Trade Secrets Provisions” of the Anti-Unfair Competition Law are widely used in judicial practice, reflecting their important role in regulating unfair competition and protecting commercial data. This shows that they play an important role in regulating unfair competition and protecting commercial data. However, as mentioned above, these clauses and their actual application have the problems of uncertainty in the determination of competitive behavior and evaluation of business ethics, limitations in the content of the clauses and judicial practice, and the tendency to fall into the protection of private interests and excessive interference in the order of competition. In addition, the competition in commercial data is constantly ushering in new situations and new forms of business, and the difficulties in adjudicating Internet big data cases are frequent. In order to better solve the above problems, on the basis of reflecting on the judicial practice in China and studying the overseas anti-unfair competition model, this paper starts from the principle of proportionality, the principle of limitation, and the principle of modesty, and explores the identification of acts of unfair competition under the protection of anti-unfair competition of commercial data, the clarity of the object of protection, and the optimization of the path of legal regulation, with a view to perfecting the protection of commercial data under the Anti-Unfair Competition Law so as to In order to improve the protection of commercial data under the Anti-Unfair Competition Law so as to promote the development of data economy.

4.1. Determination of unfair competition under the principle of proportionality

The principle of proportionality can be traced back to the Magna Carta of Liberty of the United Kingdom. According to the three-class doctrine, the principle of proportionality consists of the principle of appropriateness, the principle of necessity and the principle of balance. In layman's terms, the principle of proportionality can be viewed as a tool for weighing interests. This feature, combined with the three principles it comprises, can be applied to solve the problem of uncertainty in the determination of competitive behavior and the evaluation of business ethics under the protection of the General Clauses.

On the one hand, the principle of proportionality helps to provide a certain standard of adjudication for the evaluation of business ethics under the protection of the General Clauses, i.e., it can be divided into a hierarchy according to the importance of different business ethics to the regulation of competitive behaviors and the magnitude of the protection of the interests of market players. In judicial practice, judges can apply moral evaluation in accordance with this order of precedence instead of blindly deciding by subjective judgment. On the other hand, the principle of appropriateness under the principle of proportionality emphasizes the relevance of the means to the end. That is to say, under this principle, when the court relies on the standard of “damage + violation of the principle of good faith and recognized business ethics” in the general provisions, it should “take the end as the beginning”, and take the end to be achieved, i.e., to maintain the good order of the market and promote market prosperity, as the basis for decision. The ultimate goal to be achieved, i.e. to maintain good order in the market and promote market prosperity, should be the basis for adjudication, instead of generally recognizing an act as improper just because it violates the so-called business ethics.

In addition, the principles of necessity and balance under the principle of proportionality also emphasize a balance between the means of protection and the harm to legal interests. In view of the broad scope of adjustment of the general provisions, the courts may consider introducing the principle of proportionality in their specific decisions, while at the same time upholding a prudent

attitude and appropriately applying the means of protection, leaving room for the market to expand and contract in terms of self-regulation and technological innovation.

4.2. Clarification of the object of regulation under the principle of limitation

The so-called limitation principle centers on defining and clarifying a certain scope. As a result, this principle can be applied not only to the delimitation of the scope of the object of data protection, such as the provision of limited data in Japan's Unfair Competition Prevention Act, but also to the determination of the scope of the regulation of unfair data competition.

Specifically, the “Internet Special Provisions” have to a certain extent solved the problem of uncertainty that exists in the “General Provisions”, but only listing three typical acts of unfair competition is far from being sufficient to cope with the increasing number of acts of unfair competition in the current era of rapid development of data. However, the list of only three typical unfair competition behaviors is far from sufficient to deal with the increasing number of unfair competition behaviors at a time of rapid data development. However, not all competitive behavior should be included in the scope of protection of the “Internet Special Provisions”, which involves the identification, classification and limitation of competitive behavior. In the process of analysis, it should be noted that China's data unfair competition is often concentrated in the two areas of data protection and data utilization. Therefore, it is possible to refine and summarize the competition behaviors involved in the cases related to these two areas, so as to clarify the boundaries between legitimate and illegitimate competition behaviors, and further refine the core elements of such behaviors, so as to provide support for the delineation of the scope of protection under similar cases afterwards.

At the same time, the principle of qualification can also be applied to optimize the interpretation of the Internet monopoly touting clauses. Currently, the touting clauses are too broad and tend to focus on the technical means used in the process of competition, which greatly increases the difficulty of application. Through the introduction of the principle of limitation, the courts are encouraged to restrict the interpretation of the exclusion clauses in judicial practice, in order to exclude the determination of the impropriety of behavior that does not truly disturb the order of competition, thus improving the limited application of the Internet monopoly in judicial practice.

4.3. Optimizing the path of legal regulation under the principle of moderation

The principle of moderation here refers to the moderation connotation determined by the legal nature of the Anti-Unfair Competition Law itself, i.e. to reduce excessive intervention in market competition at the level of legislative and judicial practice. In practice, this principle can be applied to solve the problem of over-protection of rights and interests under the trade secret provisions, which may jeopardize the normal order of market competition.

The specific path of regulation can start from the legislative level and the judicial level. At the legislative level, in view of the limitations of the trade secret provisions themselves, coupled with the fact that in practice, most enterprises in the protection of commercial data often invoke the rules of trade secrets, which is likely to result in the court on the data of the trade secrets of the determination of the difficulties and over-protection of the problem. Therefore, it is necessary to further refine the original three elements of “secrecy”, “value” and “confidentiality” in the legislation [8]. For example, in the determination of “value”, the “considerable accumulation” of data should be taken into consideration at the same time, and attention should be paid not only to the commercial value of the data to be protected, but also to the “quantity” of the data. “Volume” reflects the possibility of utilizing the data, and also highlights the potential economic value of the

data. Taking into account the “economic” and “quantitative” aspects in determining the “value” of data will help optimize the scope of commercial data protection and facilitate the flow of data.

At the judicial level, the courts are often concerned about the market failure under competition and its inability to regulate itself when protecting the commercial data of enterprises, so they often tend to strengthen the protection of market entities and the data they hold, but this is prone to bring about privatization of data rights and interests and rights. Therefore, in the actual protection, the court should not ignore the role of the “invisible hand” played by the market in economic regulation, and flexibly deal with the relationship with the market's own regulation, pay attention to the degree and scope of the protection of trade secrets, and avoid over-interference in competition, resulting in the rigidity of the market system.

5. Conclusion

With the advent of the era of digital economy, commercial data is booming, which has changed many aspects of economy, society and life, but at the same time, it also poses a challenge to the existing legal system. This paper takes the protection paradigm of the Unfair Competition Law for commercial data as the research theme, and focuses on the “General Provisions”, “Internet Specific Provisions” and “Trade Secrets Provisions” under the Unfair Competition Law, and focuses on the problems existing in the judicial practice of the above provisions as well as the solutions to these problems. In other words, the principle of proportionality is introduced in the determination of unfair competition under the General Provisions, so as to determine in a prudent manner whether or not the conduct has protective value. Consider the principle of limitation in the protection of “Internet Special Provisions” to clarify the boundary between legitimate and unfair competition, and at the same time, interpret the “Internet Special Provisions” underpinning provisions in accordance with the principle of limitation, so as to ameliorate the limitation of its application in judicial practice. Incorporate the principle of moderation in the application of “trade secret provisions”, and intervene in the protection of commercial data in an appropriate and proportionate manner, taking market self-regulation as the main body, and avoiding excessive intervention in competition, which will bring about the privatization of data rights and interests and empowerment. The proportionality principle, the principle of limitation, the principle of modesty is the personal superficial opinion on the protection of commercial data under the model of the Anti-Unfair Competition Law, and it is hoped that it can provide a certain reference for the construction of the data protection system at a later stage, but how to refine the operation still needs to be backed up by further research.

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