

# The Application of Law to New Acts of Unfair Competition on the Internet

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**Abstract:** Affected by the epidemic in recent years, the Internet economy continues to flourish, showing a vibrant phenomenon. The continuous emergence of many new industries, new models and new technologies of the Internet economy, such as live streaming and online takeout, have brought great changes to the market economy. On the one hand, the new competitive behavior in the Internet field has brought huge benefits to the economy and ensured people's lives, but on the other hand, it is accompanied by risks, how to maintain the market economic order, how to protect the legitimate rights and interests of operators, and how to protect the rights and interests of consumers. Due to the limitations of Internet articles, it often occurs to escape to the "general terms" in practice; the lack of a clear standard of legitimacy of behavior leads to the problem of different judgments in the same case. On the basis of fully respecting the technical law and market law, defining the applicable conditions of the Internet special clause and determining the behavior legitimacy by the method of measuring interests is conducive to the protection of competition.

**Keywords:** Anti-unfair competition law, Competitive behavior, Legitimacy of behavior.

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## 1. The Current Situation of the New Type of Unfair Competition on the Internet

With the continuous development of information and communication technology, entering the information age, the way of obtaining information is changing with each passing day, and the continuous innovation of digital technology has led to the vigorous development of the emerging Internet industry. According to the 48th Statistical report on the Development of China's Internet released by the China Internet Network Information Center in Beijing, by June 2021, the number of Internet users in China has reached 1 billion, and the Internet penetration rate has reached 71.6%. With such a high Internet penetration rate, we know that the scale of China's Internet users is so large that it is amazing to stimulate the vitality of the Internet market. Many offline industries are unable to survive because of the epidemic, so they have the opportunity to survive online and bring the dead back to life. During the epidemic period, takeout distribution, live broadcast with goods and other forms so that people do not leave home, living needs can be met, and so that the epidemic affected by the national economy can continue to develop. With the rapid development of platform economy, new technologies, new business type and new models are constantly derived. Commodity price is no longer the decisive factor of market competition, the form of competitive behavior among enterprises has undergone many changes, there are many new types of unfair competition on the Internet. For example, the emergence of data crawling behavior aimed at competing for data, or traffic hijacking and forced jump with the core of seizing traffic, in the final analysis, these are all new types of unfair competition behavior with information technology and digital technology as the core, a new type of unfair competition behavior emerging with the changes of the times, which is different from the traditional unfair competition behavior. There are many subjects involved in the Internet platform market, and there are also many subjects

that influence the rights and interests of operators, consumers and other subjects. compared with the traditional competitive behavior, the legal interests involved in the new type of Internet competitive behavior are more complicated. how to judge the legitimacy of behavior is worth thinking and exploring in theory, and judges are deeply troubled in practice, so there will be new cases of competitive behavior that are obviously the same kind. But there is a phenomenon of different sentences in the same case.

### 1.1. Definition of a new type of unfair competition on the Internet

Compared with the traditional unfair competition behavior, the new Internet competition behavior has changed in the subject involved and the way of implementation, and there are different criteria for judging the legitimacy of the behavior. Generally speaking, for a certain type of subject or group, the traditional competitive behavior is mainly competitors, through the means of excluding or restricting competitors to achieve their own dominant position.

Under the Internet platform, the operator of the platform not only plays the role of connecting the buyer and the seller, but also meets the needs of both parties or all kinds of users to provide production and supplementary supply. With the continuous development of the Internet platform economy, the change of the identity of the platform operator symbolizes the behavior of the platform operator in operation, and has double possibilities: it may be the commodity competition carried out as a competitor, or it may be the behavior of market management implemented as a manager. With the emergence of new business type and the new mode, the unfair competition behavior in the Internet field is divided into the following two types: the first is to implement the traditional competition behavior by borrowing technical means or online means, and its behavior essence has not changed fundamentally, which is still defined as the traditional competition behavior. For example, we often encounter the false propaganda behavior of using new technologies to

maliciously brush orders on Taobao, which is a fictional transaction to achieve the desired results. The second is the new type of unfair competition on the Internet. It is that platform operators take new technologies as the core in order to seize and prevent their competitors from obtaining their own data and traffic, which is different from traditional competitive behaviors, such as data crawling, blocking and shielding, traffic hijacking, forced jump and so on, this kind of behavior is substantially different from the traditional competitive behavior in terms of implementation technology and means. In comparison, the new unfair competition behavior of the Internet is more flexible and more difficult to be regulated directly by the current law, so it is difficult to judge the rationality and legitimacy of the behavior in judicial practice.

## **1.2. The French version of Anti-unfair Competition has changed**

In the revision of the Anti-unfair Competition Law in 2017 and 2019, the changes are mainly reflected in the revision of some provisions of the General provisions and the addition of the 12th Internet section in the 2017 Anti-unfair Competition Law. The content revised in 2019 is not closely related to the new type of unfair competition on the Internet. Therefore, the following mainly focuses on the changes brought about by the revision of the Anti-unfair Competition Law in 2017.

First, with the change in Article 2 of the Anti-unfair Competition Law, we can see that Article 2, paragraph 1, of the new law modifies the limitation of "market transaction" in the old law to "in production and business activities", and the scope stipulated by the law becomes wider. In addition to the scope of market transactions, there is also the process of production and operation, including all the competitive processes.

Second, paragraph 2 of Article 2 adjusts "disturbing the social and economic order" to "disturbing the order of market competition", which can better reflect the diversification of business entities in the course of business, such as operators, consumers and the public. It gives us enlightenment: when identifying unfair competition behavior, we should fully consider the rights and interests of all parties, not only one party. We should also examine the mutual benefit brought by the behavior based on the market as a whole. The law puts "disturbing the order of market competition" before "harming the legitimate rights and interests of other operators or consumers", which reflects that the meaning of unfair competition is to disturb the order of market competition, and the way to gain competitive advantage is not reasonable, resulting in the consequences of harming the rights and interests of operators and consumers. The amendment of the law shows that disturbing the order of market competition is not only the order regulated by law, but also the protection of competition by law. At a certain level, competition will promote economic development and stimulate the vitality of the market. Under the legal and reasonable order of market competition, there can be competitive behavior.

Article 2, paragraph 1, of the Anti-unfair Competition Law, on the one hand, clarifies that market operators should follow the basic principles of "voluntariness, equality, fairness and integrity" when conducting business activities, requiring operators to abide by the law and not violate business ethics. Paragraph 2 states that the object protected by the Anti-unfair Competition Law is the competition order, which cannot

disturb the competition order, which is the standard to judge whether the behavior is legitimate or not. How to define the order of competition? Although the competition order is very abstract, the order is based on rules. The competition order should not only follow the basic principles of the Anti-unfair Competition Law, that is, "voluntariness, equality, fairness and integrity", but also within the scope regulated by the Anti-unfair Competition Law and other laws. and to follow the business ethics that we have reached a consensus in business activities for a long time. Therefore, the competition order is based on the rules of these three elements, which complement each other to form the competition order. From a certain level, this shows the concept of trinity, that is, the overall consideration of the order of competition, the interests of operators and the interests of consumers, showing the purpose of protecting competition. Balance the three based on the market and seek the maximization of social and public interests.

When the Anti-unfair Competition Law was amended in 2017, damage to the legitimate rights and interests of consumers was included in the criteria for determining behavior, from "protecting competitors" to "protecting competition". With the continuous change and development of society, it is also common to mislead consumers' free decision-making power, for example, telemarketing products and services, good takeout, concealing the true information of goods and misleading consumers, thus affecting the correct judgment of consumers.

Second, add Article 12 to the revision of the Anti-unfair Competition Law, enumerate the new type of unfair behavior on the Internet, and include provisions to adapt to the new type of unfair competition behavior that appears with the changes of the times. The Internet special article adopts the form of "general clause + typed clause + ambiguous clause", which briefly expounds how to face and solve the new anti-unfair competition behavior of the Internet in the face of the changes of the market in theory and practice.

## **1.3. The thinking and judgment criteria of behavior legitimacy analysis have changed**

First, for the analysis of changes in the path of competition damage, the general provisions of the Anti-unfair Competition Law before the revision often only pay attention to the analysis of the damage of operators, but after the revision, the competition order will be more fully considered. the protection of consumers' rights and interests is also included. Therefore, in practice, the court for the analysis of competition damage also changes with the change of the law. Not only consider the rights and interests of operators, but all aspects, including the interests of operators, the rights and interests of consumers and the public interests involved, give a comprehensive analysis and judgment of the accused behavior, and comprehensively evaluate the legitimacy of the behavior.

Second, the standard of how to judge the damage of competition has also changed. With the deepening of the court's understanding of the new type of unfair competition on the Internet in practice, it is realized that the impact of Internet competition on all kinds of subjects has both negative and positive effects, and the positive effects should be fully considered in the case. for example, consider positive factors such as the promotion of market innovation and consumer welfare. In addition, it also clearly adds the identification of

subjective elements. Whether the parties are subjective in good faith or malicious is also a factor to judge the legitimacy of the behavior. If the parties are well-intentioned and beneficial to market innovation, the behavior is justified; if the parties are malicious and disadvantageous to the public interest, the behavior is not justified. There are also traces to be followed in the law. Article 12, paragraph 2, paragraph 3, of the newly revised Anti-unfair Competition Law regards the subjective condition of "malice" as the criterion for judging the unjustifiability of the behavior. It shows that the Anti-unfair Competition Law takes the subjective elements of the parties as the elements to judge whether the behavior is legitimate or not.

## **2. Limitations of Internet Articles**

### **2.1. The scope of application is not clear**

The amendment of the law gives great convenience to the practice. The court should give priority to the application of the situations listed under the Internet special article in the trial of Internet unfair competition cases, rather than just the application of general provisions. In fact, this is not the case. In practice, many courts will be more accustomed to the application of general provisions and rely too much on general provisions because of the uncertainty of the scope of application of Internet articles.

Ideally, Internet articles should not only be distinct from other provisions, and make sure that the list the provisions mentioned above meet the requirements of mutual exclusion in order to achieve the comprehensiveness of the legislative structure, but the three types of competitive acts listed in the Internet articles are not completely mutually exclusive, and some new types of unfair competition practices on the Internet touch multiple provisions listed in the law at the same time. For example, using semantic interpretation, there is an overlapping or overlapping relationship between "misleading, deceiving, forcing users to modify, close and uninstall network products or services legally provided by other operators" and "maliciously implementing incompatibility with network products or services legally provided by other operators". The parties are all subjectively malicious and conform to the subjective elements of unfair competition. In addition, the background clause of the Internet special article is more abstract, the scope of the stipulation is wide, which gives the judge greater discretion, but at the same time, the enforcement of this clause is weak, and it is inconvenient for the judge to operate.

Article 12 of the Anti-unfair Competition Law mainly refers to the fact that operators use technical means to interfere with the behavior chosen by users, thus resulting in the effect of hindering or destroying each other's business activities or business model. In the form of "general clause + typed clause + underwriting clause", it enumerates three new types of unfair competition behavior in turn and adds a "underwriting clause". However, the Internet field is in a dynamic and ever-changing process, other new types of unfair competition behaviors emerge in endlessly in practice, and the scope stipulated in the first three items of the Internet Article is so narrow that it is difficult to include other new types of unfair competition behaviors. According to Article 12, paragraph 2, "Preface", "operators shall not use technical means to obstruct or undermine the normal operation of network products or services legally provided by other operators by influencing users' choices or other means."

Accordingly, the court held that the focus of unfair competition lies in "technical means" and "hindering and destroying network property and services". However, the expressions of "technical means" and "hinder or destroy network products and services" cannot accurately define the scope of application of anti-French article 12. The behavior stipulated in the first two paragraphs of paragraph 2 of this article has a strong certainty, which comes from the induction and refinement of previous specific cases, the expression of behavioral characteristics is very accurate, and the applicable objects and conditions are clear. In contrast, "malicious incompatibility of network products or services legally provided by other operators" is relatively vague in the expression of behavioral characteristics and the scope of application is not clear. Combined with the provisions of Article 12, paragraph 2, "preamble" of the Anti-unfair Competition Law, "malicious incompatibility" means that operators "make use of technical means. By influencing users' choices or other ways", "maliciously implement incompatibility to network products or services legally provided by other operators". Among them, "the use of technological means" is to express the uniqueness of unfair competition on the Internet, and the original intention of legislators is to distinguish it from other unfair competition. However, this provision does not accurately achieve this purpose in practice, because there is usually no need to pay special attention to and consider "technical means" in the application of the law. For example, in the case of unfair competition between Shenzhen Tencent Technology Company and several push Network Technology Company, according to the provisions of Article 12, the plaintiff needs to prove that the defendant "uses technical means" in his behavior. As a result, it "hinders and destroys" the normal operation of the network products or services legally provided by the plaintiff. In this case, first, the direct perpetrator of the brushing behavior is not the defendant, and both the original and the defendant failed to prove what "technical means" were used to achieve the brushing behavior; Second, The plaintiff alleges that the unfair competition of the defendant includes two situations, one is the behavior of brushing the plaintiff's products or services, and the other is the behavior of brushing the products or services that compete with the plaintiff. For the second kind of behavior, because it does not involve the products or services of the plaintiff, it does not directly conflict of interest with the plaintiff, and it is difficult to identify the nature of "obstructing and destroying" its "legally provided network products or services". The court held that: "throughout the whole process of completing the amount of brushing, the customer does not know whether the defendant has the relevant technical means and ability, whether he can independently complete the task of brushing, and whether he or she can realize the amount of brushing with the help of other people's technical means or network platforms." and I don't care. In the whole judgment, the court did not rigidly adhere to the identification of technical means.

At the same time, the terms such as "obstructing and destroying" and "normal operation" are very vague and abstract, and there are no clear constitutive elements, resulting in weak maneuverability and low frequency of use in judicial practice.

### **2.2. The standard for determining the legitimacy of behavior is unknown**

Article 2 of the Anti-unfair Competition Law, revised in

2017, takes into account the protection of consumers' rights and interests, followed by changes in the analysis of unfair competition behavior and how to apply the law. When judging whether the competitive behavior constitutes unfair competition, we should not only consider the damage of other operators, but also weigh the interests of many parties and consider the results from multiple angles, but in practice, the identification standard of competitive damage is not clear.

In the specific application of the Anti-unfair Competition Law, the court seldom considers the degree of competition damage in practice. when analyzing competition damage from the perspective of rights, it is preconceived to think that competition damage has caused loss of interests to the plaintiff. The essence of market competition is a kind of behavior of "benefiting oneself at the expense of others". Competition goes hand in hand with damage. Generally speaking, the damage does not have the distinction of right and wrong, it is neutral, the damage caused by the competitive behavior in the competition or the damage caused by the competitive behavior to other competitors is a normal phenomenon, when the competition will promote economic development, the factor of considering unfair competition should be specific damage, and the damage itself should not constitute the primary consideration to judge the legitimacy of competitive behavior. It should not be recognized as requiring prohibitions and remedies under competition law. The competitive damage caused by competition is the normal state of market economy, and some "excessive" competitive behavior will be defined as unfair competition only in exceptional cases.

In practice, the court judges the legitimacy of the new competitive behavior of the Internet, taking into account the specific circumstances listed under the provisions of the law, as well as whether the operator is subjectively well-intentioned or malicious. in addition, we also need to consider whether the operator has violated the business ethics and follow the basic principle of good faith. These situations are abstract and fuzzy in the provisions of the law, and there is uncertainty in practice, which requires judges to exert their discretion and judge in combination with specific cases.

When considering the application of business ethics standards, some courts will also consider whether competitive behavior has a positive effect, whether it has a positive effect on market innovation, and whether it is of positive significance in promoting market competition, on the basis of these considerations, whether it is within the scope regulated by law. For example, in the case of unfair competition between Qianjin Network Information Technology Company and Shanghai Yi Orange Information Technology Co., Ltd. The Shanghai intellectual property Court determines that the standard of business ethics needs to judge whether this competitive behavior is beneficial to the healthy development of the market economy, and must not pass its own subjective moral judgment. For the legislative purpose of protecting the legitimate rights and interests of other operators and consumers, we should comprehensively consider the impact of competitive behavior on all kinds of subjects and whether it has adverse consequences on the market economic order, and judge whether it violates business ethics.

On the issue of determining subjective malice, the court is more inclined to think that if the competitive act infringes upon the legitimate rights and interests of the plaintiff, then the competitive act is subjectively malicious. In fact, this is to

confuse the subjective intention in tort law with the subjective malice in competition law. Competition behavior already has this element, the antagonism of competition behavior, the consequences of competition damage caused by competition behavior is obvious, but also occurs as scheduled. Every kind of competition behavior is based on subjective intention, but this element can not judge the illegality of competition behavior. The interpretation of subjective malice in competition law needs further consideration and analysis, but it is not clearly defined in practice.

### **3. The Perfection of the New Type of Unfair Competition on the Internet**

#### **3.1. The provisions of the Internet Article shall apply**

The fuzziness and abstractness of the Internet special article "underwriting clause" leads to weak maneuverability in practice. When the court chooses to apply this clause, it often escapes to the general clause. For this phenomenon, we should have a deep understanding of "hindrance and destruction" based on the characteristics of Internet competition, and deeply determine the elements of the normal operation of products or services. Do not let the Internet article become a zombie clause, play its role, avoid the court biased to apply the general terms in practice, and do not choose to apply the Internet article, clearly standardize the application order of the Internet article. Follow the legal principle of the principle of re-application of the exhaustive rules, and choose to apply the general provisions only after exhaustion of the specific provisions of the law.

When it is found that the behavior conforms to the situation of "obstruction and destruction" listed in the regulations, it should be judged whether its elements constitute unfair competition, and if the constitutive conditions are not met, it should be determined that the behavior does not constitute unfair competition. If the behavior does not belong to the case of "obstruction or destruction", you can choose to apply the general terms.

When the behavior does not belong to the scope of application of the Internet special article or the conditions are not sufficient, the court should choose to apply the general terms and judge whether the behavior is justified according to the standards such as Internet industry norms or practices. The steps that the court chooses to apply in practice are as follows: the first step is to determine whether the competitive behavior belongs to the type listed in the first three paragraphs of paragraph 2 of the Internet Special Article, apply these three items if satisfied, and proceed to the second step if not satisfied. The second step is to judge whether the competition behavior meets the application standard of the Internet special clause, if it is satisfied, choose the Internet special clause, if not, enter the third step; the third step, choose to apply the general clause.

#### **3.2. To clarify the standard of legitimacy of competitive behavior**

The connotation of "business ethics" is very rich, the denotation is very abundant, and it has fuzziness and uncertainty. for the new model in the Internet field, new business type, and the new industry, sometimes the industry practice has not yet been formed and can only be judged by "business ethics". Can't solve the problem.

The Anti-unfair Competition Law actually protects the competition order by regulating the unfair competition behavior, from the beginning to the protection of the competition order and the interests of all kinds of subjects.

It forbids unfair competition not because it harms some legal interests, but because it violates the code of conduct set by protecting the interests of competitors, consumers and the public. The judgment of the legitimacy of competition behavior is the core issue of anti-unfair competition law. Competition is a dynamic process, and the resulting damage is normal, so the method of "interest measurement" can be adopted to comprehensively consider the interests related to competition on the basis of the concept of "competitive behavior centralism". On the premise of considering the public interest, then consider the interests of operators, consumers and other legal interests involved, and comprehensively consider the impact of competitive behavior on the interests of all kinds of subjects. Combined with the types of behavior and three kinds of legal interests to understand and implement business ethics, to judge whether the maximization of competitive interests can be realized, and on this basis to determine whether the competitive behavior is justified or not.

The purpose of the Anti-unfair Competition Law is to maintain fair competition and protect the legitimate rights and interests of all kinds of market subjects in the case of legitimate competition among all parties. Therefore, when the court judges whether the act not listed in the law is legitimate in practice, it should clearly recognize the standard of "improper", determine the scope of the competitive behavior on the basis of maintaining the competitive function, and judge and evaluate the objective results of the behavior. From the point of view of interests, comprehensive consideration. Specifically, it can be considered comprehensively from the point of view of the legitimate interests obtained by competitors in free competition, the benefits obtained by consumers in the case of free decision-making, and the social and public interests generated by competitive behavior. In fact, interest is the ultimate goal of competitive behavior, and the nature of operators is to pursue profits. It is correct to judge the legitimacy of behavior by the method of measuring interests around interests. How to measure the interests, it is necessary for the court to combine the specific circumstances in practice, comprehensively consider whether the competitive behavior has an adverse impact on the public interest of the market competition order, and whether the legitimate rights and interests of consumers and other related subjects are effectively protected, focusing on whether competitive behavior has a potential or long-term positive impact, which requires the court to consider comprehensively

in the light of the case.

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