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Study on the Identification of Unfair Competition in the Acquisition of Business Data

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Abstract: In the era of the digital economy, competition among operators has expanded to include competition for business data, and Unfair competition cases have sprung up around the acquisition of business data by major internet operators. In current judicial practice, referees often cite existing provisions such as the “General provisions” and “Internet specific provisions” of the anti-unfair competition law to determine the illegality and legitimacy of commercial data Unfair competition. And in the determination of such acts, there are some problems, such as the conflict between “Rights and interests protection” and “Behavior legitimacy”, the definition of data rights and interests tends to protect the interests of operators, and the judgment of legality boundary of data acquisition behavior is fuzzy. Therefore, it is suggested to correct the way of identifying the commercial data acquisition behavior, return to the nature of competition, and establish the behavior regulation paradigm. Changing the division of data ownership, confirming the portability of personal data, expanding the reasonable limit of data portability while playing the function of public-private synergy. To refine the judgment standard of justifiability of behavior, it is necessary to establish the behavior paradigm of “Reasonable legal interest test”, and to explore the rules of fact identification and cognizance of Data Acquisition Technology, in order to achieve the existing rules under the commercial data acquisition pattern of behavior identification optimization.

Keywords: Business Data; Business to Unfair Competition; Mode of Identification.

1. Introduction

Data is an indispensable factor of production in the development and innovation of enterprises with great economic strategic value, and it is the “ New oil ” in the digital age. The economic value of data is widely valued in commercial activities. The competition among operators has been extended to the competition of data. The competition for data is booming, the major internet operators frequently use data acquisition technology because of its high efficiency, and the unfair competition disputes between the operators are also common. Domestic cases such as the 2017 case of“ Cool-mike V. car came crawling data ” , the 2018 case of“Unfair competition dispute between Taobao (China) software company and Anhui Meijing Network Technology Co. , Ltd. ” , the 2021 case of “ Tencent v. s new media company crawling wechat public number ” , and the 2022 case of “ Unfair competition dispute between Taobao Network Technology Co. , Ltd. and Tencent Technology (Beijing) Co. , Ltd. ” revolved around unfair competition behavior in data acquisition[1].

The problem of data competition, which has arisen frequently in recent years, urgently requires the regulation of unfair competition in commercial data, especially the law on unfair competition, it has become the legal basis for widespread use by parties in judicial practice. It is feasible and reasonable to use anti-monopoly law to regulate commercial data in the case of disputes. But at present, “ Subject-behavior-harm result ” is often used to identify the commercial data collection, and the legal boundary between data collection and restricted access is still unclear. On the one hand, it will prejudge the unfairness of data capture. On the other hand, the anti-access measures adopted by the data access policy are often ignored or directly characterized as legitimate“ Self-defense” measures[2].

It can be seen that “Priority of private interests” has become a common understanding in today's judicial decisions, the legitimacy of its considerations, and the resulting “Balance of interests of multiple parties” concept, has not yet formed the mainstream, this leads to difficulties in the identification of unfair competition for the purpose of commercial data. It can be expected that data barriers are likely to form if too strong a protection is given to the data of one party's operators, and similarly, if data-access unfair competition is not strictly regulated, this will harm the competitive profits of first-mover firms and have a negative impact on market innovation. Therefore, how to obtain the proper balance between the values of “Competition order”, “Data freedom” and “Consumer data self-determination”, based on the rationality of the judgment, “Anti-unfair competition law” should be considered in regulating unfair competition in the acquisition of business data, which is also the main content of this article to be discussed.

2. Content of Unfair Competition in the Form of Business Data Access

2.1. Definition of Business Data

The definition of commercial data in “ Commercial data clause ” refers to the data legally collected, commercially valuable and technically managed by users[3]. So there are four things to consider when deciding whether a particular piece of data is business data:

Qualify availability. Although the business data clause defines business data, in the business data clause the collection of data is limited to production and operation. Article 2 of our anti-unfair competition law defines “Operator” as all natural person, legal person and non-legal person organizations.In addition, natural persons, legal subjects and non-legal subjects all have many characteristics. They are only called“ Operators ” when they are engaged in production and business activities, and family activities, public law

obligations (such as taxes) , the performance of official duties and so on, are not " Operators " , so of course, the data they collect can not be counted as"Business data" .

Second, it's quite cumulative. It refers to the vast amount of commercially valuable electronic data collected by electromagnetic waves. The determination of "Considerable quantity" shall be based on "Value" and shall be broadly consistent with the requirement of "Commercial value" in the request for advice [4]. Information that an operator requires to be protected can be considered to have commercial value regardless of whether it is published or not if it is large enough to be used in production and operation and can provide a competitive advantage to the operator. The cost of collecting and processing the data, the income from the use of the data, or the time available to maintain a competitive advantage, is only a consideration in the judgment of the commercial value of the data, rather than a condition of whether the data is commercially valuable.

Third, we should carry out technology governance in a targeted way. Commercial data right is a kind of right to the world, in order to reduce the cost of search, to protect the security of transactions, it is necessary to equate it with other property publicity. Commercial data right is a kind of intangible property right, which is different from property right and personality right. It needs to be defined and published by law, just like other information property, so is commercial data right. Even the protection of trade secrets, but also through the legal confidentiality measures to determine the limits of their rights or scope. Similarly, in the technical management measures provided by law, the protected commercial data may be specialized and published, thus realizing the publication of the establishment, alteration and elimination of the rights of commercial data. Through public disclosure, business data rights can be perceived by the public as other property rights, property rights, public awareness and experience, it is part of the entire data set, therefore, it can be identified. This provides a warning to potential infringers, which can help to maintain a reasonable social expectations and guarantee the freedom of movement of people[5].

Fourth, those that are freely available are excluded. On the basis of restricting the right of provision, the protection of information takes the form of " Collection " to avoid excessive influence on freedom of expression and public sphere. It should be noted that the fact that a piece of data is freely available does not mean that the data set can not be protected. For example, at one point in time, the value of individual typhoon data is not high and can not be preserved, but if a large amount of time and effort is spent on the collation of typhoon data from the region and adjacent regions over the past 100 years, form a huge data set, can the rule of the occurrence and development of typhoons can be summed up, then, the data can be preserved.

2.2. The Concept of Unfair Competition in Terms of Access to Business Data

The business data clause provides for four types of unfair access to business data:

One is the technical management of data acquisition. Whether it's theft, coercion, fraud, cyberattacks, etc. , it's used to achieve goals. The technical management means used to obtain business information will inevitably increase the operating costs of the operators and harm the legitimate competitive interests of the operators [6]. Specifically, the unreasonable growth of the operating costs of operators, mainly for the real-time, large-scale capture of operators platform data, thus causing greater pressure on the normal operation of the platform server. To interfere with the normal business of the operator, mainly by wooing or soliciting users, thus causing the latter's potential users to drop ; to directly replace certain features of the operator's site, caused the loss of users of these sites; made the operators' software in similar products, thus causing the operators' software traffic to decline; essentially replaced the operators' operating platforms, it diverts potential users of operators , reduces the trading opportunities and trading space for operators to make commercial use of relevant data, and damages the data security of platforms operated by operators, and the provision of services to interfere with the operators and users of the relevant data processing and security between the implementation of the provisions; This makes the users lose the security and basic trust of the platform because of the risk of information security, which reduces the attention of the users and the attraction of the data traffic of the users.

For example, in the case of Coomnico v. Yuanguang, the court held that Yuanguang had breached the coomnico APP encryption system of coomnico, and used the crawler technology to capture and use large amounts of Coomnico's backend bus operation data, the act was found to constitute unfair competition[7].

The second is to violate the agreement between the two sides, the theft of each other's information. This is usually the case if the parties are already in a trading or cooperative relationship, for example, in the process of obtaining data, violating the data protection agreement signed during the trading or cooperative process. As far as the consequences of the act are concerned, they are necessary for the material replacement of the goods or services offered by the operator. It may be held liable for breach of contract in the absence of a substantial substitute result that infringes its legitimate right to competition[8].

Third, it violates the data-scraping rules.Since the data capture protocol is set up unilaterally by the operator, in order to balance the interests of all parties, it is necessary to bear more duty of care to the contract-maker. Prior to this, the Robots protocol is considered reasonable because it is not in line with the network industry's business ethics. Therefore, only in the data collection agreement violations of legitimate and reasonable behavior, it will constitute unfair competition. In the prosecution, the operator only needs to set up the data capture agreement for a reasonable burden of proof, and the burden of proof will be transferred to the defendant[9].

Fourth, the illegal collection of data of other acts. Even if the perpetrator did not obtain the data by circumventing the technical management measures, if the means by which the data were obtained could be considered to be contrary to the principles of good faith and business ethics, this results in interference with fair competition in the market, which is still an illegal acquisition of commercial data. In general, in addition to technical management measures, there are methods of data collection that violate integrity and business ethics, the specific performance for breach of contract credit, the first and second contractual obligations, obligations between specific relationships such as fiduciary obligations.

3. Rules for the Identification of Unfair Competition

3.1. Approach to the Determination of Unfair Competition in the Context of Access to Business Data

3.1.1. Determination of Interest in and Nature of Data

In particular cases, our courts usually pay more attention not to the definition of competitors but to the analysis of the basis of whether the data owner has the right to the data. This means that the operators (that is, data processors) of the enjoyment of the data benefits to be given more attention. China relies on the traditional"Labor value" in thinking. Based on this theory, enterprises collect data, separate data from some chaotic resources, and sort and process it, often there is some labor involved, and it is precisely because of this labor input that an enterprise has a greater chance of satisfying its claim to the carrying rights and interests on these data, but in the practice also requests the operator must invest the massive labor effort to the case data in order to be able to enjoy this data rights and interests. In the case of unfair competition, because of the difference of data types, it will directly affect the court's determination of data rights. Business data can be divided into source data and derived data according to the degree of processing. Courts have often found that data holders generally do not have an independent interest in the original data, but may have an independent property interest in the derived data, but may have an independent property interest in the derived data. In the case of"Taobao v. Scenic View", the data rights of Taobao Company are the big data products which are formed by analyzing, processing and processing after collecting user information by legal means[10]. Due to the investment of a large amount of intellectual work, these data are Taobao company based on the original data, through a specific algorithm, its in-depth analysis, filtering, refining and encryption, as a result, Taobao enjoys data rights recognized by courts at all levels.

Moreover, China does not generally distinguish between data disclosure and non-disclosure. Any scraping of data would be seen as unfair competition. In fact, however, the degree of disclosure of the information reflects both the degree of control of the information holder and the difficulties of the offender in obtaining the information, as well as the legitimacy of the access and use of the information. In the case of unfair competition related to data capture, the data involved are mainly in the fields of social, e-commerce, tourism, public administration and so on. Most of them are public data. As far as public data is concerned, platform operators should have some tolerance for the data that their platforms have already published, otherwise it will hinder the use of data for public welfare research or other useful purposes, goes against the spirit of Internet connectivity. However, whether in the case of Sina v. Pulse, user data obtained from Sina Weibo, or in the case of Taobao v. Beautiful View, the legitimate collection of user data by Taobao Company was captured, the current judicial decision has ruled that the act is unfair competition. The exception was a 2019 case in which a software company sued a beijing-based company for unfair competition. The court first made a distinction between public and non-public data, and made a new argument. In this case, the court found that Sina's platform data can be divided into public data and non-public data. If it is not unfair competition to crawl public data by using technical crawl method, but for undisclosed data, it is necessary to judge whether the way of using is legal and reasonable[11].

3.1.2. Judge the Legitimacy of Commercial Data Acquisition

In judicial practice, it is also a key step to judge the legitimacy of data grabbing, mainly to investigate whether the crawler is authorized to access the data and whether the technology of grabbing the data is up to standard.

As to whether the platform can obtain commercial data, the judicial practice generally follows the"Triple authorization principle" proposed in the Sina case. Since digital platforms are both contractual in private law and public in public law, whether they are with horizontal operators or with vertical operators and users, all three parties must abide by certain rules when accessing data. The"Triple authorization principle" includes three kinds of authorization: first, the captured party is in compliance with the acquisition method of its own platform user data; second, whether the network operator has corresponding agreement in the process of data sharing; Third, it refers to the data captured by the user's own permission. In the Sina v. Pulse case, the court found that pulse had breached the terms of the developer's agreement by accessing and using Sina's Weibo content without the consent of the Sina Weibo user or himself. This behavior violates the obligations of both parties in the contract, and does not give enough respect to the user's right to know and the right to choose, so the pulse of the data capture is illegal[12]. In China, the crawler protocol (Robots protocol) is commonly used to solve the problem of legality of crawler technology. But the Robots protocol is not the basis for Chinese courts to judge whether fetching data is justified or not, but whether the fetching method is compliant through case analysis, it is possible to determine whether the"Business Ethics" provisions of the anti-unfair competition law are valid. In the case of Kumeke v. Car Coming, the court found that it was against business ethics for a person to hack into the back-end of the system by attacking the person's server in a procedural way.In the"Bytedance V. Micro Dream Innovation and Technology Case", Baidu developed a"Robots protocol", explicitly stated that the defendant can not crawl its web content, and has taken relevant technical measures to prevent the crawling. The defendant then not only failed to comply with the"Robots Protocol," but also used a technical countermeasure to display targeted web pages, causing web users to click on search results using the defendant's search engine, a snapshot of the target page pops up. In that case, the court first affirmed that the "Robots agreement" entailed business ethics, but that whether it specifically constituted unfair competition also required consideration of the "Legitimacy of the means of competition and the soundness of the competition mechanism" . It is worth noting that in this case the court stated that even if the plaintiff's technical measures were considered unfair, they should not be resolved by"Violence against violence," whereas, the issue can be reconsidered by the agency or taken to court[13].

3.1.3. Measuring Multiple Interests

In determining whether an operator's business data acquisition is illegal, judges often look at the balance of multiple interests. Among them, the factors that determine the damage to the interests of the operators are multiple. Data sets can be broadly divided into raw and derived data according to the difference in the degree to which business data are

processed, based on the classification classification of business data. From the current judicial judgment, the expression of the operator's interests"Damage" in the judgment can be broadly divided into two types. The mainstream view is that when there is competition between the two operators, the acquisition of the defendant will have the effect of substantial substitution for the plaintiff's competitive advantage, this act of grabbing damages the innovation enthusiasm of the market main body. Some important judicial interpretations and departmental regulations are replaced substantially as the constitutive requirements of justifiability judgment of data acquisition. As stipulated by the state administration of Market Supervision and administration, as a"Substantial substitute" for the constituent elements, the operator may not make use of technical means, the illegal acquisition and use of the data of other operators constitutes a substantial substitute for the main content or part of the network products or services legally provided by other operators[14].Secondly, in the situation where there is no competition between the two parties, the court's statement on the damage to the operator's interests is ambiguous. If it causes the core competitive advantage of the plaintiff to be reduced, causes the user to the plaintiff product or the service trust degree to decline, has destroyed the user stickiness and the platform ecology, it caused extra burden to the normal operation of the plaintiff's platform server, increased the cost of the plaintiff's operation and maintenance, and made the plaintiff's investment in data maintenance unable to get a return, bring the plaintiff negative evaluation and loss of goodwill, etc.

Second, examine whether the consumer's interests have been harmed. By ensuring that the abstract consumer is not repressed and misled in the transaction process, the anti-law enables operators to compete for performance. In the anti-law, there are expressions that affect the choice of users, which shows that the paragraph is not only to protect the interests of the operators, the interests of consumers is an important aspect of legitimacy judgment. In the disputes of unfair competition of commercial data acquisition, the judicial adjudication of our country can be divided into two types. The first is that in cases of unfair competition for access to relevant personal data, the information subject has control over the access to personal information by others, some courts have used this rule as a criterion for determining whether an act is unethical,bordering on the"Illegal first" type of unfair competition,where competition is interfered with without breaking the law, to gain a competitive advantage. For example, the tribunal held that it was a well-established business ethics to determine whether unfair competition for access to and use of user information on the network had been conducted with the consent of the user, guaranteeing the user's autonomous choice[15].On the other hand,can"Personal information subject's consent" exempt the illegality of data acquisition between platforms? Our country has the court to hold the negative attitude: the data type that the data portability corresponds to and the legal interest that wants to protect, does not have the comparability with the content that this case involves. Second, in the case of data acquisition without personal information, the court's statement on the damage to consumer interests is uncertain, the general idea is to take the consumer's interests as the reflection interests of the anti-law to protect the interests of the operators or the interests of the competitive order, which damages the competitive order and the interests of the consumers. Some judges believe that improper access to data will lead to vicious competitive consequences, hindering the healthy development of the industry, thus affecting the general improvement of consumer welfare[16].

Finally is the judgment of the social public competition benefit damage. At present, there are two perspectives in the judicial judgment on the interests of the Order of competition. First of all, the Court of our country discusses the damage of the competition order, which focuses on the free-rider effect of the acquisition behavior, such as obtaining and using the data of other people's rights and interests by improper means, this approach to commercial profits and competitive advantage is a form of free-riding unfair competition that can significantly discourage the innovation enthusiasm of peers and adversely affect the healthy development of the Internet industry. Secondly, from the perspective of data security, platform ecology and other points of view on the impact of data acquisition on the Order of competition, these interests will be equal to each other.

3.2. Difficulties in the Identification of Unfair Competition with Respect to Business Data Access

3.2.1. The Route of "Protection of Rights and Interests" Conflicts with the Route of "Justification of Conduct"

At present, China's courts have defined the improper obstruction of the internet in two ways. One approach, which can be called"Safeguarding rights", is that the court, from the interests of the operator, takes the economic interests of the operator, which are not only in the mode of operation, but also dependent on the mode of operation, as the object of protection, there is not only the mode of operation, but also the unfair hindrance to the first-mover if the competition causes the first-mover's mode of operation to be challenged or the first-mover to suffer economic loss in the operation[17]. Another form of what might be called"Freedom of conduct" is if the consumer voluntarily accepts a product or service from a later operator, even if that has a negative effect on the business model or economic interests of the first operator, even if the operator's behavior constitutes"Improper obstruction", the court will take the free choice of consumers as the evaluation standard. From the view of the existing judgment, the judicial judgment in our country has a tendency of tort paradigm of"Rights and interests damaged" in the determination of unfair competition of commercial data, that is, the main line to judge the legitimacy of Acts is the interests of the operators. This is manifested in the following two aspects:

On the one hand, the simple application of the"Infringement of rights and interests" infringement mode, to damage the interests of operators as the core, and its own legitimacy of a symbolic argument. In the benign market environment, the competition and the game represent the interests of the vicissitudes, because the competition behavior causes the homogeneous competitor to suffer the damage is the normal state of the market competition, and in line with the market"Survival of the fittest" competition mechanism. At the same time, the operation of the market economy is in the dynamic track of"Competition → damage → break the inherent business model → establish new industry and new business form", damage comes from the competition, and the competition pushes the market innovation development continuously, thus realizes the higher level equilibrium. In

other words, competition and damage go hand in hand, damage itself does not have a legal or illegal color, it is not the cause of improper behavior, but the inevitable result of market competition. Under the data element market, if one-way, slanting the interests of specific operators as the core and main line to judge the legitimacy of business data competition, to ignore the essential judgment of competitive behavior and the overall consideration of competition is to misunderstand and reverse the"Damage" in market competition.At the same time, it deviates from the goal of the anti-unfair competition law, which is centered on the evaluation of conduct, and pushes it to the wrong area of the law of protection of rights and interests[18].

On the other hand, one-way way to consider whether the interests of the operators are damaged, or although the market competition order and consumer interests into consideration, but did not launch a substantive argument for this, in fact, it is still trapped in the idea of putting the interests of the operators first. In fact, the interests of managers and consumer interests, market competition order is inseparable. First of all, from the operating mechanism of market economy, consumers are usually the ultimate inheritor of market competition behavior, which is the direct object of competition behavior, it is also often the means by which the operator obtains the competition benefit and the terminal which transfers the competition loss. Such transmission mechanisms are particularly evident in data element markets, where consumer privacy and data are both a consideration for the acquisition of goods or services and, at the same time, it also refers to the information resources of the products and services provided by the operators in their business activities, and it is also a main way to obtain economic benefits. Secondly, good market order and benign competition ecology are the premise and foundation to ensure the market main body to participate in the market competition equally and gain economic benefits according to law. At the beginning of the establishment of the anti-monopoly law, it is to establish and maintain a fair, free, orderly and open market competition order, to ensure that market participants can obtain the maximum benefits from"Fair competition" . From this, it can be seen that the interests of operators, consumers and the Order of market competition should be an organic and interactive organic whole. However, in the judicial practice of our country, the cognizance model of Unfair Competition, which is centered on the pattern of"Loss of rights and interests", neglects the interests of consumers in competition, it runs counter to the objective demand of"Anti-monopoly law" to promote consumer welfare, and it does not take into account the market competition order of data elements.

3.2.2. The Definition of Data Interests Tends to Protect the Interests of Operators

In judicial practice, some courts often use article 2 of the anti-monopoly law to judge the behavior of obtaining data on the basis of"Causing damage to the operator" as the main basis, and even the only sentencing standard. This criterion has its own particular approach: first, to determine that the plaintiff is within the protection of the law against unfair competition, and secondly, to determine that the action complained of has caused damage to the plaintiff's competitive interests as described above, whether the defendant acted with malicious intent; and third, whether the act was lawful. However, in judgments, the court often finds that the data acquisition behavior harms the interests of the operators through a relatively large space, while on the issue of the legality of the data acquisition itself, mainly through the"Breach of good faith principle" and"Business Ethics" these two aspects to carry on the general definition. The thinking behind the justification of"Damaging the interests of the operators" is self-evident. The widely used business model of the platform is to attract users by providing free data products on the one hand, and obtain corresponding benefits by placing advertisements or providing value-added services to users on the other hand[19]. Driven by business profits, web platforms will continue to optimize their businesses to attract more users with higher-quality data services, thus creating a virtuous circle in the internet industry. If other operators acquire platform data through acquisition behavior, they can gain competitive advantages such as traffic and consumer attention without investing the necessary capital and technology. Compared with the cost of production and operation incurred by the operator whose data is obtained, the operator who performs the acquisition can obtain almost the same data at a lower cost, this happens not because the operator who implements the acquisition is more productive, but because he uses technological means to hitch a ride on others.Those platform operators who pay production and operating costs, on the one hand, their servers need to respond to many successive and large number of access requests, which increases the operating costs; On the other hand, the unearned acquisition behavior may break the network platform's data display rules and business model, or cause the user traffic to reduce, thus damaging their advertising revenue and value-added services revenue, this results in substantial substitution, which leads to the platform operator's huge cost can not be paid back, affecting its enthusiasm to improve service quality, which makes the platform operator at a disadvantage in the competition[20].

It should be noted that the above-mentioned"Damage to the operator's interests" of the legitimacy of the thinking is a tort law thinking, too focused on the protection of platform operators enjoy data rights. Article 1 of the Act on unfair competition provides that it is a code of conduct rather than a protection of interests act, and that it damages the interests of operators, does not necessarily undermine the competitive order. If we judge the rationality of data acquisition only from the angle of"The harm caused to the operator", this is contrary to the legislative purpose of the anti-monopoly law, it also fails to take into account the interests of consumers and the public in accessing data. Data Resource is the most competitive field in the internet industry[21]. The law of market competition makes data platform operators intend to exclude other business entities from the use of user-uploaded data, the network platform user agreement often has the format clause, the agreement to the user uploads the original data, the single data enjoys the use right and may the sub-authorization, and the original data, single data and platform-generated derived data confused. When both innovative technology and high-tech industries need the support of users' original data, internet platforms often take technology protection measures to restrict the access behavior of other operators under the pretext of protecting the platform's legitimate competitive rights, or litigation over data acquisition, which restricts the flow of data and may even create a data monopoly. Data resources are controlled by a few platform operators, excessively protecting the interests of the operators and excessively restricting the access to data, which may hinder the innovation momentum and growth opportunities of smes, is detrimental to the long-term

welfare of society as a whole; in the long run, consumers lose access to other quality services to the detriment of consumer welfare.

3.2.3. The Boundary of Legality of Data Acquisition is Ambiguous

In judicial practice, there are many kinds of legal standards for data acquisition, such as the principle of"Triple authorization" put forward by the court of second instance in the case of"Micro Dream v. Taobao Friends", and the case of"Chain Family v. Divine Eagle", the Court divided the act of data acquisition into three parts: acquisition, storage and use, and evaluated its legitimacy respectively In the case of"Weimeng v. Yunzhilian", many factors are mentioned, such as the influence of the accused behavior on the normal operation of the plaintiff's products, whether it has substantial substitution, whether it causes economic loss to the plaintiff, whether it will lead to the leakage of personal information, whether the platform and the user agree, and whether the access method is improper. As mentioned above, there are various criteria and arguments for the justification of data acquisition in judicial decisions[22].

In the case of"Micro Dream v. Taobao Friends", the court put forward the"Triple authorization principle" for the commercial use of user data information. Third-party software developers through the OpenAPI access to user data, the need for mutual consent to access, both indispensable. In the case of Taobao v. Mirage, the court also borrowed the principle of"Triple authorization" and made a proper judgment on the defendant's behavior. In the case, the plaintiff obtained Tmall's user information with the user's consent and used it on its retail e-commerce data products. The court held that the defendant's use of Tmall's user information required not only the consent of the user, but also the consent of the platform operator. The principle of triple authorization adopts a high standard in the judgment of the legitimacy of data acquisition, and the single authorization of any party can not make the behavior of data acquisition legal, which strengthens the protection of user information and platform data. However, it should be more careful to judge the legitimacy of data acquisition by reference to the principle of triple authorization. On the one hand, under the background of fierce competition in the data market, it is common for the platform to restrict the competitors to obtain the platform data because of its own interests. If we insist that the behavior of data acquisition must satisfy the authorization of both the user and the platform operator, we can not satisfy the control of the user to the data, third-party technology innovation with data demand is also difficult due to differences in market position. However, it can be seen from Article 2 of the anti-monopoly Law, the"Triple licensing principle" can not completely replace the general business ethics. Although business ethics are somewhat ambiguous, according to the provisions of the Supreme People's court on the application of the second and third paragraphs of Article 3, the court may still, on a case-by-case basis, on the basis of a comprehensive consideration of various factors of interest, the court may make a judgment on whether it violates business ethics. Article 26 of the Supreme People's Court's interpretation of certain issues concerning the application of the law of the People's Republic of China on anti-unfair competition (draft for consultation) , it is not clearly stipulated that the third-party use of data requires the consent of the platform operator, but only requires the consent of the user and legitimate moderate use. Through this draft, we can know the legislative tendency of promoting data circulation. Under the background of encouraging data circulation and mining data efficiency, the principle of"Triple authorization" still needs to be developed[23].

The second is the use of access dichotomy, in the data access unfair competition disputes, the legitimacy of the parties is the focus of the dispute, but also an important part of the judicial discussion. In the early years, many judicial decisions did not evaluate the behavior of data acquisition and use separately, but regarded the behavior as a whole. This kind of judgment thinking may blur the legitimacy analysis of each link, thus weakening the guidance function of the judgment. What needs to be overcome in the judicature is the generalization tendency in the argumentation process. With the continuous development of society, some judicial decisions that although the specific behavior of different forms of expression, but the accused behavior usually includes two links, namely, Data Access and data use, therefore, the"Access and use behavior dichotomy" evaluation criteria, that is, data access and use behavior were discussed separately, and finally the overall judgment.

In judicial practice, there are different judgment standards for the legality of data collection and utilization. In the process of data acquisition, the factors considered by the court mainly include whether the means of data acquisition is justified and whether the platform operator has approved it, the type of data obtained, whether the behavior will cause personal information leakage or affect data security, and whether the behavior will increase the operating cost of the platform. Where data is used, the court focuses on whether the act of use is a material substitute for the operator, whether it is outside the scope of the authorization and is used in a copy-and-paste manner, or whether the secondary development of the data results in new products. In the overall judgment of the legitimacy of the act, the judicial decision holds that if the act of obtaining and using the data itself is improper, it can make a negative evaluation of the accused act. However, if access to and use of data is not always illegitimate, a distinction should also be made on a case-by-case basis. Where the access was justified and the use was improper, judicial decisions generally take the view that even if the means of access to the data were justified, it does not mean that the subsequent use of the data was justified, where there is no justification, the law against unfair competition should apply. For example, In the case of improper access, there are two different views of judicial decisions[24]. One view was that the act of acquisition itself was an independent act, and that if the act was to acquire data in an improper manner, the subsequent use, whatever its specific form, could not be justified. The second view held that the improper act of acquisition did not constitute unfair competition if the act of use did not harm the interests of the operator and was in the interests of consumers and society. Users can log in to the plaintiff's account password on the defendant's website and select the function of"Related extranet account", can be achieved in the defendant's website to complete the resume on the plaintiff's website one-click publishing operations, and can be self-set whether the resume of job seekers stored in the cloud talent pool. The court held that although the defendant's acquisition did not obtain the plaintiff's consent, its use caused limited losses to the plaintiff's traffic, and could improve consumer welfare and be beneficial to the technological innovation of data flow, did not meet the need for a remedy under the anti-unfair competition law[25].

The judgment standard of“Access and use behavior dichotomy” can provide clear behavior guidance for the market subject through the stage of analyzing data circulation. Whether access increases the platform's operating costs. Where data is used, the court focuses on whether the act of use is a material substitute for the operator, whether it is outside the scope of the authorization and is used in a copy-and-paste manner, or whether the secondary development of the data results in new products. In the overall judgment of the legitimacy of the act, the judicial decision holds that if the act of obtaining and using the data itself is improper, it can make a negative evaluation of the accused act. However, if access to and use of data is not always illegitimate, a distinction should also be made on a case-by-case basis. In cases where the acquisition of data is justified and the use of data is improper, judicial decisions generally consider that different types of data are used differently, even if the means of obtaining data are justified, it does not prove its legality and can only be applied to anti-unfair competition laws if they are illegal. There are two different points of view in the administration of justice in cases of improper access. One view was that the act of acquisition itself was an independent act, and that if the act was to acquire data in an improper manner, the subsequent use, whatever its specific form, could not be justified. The second view held that the improper act of acquisition did not constitute unfair competition if the act of use did not harm the interests of the operator and was in the interests of consumers and society. The court held that although the defendant's acquisition did not obtain the plaintiff's consent, its use caused limited losses to the plaintiff's traffic, and could improve consumer welfare and be beneficial to the technological innovation of data flow, did not meet the need for a remedy under the anti-unfair competition law[26].

4. Optimization of the Pattern of Cognizance of Unfair Competition in Business Data Acquisition

4.1. Build a Two-tier Identification Model based on “Data Typing”

4.1.1. Return to the Nature of Competition and Establish a Paradigm of Conduct Regulation

In the judicial practice of our country, the identification of the unfair competition of commercial data falls into the mistaken paradigm of the infringement of rights and interests, which stems from the failure to fully understand the nature of market competition, misunderstanding the value objectives of the anti-unfair competition law. Therefore, the paradigm of the legitimacy of corrective action needs to return to the “ Competition ” nature of the market and clarify the goal of the anti-unfair competition law, thus, we should establish the behavior regulation paradigm for the determination of the legitimacy of conduct. Lies in the dynamic competition for trading opportunities. Based on the theory of dynamic competition, the essence of market competition is the dynamic process of market entities competing for economic benefits and trading opportunities. This means that competition is based on a dynamic process of confrontation, and that its essence should be embodied in the struggle for economic benefits and trading opportunities in the course of confrontation, rather than as a static and neutral result of damage caused by competition. Therefore, if we return to the essence of competition, we should focus on the act of competition itself, not on the damage of interests.

Secondly, the value goal of anti-unfair competition law is to regulate behavior and protect competition. Article 1 of the Act on unfair competition begins by stating that it aims to protect fair competition by preventing unfair competition. At the same time, from the typology of the provisions set out in the law, are to limit the unfair competition of others in a way to protect the fair order of competition. Any of the above may indicate a regulatory position on conduct under the law on unfair competition, namely that the law on unfair competition places more emphasis on dynamic regulation of conduct than on static protection of interests, the value pursuit of protecting fair competition in the market. Obviously, whether it is returning to the “ Competition ” nature of the market, or from the value objective of anti-unfair competition law, it is legitimate and reasonable to establish the norms of conduct regulation. Bearing in mind that the paradigm of conduct regulation does not completely abandon the identification of interests, but rather emphasizes that the identification of the justification of conduct should be based on a comprehensive weighing and consideration of the conduct itself, based on the multiple factors of the conduct, the determination of interests is only one of many considerations [27].

4.1.2. Balance Multiple Interests and Build a Framework for Measuring Interests

The justifiability of business data competition behavior determines the multi-interest game of embedded operator's interests, consumer's interests and market competition order, this requires that the determination of unfair competition in commercial data should be made on the premise of adhering to the norms of conduct regulation, to achieve the interests of operators, consumers and market competition order “ Three-superposition ” of the dynamic balance. Therefore, the determination of unfair competition in business data should be constructed into a frame of interests.This can be done in sequence in the following three steps:

Step 1: identify interests. Specifically, the first, individual interests: business interests. The consideration of the interests of the operators can be divided into the operators who carry out the competitive behavior and other operators who are affected by the competitive behavior[28]. For the actors, they should focus on identifying the benefits they enjoy based on free competition, such as obtaining competitive advantage and seeking economic benefits. Where the affected party is usually the holder or controlling party of business data, attention should be given to identifying whether the competition action actually infringes the affected party's competitive interests based on business data. 33 second, group interest: consumer interest. The term“Consumer” here refers to an abstract group of consumers. First of all, the anti-unfair competition law mainly protects the interests of consumers based on their own choice, and full right to know is the basis for consumers to make their own choice. Second, competitive conduct in commercial data may involve improper infringement of consumers' personal information. Therefore, the identification of consumer interests should take the protection of consumer personal information into consideration. Finally, the impact of competitive behavior on consumer interest should be considered in a longer and longer time dimension. Third, Social Public Interest: Market Competition Order. The social public interest protected by anti-unfair competition law is embodied in the

maintenance of market competition order which is not distorted. The basic structure of competitive order is entry mechanism, supply and demand mechanism, price mechanism, information mechanism and innovation mechanism. Therefore, we can identify the effect of data competition on the Order of market competition by evaluating its promoting or damaging effect on the above-mentioned market mechanism[29].

Step 2: Benchmark selection. From the perspective of legislation, the market competition order that the anti-unfair competition law aims to maintain is the competition order that can promote the development of market economy and protect the legitimate rights and interests of operators and consumers. This means that under normal circumstances, the interests of operators, consumers and market competition order should be a growing organic whole. However, in exceptional cases, when the three interests have different orientations or have the relationship of trade-off, the three interests will produce contradictions and conflicts. In the face of complex conflicts of interest, it is necessary to first identify which should be the priority interest or the benchmark for balancing conflicts of interest.

Step 3: measure interest. There may be conflicts between the interests involved in the acquisition of data, and the law does not provide for a value hierarchy between the interests of operators, consumers and the public interest, it can not be judged directly by simple upper and lower orders, so it is necessary to introduce the principle of proportionality as an analytical framework to measure interests among the three. In a narrow sense, the principle of proportionality emphasizes the need to strike the right balance between the harm caused by an action and the goal pursued. This kind of analysis not only includes some economic research, but also avoids the overly rigid numerical analysis, and suits the real demand of law enforcement. In the case of“Han Tao v. Baidu”, the court of second instance also applied the principle of proportionality, holding that the defendant's behavior of obtaining and displaying the comments in the public comments on the Baidu map provided convenience for consumers, but the social benefit and the loss caused to the plaintiff are not balanced and exceed the necessary limit.

To sum up, the interests in data collection activities are complex, there is no order of priority, in the judiciary to judge the legality of the act, we must use the principle of proportionality and balance of interests theory, the interests of platform operators, consumers and the public are taken into account to balance the interests of all parties and achieve the dynamic balance of the“Dual system” of data protection and data flow.

4.2. Change the Ownership of Data and Confirm the Portability of Personal Data

4.2.1. A Public-Private Partnership to Safeguard Portability

At this stage, “Data portability” has been widely supported and applied in foreign countries. In 2018, the European Union adopted the“General Data Protection Regulation”(GDPR) , article 20 of the data portability made clear, is the most complete and specific legal norms. Giving consumers“Data portability rights” is legitimate in the context of data competition. Unnecessary red tape, such as privacy notices or access rights, will be greatly reduced, and it will also encourage some users to have a large user base.Corporate competitors are moving away from the advantages of data barriers to innovations or improvements in the quality of the services they provide in-house, in order to attract the attention of consumers with full freedom of choice. This kind of benign “Upward competition” state can properly balance the conflict between data freedom and market order, and also can maximize the market competition mechanism.

From the above discussion, it can be seen that the existing scholars have discussed the coordination mechanism between mobile data and business data protection, but the premise is that most of the existing research focuses on private subjects, that is to say, we study the benefit relationship between the individual and the data controller, the data controller and the data receiver. In the context of personal-data control-data receiver-personal conflict of interest, focusing on one side of the protection is tantamount to limiting the interests of the other, and the relationship between the two is one-or-the-other. That is, under such a premise, the choice of the relevant system has become a pure comparison of advantages and disadvantages or value choice. Due to its negative impact on data processors, such as the burden of unfair competition, scholars tend to protect business data, which constitutes a“Portability” limit model. While these claims are essentially aimed at mobile rights and at protecting private interests, they do not fully capture the full spectrum of portable rights. Portability is a part of personal information right, which not only protects personal interests, but also promotes public interests. The whole personal information protection system is characterized by the combination of public and private law in terms of legal sources, readjustment of relations, protection of groups, protection of legal interests, damages and remedies for breach of contract, the personal information protection law should not only protect the individual's independent rights and interests, but also undertake the public function of promoting innovation.

Mobility is a kind of personal information right stipulated in the personal information protection law. It is a right combined with public law and private law. Aware of the possible negative impact of portable devices, the legislator has established portable devices, which reflect the dominance of natural persons over their personal data and facilitate the exchange of platforms between individuals, it also helps to“Break the monopoly in the field of data and promote industrial competition and technological innovation” . This expectation of legislators is not directly linked to the protection of the public good, but more reflects the value orientation of the public good. From the point of view of some scholars, mobile communication as a strategic regulatory means, on the basis of anti-monopoly and promoting competition, can play a role in stimulating technological innovation and promoting the development of the industry. If we only focus on the deduction and comparison of formal format, it is easy to ignore or even ignore the underlying functional premise, resulting in a significant deviation between its conclusions and the expected functional expectations. the functional premise of a portable system is not the same as the right to informed consent, the right to access and copy, and the right to correct and delete. Compared with the Commonweal attribute highlighted by the latter, the mobile internet is more capable of facilitating the flow and use of data, promoting market competition and breaking up data monopolies, thereby improving social welfare. Therefore, when other interests and portable rights conflict, its corresponding interests balance needs to be considered in the public and private law levels. From the perspective

of coordination of public law and public law, the interests of individuals, data controllers and data recipients should be"Rebalanced" with public interests (such as scientific and technological innovation, industrial development) .

4.2.2. Expand the Scope of Data Portability Within Reasonable Limits

From the perspective of public-private law coordination, the public interest of portable rights should be realized by expanding the scope of portable data. Because it can guarantee the individual to transmit the valuable data to the data receiver to the maximum, it is to give full play to the data economic effect, prevent and crack the phenomenon of data monopoly under the platform economic condition, promote the effective circulation and use of commercial data. The algorithm model and other accumulated data resources are different between the data controller and the data receiver, so the same data mining may bring different economic benefits. Enterprise data need to be used repeatedly, and through different types of data for association and Integration, in order to give full play to its social and economic value. Continuous use and sharing of business data can effectively improve the efficiency of resource use, reduce the intensity of repeated collection of information, and promote the overall level of social welfare. With this efficient flow of data, data companies can gain a competitive advantage only if they continuously optimize their algorithms and computing power, for the benefit of society as a whole. This has been amply demonstrated in our judicial practice. In Qianjin v. Yicheng, the court held that, because it is"Placed under the legislative purpose of the anti-unfair competition law to promote the sound development of the market economy, encourage and guarantee fair competition, and protect the legitimate rights of competitors and consumers", the practice is innovative. In general, as long as the data controller's protection of public interest is beneficial, the data controller's claim can not be accepted by the court[30].

From the perspective of public-private law coordination, portability needs to give full play to the macro objectives of maintaining the order of market competition and promoting the development of data economy, so it is necessary to expand the scope of data portability, but such expansion must be in line with the institutional functions of the mobile internet. At the same time, in order to protect the core competitive rights and interests of the data controller, while expanding the scope of portable data, the category of non-portable data should be clarified, and through the specific use of restrictions on the use of data recipients to eliminate unfair competition concerns. On this basis, the relationship between the mobile internet and the protection of commercial data has a clearer direction, in particular, from enhancing the portability of personal data and constraining the processing behaviour of data recipients.

4.3. Refine the Criteria for Justifying the Conduct

4.3.1. Establish a Paradigm of Conduct for the Test of Reasonable Legal Interest

In the process of determining the illegality of a specific act, China's judicial decisions are usually based on whether it conforms to the"Business Ethics" to elaborate. According to the connotation of"Business Ethics", we can synthetically judge the behavior influence of data acquisition from the aspects of consumer rights, market competition order and social public interests. Specifically, regarding the consumer, we should examine whether the consumer's use experience is affected, whether the consumer's true expression of will is hindered, and whether the consumer's privacy is violated. Regarding the market competition order, we should combine the operator's subjective state to judge whether the behavior itself has damaged the three values of"Freedom", "Justice" and"Efficiency" in the market order. As an exception, it is to"Protect the public interest" to prevent illegal behavior. The specific steps taken to balance the interests of the three parties can be drawn from the EU's"Legal interest test" 1. The legal interest test is a method used to assess whether a data processing activity complies with the principle of legal interest set out in Article 6, paragraph 1 f, of the General Data Protection Regulation (GDPR) of the European Union. The principle of legal interest means that the data controller or the third party can deal with personal data based on its legal commercial or social interests without impairing the rights and freedoms of the data subject. This can be done in three steps.

First, identify what are the"Legitimate interests" of data controllers? Considering the characteristics of rational economic man in commercial competition, the demand of marketing and publicity is"Legal interest" . Compared with the traditional marketing methods, under the internet platform, especially for some small and medium enterprises with limited economic budget, small customer base and relatively fixed base, data capture can help them reach and expand their potential customer base in a low-cost manner to the greatest extent possible. Thus, data acquisition is essentially a marketing and advocacy tool. Secondly, after determining that the data controller is based on his"Legitimate interests", the"Minimum necessary principle" should be followed when obtaining data, that is, to determine whether data processing is necessary, and whether it is balanced with personal interests. For example, a company might send an e-mail to a customer for marketing purposes. It informs the customer in the mail about the purpose and basis of processing the data, and the customer has the right to refuse to receive the e-mail. This behavior is related to compliance with the legal interest test. Finally, in the process of balancing the interests of the data subject and the competing interests of the data controller (platform) , different cases need different judgments. For example, if the invasion of personal privacy and other personality of the highest rights and interests, it should be directly characterized as illegal. In addition, the data subject's individual expectation, the degree of intrusion and so on are also the factors that should be considered. To sum up, the analysis of the legitimacy of data acquisition should be from the perspective of civil law thinking from the individual-based to the social-based perspective, rather than just rely on" Business Ethics " standards; At the same time, according to the steps of " Legal interest test " , we can establish a measurement paradigm that takes into account the interests of competitors, consumers and the public.

4.3.2. Explore Rules for the Identification and Identification of Technical Facts for Data Acquisition

First of all, in judicial practice, the accused often think that what they have obtained is the information on the third party platform, not involving their own information. There are two key facts about whether or not the accused carried out the prosecution: the fixed identified data and the access records of the query server. Adopting the method of"Data marking", we can fix the concrete performance and details of the accused behavior effectively, and then find out the facts of

the case. In some cases involving data collection, there may be data stored on the plaintiff's server with a particular mark or potential flaw that can be traced back to the defendant's access to and use of the data, the determination of the facts of the case plays a very important role. In the“Micro Dream V. Cloud Intelligence Association” case, the collegial panel asked the plaintiff at the trial scene to put some data with a special mark into its server, and then immediately went to the defendant's products to look at it, it was found that the defendant's products displayed in real time the specially imprinted data content that had just been put into use, thereby fixing the key facts of the defendant's real-time access behavior by means of such spot tagging[31].

Server access records are also important evidence of acquisition behavior. No matter what technology the defendant uses to acquire the data, it will definitely send a request to the server of the plaintiff's platform, and a large number and high frequency of abnormal access records will prove that the defendant has performed the act of acquiring the data, the defendant's infringement plot, subjective malice and other factors play an important role. In the case of chain family V. Condor, the plaintiff submitted to the court the records of visits made by the defendant's website on its server, which showed that the defendant had obtained over a million visits in just a few months, it can be proved that the defendant actually used the computer program to simulate the real user's request to the shell net, and stored and used the key data returned by the shell net. This evidence played a key role in determining the nature of the case. In some cases, the defendants refused to give evidence of the technical means they used, and some even made false statements about the technical means they used in order to justify their acquisition. To this end, we propose the inclusion of specialized people's jurors, technical investigators, forensic institutions, expert support persons and external technical advisers in cases of unfair competition involving access to data, and through the court to explain the problem, accept questions, technical survey or experiment, and participate in the identification of technical facts, improve the efficiency of the identification of technical facts.

Technology neutrality and the justification of access in cases involving unfair competition for data access, the defendant will also argue that the technology used to obtain the data was neutral, it should not make a negative assessment of its conduct. But there is no direct relationship between the neutrality of technology and the justification of behavior. In the case of web crawlers, a Web crawler is essentially a way to traverse the Web, extract the Web data you need based on certain rules, and then download it locally to create a mirrored backup of Internet Web pages. In the judicial decisions, there are many cases in which the use of web crawler technology to obtain data has been found to be unfair competition, and there are also cases in which the restriction of web crawler access to data has been found to be unfair competition. In“Qihoo v. Baidu” case 1, the defendant did not include the plaintiff's search engine in the whitelist set up in the Robots Agreement on its website, resulting in the plaintiff's search engine being unable to access baidu-related web pages normally, the defendant's actions were found to be unfair competition. It can be seen that the web-crawler technology itself is not improper, and judicial practice gives a negative evaluation of the use of neutral technology for illegal purposes. In other words, as a neutral technology, web crawler does not necessarily deduce that the behavior of data acquisition performed by this neutral means is justified. In general, the use of technology as a means or tool of unfair competition by a defendant in such a case is not a mere use of neutral technology. For example, in the case of“Taobao v. Beautiful View”, the defendant used the sub-account provided by Taobao users who had ordered the“Business Advisor” data service to help others access the data content of the“Business Advisor” product. The court found that the act directly led to the reduction of the plaintiff's sales of data products, and the two had a trade-off between the two.

5. Conclusion

As the“Oil” resource which plays a key role in the digital economy, data contains huge commercial value, which is very important for platform operators. In the absence of specific laws and regulations that provide adequate protection for the rights and interests of the platform's data, the Unfair competition can be achieved through the general provisions of the law, will play a major role in Unfair competition disputes. As an emerging area where Unfair competition laws are applicable, the path of justifying data-grabbing is an important and difficult point in judicial practice.

Observing the practice, in our country, there are still many practical dilemmas for judicial adjudicators to solve, such as the conflict between the path of “Rights and interests protection” and the path of “Behavior legitimacy”, the Unfair competition of data rights and interests tend to protect the interests of operators, and the judgment of legality boundary of data acquisition is vague. In view of the above-mentioned problems, this paper provides a feasible and optimized plan for the judicial determination of commercial data Unfair competition from the following three aspects: rectifying the determination approach, confirming the portability right, and refining the criteria for the determination of legitimacy. Firstly, we should correct the way of identifying the commercial data acquisition, return to the nature of competition, establish the paradigm of behavior regulation, and realize the goal of protecting competition by anti-law, to confirm the portability of personal data, expand the reasonable limit of portability of data while playing the function of public-private synergy of portability. Finally, the criterion of justifiability should be refined, that is, to establish the paradigm of“Reasonable legal interest test”, and to explore the rules of fact identification and identification of data acquisition technology, in order to achieve the existing rules under the commercial data acquisition behavior identification model optimization. Due to the limitation of the article's length and empirical materials, this paper has not been done, and needs further research and exploration.

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