

Issues Related to the Application of the Principle of Technology Neutrality in Internet Unfair Competition

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Abstract:

With the continuous expansion of the technological space, unfair competition in the network environment has emerged and the academic community has paid deeper attention to it. article 12 of the Anti-Unfair Competition Law, which came into effect in 2018, newly added a provision on the determination of unfair competition in the network environment. The provision also reflects the modernization and information trend in the determination. At the same time, the competition technology gradually tends to be high-end, and the competition cost is low and far-reaching. It is difficult to determine the boundary between technological innovation and protection of legal interests, and the principle of technology neutrality is raised. In view of this, the four aspects of the meaning of technology neutrality in Internet unfair competition, the necessity of its application, the current situation of its application and the path of regulation will be discussed.

Keywords:

Technology Neutrality Principle, Unfair Competition, Internet

1. Meaning of the Principle of Technology Neutrality

Technology neutrality originated in the Sony case in 1984 and was first established to protect the innovation and development of technology. The main embodiment is that a third party uses the technology to produce the consequences of infringement, and the technology provider is not liable for the fault, thus to balance the development of technology and the protection of rights by law.

The rapid development of the Internet platform, the continuous innovation of various types of technology. When using technology for profit-making activities, the new technology should be used within the scope of legal permission. Instead, it should not be used in the name of technology neutrality to violate business ethics and steal the rights and interests of others. At present, most scholars in China believe that the meaning of technology neutrality includes at least three kinds: function neutrality, responsibility neutrality and value neutrality. Function neutrality refers to the realization of technology based on its own function without considering other factors.

[1] Liability neutrality only explores whether the provider of the technology has subjective malice, regardless of whether the technology causes the result of unfair competition. [2] Value neutrality, on the other hand, is where the value of the technology is absorbed and changed by the value of the law, thus producing a change in the legal norms. [3] In the new Internet competition, although the technology developer may not be subjectively malicious, the intention of the technology user is beyond the control and anticipation of the developer. Then based on what some scholars believe to be the meaning of technology neutrality, value neutrality and function neutrality should not be applied in the context of Internet unfair competition.

Therefore, the principle of technology neutrality discussed in this paper should have the same connotation as “substantial non-infringing use” in the United States, that is, if the technology is not developed for illegal use, then when the technology is used by others for infringing acts, the provider cannot be considered or presumed to know that others will use the technology for infringing acts, let alone be held liable for it. [4]

2. The Necessity of Applying the Principle of Technology Neutrality in Internet Unfair Competition

2.1. High ambiguity of the general provisions in the Anti-Unfair Competition Law

Paragraph 1 of Article 2 of China’s Anti-Unfair Competition Law stipulates that operators shall follow the principles of voluntariness, equality, fairness and honesty and credit in market transactions and abide by generally accepted business ethics. In the final judgment of Tencent v. 360 Buckle Bodyguard, the Supreme People’s Court also pointed out that the determination of what constitutes unfair competition in the case mainly lies in whether the defendant’s behavior has violated the principle of honesty and credit and the accepted business ethics of the Internet industry. However, at present, China’s law does not crystallize the principle of honesty and credit and business ethics. Therefore, in practical trials, judges are given excessive discretionary power. As a result, it is difficult for judges to be consistent in their understanding and application of the principle provisions, and they even have completely different decisions for similar cases.

Secondly, it must be affirmed that the general provisions in the anti-unfair competition law, although in the core and basic position, constitute the standard of all unfair competition behavior. However, the essence of competition is that market operators compete with each other to obtain the opportunity to trade. The definition of the new Internet technology, which is increasingly complex and diverse, is too vague and arbitrary for the practice, and may hinder the development of technology and the fairness of justice.

2.2. The limited scope of Internet-specific articles

China’s Anti-Unfair Competition Law was amended for the first time in 2017 and came into effect in 2018. It is noteworthy that this amendment added a new article on unfair competition on the Internet, which is also called “Internet-specific article”. Professor Li Mingde believes that the legal interest protected by this article is the protection of technical measures rather than the protection of successful intellectual activities. At the same time, the technology is constantly updated, and if the technical terms are outdated, the problem of revising the law again will arise. [5] The author also believes that the addition of this article is progressive in the legislative level, but

it cannot list all unfair competition. At the same time, the fourth paragraph of the article for the bottom of the article, giving judges too wide discretion, too much resistance to the development of technology. Therefore, the current regulation of unfair competition in the Internet market is still not universally applicable, and cannot be universally applied to cases of unfair competition in the Internet.

3. Current Status of Application of Technology Neutrality Principle in Internet Unfair Competition

3.1. Prerequisites for the application of the principle of technology neutrality in practice

Everything has two sides, and so does technology. When a new technology is created, its use is not only limited to the possibility of being justified and legal, but also the possibility of being used for illegal purposes that harm the interests of others. Therefore, it is necessary to apply technology neutrality as a criterion for judging the difference between legal and illegal use.

First of all, if technology neutrality is used in the case of unfair competition on the Internet, then the first thing that should be confirmed is that there is a competitive relationship between operators. Only between operators with a competitive relationship will the relationship of unfair competition be identified, and only then can it be further decided whether the principle of technology neutrality can be used to defend. Therefore, it is necessary to clarify whether the operators have a competitive relationship.

The traditional competitive relationship requires “the relationship between operators of the same or similar goods with substitution for each other for trading opportunities”. [6] In other words, the existence of the same range of products and services between operators as a qualifying condition, so as to determine whether operators have a direct competitive relationship.

In this case, the software developed by the plaintiff and the defendant had different functions and different scope of services. Analyzed by the traditional determination of competitive relationship, then the two parties must be operators who do not have a competitive relationship. However, if the software developed by DAMO is separated from the video broadcasting website of Akiyo, then the video ad blocking function in the software developed and operated by DAMO will be useless and will not have the basis and value for operation, let alone providing revenue for DAMO. From the viewpoint of the value brought by its behavior, the two are the subject of a competitive relationship.

Therefore, the author believes that, with the increasingly novel type of network competition, the determination of competitive relationship can no longer be limited to a certain field, but should adopt a broader standard. First of all, the identification of the operator’s competitive relationship should be across different fields, not limited to the same market competitors. Secondly, the criteria for the determination of unfair competition relationship should give due consideration to the issue of benefit acquisition.

3.2. Difficulties in applying the principle of technology neutrality in practice

Most of the uses for which technology is developed will follow the intent of the developer and be used for the intended purpose, while others will be used for purposes

beyond the intended use. In cases of unfair competition on the Internet, judges generally consider not the technology itself, but the consequences of the use of the technology. According to the analysis of the principle of subjective and objective consistency, firstly, subjectively, the purpose of the development of the technology provider is analyzed. Second, objectively, whether the provider of the technology is thus profitable and thus constitutes aiding infringement.

3.2.1. Subjective purpose of the technology provider

Only if the technology provider has subjective intention, the damage caused can be attributed to the technology provider, but not vice versa. As to how to judge the subjective intent of the technology provider, but also combined with the analysis of specific judicial cases, the court can make different judgments on the subjective purpose of the technology provider.

In trial practice, there are three situations in which the subjective malice of the technology provider is judged.

First, whether the technology developed by the technology provider is relevant. If the technology developed by the technology developer has a business model for a certain type of operator, then it can be judged to have subjective malice. For example, in the case of Unfair Competition between Geeks and Aiki, Geek is the manufacturer and seller of the “Extreme Routing” router, which can block Akiyip's advertisements and attract users by doing so. The router developed by Geeks obviously caused a large loss of advertising revenue for video websites, not only for Akiyay, but also for other websites with similar business models. Thus, such is a targeted technology for video advertising, and it can therefore be determined that the geek company is subjectively malicious. However, at the same time, there are some technology providers who claim that the infringing software they developed is free for users to use and is software for the public good rather than for profit, and thus is not targeted. For this type of defense, the court generally believes that although it is free for users, it cannot be used as a reason to judge that it is not targeted. Even if the software is provided free of charge, it may cause the video website operator to suffer from loss of interest due to users' use, while the technology provider will not gain benefit from the download of the software, but the download volume and usage rate of users will bring other benefits to it. Whether the browser or software used for unfair competition is free of charge does not affect the development of the technology will infringe on the legitimate interests of unspecified operators and constitute unfair competition.

Second, whether the technology developer induces or induces users to use the technology. The technology itself is not good or bad, but the main purpose of the technology developer to develop the technology is to conduct unfair competition or induce others to carry out illegal activities, it is inevitable that the subjective intent is considered malicious. For example, in the Geeks case cited above, Geeks placed advertisements on several Internet shopping platforms, the content of which mainly reflected that the Geeks product could remove advertisements from video sites, and then induced users to download it to block advertisements. It can be seen that if the advertising about the product, the publicity is not its own product has the value of the function, but to lure users to buy the product to use the video site, so as to infringe on the interests of video site operators and make their own profits. This reflects that the product can be used for improper purposes, but also to lure users to download, the subjective malice of the technology provider is also evident.

Third, whether the technology developer violated the basic principle of honesty and credit and the business ethics of the Internet industry. In the Supreme People's Court's "Sea Belt Quota Case", the principle of honesty and credit and business ethics were applied for the first time to determine whether the competition among market players constituted unfair conduct. The principle of honesty and credit is the "imperial rule" in the anti-unfair competition law, [7] while business ethics is an enlightened egoism that pursues self-interest but also pays due attention to the interests of others, which is a dual fusion of economic and moral rationality. [8] What business ethics embodies is a business ethics that is recognized by both market operators and consumers, i.e., the public order and morals of economic society formed in the market environment. In the absence of consideration of the objective situation of competitive behavior and the balance of many interests, directly into a logical thinking contrary to the accepted principles of business ethics and good faith, although it will simplify the workload of the trial and raise the standard of judging unfair competition to the height of morality, but can not withstand the consideration of the law. [9] Although business ethics is recognized by market traders, the most essential thing that businessmen pursue is profit, and business ethics is different from social morality and morality in the field of civic life. At the same time, there is no legal uniformity in the criteria for judging what business ethics are in practice.

Therefore, although in practice, honesty and credit as well as business ethics are used as the basis for determining the legitimacy of the use of technology. However, the author believes that the market demand leads to the continuous development of technology, but because of the lagging nature of the law, technology in the process of development will inevitably touch the areas not provided for by law. At this time, in the definition of the exercise of technical legitimacy, the use of the principle of good faith and business ethics to regulate, on the one hand, will inhibit the development of technology, on the other hand, will also affect the justice. Therefore, the subjective intent of the technology provider cannot be judged by honesty and credit and business ethics alone, and other important principles such as voluntariness and fairness can be considered for definition.

3.2.2. Objective results for technology providers

The innovation of a technology is to better promote the development of the Internet platform, drive the continuous innovation of the technology market and stimulate the market vitality. If the innovation of a technology objectively brings losses to the market, operators and consumers, then the lawsuit with technology neutrality as a defense will naturally not be supported.

A fair and stable market order is the basis for the survival of operators and enterprises. The premise that technology development and innovation can be fully used is the existence of the Internet platform, and the stable development of the Internet platform is necessarily based on the fair and orderly development of the entire Internet market order. When technological innovation and technological progress become tools for unfair competition and used to harm the legitimate interests of others, it is inevitable that the legitimacy of their actions cannot be claimed in the name of technological neutrality. However, with the continuous development of Internet technology and the opening of the market, the process of technology development will inevitably involve the domain of the competitor, but as long as the normal market and the business order of the competitor are affected, such technology development should be protected by law. For example, in the case of *In Baidu v. Sogou Unfair*

Competition, the court of second instance held that the conduct complained of in this case did not damage the normal operation of Aiki's website, nor did it bring losses to consumers, and did not reach the extent prohibited by law. According to the principle of proportionality, the alleged competitive behavior is still an efficacious competition in general. [10] The vitality of the market lies in competition, and a market without competition is like a pool of stagnant water. The law should give technology developers and operators some room for technological innovation without affecting the market order.

At the same time, it can be seen in the above-mentioned articles that the Anti-Unfair Competition Law not only protects the order of market competition, but also safeguards the legitimate interests of operators and consumers, and operators, as the main body of the market, are bound to be protected by the law. At the same time, in the era of big data, the position of consumers is equally important. The economic interests brought by consumers are the basis for the survival of an Internet enterprise, and it is particularly important to protect the interests of individual consumers under the premise of ensuring the normal order of market competition.

The current existence of the Internet unfair competition technology, often with a strong technical and professional, for the neutrality of the technology is difficult for ordinary video users to identify, the user in the uninformed use of improper nature of the technology, is likely to bring losses to themselves. For example, shielding technology, data crawling, web crawlers and other technical means often bring about the collapse of the system or two kinds of software due to their own program editing conflicts, and lead to the loss of Internet users. The common ones are abnormal closing of web pages, flashbacks and computer poisoning or automatic shutdown, which may bring losses to users in terms of information or money, etc. and cause great inconvenience to Internet consumers. Then, such technologies are simply unlikely to be supported with technology neutrality as a defense. At the same time, these technologies may also cause unforeseeable losses to the operators, such as the reduction of advertising revenue, the crash of web pages, the loss of potential customers due to the degradation of user experience, and other situations that cause damage to the operators' interests.

Therefore, technology can be used as a defense as long as it does not disturb the market order and does not harm the operators and consumers, and the law should not restrict the development of emerging technology as long as it does not harm the legal interests protected by the law.

4. Regulatory Path for the Application of the Principle of Technology Neutrality

4.1. Suggestions to improve the regulation of the Anti-Unfair Competition Law

The Anti-Unfair Competition Law is the main legal basis for regulating unfair competition on the Internet in China, and the rapid development of network technology has highlighted the relative lag of the law. In practice, it is difficult to make precise determination of all Internet unfair competition behaviors based on the existing Anti-Unfair Competition Law. The law also does not determine the principle of technology neutrality. The introduction of the principle of technology neutrality into the field of anti-unfair competition law will, in a way, ease the tension between technology and law. The establishment of the Anti-Unfair Competition Law is to

protect the interests of operators and consumers, but based on the rapid development of the Internet now, still use the lagging legal provisions to adjust the emerging technology, is bound to hinder the development of technology and market. Only by introducing the principle of technology neutrality can we balance the interests of network service operators and technology developers and promote the establishment of a fair competitive order in the market. However, the author believes that the introduction of the principle of technology neutrality is not a negation of the existing provisions, nor does it conflict with them. On the contrary, the principle of technology neutrality should be the materialization of the existing provisions, which can further improve the judgment on the legitimacy of Internet technology, limit the discretion of judges, and play a better regulatory role.

The revision of a law cannot be completed in a short period of time, and it is impossible to accurately elaborate and establish the principle of technology neutrality in a timely manner by revising the Anti-Unfair Competition Law. Therefore, the author believes that the judicial interpretation of the principle of technology neutrality can be formulated first, and the Supreme People's Court will issue the relevant judicial interpretation to establish the principle of technology neutrality in a more timely and accurate manner. The judicial interpretation can clarify the definition of the technology neutrality principle and give examples of new Internet competition models not regulated by the Anti-Unfair Competition Law that can be applied to the technology neutrality principle. It can clarify the regulation of the application of the principle of technology neutrality in a relatively quick time, and can also point out the direction for the trial practice and limit the discretion of judges in such cases.

4.2. Suggestions for Establishing Relevant Supporting Mechanisms

The law is not omnipotent and cannot regulate all social problems. In the case of unregulated laws, relevant supporting mechanisms can be established first.

First, the self-regulation of the Internet industry can be strengthened. In 2011, China's Internet Society issued the Self-Regulation Convention for the Internet Terminal Software Service Industry, Article 19 of which regulates the act of blocking and blocking legitimate information content and pages. For the use and establishment of the principle of technology neutrality, this approach can also be referred to. The principle of technology neutrality can be regulated through industry self-regulatory conventions to clarify what characteristics of new technologies in the Internet industry can be applied to the principle of technology neutrality.

Second, business models can be improved and industry standards can be set. Unfair competition due to technology exists in large numbers because the business model has certain flaws that allow technology to take advantage of the situation. At present, the domestic Internet industry is in a time of continuous innovation, and all kinds of applications and software are in constant development and use. Take software and browsers that block video ads for example, as long as users watch a short video ad on a website, they can get free video products and services provided by the website. Most Web users are not willing to pay for a membership, and they can accept the lower cost of time for watching ads. Therefore, this business model is to some extent within the range of acceptability for web users. However, there is no regulation on the specific length of "short video ads", which leads to the emergence of ads of a few minutes or even longer in the market, which not only do not allow ad providers to promote well, but also cause video sites to lose a large number of users. Therefore, a uniform

industry standard can be set to improve the business model. In cases where the industry standard is exceeded, the use of technical means to shorten the advertising time is not applicable to the principle of technology neutrality. Then at the same time, for the network advertising filtering technology, to a certain extent, can also effectively prevent the harassment of malicious advertising, so as to ensure that users are not disturbed on the premise, but also to video site operators can bring a great loss of profit. Then this situation can be included in the industry standard to be able to apply technology-neutral situation.

5. Conclusions

With the development of new technologies, many unforeseen situations may arise, and the lagging nature of the law makes it impossible to regulate all types of Internet unfair competition. The principle of technology neutrality arises and is improved along with the development of the Internet. Applying the principle of technology neutrality to unfair competition in the Internet is a balance between the interests brought by technological innovation and the interests of multiple parties such as Internet service operators and consumers, so as to promote technological development and stimulate market vitality. At the same time, the competition in the Internet industry has its own special characteristics, in the application of the principle of technology neutrality, not only to give operators and consumers more adequate protection to promote the development of the Internet industry, but also to protect the interests of new technology developers. Therefore, the application of the principle of technology neutrality requires continuous practice in practice, continuous research by experts and scholars, and, most importantly, the updating of legislative concepts by legislators in line with the development of technology.

Conflicts of Interest

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