

# Research on Regulation of Data Capture Behavior from the Perspective of Anti-unfair Competition

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## Abstract

As the big data seeping through our lives, become a kind of important assets, data fetching behavior also gradually become a new business model, data fetching disputes also appear constantly, for data fetching behavior whether the violation of business ethics, in judicial practice are often based on "the Anti-unfair competition law" article 2 for regulation of this behavior, But this method of regulation there are belong to the data is unknown, the operator right does not fully relief and the problem such as the lack of administrative regulation, based on this, should be on "Anti-unfair competition law" article 2 explain clearly, both the data characteristic and the competition effect, perfect the administrative supervision system of data protection, data so as to establish a fair and just competition order.

## Keywords

**Data Capture Behavior; Market Order; Law Against Unfair Competition.**

## 1. Introduction

In business activities, enterprises obtain a large amount of business data through user registration, use and feedback, which are important assets of enterprises. In the process of data development, enterprises invest a lot of financial and material resources, which should enjoy the competitive advantage brought by data information, but due to the timeliness and economic value of data, leading to other operators through data capture to enhance their own advantages. However data fetching behavior and business activities of infringing business secret is different, although most of the data is collected, but are users of voluntary disclosure, such as some user experience evaluation, because these data are consumers voluntary disclosure, so the data of the ownership has not yet been law, also derived a lot of data capture software, such as the crawler software, At the same time, data capture also conforms to the Robot protocol and does not violate general business rules, so that data information can play a greater economic benefit in circulation.

### 1.1. Judicial Practice of Data Capture at Home and Abroad

This legal status leads to disputes in recent years, the data of competition between domestic enterprises, but domestic competition rules and laws about data is still brewing, competition law standard relative fuzzy boundaries, for data related legal rules of the competition is crisscrossed with the various legal department, first, in the civil law general principles, left to the rules of data ownership is white, Have provided in accordance with the stipulations of the law, second, in the network security law to define data collection, site collection and use of consumer information shall be legally justified, that is to say, if the operator for information collection appear flaw, the data can't be legal protection, in the end, is about the data of unfair competition, In judicial practice, Article 2 of the Anti-unfair Competition Law is often used as the basis for judgment.

In the famous public comment on baidu map cases, when people in the use of baidu for navigation, also can see many consumers evaluate information on various local shops, and this

information is not baidu collection, but using data capture software capture the public comments on the data information, and indicate the information from the public comments. In the data is known as the "oil" s business, the data itself can bring many economic benefits to the enterprise, baidu is not only used to steal data, public comments on the sticker, also called authorization, it is tort, directly to the public comments on the website information to copy and paste, obtained with the public comments on the same competitive advantage, while baidu's behavior conforms to the Robot grab agreement, However, as Dianping and Baidu have a competitive substitution relationship, it is confirmed in judicial practice that the two have a direct competitive relationship. If baidu's "free-riding" business model is allowed, the ecology of competitive market will be destroyed. In reality, data capture behavior is common, and many operators, such as Douban and Xiaohongshu, have had data-related disputes.

There is an academic controversy regarding the court's application of Article 2 of the Anti-unfair Competition Law for judgment, because to some extent, it will lead to taking morality as the defining standard, while morality is ambiguous, which belongs to the judge's value judgment and will expand the judge's discretionary power. Secondly, the industry has not yet formed a unified statement on business ethics, which is abstract and unstable to a certain extent. If it does not restrict the application of Article 2 of the Anti-unfair Competition Law, but excessively relies on moral deregulation, it is bound to bring trouble in practice.

## **1.2. The Dilemma of Operator Data Protection under Article 2 of Anti-unfair Competition Law**

### **1.2.1. Unresolved Data Ownership Issues**

Legal rights belonging to the data in our country did not make clear a regulation, although the data fetching behavior law spread in every department, every law but not the data information clearly define the rights of ownership do, law is based on legal principles or prohibitive provisions appear more, thus causing the data collection, namely, there are many disputes between companies and data scrapers, For what legal rights should be given the data, the academic circles have different views, some even argue that qualitative data rights into a kind of property right, public comment on baidu's case, in the court and no rights belonging to the data to define, but cleverly avoid this problem, at the same time from against unfair competition and the perspective of tort law, To admit that the website operators for its research and development and collecting data have a certain degree of property interest, such as taobao v beauty case, the court has been clear about the operator for its research and development of data items with property rights, but is not comprehensive in this way, in practice there are certain risk, so the qualitative data ownership is still a problem to be solved.

### **1.2.2. It is Difficult to Fully Remedy the Rights and Interests of the Operator**

As mentioned above, operators' human and material resources play an indispensable role in data development, so it is natural that they enjoy the competitive advantage brought by data value. Relevant competitors directly intercept their R&D achievements through data capture, which distorts the normal market competition mechanism and causes great damage to their interests. Operators through legal relief, however, slightly insufficient, such as in the case of public comment on v. baidu plaintiff public comments on 90 million to baidu's claim for compensation, and actually in the first instance verdict, the court ruled baidu compensation for only 3 million, and public comments on the claims of expectations, appear this kind of circumstance is because after data is fetching, The original operator can still use the data, and it is difficult for the plaintiff to prove the specific amount of loss of the enterprise, and it is also impossible to prove the benefits gained by the data grabber. As we all know, data information is hidden potential assets that cannot be measured by money. Therefore, although the Anti-unfair Competition Law can define data capture behavior, it still cannot provide adequate relief for the interests of victims.

### 1.2.3. This Law May be Abused

Court in the judicial practice is mainly dependent on "the Anti-unfair competition law" article 2 to regulation of data capture, resulting in a lot of questions about this law is abused, mentioned above, this article belongs to the legal principles, suspected expansion of judge's discretion, and the lack of specific operation guide, if a large number of references in this article, will be against the liquidity characteristic of the data, Reduce the value of data and market economy efficiency, resulting in market competition disorder.

The specific application of principled provisions will bring the following problems: First, "the Anti-unfair competition law" article 2 covers business ethics and the principle of honest and trustworthy, the plaintiff has found it difficult to specific tort, and also want to consider in the decision to the interests of consumers, the second, the method of linking problem with other legal provisions, whether by the infringer can be filed at the same time as data tort principle terms and clauses of v, The third is the law and the Internet special provisions of the bottom law to cooperate with the application.

### 1.2.4. The Incomprehensiveness and Lag of Administrative Supervision

Administrative supervision is of vital importance in the regulation of data competition behaviors. Administrative authorities need to regulate operators by reviewing their qualifications and monitoring and management in the background, so as to strengthen the protection of operators' data [6]. But now the Internet environment makes the data fetching behavior emerge in endlessly, caused a certain impact to the administrative supervision system, the original administrative supervision system has been unable to meet the needs of the network environment, huge amount of data, difficult to cover all operators of data research, collect applicable model, at the same time, with the continuous upgrading of technology, Operators' means of data development are also changing, and the technical equipment and capacity of the administrative supervision system are difficult to keep up, thus hindering the identification of the legitimacy of data capture.

At the same time, the Anti-unfair competition law does not completely eliminate the repeated use of data capture. Only when the data capture behavior of operators causes economic losses of data developers and disrupts the competition order, it will be punished by the administrative department. However, due to the unclear legal boundary of data capture and the lack of unified identification standards, administrative departments may make subjective assumptions in the identification, resulting in improper judgment. Therefore, in order to reduce the impact on free market competition, administrative authorities often only impose administrative penalties on individual obviously improper data capture behavior, but for the overall regulatory system, there is an obvious lack of responsibility.

Because of a lag in legislation, many about data fetching the misconduct is not into the regulatory scope, lead to the operator often find reasons, only after the data being stolen for data from the Internet in our country at present stage use relative to the low level of foreign research and development, both to full protection to operator, also can't hit the market economic activity, This also causes that the administrative authorities often can not timely carry out administrative penalties on improper data capture behavior, maintain a benign competition environment.

## 1.3. Research on Data Capture Regulation in Anti-unfair Competition Law

### 1.3.1. Weigh Economic Benefits Against the Public Good

Data is a kind of information, and the essence of information is free flow, so as to give full play to its due value. Therefore, under the condition of observing business ethics, free flow of data is conducive to economic progress. For whether data capture constitutes unfair competition, we should combine the analysis of competition effect, such as the debate between hiQ and

LinkedIn mentioned above. To comprehensively consider the fairness of competition, market order and the impact on users' rights and interests. Secondly, data capture behavior and application behavior may violate business ethics or the principle of good faith, and thus constitute unfair competition. First of all, for data developers, it is necessary to ensure that data collection methods and channels are reasonable and legal, and on this basis to ensure that the process of data use by enterprises is legitimate.

As Locke put it, "at least to the extent that there is enough of the same good left to be shared by others," which ensures that the acquisition of property by an individual does not adversely affect others. In many data fetching dispute cases, while the data is not given status of property rights, but the extent of the law on the protection should be limited, so in "Anti-unfair competition law" article 2, on the application of some competition even cannot produce huge economic benefits, but may benefit to the public interest, and thus be exemption from punishment. Under special circumstances, there will be a tradeoff between public interests and economic efficiency. For example, if the life and health safety of users are involved, the legal legitimacy will be affected if operators are given protection. Although article 2 of the Anti-unfair Competition Law should take economic efficiency as the premise to measure the legitimacy, But never at the expense of public interests at the expense of [7], for example in the bus data fetching information in real time, real-time data bus operators to some extent may be considered public information, if the case operator for real time data hidden, would give consumers travel inconvenience, so in the public interest, Operators who capture bus information data cannot be identified as unfair competition. Similarly, the data of the National Meteorological Bureau or the National Bureau of Statistics can be captured and collected by operators and embedded in the data information system, which is convenient for users to query and use.

### **1.3.2. Clarifying the Application Conditions of Article 2**

Of article 2 of the Anti-unfair competition law belongs to the principle provisions shall be applicable, has certain flexibility in dealing with uncertain data fetching behavior law can play out in the supplementary function, so the future whether to develop a specific operational legal provisions to regulate data fetching, this method still play an irreplaceable role. Hui-xing liang teacher put forward in the civil law hermeneutics, the uncertain concept and general terms and conditions is necessary, but of the human in the specification design of puff "[8] the judge with discretion applies the second process, is also a kind of continuous weighing process, because the second too abstract, if hold bad this balance, Excessive abuse will lead to market order instability.

In the practice of courts at all levels, there are many disputes on the application of Article 2. In this regard, the Supreme Court clearly pointed out in the judgment of kelp Quota [7] that the following three conditions should be met by default if article 2 of the Anti-unfair Competition Law is to be applied to identify data capture as illegal: First, there is no specific operation stipulated by relevant laws. Second, the crawler suffers economic losses and has a causal relationship with the defendant's data capture behavior. Third, such competitive behavior violates business ethics and has accountability. Business ethics here needs further explanation and clarification, especially the universally recognized unified moral standards in the business field, which should be determined based on specific cases in practice. The rules of business ethics recognized in past judicial practice can be listed and compared, such as the "principle of non-interference for non-public interests". In addition, commercial ethics can be refined and classified in relevant judicial interpretations to form unified operational rules. In the case that business ethics cannot be determined, other factors such as the spirit of competition, market economic efficiency and protection of operators should be combined.

### 1.3.3. Improve the Administrative Supervision System for Data Protection

Article 2 of the Anti-unfair Competition Law protects operators' data, Main purpose is through the acknowledgment and clauses of ACTS of unfair competition regulation, therefore, administrative agency must first need data for all possible infringement of operators clauses similar behavior recognition of rights, perfect the clauses operators of similar data protection system of administrative and regulatory system, first of all, administrative agencies need to establish operator data comprehensive protection, secondly, that is, to enter One step to enhance operators' administrative and law enforcement capabilities, strengthen the identification and prevention ability of operators' data capture and capture unfair competition behavior, through the administrative punishment for unfair competition behavior to achieve the purpose of maintaining operators' data security.

At the same time, the administrative and regulatory departments shall also establish close contact with between network operators, through a set of more perfect supervision and reporting system, such as strengthening the operator for data capture and scraping of the ACTS of unfair competition of recognition and prevention ability, through the implementation of ACTS of unfair competition law enforcement and punishment measures to achieve the objectives of the maintenance operators database data security. At the same time, administrative and regulatory bodies should also establish close ties with network operators, and promote network market operators to secure their own interests more conveniently and efficiently by improving and perfecting the network supervision and reporting system.

#### (4) Focus on maintaining a fair market environment for data competition

Data competition requires a fair market environment in order to facilitate the promotion of product quality and service levels by various operators. "Anti-unfair competition law" is not required to completely eliminate data fetching behavior, legal or not shall be based on data competition legitimacy as the boundary [9], hope the operators through legal means to collect, at the same time without causing economic losses to be scrapers prompted operators create competitive advantage through its own research and development ability, rather than relying on pull other operator's data.

On the contrary, if operators take measures to keep user data completely confidential, it is not conducive to improving user experience of consumers, but will also lead to operators in a monopoly position and be subject to legal sanctions. Therefore, legitimate data capture behaviors should be tolerated by operators, but in the process of data capture, business ethics and relevant authorization and norms should be followed, the original interests of the captured should be respected, and the source of data should be indicated in the process of use.

### 1.4. Conclusion

In the era of big data, the collection and analysis of user-related consumption data not only helps operators upgrade products and services based on consumer feedback, but also improves the economic advantages of the whole industry. Data capture is a game of interests between different operators. Regulation of data fetching behavior directly affect the market order of specification and the ecological balance of the competition, through change train of thought in the judicial practice, correction of "Anti-unfair competition law" article 2 applies, weigh the good economic efficiency and the public interests, perfect the administrative supervision system, can help one party maintain rights and interests of suffer maintain data the fair order of competition, It would also facilitate the legal and free flow of data and strengthen market economies.



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