

# Consideration of Consumers' Interests in the Application of Article 12 of the Anti-Unfair Competition Law

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## Abstract

In Article 2 of the latest revision of the Anti-Unfair Competition Law, the definition of unfair competition includes "harming consumers' interests". In the Internet context, the position of consideration of consumers' interests is more complex, and there are often different conclusions from different perspectives. For example, some conducts that seem to be beneficial to consumers in the short run, will ultimately harm consumers' interests in the long run. The consideration of consumers' interests should be based on an independent status and a dynamic approach.

**Keywords:** internet unfair competition, consumers' interests, internet context

## 1. Raising of Issues

The role of consumers in China's Anti-Unfair Competition Law is undergoing a restructuring. At the legislative level, the 2017 Anti-unfair Competition Law has adjusted the definition of unfair competition, changing "infringing upon the lawful rights and interests of other business operators" to "infringing upon the lawful rights and interests of other business operators or consumers", thereby expanding the scope of harming persons.

Different from the market competition under the traditional real economy, consumers' interests are highly vulnerable to get harmed and complicated in the context of the Internet. On the one hand, under the Internet economy, it is increasingly difficult for consumers to clearly judge their own interests; on the other hand, the internal mechanism of the Internet competition has become increasingly complex, consumers are more deeply involved in the process of value realisation, and it is more and more difficult to evaluate consumers' interests (Du, Y., & Xu, Q., 2020). Based on the considerations from these two aspects, the consideration of consumers' interests plays a more prominent role in determining the legitimacy of Internet unfair competition. However, limited by the imperfect provisions of the Anti-unfair Competition Law and the lack of relevant research, how to consider consumers' interests in Internet unfair competition cases has always been a puzzle for the adjudicators.

## 2. From Mixed Consideration to Independent Consideration

When the provisions of typed conduct are applicable, the position of consideration of consumers' interests is more complex. The Resolution of the Problem is how to apply Article 12 of the Anti-Unfair Competition Law.

The conducts that are concluded into the "three specific conduct" provisions of Paragraph 2 of the Article obviously needs to be judged on its conformity according to the provisions, based on basic legal principles. Even if the relevant conduct is conducive to the consumer's rights.

The realization of consumers' interests should not be used to deny its unjustifiability; in addition to the three specific conduct provisions, the Anti-Unfair Competition Law Paragraph 2 of Article 12 also provides a catch-all provision in the fourth subparagraph.

There is still a big doubt as to how to fix the quantity of assessment of Consumers' Interests if the Catch-All Clause Applies. Usually, the adjudicator will conclude the two main elements of applying relevant catch-all clause, which are "the use of technical means to influence or directly substitute for user choice" and "the result leads to network products or service legally provided by other operators cannot run normally", and then an evaluation of element compliance shall be conducted based on this.

But it is clear that these two elements can not precisely define all Internet unfair competition cases. In ad blocking cases, users can choose whether to block ads or what kind of ads to block, and their related rights are not violated.

Some decisions, based on adherence to statutory law, relaxed the evaluation of the element's conformity. For example, in the case of *IQiyi v. QianYing Films* (Beijing Intellectual Property Court, 2018), the court held that: "Although QianYing Films did not come to court to prove what kind of technology it had used, the result showed that it had in fact provided the user with the possibility of skipping the advertisement and watching the video directly." Of course, "offer possibility" itself can influence the user's choice, but this kind of influence obviously can't match with "misguide", "deceive" and "force".

### 3. From Static to Dynamic Considerations

In internet unfair competition cases, the formation mechanism of damage to consumers' interests tends to be complicated. Like "Membership ID Rent" cases,

the actors purchase a large number of VIP accounts on the network platforms and lease them to users for use by a period of time. On the surface, this behavior makes full use of the resources of VIP accounts and facilitates some personalized needs of the consumer, but this behavior is actually a parasitic behavior that will eventually damage the interests of the consumer. As in "*IQiyi v. Long Hun*", the court said: "Only an orderly and effective market competition mechanism can promote the network video platform to strengthen the technical support of hardware and software, thus

optimizing the user viewing experience, improving the level of user service, and enabling users to enjoy more convenient, high-quality, and inexpensive services; only with the protection of the legitimate rights and interests of the network video platform, can it be promoted to tap its potential and use its advantageous resources to create distinctive and personalized platform features and brand personalities, and to enhance its competitiveness with the help of quality content, thus promoting the overall development and progress of the industry." (People's Court of Haidian District, Beijing, 2018)

From the effect, the damage to consumers' interests by Internet unfair competition is gradually no longer limited to the short term. The traditional act of misleading, forcing, and deceiving users to replace software infringes upon the interests of consumers, and after consumers realize that they have been deceived, they will "vote with their feet" to kick the relevant goods or services out of the market. And the emergence of browser -blocking cases overturning this model, the interests of consumers in functional considerations are not damaged, but their long-term, fundamental interests are faced with the risk of damage. Although consumers can enjoy content resources at a low cost for the time being, the damage to advertising revenues may harm

the interests of the creators and the video websites, and thus the quantity and quality of the content they provide may decline, consumers rights get harmed eventually. In decisions like "*Youku v. Cheetah Browser*" and "*Tencent v. Window of the World Browser*", the judge carries out a detailed analysis and reasoning of the short-term and long-term interests of consumers. In such a process, many consumers can not form a complete understanding of the impact of shielding conducts on the market, and thus cannot make a clear prediction of the long-term growth and decline of their own interests.

To sum up, from traditional acts of misleading, forcing, and cheating to ad-blocking and renting out membership ID, the damage effect of unfair competition on the interests of consumers is becoming more and more long-term. Short-term damage is often clear, while long-term damage is often not obvious enough, which requires the judge to combine the evidence submitted by the both parties and his own research, to make a dynamic identification of the damage to consumers.

In essence, the interests of the consumers in such cases should be taken into consideration over the long term, and the catch-all provisions of paragraph 2 of Article 12 of existing Anti-Unfair Competition Law cannot yet shoulder such a burden on its own. As some scholars have said (Kong, X.-J., 2019): "Article 12 Item 4 of Paragraph 2 of Article 12 regarding the characteristics of the acts of unfair internet competition are too neutral, and lack of pertinence and substantive components, so the function of the general clause cannot be brought into play." Based on judicial practice, not only do many parties jointly file litigation claims under Articles 2 and 12 of the Anti-Unfair Competition Law, but some scholars also advocate supplementing the corresponding conditions according to the general provisions when applicable, so that the general provisions and the "Internet Provisions" can be combined and applied to give play to the judicial value of the Anti-Unfair Competition Law. Based on this, many adjudications now do not forget to make supplementary considerations on the elements of consumer interest consideration when applying the provisions of Item 4 of the Second Paragraph of Article 12 of the Anti-Unfair Competition Law. However, in fact, since specific provisions of conduct have been applied, there should be no independent evaluation of the elements of consideration other than the provisions, which is the basic requirement for maintaining legal stability. Therefore, under the reality that the Internet clause is incomplete, careful treatment shall be given to the application of the catch-all provisions of the article and the

collective application of Article 2 of the Anti- Unfair Competition Law which is a general provision in nature shall not be excluded, if necessary.

#### 4. Conclusion

Consumers' interests in an internet scenario are complex and vulnerable to infringement. Although the Anti-unfair Competition Law confirms the goal of protection of consumers' interests and judicial practice increasingly takes into account arguments for consumers' interests, there are still doubts about how to consider consumers' interests in unfair competition cases in the context of the Internet. In terms of the object, it should be the consumer interests rather than the rights of consumers that are the factors to be considered; in terms of status, the interests of consumers should be involved in the evaluation of the legitimacy of the behavior as an independent consideration factor, rather than only the existence of mixed considerations; and in terms of methods, the interests of consumers should be dynamically evaluated rather than a single static consideration.

In fact, Internet unfair competition is only an incision, and it is the front line of technological development and business model changes impacting the existing market environment. It constantly calls for the "deconstruction" and "reconstruction" of competition law in the new era. In the face of this "deconstruction" and "reconstruction", consumer interests are just a good clue. From the perspective of "deconstruction", the increase in the importance of consumer interest considerations has prompted the anti-unfair competition law to gradually get rid of the shell of rights logic and return to the true colors of market behavior law and social law. From a constructive point of view, thinking about the position of consumers has prompted us to reconstruct a paradigm of judgment on the legitimacy of behavior. In the era of digital economy, the interests of operators and consumers should not be the ultimate value pursuit, and maintaining the competition mechanism from distortion is the real foothold. Based on this, consumer interests can not only be better considered by adjudicators, but also have inherent compatibility with innovation based on the interest balance framework of competition structure, which can be extended to new fields and cover new behaviors without obstacles, so as to promote the anti-unfair competition law to adapt to the economic and social development of the new era with a more flexible and inclusive attitude.

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