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IP UPDATE



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Fighting Against Data Scraping in China: Any Legal Redress?

Data scraping, namely conducting automatic data extraction (usually through robots) from other websites, is an increasing concern for businesses in the era of big data. Web scrapers often use such data, including news, financial information, personal data and customer reviews etc., for their own commercial purposes e.g. to offer services that compete with or complement the offerings of the scraped websites.

Do businesses have any legal relief against these web scrapers for extracting data from their own websites? The Chinese courts have given the answer in the affirmative, and provided two routes for protection, namely copyright infringement and unfair competition.

I. COPYRIGHT INFRINGEMENT

To establish a copyright infringement claim against data scrapers, the party asserting right over the data ("Data Owner") must prove two elements:-

First, there must be copyright in the scraped data. In the case of **Dianping vs. Aibang [copyright dispute] (2011)**, the Haidian District Court of Beijing confirmed that for restaurant reviews on Dianping.com (China's equivalent of Yelp), only those showing the personality, emotion and experience of the author and thus with originality may be protected by copyright. Further, as confirmed in **Tencent vs. Toutiao (2017)**, although there is no copyright in current affairs, news review with the author's personal comments and appraisal has originality and is subject to copyright protection.

Second, the Data Owner must have exclusive ownership of the copyright, or be authorized by the actual data owner to claim the copyright on their behalf. In **Dianping vs. Aibang [copyright dispute] (2009)**, the Beijing No.1 Intermediate People's Court in its appeal decision rejected Dianping's claims for copyright infringement on the basis that the copyright in the restaurant reviews is jointly owned by Dianping and the users and Dianping was therefore not the suitable plaintiff on its own. Although Dianping later updated its Terms of Use pursuant to which users agree to assign their copyright in restaurant reviews exclusively to Dianping, in **Dianping vs. Aibang [copyright dispute] (2011)**, the court did not recognize the general enforceability of the updated Terms of Use but only recognized Dianping's exclusive

copyright in a few reviews where the authors have expressly affirmed their assignment of copyright to Dianping in writing. The validity of such Terms of Use where the network platform gives no valuable consideration to the assignment of copyright is questionable and is yet to be confirmed by court decisions.

The Data Owner therefore would usually have to prove in a copyright infringement claim for data scraping that i) the data was an actual copyright work by an individual; ii) the copyright was acquired by the Data Owner (if needed), and iii) express authorization was given by the individual to the Data Owner to take enforcement actions on their behalf.

II. UNFAIR COMPETITION

Unlike copyright infringement, in an unfair competition claim, the Data Owner is not required to have exclusive right in the data or express authorization from the copyright owner for the same, but would have a valid claim under the Anti-Unfair Competition Law as long as its legal commercial interest can be proved to have been infringed by the scraping of data.

The Court ruled in **Dianping vs. Aibang [unfair competition dispute] (2011)** that the customer reviews collected and sorted out on dianping.com are the plaintiff's fruits of labor with high commercial value and should therefore be protected by the Anti-Unfair Competition Law.

It was further confirmed in the leading case of **Sina Weibo vs. Mo Mo (2017)** that a network platform has legal right in users' personal information obtained for the purpose of its own business activities and with consent, if collected for commercial use or has commercial value. The platform

would thus have a legitimate claim if such personal information is "scraped" without consent.

To establish an unfair competition claim, the content on the data scraper's website must be proved to be a "substantive substitute" of that on the website of the Data Owner, so that web users would be able to obtain a substantive part of the data concerned merely by accessing the data scraper's website and would therefore visit the Data Owner's website less often. According to the judgment in **Dianping vs. Baidu Map (2017)**, such substitution would damage interest of the Data Owner, violate general commercial ethics and disrupt the economic order and market competition in the network environment, and therefore constitute unfair competition.

Further, in determining the existence of unfair competition, the Court would usually take into consideration the balance of different interests. In **Dianping vs. Baidu Map**, while having recognized the positive effect of the new business mode of Baidu Map (China's equivalent of Google Maps, which in its updated version showed restaurant reviews when searching a place on the map), the Shanghai IP Court ruled that such positive effect is disproportionate to the damage caused to the Dianping's legal commercial rights and the improvement can have been achieved via different means. The showing of the restaurant reviews on Baidu Map itself led to disproportionate damage and decrease in traffic to Dianping. In cases involving scraping of personal data e.g. **Sina Weibo vs. Mo Mo**, the Court tend to consider balance of interests of consumers, businesses and fair competition of the market. Such a balancing act is now required even more as evidenced by the new **Anti-Unfair Competition Law (2018)** which requires the balancing of consumers' interests and the order of market competition for the first time. Read more about the new Anti-Unfair Competition Law in our newsletter [here](#).