



***Hantao v. Baidu* – 'scraping' third-party information as unfair competition**

On 26 May 2016, the People's Court in Shanghai's Pudong New Area handed down its judgment in *Hantao v. Baidu*, in which Baidu was sued for inappropriately using information uploaded on dianping.com, a Hantao-owned website and app. The court decided in favor of the plaintiff, and laid out a possible analytical framework for assessing unfair competition aspects in the production, collection and use of information in the Internet space.

Background and findings

Hantao operates dianping.com, a classified information site that provides independent consumer reviews of local services such as restaurants, hotels etc. Baidu is the leading search provider in China, and also provides online mapping (Baidu Map) and Q&A (Baidu Zhidao) services. Baidu was found to have "scraped" consumer reviews from dianping.com (*i.e.*, appropriating some of the dianping.com content through its search technology), and present dianping.com consumer reviews in Baidu Map and Baidu Zhidao, without the authorization of Hantao.

The Pudong court decided that the unauthorized use of consumer reviews from dianping.com violated Article 2 of the Anti-Unfair Competition Law ("**AUCL**"). The AUCL has a broad scope, which includes specific prohibitions on various types of unfair practices. For practices that do not fall under the specific prohibitions in the AUCL, past cases suggest that the courts tend to apply the catch-all clause in Article 2, which requires companies to honor the general principles of willingness, equality, fairness, honesty and good faith, and widely-recognized commercial ethics.

Consistent with past cases, since the specific prohibitions in the AUCL did not apply, the court in *Hantao v. Baidu* relied upon Article 2 of the AUCL to decide the case. In this case, the court examined how Article 2 applies to the production, collection and use of information. In particular, the court indicated that there are three requirements for conduct to amount to unfair competition: (1) the companies in question are competitors; (2) the plaintiff suffered a loss as a result of the conduct; and (3) the conduct is not legitimate.

In relation to the first requirement, the court followed "traditional" Article 2 "case law" which reads a requirement that the plaintiff and defendant be competitors into the law. Similar to past Internet cases, the Pudong court took a broad approach in finding a competitive relationship, holding that companies from different sectors may be considered competitors for the purposes of the AUCL. The decision suggests that, in the Internet sector, companies that target the same group of consumers may be viewed as competitors, regardless of the nature of the specific services they provide.

In relation to the second requirement, the court found that Baidu had collected consumer reviews from dianping.com, and presented some of them in full on Baidu Map and Baidu Zhidao. This practice allowed Baidu users access to the consumer reviews without visiting dianping.com. As a result, the court held Hantao had suffered losses of user visits and potential business opportunities.

Collection and use of third-party information

In relation to the third requirement, the court's analysis was most interesting. Here, the court evaluated the legitimacy of Baidu's collection and use of information by looking at the following factors: (1) whether the information at stake had commercial value and conferred a competitive advantage; (2) how difficult was the information to obtain and what costs Hantao incurred in that regard; (3) whether Hantao's original collection and use of the information violated the law, commercial ethics or public interests; and (4) whether Baidu's use of the information was legitimate.

- On (1), the court considered consumer reviews to be valuable resources and to confer a competitive edge upon Hantao. In particular the court found that, through the accumulation of consumer reviews, Hantao managed to assist consumers in making informed decisions and provide vendors with feedback from consumers.
- On (2), the court found Hantao to have invested a significant amount of time and effort in setting up a functioning consumer review system and accumulating consumer reviews.
- On (3), the court considered that Hantao's original acquisition, holding and use of the consumer review information had not violated the law or commercial ethics.
- On (4), Baidu was found to collect consumer reviews from dianping.com and use some of them in full in its own products. According to the court, Baidu's collection and use of the dianping.com information was a "free ride" on Hantao's efforts, and thus ran against well-recognized commercial ethics and the principles of honesty and good faith. Interestingly, the court also indicated that an alternative solution, which Baidu had adopted for one of the earlier mobile versions of Baidu Map, would not breach the law: providing only a limited number of consumer reviews; copying only parts of the reviews; and including a link to the original source at dianping.com.

Impact of ruling

The *Hantao v. Baidu* judgment is interesting as it focuses on a rather novel issue. In the past, most "scraping" cases in the Internet sphere brought under Article 2 of the AUCL focused on the (undue) appropriation of content "owned" or created by competitors – for example, video streaming available on a website (see our alert on a recent "ad block" case [here](#)). In this case, in contrast, the "scraped" content was not "owned" by the plaintiff Hantao, but was produced by users of dianping.com (*i.e.*, everyday consumers). This position seems largely consistent with the Trial Guidelines on Network Related Intellectual Property Right Cases, issued by the Beijing High People's Court in April 2016. According to these guidelines, the courts in Beijing may hold the unauthorized use of information from a website to be unfair competition under Article 2 of the AUCL if (1) the information can increase business opportunities and competitive advantages for the plaintiff; and (2) the use of the information provides users with an effective alternative to the website where the information is from. Similar to the court's ruling in *Hantao v. Baidu*, the guidelines seem to apply irrespective of whether or not the information in question is "owned" by the plaintiff (see our alert [here](#)).

To rule on the "scraping" issue, the court in *Hantao v. Baidu* focused on the four-factor analysis described above. A key element in the court's analysis was that Hantao had made significant efforts in the collection and use of the original information, even if the authors of the reviews were individual consumers. Although the court's finding may have been fact- and case-specific (for example, the court considered the dianping.com reviews to reduce the "information asymmetry" vis-à-vis consumers), the judgment contains some upbeat language on the positive effects of producing, collecting and using consumer-related information by Internet players. This stands in contrast to some of the developments in Europe where the handling of consumer-related information is at times viewed skeptically – not only from a privacy, but also increasingly from an antitrust, perspective (see our recent blog post [here](#)).

In China, the Pudong court found Hantao's investment into building up the consumer review system on dianping.com as worthy of protection. Interestingly, the court also used language reminiscent of the provisions in the Anti-Monopoly Law, finding that Baidu "has strong technical capabilities and a leading market position... [and] achieved the purpose of excluding competitors by exploiting the results of other websites at extremely low cost." But, for the most part, the court's arguments were similar to judgments in past Chinese Internet cases under the AUCL, focusing on Baidu's "free-riding" (other cases referred to the seemingly more general concept of "interference").

As with many of the past AUCL cases, one driver behind the court's findings in *Hantao v. Baidu* may have been the

recognition that Internet players often make significant upfront investments which they need to recoup at one point. Hence, courts at times provide some protection for past investments and existing business models under the Article 2 "case law."