

New anti-unfair competition guidance for Internet players from Beijing court

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On 13 April 2016, the Beijing High People's Court released the Trial Guidelines on Network Related Intellectual Property Right Cases ("**Guidelines**"). To a large extent, the Guidelines seem to be an attempt to codify the vast – and at times inconsistent – case law in this area by courts across China.

The issuance of the Guidelines represents the second codification effort within a relatively short period of time, after the circulation of the draft amendments to the Anti-Unfair Competition Law ("**AUCL**") for public comment in February 2016.

Background

Over the past few years, many of China's largest Internet companies were entangled in legal disputes under the AUCL. These disputes involved "new types" of conduct such as ad-blocking; enabling users free access to others' non-free content; inducing users of other products to use one's own products; etc.

Given the lack of specific rules on Internet-based conduct in the AUCL, courts have dealt with these cases mainly on the basis of Article 2, a provision referring to the high-level principles of voluntariness, equality, fairness, honesty, good faith, etc. From these high-level principles the courts have developed other, more concrete principles – such as that of "non-interference" with legitimate operations of competitors – though the case law is uneven across different courts in China.

The Guidelines contain 42 provisions, divided into three sections on copyright, trademark and unfair competition related aspects, respectively. In this update, we will focus on the unfair competition aspects that are not directly related to copyright, trademark or patent rules, among which two sets of provisions are particularly noteworthy: those on "non-interference" and on search keyword bidding.

Interference

The Guidelines provide rules on specific manifestations of unjustified "interference" with the legitimate business operations of other companies:

- **Undue appropriation of other companies' website content.** This rule targets the unauthorized use of content on another company's website with the result that user visits to that website are channelled to the unduly appropriated content. The aim here may be to prevent free-riding, as reflected in a number of past court cases like **iQiyi v. Juwangshi** (where the defendant's software was found to have "scraped" content from the plaintiff's video platforms, yet blocking all ads from those platforms) and other cases such as **iQiyi v. TVMao**, **Sohu v. Hualu Tianwei** and **iQiyi v. HiWifi**.
- **Interference with predictive search suggestions.** The Guidelines prohibit illegitimate changes to predictive search keywords suggestions by search engines. The background to this provision seems to be the dispute between Baidu and Qihoo 360 in 2013 (where the predictive search suggestions by Qihoo 360's browser directed users of Baidu's search engine to Qihoo 360's own services) and the **Baidu v. Sogou** judgment last year (where Sogou's

software for the Chinese-character-input-method replaced the predictive search function of Baidu's search engine, redirecting users to Sogou's own search results).

- **Ad insertions on other companies' websites.** The Guidelines also target the insertion of ads on other companies' websites, thereby free-riding on user visits to those websites. Previous judgments, which may have served as benchmark for this provision, are **Baidu v. Qingdao Aoshang & China Unicom** and **Baidu v. Qomolangma**.
- **Disruption of other companies' operations.** The Guidelines contain a general prohibition of disruption of other companies' business operations by interruption, impediment, or other means. This provision allows broad interpretations.

In addition, although one of the goals may be to reduce the courts' wide flexibility to apply Article 2 of the AUCL, the Guidelines contain a "catch-all" clause simply referring to "other circumstances" amounting to unfair competition in violation of Article 2.

Keyword bidding

The Guidelines provide specific rules on search keyword bidding. They put forward a range of factors for the legal assessment of search keyword bids, in particular proposing to examine whether

- the bid would constitute an unauthorized use of another company's "commercial logos"
- the use of the keyword is made for valid reasons
- the unauthorized display is in the title or introduction of the search results, or on the bidder's own webpage
- the use would reduce trade opportunities or competitive advantages.

The above rules may be the result of the Beijing court's learnings from a number of court rulings such as **Qihoo 360 v. Baidu** (where the use of Qihoo 360's product name "Qihoo antivirus" in the title of the link directing to Baidu's antivirus software in Baidu's search results was found to be illegal).

At the same time, the Guidelines confirm that bidding for search result ranks is a legitimate business model for search engines – which are not obliged to engage in verifications of keywords used in the bidding. Search engines only need to remove content from search results if notified by an aggrieved party or if they become otherwise aware of an infringement.

Conclusions

Unlike the provisions in the to-be-amended AUCL which apply across the entire country, the Guidelines only apply to cases handled by the Beijing High People's Court. However, in light of the fact that many disputes between Internet companies are litigated in Beijing, the Guidelines will be important for many market players.

The Guidelines may be meant to reduce the wide discretion which Beijing courts currently have on how to interpret Article 2 of the AUCL, by providing more specific guidance on some of the frequently observed unfair competition conduct in the Internet space. At the same time, with the

fast pace of innovation in technology and business models, we can expect novel legal questions to be placed before courts in the future.

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