Most recent Chinese 'ad block' judgment affirms ad-based revenue model for Internet businesses

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On 14 October 2015, a local court in Shanghai adopted the latest in a series of judgments on the legality of software and other technical measures that block or skip advertisements on digital platforms.

In its judgment, the Shanghai Yangpu District People's Court found that Juwangshi Technology Corporation ("**Juwangshi**"), a video streaming service aggregator, had breached anti-unfair competition rules by utilizing certain decryption measures to block ads while displaying videos streamed from iQiyi, one of China's main online video sites. The judgment also addressed the issue of online businesses "scraping content" (*i.e.*, using information) from other websites.

Background to the case

The plaintiff in this case was iQiyi, which streams video programs for free but has ads embedded at the beginning of the programs. For a fee, users can subscribe for iQiyi membership, which allows them to skip the ads.

The defendant Juwangshi is the developer of a video aggregation software called VST. VST can be installed in set-top boxes and smart TVs to enable users to watch online videos and TV programs from various sources on a single, aggregated platform without any embedded ads. In this case, the VST software was found to have adopted certain technical measures (including decryption of iQiyi's software) to obtain access to the videos streamed on iQiyi's sites while blocking the embedded ads. In effect, through VST, users may enjoy ad-free content without having to pay iQiyi any membership fees or other premiums. As a result, the visitors and page views of iQiyi's sites dropped, and iQiyi's collection of ad revenues (which are tied to the number of visitors and page views) decreased.

To protect its interests, iQiyi filed a court action against Juwangshi earlier in 2015 under the Anti-Unfair Competition Law ("**AUCL**"), a law with provisions pertaining to different legal fields, ranging from antitrust and intellectual property, through consumer protection to unfair competition in a narrower sense. In the lawsuit, iQiyi claimed that Juwangshi had engaged in unfair competition by blocking the ads before iQiyi's videos and, more generally, by free-riding on iQiyi's video streams.

The judgment

On the ad block claim, the Shanghai court held that the VST software had decrypted iQiyi's security key codes so that iQiyi's servers mistakenly took VST's access requests as coming from iQiyi's own platform. Through this approach, the court found, the VST software was able to directly displaying iQiyi's videos without the ads, which had the same effect as explicit "ad blocking." The court pointed out that Juwangshi's ad blocking conduct was able to attract users who neither want to watch ads nor pay for iQiyi membership, which in turn reduces iQiyi's revenues.

On this point, the Shanghai court judgment is consistent with a series of "ad block" judgments by various Chinese courts in the last two years. For example, in a judgment at the end of July 2015, the Beijing Shijingshan District People's Court found Hualu Tianwei, also an online video aggregation software provider, to have engaged in unfair competition by blocking or intercepting ads embedded in online videos of Sohu, a major Internet portal with a prominent online video site.

On the free-riding claim, the court in *iQiyi v. Juwangshi* held that the defendant's "scraping" of videos streamed from iQiyi's servers constituted unfair competition – even if the ads had not been blocked. The basis for this finding was, again, that Juwangshi's VST software had resorted to improper technical measures to decrypt iQiyi's security key codes. The court's rationale was that iQiyi's ad revenues are based on the number of ad displays, yet VST's technical measures prevented iQiyi from tracking the exact number of visitors and views, hence affecting its revenue stream.

In its opinion, the court was keen to emphasize that its finding would have been different if VST had used proper technical measures to link users to iQiyi's video sites. If done properly, the court found, such linking can actually promote interoperability in the Internet space, and would not constitute unfair competition.

Overall, the Shanghai court appears to have sided with protecting the plaintiff's commercial interests, finding that linking to a video platform's content is acceptable generally, but not acceptable if it is done in a manner that negatively affects the platform's ability to monetize the content through advertising.

By contrast, in *Sohu v. Hualu Tianwei*, the Beijing court side-stepped the issue and held that the legality of content "scraping" would need to be examined under the Copyright Law or the Regulation on the Protection of Information Network Diffusion Rights, not the AUCL.

Takeaways

As noted, the judgments in *iQiyi v. Juwangshi* and *Sohu v. Hualu Tianwei* are issued against similar factual backgrounds, and their reasoning on "ad blocking" is largely consistent. When it comes to "scraping," however, the judgments followed different paths.

This may not be entirely surprising, since both judgments were first-instance decisions before District People's Courts. At the same time, however, the differences in the approach point to a broader issue: at present, the AUCL contains no industry-specific guidance for Internet businesses, although an ongoing legislative effort to amend the AUCL may change this.

For the time being, plaintiffs – including those in *iQiyi v. Juwangshi* and *Sohu v. Hualu Tianwei* as well as those in a number of other cases – base their arguments on Article 2 of the AUCL, which contains the high-level, and therefore fairly amorphous, principles of "voluntariness, equality, fairness and good faith" and "commercial ethics."

Over time, Chinese courts have further developed the high-level principles in Article 2 and have come up with certain more concrete principles for the Internet industry – for example, applying the principle of "non-interference" to prohibit Internet players from interfering with competitors' operations, except where justified by public interests. Still, China is a civil law country which does not fully recognize the value of court precedents and, given the still small number of judgments issued by the highest court in China on the application of Article 2 of the AUCL to the Internet sector, some uncertainty for businesses persists.

On a substantive level, in *iQiyi v. Juwangshi* and *Sohu v. Hualu Tianwei*, the courts seem to have tried to strike a balance between the protection of established business models in the online economy and the emergence of new, sometimes disruptive technologies, as well as between individual users' interests and the long-term health of the Internet industry.

The gist in both judgments is that a business model based on ad revenues is legitimate. Behind this finding is a reality that video and other online platform providers make substantial investments into the acquisition of digital content. As China is increasing its level of intellectual property rights protection – which frequently applies to online content – the courts seem to find ad revenue-based business models worthy of protection.

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