

Thoughts on the Illegal Determination of Advertising Shielding Behavior from the Perspective of Anti-unfair Competition Law

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Abstract

The blocking behavior of video advertisements has become a relatively common behavior in Internet competition, but whether such behaviors are unfair competition behaviors has always been disputed in the academic and practical circles. The identification of advertising blocking behavior cannot be limited to the traditional identification thinking, but to use dynamic competition to look at such issues, sum up the identification thinking that has been put forward by the academic and practical circles, based on the local foundation, and draw on the identification thinking outside the territory., Follow the path of "consequence elements-oriented + reasonable analysis principle" to judge and consider the illegality of advertising blocking behavior.

Keywords

Unfair Competition; Internet; Advertising; Blocking Behavior.

1. Questions Raised

Whether the video ad blocking behavior is an unfair competition behavior is controversial in the academic world. The reason is that the author believes that a very important reason is the difference in the legal system for the behavior and the determination in the judicial system. Furthermore, This led to a situation of "different opinions" on this issue. In the 1993 Anti-unfair Competition Law, the general clauses were widely used by the courts.

The courts judged most video advertising disputes on this basis. Although the newly revised Anti-unfair Competition Law in 2017 added the "Internet Specialty "Article", categorizes the manifestations of unfair competition in the Internet by means of "generalization + enumeration + bottom-up", but it clearly includes the situation of video advertising blocking behavior, and the bottom-up terms are too abstract, and the judgement scale is difficult to grasp , Which makes the identification of this kind of situation into a dilemma. Therefore, these two issues are of value in the "Anti-unfair Competition Law" as to whether the video advertisement blocking behavior belongs to the unfair competition behavior and how to identify it.

2. A Review of Researches on Video Advertisement Blocking Behavior

2.1. Qualitative of Video Ad Blocking Behavior

Under the wave of digitization, the competition among Internet businesses in my country has intensified. Among them, the case of blocking advertisements in online videos has received particular attention. Since such cases involve the interests of all parties, and in judicial practice, there are differences in the final judgments of the courts in various regions, which makes them complicated. In the field of online advertising blocking, the controversy mainly focuses on the following issues: "Does the video website operator and the operator that provide the ad blocking plug-in have a competitive relationship", "Whether the advertising + free video business model can continue to develop in the long term? "How to protect the legitimate rights and interests of consumers in it", "After the Internet special provisions, the application of general terms", "Can the Internet special provisions be used to regulate online video advertising

blocking behavior", etc., regarding the above issues, since 2017. Since the "Internet" article was added in the Anti-unfair Competition Law in 1999, more in-depth discussions on this issue have been conducted in the theoretical and judicial circles.

The author used "advertising shielding" as a key word on CNKI to search in law papers. From 2014 to the present, there are 24 articles in total. The author emphatically reads papers in People's Justice, China Applied Law, and core journals. The opinions of many scholars are sorted out and divided into the following three categories.

Some scholars believe that online advertising blocking behavior is an act of unfair competition, that is to say for sure. This is also the view supported by the current judicial judgment. The judge who supports this view, Rui Songyan, believes that in order to determine whether there is a competitive relationship, it is necessary to determine whether there is a possibility of "harming others and benefiting oneself" and providing Internet users with a browser with the function of filtering video advertisements. , Belongs to the destruction of the "free video + advertising" business model, this behavior violates the principle of good faith, and therefore is an act of unfair competition [1]. Liao Jianqiu and Chen Jintao believe that the operator knows that the act of providing blocking plug-ins for network users is harmful to the order of competition, but still does it, deviates from business ethics and is malicious, and should be deemed to be an unfair competitive act[2]. Professor Wang Qian also supports this. He believes that providing network users with ad-blocking software is similar to providing them with a means of circumvention. Therefore, the Anti-unfair competition law applies and prohibits the free appreciation of the above actions. It is justified to block video advertisements under the conditions of film and television dramas[3].

Some scholars believe that online advertising blocking behavior should not be regarded as unfair competition and hold a negative attitude. Lan Nan, a scholar with a negative view, jumped out of the usual judging thinking, that is, to recognize that the protection of the "free + advertising" business model is necessary, and thus affirmed the impropriety of advertising blocking behavior. He believes that such a causal relationship has been established. There is no reliable basis. The protectability of the business model of a video website and the legitimacy of advertising filtering are two completely different issues, which should be judged separately[4]. Analyzing from the behavior itself, the advertising blocking behavior itself has realistic legitimacy, can enhance the welfare of consumers, and can improve the efficiency of advertising competition. Therefore, from this perspective, the advertising blocking behavior is legitimate and does not constitute unfair competition behavior.

Huang Wushuang and Liu Jiancheng also believe that market competition is dynamic, and that the existing business model is also changing with the development of the times. Moreover, no country has stipulated the protection of a certain business model in the law. The "Fair Competition Law" should not actively intervene in this behavior, and the blocking behavior of video advertisements does not constitute unfair competition[5]. Liang Zhiwen also believes that the right to choose video ads should be in the hands of consumers, and the provision of this feature should be conducive to improving the consumer's viewing experience, thereby enhancing the welfare and rights of consumers. Therefore, this behavior is not. It should be considered improper.

There are scholars who hold an eclectic view. These scholars have a more neutral attitude towards this and will consider more factors in order to solve the problem to balance the interests of all parties. Scholars holding this view include Chen Canping and Wu Di; Chen Canping and Wu Di believe that the development trend of the video industry should be used as a dynamic guide, and the trial of such cases should be infused with new trial concepts, focusing on maximizing social benefits and welfare, and being cautious[6].

Balance free market competition and legal intervention. Therefore, they hold similar views, except that they enumerate the "other factors" in more detail, and use this as a specific way of determining judicial decisions.

The business model innovated by the operators of ad-blocking software inspires us to make more rational choices based on local conditions. In addition, some scholars who support the eclectic approach view this issue in a "differentiated treatment" manner. Zhu Jianjun believes that this issue cannot be viewed across the board, and different types of operators should be distinguished: For the operators of online video sites, they can provide online users with free videos + watch titles, and focus on advertising. It belongs to a normal business method and does not involve the question of whether it constitutes unfair competition. For other market operators, providing plug-ins that block online videos to network users has harmed the normal business model of the video website operator. It constitutes unfair competition.

Through the above analysis, the author agrees more with scholars who hold the affirmative view. They believe that video advertising blocking behavior is an unfair competition behavior, because in competition, there will be harm when there is competition, and the same is true in market competition. In the era of rapid Internet development, the Internet economy has shifted from traditional economic product user competition to Internet traffic competition. Video website operators must earn more clicks from Internet users in order to compete. Stand out, and this "free video + advertising" business model is able to earn more "traffic" for it, and it also injects more derivative products into it through video, which is also invisible, To bring more network users to it. And depending on the video ad blocking software provider's blocking of ads, it will invisibly divert users of the original video site, weakening its ability to develop network derivative products by attracting network traffic, and then destroying it in the long run. The ecological chain of the industry of video website operators has further reduced their expected value-added benefits. Therefore, this behavior lacks legitimacy and video blocking behavior constitutes unfair competition.

2.2. Thoughts on the Identification of Video Advertisement Blocking Behavior

By reading the articles of the above-mentioned scholars, the author summarizes the above-mentioned scholars' identification ideas as follows:

2.2.1. Thinking of "Five Essentials" Identification

The "Five Elements Identification Methodology" is to examine the impropriety of video advertising blocking behavior from five aspects[7]. First, to judge the accountability of the sued competition behavior based on the competitive efficiency, the value of the network economy is more reflected in the "openness, In terms of content such as "sharing and efficiency", it is necessary to fully encourage innovative and free competition. However, the use of network resources controlled by others to compete should also be treated cautiously. If the provider of video blocking software makes destructive use of others For example, in Youku's v. Shuowen's ad blocking case, Shuowen developed software with an ad-blocking function. After users use the software to enable the blocking function, they can watch Youku.

The pre-film advertisements are automatically skipped during the video program. The court held that it deleted the pre-film advertisements of Youku Video in the process of playing the video, which undermined the complete utilization of the video resources by Youku Video Company and was unjustified. Secondly, deliberateness is used as the main criterion for judging the subjective fault of competitors. Neither the general provisions of the Anti-unfair Competition Law nor the "Internet Special Articles" take fault as a determination element. As long as business ethics are violated, it will be very significant. It may be regarded as unfair tort, but some scholars believe that unfair competition is a special type of tort, which should also be subject to subjective fault when being investigated for legal responsibility. Third, to judge the legitimacy of the rights and interests of claimants, and to judge them, it is necessary to rationally

consider whether the business model of "free video + advertising" should be protected by law. Youku sued Shuowen for blocking video advertisements.

In China, the court held that Youku's acquisition of video copyright will inevitably pay corresponding costs. While Youku provides users with free videos, it also plays advertisements for a certain period of time at the beginning of the video. The advertising fees charged accordingly are both an important source of its operating income and It is an important part of making up for operating costs. Under this business model, all parties take what they need to form an orderly distribution and circulation of benefits. Therefore, the business model should be protected by law and has litigious benefits. Thirdly, taking causality as the main judgment, this four-way judgment is an alternative to using competition as the criterion.

The change in this four-way judgment is mainly due to the difference between competition in the Internet economy and traditional economic competition. In the competition of the Internet economy, the network user group has become the main object of competition for network operators, and the attraction of network traffic has become the core competitiveness of the Internet market players. Even if there is no competition or cooperation in the business scope of the network business entities, there are all. They may become competitors with each other. Therefore, the traditional method of determining whether there is a competitive relationship is obviously no longer applicable in the era of the Internet economy, and it is necessary to judge whether the damage caused by the video blocking behavior to the video network operator is causal or not. Finally, when determining the damage result, it is necessary to determine whether the original industrial ecological chain of the video website operator has been damaged.

The author believes that such a determination method and the factors considered are close to the method of determining infringement, breaking the original method of determining unfair competition, taking into account the particularity of Internet competition, and having certain reference value. However, the "subjective fault" element in it is questionable. Although the standard is not particularly clear for the judgments that violate the "business ethics" and the "principle of good faith", it is still acceptable under mainstream value judgments. However, in order to confirm that the perpetrator is not out of hope or laissez-faire attitude towards the damage result, it is necessary to provide corresponding evidence to prove it. In practice, in order to circumvent legal sanctions, they are often unwilling to admit that they have Subjectively malicious, this is more difficult to operate than the "business ethics" standard.

2.2.2. How to Identify the Principle of Proportionality

This method is based on the general provisions of the Anti-unfair Competition Law as the basis for determining the illegality of this type of behavior. The Internet market competition is a dynamic process, and this issue should be viewed with dynamic competition, and the "appropriateness- Necessity-balanced path to judge the illegality of video blocking behavior. Using this method, it is necessary to gradually carry out appropriateness, necessity, and balance analysis of the behavioral purpose, behavioral means, and behavioral consequences. On the basis of fully measuring and comparing the public interests, the interests of operators, and the interests of consumers, a determination is made.

Conclusion, to be specific, first of all, it is necessary to judge whether the video blocking behavior has a legitimate purpose. In the judgment, it is not only necessary to consider the needs and welfare of consumers, but also whether the video blocking software provider has a legitimate purpose. Purpose; secondly, it is a necessary means to judge whether the shielding behavior is related to reality, and finally, to weigh the damage and benefits brought by the shielding behavior. If the shielding behavior cannot satisfy the principles of appropriateness, necessity, and balance at the same time, then it should be identify it as an act of unfair competition.

The author believes that such a determination can be measured and judged with the general provisions of the Anti-unfair Competition Law from a developmental and comparative perspective, compared to the traditional application of the general provisions of the Anti-unfair Competition Law. Only using the "Non-public interest essential Non-interference principle" and "recognized business ethics" as the method of identifying illegality has made significant progress. However, it is worth noting that the essence of the principle of proportionality is to measure whether a certain competitive behavior is justified by judging the effect of competition, and the effect of competition is uncertain, and it is difficult to accurately predict, and it is inevitable that the result of comparison is unavoidable. With a subjective color.

2.2.3. "Consequence-oriented" Identification Ideas

This way of identification refers to the fact that it is guided by factual consequences and logical consequences, through the method of "social effect evaluation and analysis of legal effect", to complete an effective deduction of the legitimacy of the judgment conclusion. The model mainly considers three consequences. The first is the impact on the business model of the operator, the second is the impact on the interests of consumers, and the last is the impact on the demonstration effect of market competition. It can be seen that the core requirement of this kind of identification thinking is that the first is to take into account the factual consequences and the logical consequences, comprehensively use the two consequences to examine the consequences of the video blocking behavior and the video website operator, so as to determine whether the behavior is justified. , To provide "guarantee" in the consequences, and the second is based on a more objective and neutral position, extracting factual claims that are beneficial to both the plaintiff and the defendant to verify the consequences, thereby avoiding preconceived and affecting judicial justice.

The author believes that the focus of this type of determination is to consider the consequences of competition, focus on the consequences, make relatively fair and reasonable judgments, and then maintain the order of the competitive market. Such a determination can prompt us to look more closely. It is more practical to focus on the specific referee basis and repeated scrutiny and verification of the results, and this kind of identification idea can also be widely applied to other new competitive behaviors in the network environment, such as: traffic hijacking, data crawling Malicious incompatibility, etc., are extensive and universal. In practice, through repeated inspections and verifications of specific cases, they can become new research programs and judgment ideas in judicial adjudication.

The author will organize the judicial cases in our country, learn from the advertising innovation model of foreign operators, and propose further identification ideas based on the above-mentioned scholars' identification ideas.

3. The Status Quo of Judicial Judgment on Internet Advertisement Screening

It can be seen from the general provisions of the current "Anti-unfair Competition Law" and the "Internet Special Articles" that are Articles 2 and 12 that there is no indication between the lines whether the video blocking behavior is legitimate, nor the determination of this type of behavior. Ideas. However, judging from the cases that can be retrieved from the case database such as WeikeXianxian and Peking University Magic Treasures, from the earliest iQiyi v. Jike Geek Company and Heyi Public Prosecution v. Jinshan Company as representatives, most courts will not The principle of Non-interference for public welfare is one of the criteria for judging whether such behavior constitutes improper behavior.

The foundation of this principle is to use Article 2 of the Anti-unfair Competition Law as the basis for refereeing and block behaviors in video advertisements. In the judicial practice of unfair competition disputes, most of the judgments consider the conduct to be an act of unfair

competition. This is consistent with the viewpoints of most scholars in the academic field. A small number of judgments believe that the conduct is legitimate, the most typical It was the 2018 Tencent Company v. World Star Company case. The second-instance judgment in the case overturned the first-instance judgment, but it failed to make adequate and appropriate arguments for the legitimacy of the video advertisement blocking behavior.

In addition, from these judicial judgments, the author is most concerned about the thinking on the determination of this type of behavior in the judicial judgment.

3.1. Pay Attention to the Protection of Business Models

The business model adopted by the existing video website operators is the "free video + advertising" model. In most court judgments, this is used as one of the ideas for determining the impropriety of video blocking behavior. For example, In the Cheetah Browser v. Youku Unfair Competition Dispute, the court held that: "Youku.com has adopted restrictive measures to distinguish Cheetah Browser from other browsers, that is, under the same conditions, Youku.com treats Cheetah Browser differently. In addition, the lack of justified reasons has an impact on the normal operation of Kingsoft Networks, and also has an adverse impact on the relevant public. It violates the principles of equality and fairness and good faith and constitutes unfair competition." Similarly, in Hunan Happy Sunshine Interactive Entertainment Media Co., Ltd.

In the case of suing Guangzhou Weisi Software Co., Ltd. Youxin Company for unfair competition, the Guangdong Huangpu Court held that Weisi Company did not constitute unfair competition as: "Browser and website interact technically, and their respective operating entities are in legal status. Mutual equality and freedom to choose business models and technical means. When plug-ins that block video advertisements in the browser are not developed and used for specific objects, it is difficult to determine that the behavior violates the principle of good faith and business ethics, and does not constitute unfair competition. In this regard, the website can take necessary and sufficient technology or measures to deal with, instead of resorting to the law to restrict the development of ad blocking technology." The second instance of the case revised the verdict.

In my opinion, it is not so much the protection of business models by these courts that it is the regulation of video ad blocking behaviors that improperly obtain traffic. However, there must be a limit to the regulation of traffic. Market competition itself is a survival of the fittest. The process of "harming others and benefiting oneself" must not indiscriminately protect the business model in order to blindly regulate traffic.

3.2. Negation of the Principle of Technological Neutrality

In most judicial judgments, the technically neutral defense opinions of the defendants in most cases are difficult to be accepted by the court. The court's view of technology neutrality generally held that technology itself is neutral, but not any technology itself can be used as a basis for exemption from legal liability. If the defendant's use of technology to compete in an objective infringement of the plaintiff's commercial interests, or grabbing Given the network traffic or transaction opportunities that belonged to the plaintiff, it is difficult to say that the defendant's use of the technology is justified. Technology as a tool is neutral in value, but this does not mean that technology can be used to break through the original The business model to conduct vicious competition against business ethics.

In specific cases, the court generally examines whether the defendant's technically neutral defenses should be accepted through the subjective intention of the defendant's behavior. For example, in the case of iQiyi v. Beijing Sixiang Lianchuang Network Technology Co., Ltd. which developed the orange browser to block advertisements, the court held that even when neutral technology is applied, the legitimate rights and interests of others should be respected. The law

allows technological innovation. But it must be carried out within the scope permitted by law. Therefore, the use of technology should be realized in a necessary and reasonable form, and should comply with the principle of good faith and the basic requirements of business ethics recognized by the Internet industry.

In this case, the Orange Browser developed by Sixiang Company enables Internet users to fast-forward the pre-film advertisements played on the iQiyi website, so that Internet users who use the browser can fast-forward the advertisements without paying for membership. The act directly intervened and seriously damaged iQiyi's operations, resulting in a reduction in iQiyi's advertising costs and membership fees. It improperly gained a competitive advantage and grabbed iQiyi's legitimate business interests. The defendant was acting as a professional. The browser network service provider should be aware of this. Therefore, its competitive behavior violates the principle of good faith and recognized business ethics.

Coincidentally, in the case of *Vuliu.com v. Qingdao SoftMedia Network Technology Co., Ltd.* which developed a swordfish browser to block advertisements, the court held that the "advertising killer" was the focus of the soft media company's promotion of its developed browser. By attracting the attention of users, media companies improve the technical advantages of Sailfish browser, and then increase their attention to soft media companies, and ultimately make profits. Such a technological innovation of "harming others and benefiting oneself" has gone beyond the scope of technological neutrality. , Has an improper purpose and harms the legitimate rights and interests of others.

3.3. Use the "Non-public Interest Essential Non-interference Principle" as the Criterion for Judgment

The "Non-public interest necessary Non-interference principle" was established in the second-instance judgment of the "*Baidu v. Qihoo Standard Insertion and Traffic Hijacking Case*". Later, the principle was also invoked in the ad blocking case. The "Non-public interest and Non-interference principle" means that network service providers can interfere with the operation of other Internet products or services without the knowledge and active choice of network users under certain circumstances, and without the consent of other Internet product and service providers, but they must. It is limited to the need to protect the public interests of the society such as network users, and the necessity and rationality of interference means should be ensured. Therefore, in court judgments, judges who have invoked this principle need to determine the existence of "public interest" and the necessity and rationality of intervention methods when determining whether the defendant's behavior constitutes an act of unfair competition.

3.4. Use General Terms as the Basis for Judgment

Although the 2017 Anti-unfair Competition Law added an "Internet Special Article", in judicial practice, most courts still intend to use general terms to judge whether blocking acts constitute unfair competition, and some courts will also cite them at the same time. Internet special terms and general terms. The reason is that the author mentioned above that the "Internet Special Article" does not clearly stipulate the behavior of advertising blocking. Of course, this article also has an improvement, that is, the practical experience of existing precedents is raised to the legislative level, and it provides a concrete basis for the regulation of unfair competition behavior in the Internet field.

When the court uses the general terms as the basis for the judgment, it mainly determines from the "good faith principle" and "business ethics" stipulated in the general terms. From a logical point of view, business ethics should be the principle of good faith in the field of unfair competition law. Specificity is the standard for judging whether competitive behavior is legitimate. The Supreme People's Court clearly pointed out in a retrial ruling that the business

ethics required by the Anti-unfair Competition Law must be recognized business ethics, which refers to the general recognition and Accepted standards of conduct are generally recognized and general. Even in the same business field, since it is a code of ethics in market transactions, recognized business ethics should also be the common and universally recognized standard of conduct for transaction participants. Or the position of the seller, the enterprise, or the unit side of the employees to judge whether it belongs to the recognized business ethics.

In some cases, it can be seen that when the industry already has relatively fixed industry rules, the courts will be more inclined to refer to these rules to determine the recognized business ethics in a particular field. For example, Articles 33 and 34 of the "Guidelines for the Trial of Cases Involving Internet Intellectual Property Rights of the Beijing Higher People's Court", as well as self-discipline conventions such as the "Internet Search Engine Service Self-discipline Convention", are all regarded as "business ethics" in the judgment. ", and then determine whether the defendant's behavior constitutes an act of unfair competition.

Nowadays, the Internet field is developing rapidly, and new business models or operating methods are emerging one after another. Compared with the constantly emerging and rapidly changing business models or operating methods, it still takes a certain amount of time for the complete formation and development of recognized business ethics. Therefore, when taking this as the idea of identification, more attention should be paid to the ethical standards of economic man generally recognized and accepted by specific industries, and the identification should be carried out under the purpose of the general provisions of the Anti-unfair Competition Law.

3.5. Take Consumer Rights as an Important Consideration

Article 2 Paragraph 2 of the Anti-unfair Competition Law revised in 2017 clearly defines that acts of unfair competition refer to operators who violate the provisions of this law in their production and business activities, disrupt the order of market competition, and harm other operators or consumption. The legitimate rights and interests of the author. Protecting the interests of consumers is an important value goal of the Anti-unfair Competition Law, and it is also covered in the legislative purpose of the Anti-unfair Competition Law. Internet consumers are Internet users. In judicial practice, in the newly revised.

In many cases before the Anti-unfair Competition Law, factors such as whether to harm the right to know, choose, and privacy of network users have been taken as important considerations in determining the legitimacy of the operator's behavior. In cases involving video blocking, most courts have fully considered the improvement or reduction of consumer experience, whether misleading or deception is caused, and whether the behavior is the necessary technical means to protect the interests of consumers. For example, in the case of Sogou v. Qihoo Software Unfair Interference, the court held that the use of pop-up windows to block, the behavior itself deprived Internet users of their right to know and choice, and squeezed out Qihoo Software's trading opportunities. unfair competition.

Competition in the Internet industry is a competition for network users. The unfair competition carried out by some operators not only harms the interests of other operators, but at the same time, it also harms the interests of network users, and further undermines the order and order of fair competition. The overall benefit to society. Therefore, in practice, more and more case courts determine whether an act constitutes unfair competition whether it harms the interests of consumers in the individual case, or whether it constitutes unfair competition by damaging the industrial ecology and thus long-term consumer welfare. One of the ideas of behavior identification.

4. Judicial Practice and Enlightenment of the Shielding Behavior of Video Advertisements Outside the Territory

4.1. The Judicial Practice of U.S. Video Advertisement Blocking

In the US legal system, there is no special "Anti-unfair Competition Law" to regulate Anti-unfair competition. Behavior, the regulation of unfair competition behavior, is scattered among other legal norms. As we all know, the United States is one of the birthplaces of the Internet industry and industry. With the development of the times and technology, the use of online advertising blocking software has long been very common. In 1999, in order to deal with the problem of excessive loading speed caused by a large number of advertisements on the website, the first ad blocking plug-in was born. Although ad blocking software has been widely used in the Internet market in the United States, it is related to this problem. Unfair competition cases are rare.

From the case of Zango Company v. Kaspersky Company, it can be seen that the US court's determination of such cases is based on the "Communication Regulation Act" (hereinafter referred to as CDA), and Article 230 of the CDA is used to regulate Internet cases. The main legislative purpose of the iconic clause is to prevent minors from browsing pornographic information on the Internet, and at the same time give Internet users greater control over the information they come into contact with[8]. Article 230 of the CDA divides the legislative purposes of the bill into five items, two of which are related to advertising blocking behaviors. These two provisions provide a safe haven for the operators of blocking malicious programs. Of course, some American scholars believe that the safe haven clause stipulated in Article 230 of the CDA provides too broad protection for advertising blocking.

This case is a more typical case in the case of blocking advertisements in the United States. The plaintiff, Zango, is a company that provides online video and other services, and the defendant, Kaspersky, is a company that provides users with computer anti-virus and other services. Its anti-virus software marks Zango's software as adware. In 2009, Zango Company filed a lawsuit against Kaspersky Company, claiming that Kaspersky Company improperly blocked Zango Company's software. In this case, the state court held that Kaspersky Company's online advertising blocking behavior complies with the conditions for exemption from the safe harbor clause stipulated by the CDA. Therefore, Zango's litigation request was rejected. Zango refused to accept the judgment of the state court and filed an appeal to the Ninth Circuit Court. The Ninth Circuit Court still held that Kaspersky's software complies with the requirements of the Safe Harbor Clause and is entitled to be exempt from the CDA Safe Harbor Clause. In addition, the Ninth Circuit Court, in its judgment, proposed to determine whether online advertising is uncomfortable online information. The decision-making power is in the hands of network users, and network users have the real decision-making power[9].

It can be seen from this case that one of the ideas of the U.S. court in determining whether advertising screening is an act of unfair competition is to pay special attention to the protection of consumer interests. It can also be seen from the safe harbor clause that the U.S. judicial system has The intervention of this type of case is also extremely cautious, placing more emphasis on the mechanism of free competition among market entities.

4.2. Judicial Practice of Video Advertisement Blocking in Germany

Germany has specific laws and regulations to regulate unfair competition behavior, which is different from the United States. In Germany's Anti-unfair Competition Act, the targeted obstruction provided in Article 4, Item 4 and the aggressive transaction behavior provided in Article 4a shall be tried if the case facts do not meet the above two provisions after the trial. The court can also invoke the general market obstructive acts as stipulated in Article 3, paragraph 1 of the Anti-unfair Competition Law as the basis for the trial.

In Germany, to determine whether a video ad blocking behavior is legitimate, the line of thinking is roughly as follows: First, to determine its nature, the legal article is based on Article 2, Article 1 of the Anti-unfair Competition Act. The provisions of item 1 of paragraph 1, secondly, it depends on whether the parties to the litigation and the accused have a competitive relationship. Identify the types of obstacles and determine whether it is one of targeted obstacles, aggressive transactions, and general market obstacles. If the behavior meets the above three requirements, then the behavior constitutes an act of unfair competition.

Typical case: the "TV Wizard Case" The plaintiff used the business model of advertising in the TV program as a profitable business model while providing TV programs. The defendant produces and sells "TV Wizard", which has an advertisement filtering function, which can be set by the user to filter the advertisements inserted in the program being played. The plaintiff believed that the act constituted unfair competition, and therefore filed a lawsuit requesting the defendant to stop the production, sale and use of the "TV Wizard".

In 2004, the German Supreme Court ruled in the "TV Wizard" case and found that advertising filtering does not constitute unfair competition.

The German Supreme Court held that the act did not constitute unfair competition. The court held that, first of all, it does not constitute an obstacle to the product. The device provided by the defendant in this case did not damage the plaintiff's program and did not affect the plaintiff. The defendant's actions also did not constitute an obstacle to competitors' advertising and marketing. Secondly, the defendant's behavior was not improper. Although this behavior aggravated the plaintiff's operating burden and survival pressure, it did not threaten the foundation of its survival. However, for the defendant, advertising screening itself is the core of its commercial value. If the referee constitutes an Anti-unfair competition behavior, its survival will be endangered.

It can be seen from typical cases in Germany that, first of all, it has fully taken into account the demands of consumers and fully respected consumers' right to choose. At the same time, the German courts have noticed that the blocking of video ads is not targeted. It is for a certain website operator. Finally, it realizes that there is competition in the market to develop. Competitors are interdependent. The loss caused by the website operator in advertising can be achieved through other Technological means to make up for it, such as technological innovation, TrueView mode, and whitelisting, etc. German courts are more hopeful that the market can independently and dynamically adjust such competition issues.

4.3. The Enlightenment of Judicial Practice Outside the Territory to Our Country's Thinking of Identification

4.3.1. Pay Attention to Consumer Protection

From the two typical cases in Germany and the United States, it can be seen that when the court makes a judgment, it considers the interests of consumers and the overall interests of Internet users. In the Zan go case in the United States, the court It does not pay attention to the operator, and it can be said that the determination of blocking advertisements is not the focus of the trial. If the operator makes a choice based on the needs of network users, the use or non-use of video ad blocking software will not affect the determination of the case.

In China's judicial cases, some courts believe that the use of technologies that can increase consumer welfare should give them a certain amount of room for development. However, in comparison, the courts in China determine whether this behavior is justified, relative to the promotion of consumer interests. We still pay more attention to the protection of rights and the stable maintenance of the competitive market structure. The author believes that with the development of Internet technology, our identification thinking should also be appropriately adjusted to better balance operators, competitors, and consumers. The relationship between these three.

4.3.2. Fully Weigh the Interests of All Parties

It can be developed from a typical German TV wizard case. The German court fully weighed the interests of all parties when determining the behavior. The court held that the key to the defendant's non-targeted market interference was the defendant's "TV wizard" equipment behavior. The method is to help the user to automatically switch or shut down the channel when the advertisement is playing, thereby avoiding the user from actually watching the advertisement. The defendant's behavior did not actually block the video advertisement, and the advertisement is still played normally, so it does not affect the advertising costs obtained by the operator. From here, it can be seen that the shielding method of the German "TV Wizard" plug-in is completely different from the shielding method provided by the Chinese shielding plug-in provider. There is a difference in this point. Therefore, when determining, the method and method considered cannot be copied and used. Yes, but one of them is still certain, that is, the court's weighing of the interests of all parties in the determination, and the weighing and considerations made, are worthy of learning and reference in our judicial practice.

5. Thoughts on Judgment of Illegality of Network Advertisement Screening

Through the above summary of the scholars' identification thinking, it is not difficult to find that each model has its own advantages and disadvantages. For example, it is inevitable to identify competitors as "knowingly" in the "five elements model". Able to accurately grasp the nature of the behavioral law of the competition law and the legal benefits it protects, that is, the fair competition order. Therefore, the principle of "Non-public interest necessary and Non-interference" based on the judicial judgment can be used as a supplement to the two Neutralization judgment is based on the competitor's "knowledge" that the behavior should be the main damage to the competition order, taking into account whether the behavior violates recognized business ethics and then considering whether it is malicious. In addition, in my country's judicial practice, the determination of the behavior established has practical reference value and practical value. Judging from the judgment experience outside the territory, we should be based on the local market and take the actual situation of my country's Internet competition market as an example. Lord, carefully refer to its identification ideas.

The author will use the shoulders of previous people to integrate the existing identification ideas and propose further identification ideas.

5.1. Consequence-oriented

The author is deeply inspired by the idea of "Consequence-oriented" identification, and uses reverse thinking to determine whether there are consequences caused by the video blocking behavior claimed by the operator to determine whether the advertising blocking behavior constitutes unfair competition.

This consequence must also be a departure from the value advocated by the "Anti-unfair Competition Law" and the destruction of the purpose of protection, and it is a disturbance to the existing competition order. When pre-judging the consequences, the author believes that the general provisions of the "Anti-unfair Competition Law" should be used as the basis for the judgment, because its provisions "disturb the order of market competition and damage the legitimate rights and interests of other operators or consumers." "The regulations have accurately predicted the common characteristics of the results of unfair competition.

5.2. With the "Reasonable Analysis Principle" as the Superposition

The author believes that, on the basis of a clear and accurate grasp of the characteristics of the Internet industry, the idea of clarifying the illegality of video advertising blocking behavior

should be carried out. It is foreseeable that future data competition will occupy an increasingly important position in Internet unfair competition.

A major feature of competition in the Internet field is that the boundary between unfair competition and fair competition is becoming more and more blurred, which also makes it more difficult to determine the boundary in legislation and justice, and it is necessary to protect the legality of operators. Rights and interests must also take into account the innovative development of the Internet industry, which requires legislators and judicial officials to carefully weigh them.

The author believes that to determine the unfair competition behavior of video advertising blocking behavior, the "reasonable analysis principle" should be adopted, that is, the three elements of the maintenance of market competition order, the increase of consumer welfare, and the protection of the rights and interests of operators must be properly carried out. It is difficult to evaluate its legitimacy. On the one hand, the provider of the video ad blocking plug-in may infringe the competitive resources of other operators, but at the same time, it may also bring innovation. Therefore, the author believes that "reasonable. The use of "Analysis Principles" may be critical to such cases in the Internet field in the future.

The "reasonable analysis principle" is roughly identified as follows: First, after making a preliminary judgment based on the consequences, then analyze whether it harms the interests of operators, whether it harms the long-term welfare of consumers as a whole, and whether it hinders the order of competition. Maintain stability, comprehensively consider these three factors, and conduct a comprehensive and systematic evaluation. If the "damage to the order of competition" is confirmed in the conclusion, then the advertising screening is an act of unfair competition as stipulated in the general terms. If only "damage to the interests of the operators" is confirmed, the "order of competition" is confirmed. And "consumer interests" are in the situation where the damage is unfounded or cannot be accurately identified, it is necessary to focus on these two aspects to carefully consider the social gains that may be generated by the advertising blocking behavior and the damage suffered by the operators. Dynamic value measurement, ultimately, determine whether the behavior constitutes unfair competition.

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- [8] See 47 U.S.C.A. § 509.
- [9] See *Zango, INC. v. Kaspersky Lab, INC.*, 568 F.3d 1169 (9th Cir. 2009).