



Hot Topic:

Legislative Protection on the Field of Big Data in China

Nowadays, the scale of the market of Big Data is expanding at an alarming rate. According to statistics from the China Market Intelligence Center, by 2018, the size of China's Big Data market will reach 46.34 billion yuan.¹ However, along with the rapid development of the Big Data market, the controversy and challenges regarding data use also emerged.

New Challenges Faced in Big Data Era

Under the background of Big Data, there are many traditional fields that are faced with challenges, such as IP, privacy, unfair competition and so on. We would like to share some typical and interesting cases with you in this part.

(i) Anti-unfair competition field

In the dispute over Unfair Competition between Baidu and Dianping (Shanghai No. 1 Intermediate People's Court (2016) Shanghai 73 Civil No. 242) (listed as one of the "Top Ten Cases Affecting China's Internet Rule of Law" in 2016)², an Internet searching company ("Defendant") captured commodity information and customer comments from an APP operator ("Plaintiff"), and used such information captured by it on its own APP without jumping to the APP interface and referring to the Plaintiff. The Plaintiff initiated a lawsuit against the Defendant for the reason that the Defendant committed the behavior of unfair competition.

The court held that the Defendant's unauthorized access to and use of the data on the Plaintiff's website and APP violated the principle of public order and good faith and damaged the market competition order of the Internet and the Plaintiff's competitive advantage, thus constituting unfair competition.

The challenge reflected in this case is that due to lack of more specialized laws and regulations on Big Data, relevant parties/entities and courts can only refer to relatively broad and vague legal basis to confront complicated cases in connection with Internet and data use that occurred more and more frequently in the Big Data era. Some observers comment that using the principle set out in the Anti-Unfair Competition Law would expand the original legislative intent, and thus would not solve those specific problems and disputes over data use, let alone protecting the interests of relevant parties properly.

(ii) Civil field.

In the dispute over Right of Reputation between Ren Jiayu and Beijing Baidu Netcom Technology Co., Ltd. (Beijing No. 1 Intermediate People's Court (2015) Civil No. 01558³, Ren had terminated the employment relationship with a company which he once worked for ("Plaintiff"), found that his name was still linked to his former employer after his leaving via Baidu, an Internet searching engine. Since the Plaintiff believed his former employer had bad reputation in its industry, the Plaintiff brought a lawsuit against the operator of the Internet searching engine ("Defendant") and requested the Defendant to delete the message that linked him to his former employer.

The Plaintiff referred to the concept of "right to be forgotten", which has been set out in the General Data Protection Regulation (GDPR) of European Union under the Big Data background, to be its legal basis. The "right to be forgotten" under Article 17 of GDPR could be summarized as the following: the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where certain grounds apply, such as when the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed. However, such concept has not been adopted under the PRC laws. Therefore, without a proper legal basis, the Plaintiff has failed the case.

The challenge reflected in this case is that with the development of Internet and application of Big Data, a huge gap has arisen between needs of people in reality and the their rights currently protected by law, for lack of a suitable legal base. Therefore, in the Big Data era, more efforts are in need on legislation through analyzing and observing new technology developments and corresponding needs of the public, and prompt action is required once new gaps are found between the existing law and the legitimate interests of relevant parties.

Current Legislative Protection regarding Big Data and Next Step

As mentioned above, given the rapid development of Internet and Big Data, the legislation may fall behind the newly generated problems and issues. Currently, the main laws and regulations that are commonly referred to deal with disputes in Big Data files are the General Provisions of the Civil Law of the PRC, the PRC Copyright Law, and the Anti-Unfair Competition Law, etc.

So, for the next step, experts and scholars comment that acceleration of the construction and completeness of legal system in connection with Big Data is necessary, in order to promote the development of the Big Data Industry.

In fact, some provinces and cities have already carried out active exploration and practice in relevant Big Data legislation, such as Guizhou⁴, Tianjin⁵, Zhejiang⁶, Shanghai⁷, etc., which are promoting the development of relevant Big Data legislation collectively.

1. See <http://ip.people.com.cn/n1/2017/0808/c179663-29456295.html>

2. See original judgement at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=3453e3c4e7c245af8e9ba9690128a4de>

3. See original judgment at: <http://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=789e76edc08441bb8e75a092cba58912>

4. On Jan. 15th, 2016, "Regulations of Guizhou Province on the Promotion of the Development and Application of Big Data" was promulgated, see: http://www.cbdi.com/BigData/2016-01/18/content_4501549.htm

5. On Dec. 14th, 2018, "Regulations of Tianjin Municipality on Promoting the Development and Application of Big Data" was promulgated, see: http://dsj.guizhou.gov.cn/xwzx/gnpd/201812/t20181219_3372603.html

6. On Mar. 27th, 2018, "Administrative Measures of Zhejiang Province on Public Data and Electronic Government Affairs" was promulgated, see: http://www.zjzfw.gov.cn/art/2017/3/27/art_42276_6090036.html

7. On Oct. 12th, 2018, "Procedures of Shanghai Municipality on the Administration of Public Data and One-net Handling" was promulgated, see: <http://www.shanghai.gov.cn/nw2/nw2314/nw2319/nw12344/u26aw57203.html>

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