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Legal boundaries of Competition in the Area of Internet: Challenges and Judicial Responses

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ABSTRACT

Some new characteristics of competition in the Internet industry, e.g., competition for attention, innovation competition, cross-market competition etc., have brought about new challenges and difficulties for the legal regulation of competition. In virtue of the theoretical innovation and the innovation of law applicability, Chinese courts gave creative judicial responses in the scopes of Anti-Unfair Competition Law and antitrust Law, clarified the legal boundaries of competition and effectively regulated competition in the online environment. Certain trends and rules implicit in this kind of judicial responses are worth noting.

The growth of the Internet industry in our country has become a new engine for the development of domestic economy. The online technology has been updating rapidly; new products, new services and new business models have been emerging uninterruptedly, impacting existing models and established order of the traditional commercial community, changing the structure of commercial interests in the economy and the society. This process is accompanied with the increasingly fierce competition in the Internet area and the continuous emergence of new kind of competition that constantly challenge legal boundaries. At the early stage of Internet development, the challenge had mostly appeared to be the difficulties in protecting online copyright. In pace with the maturity and progress of the Internet technology, the scale of e-commerce enlarges rapidly, new business models relying on the Internet are emerging uninterruptedly, therefore the mentioned challenge has expanded to areas such as trademark protection, competition regulation, etc. in the Internet. By examining specific cases, Chinese courts have clarified and delimited competition rules on the internet, filled the legal gaps, and thus, played an important role in the regulation of competition on the Internet. First, the paper describes the characteristics of competition on the Internet. Second, it explores the special challenges this kind of competition has brought to the judicature, and third, the paper will analyze the creative judicial responses to the challenge, and endeavor to reveal the trend and the regular pattern in such judicial actions.

I. BASIC FEATURES OF COMPETITION IN THE INTERNET AREA

A. Competition for attention

The expansion of information continues constantly in Internet, whereas everyone's time and energy are limited and valuable. Hence, Internet users' attention has become a scarce resource. Each Internet service provider tries to do its best to obtain customers' attention and to focus it on its product by virtue of its particular tools, operations and services in purpose to gain its business benefits through customers' attention.[2] There are two ways to turn customers' attention into business benefits: 1) to develop value-added services for interested customers and thus gain profit and 2) to sell the gathered customers' attention to a third party that seeks this kind of resource. Baidu, for instance, has gathered great amount of Internet users via its search engine platform and then began to gain business benefit by selling advertising or by offering value-added services.

The competition to obtain customers' attention in online environment has derived three subsidiary features. First, the zero price (or negative price) competition. Internet service providers have found in the competition of obtaining customers' attention that the most effective way to attract customers' attention is zero price, or even negative price. Zero prices for basic services have become a mainstream business model of Internet service providers. Recently, for instance, in areas of instant messaging, search, social networks, security, e-commerce etc. all providers offer their basic services for zero prices. In some areas of intensive competition providers prefer even negative price competition by subsidizing customers in order to continuously attract and maintain users' attention. Second feature is the platform competition. In the online environment the operations and services offered by the providers are increasingly platform-related. Services, offered by Internet service providers, turn to be the platform, connecting two or more groups of different entrepreneurs who take part of business via the platform; in this form of business the benefit of one group of participants by joining the platform depends of the scale and the development of another group of entrepreneurs joining this platform. Internet service providers who offer the platform service will "create value by virtue of reducing the conflict between different participants of the platform or lowering the transaction cost."[3] Internet service provider will continuously increase the user's dependence on their platforms and improve customer stickiness by virtue of offering added particular function that other platforms cannot propose or supplying the function of better quality than that of other platforms. Third of these features is the motto "the customer is the king." Internet service providers pay high attention to customers' needs, constantly update their products or offer new type of services, and this way attempt to improve the users' experience, to enhance the attractiveness of their products and services, and finally to keep customers.

B. Innovation competition

Given the new ways to disseminate information and the speed to do so, Internet, to a large extent, provides endless resources and spaces to expand innovation. The magic weapons in the competition are rapid innovation and seize and keep customers as soon as possible. In the area of Internet the focus of innovation is shifting from traditional innovation of technology and production to innovation of business models, and the leading innovation factor is to shift from a closed mode of innovation to an open one. That is, innovation is no longer limited to the companies' development centers, but opened to the community, providers and end-users, and innovation is carried out in accordance with customers' demands and ideas. No doubt that in online environments the customer is the decisive factor for the survival of the enterprise, creativity is the leading factor for development of the enterprise. Competition in online environments appears to be a dynamic

competition, where operators attempt to build their competitive advantage by virtue of constant innovation. "The period for leading enterprises of many industries to keep their dominant position is getting shorter. Enterprises resting on their dominant position and revealing their former laurels will soon be replaced by more innovative competitors."[4] Meanwhile products and services differentiation offered by different providers is becoming more relevant. Providers compete for customers by offering different functions and user experience.

C. Cross-market competition

Another obvious feature of competition in the area of Internet is cross-market competition. Products and services, offered by a typical network provider, are mostly based on software and provided via Internet, where the market entry threshold is not very high and the cost of changing the scope of products and services is relatively low. Thus, the network provider can easily bring its existing customers into a new area by adding services without customer churn, if he has already obtained massive customer resource. Therefore, in the area of Internet, service providers who offer different products and services are used to look at each other as competitors and do not stop to compete for customers' attention.

D. Huge impact

The scope, magnitude, breadth, and depth of impact caused by competition behavior may expand unlimitedly and spread to the entire Internet environment in a very short period of time; it is difficult to eliminate the result of such impact effectively. An Internet service provider that faces intensive competition could suffer customer churn for a couple of days, lose its competitive advantage and even be forced to withdraw from the market.

II. CHALLENGES BROUGHT TO COURT BY COMPETITION IN THE AREA OF INTERNET

The abovementioned characteristics of the competition in the area of Internet have brought about new challenges to court, concerning at least three aspects: changes of judicial functions; industry's stronger expectation of reasonably determined legal rules; right holders' higher requirements for the prompt and effective judicial relief.

A. Changes of judicial functions

It is often difficult for the law to timely respond to changes, occurring when technology and business models are developing dramatically. At the same time it is also difficult for the administrative law enforcement organs to promptly investigate the competitive behavior in the area of Internet due to lack of a clear basis for enforcement. The court is thus inevitably pushed to the forefront of solving disputes of network competition. According to an incomplete statistics report, Chinese courts have heard 126 cases involving disputes of unfair competition in the internet industry as of October 2014.[5] These disputes demonstrate the following characteristics: disputes occur frequently and easily shift along with hot new technology and revolution of business models; numerous disputes occur due to new type of competitive behaviors that are not yet clearly regulated by law and are to be adjusted by applying the guidelines of anti-unfair competition law; many disputes are tentative, i.e. the purpose of the litigation parties is not just fighting the interests of the pros and cons, but rather requiring the judiciary clear industry rules and code of conduct; disputes between Internet service providers, spreading to disputes between traditional enterprises and Internet service providers, appear to be intense competition for each one's own interest. Thus, it becomes a major issue for the courts to provide proper administered judicial rules for new types of competitive behaviors, to guide and regulate healthy

competition while resolving disputes. That means that the justice must assume not only the functions of legal performer of competition law, but also the functions of competition policy/rule maker. Along with implementing national strategy of establishing an innovative country and accelerating the pace of innovation-driven development, the role of competition policy is increasingly prominent. "The closer the forefront of knowledge, the higher the complexity and uncertainty."[6] The lower the accuracy and efficiency of industrial policy and the greater the role and value of competition policy, the more urgent of demands to maintain a healthy competitive environment. The actual situation requires justices to define the legal boundaries of the legality of acts by virtue of creative application of the law in every specific case, "bridging the gap between law and constantly changing reality."[7]

To perform this function properly and to creatively apply the law, the justice needs to be not only proficiency in the spirit of the law and rules, but also to have a deep understanding of the competition reality in the area of Internet, knowledge of information technology and a good understanding of the business development model and innovation requirement. In the process of dealing with some knotty disputes of competition in the area of Internet, the court, applying guidelines of Article II of the Anti-Unfair Competition Law, has carried out certain exploration of the standard of legitimacy of competitive behavior. In *Baidu, Inc. vs. Qihoo* case of violation of robots protocol, the trial court, for instance, has put forward the rule of procedures of "consultation-notice."[8] In *Baidu, Inc. vs. Qihoo* case of inserted standard, the trial court has put forward the principle of "no interference in case of non-public necessity."[9] These explorations have, to a certain extent, deepened the understanding of the principle of Article II of the Anti-Unfair Competition Law. These explorations have, of course, sparked considerable controversy that demonstrates a fact that a relatively broad social consensus is not yet established in this area.[10] The justice still has to take a heavy burden and to embark on a long road for properly shaping the rule of law, responding to demands of market and uniting social consensus.

B. Difficulty of legal evaluation

The competition for obtaining customers' attention, innovative competition and cross-market competition with the retrofit of competition means in the area of Internet leave a gray area where competition bears the characteristics between legality and illegality that cause serious difficulty of legal evaluation. The difficulty is reflected in the scopes of anti-unfair competition and antitrust laws.

This difficulty is mainly reflected in two aspects of unfair competition. One of them is the problem of judging the competitive relationship. In civil cases of unfair competition, the traditional theory and practice of the anti-unfair competition law sets the existence of competition between the plaintiff and defendant as the preconditions for relief of the plaintiff. In the online environment the real and strong competition exist also between the operators of different products and services due to the competition of obtaining customers' attention, platform competition and cross-market competition. Many victims of unfair competitive behaviors cannot be protected by law, if the existence of competition (even direct competition) remains to be the precondition for legal remedy. It is thus appears to be the theoretic and practical issue the justice should address to re-identify the competitive relationship and to re-define the competitive relationship in anti-unfair competition law.

Another aspect of the difficulty mentioned above is to judge the legitimacy of competitive behavior. Unfair competitive behaviors in the Internet environment are carried out mostly by means of the implementation of information technology and often in the name of technological innovation with powerful technical features. Operators tend to defend their competitive behaviors on the excuse of necessary measures to meet customers'

demands. The competitive behavior of one operator usually does not immediately have an impact on its competitor, but it does through the customer as the intermediary, i.e. the customer's interest is kidnaped by the Internet service providers who exploit their customers as a shield to fight their competitors for their own business benefit. In comparison with traditional competition, competition in the Internet environment is more neutral, at least on the surface; its boundaries of legitimacy are blurred. Technological and neutral features of competitive behaviors make more difficult to define the subjective fault of the operator and the economic effects on competition. Under certain conditions, the competitive behavior, though injuring the competitor, can enhance consumer's welfare or it might impact consumer's welfare for a short time, but can enhance consumer welfare in the long term. The traditional anti-unfair competition law simply defines the boundary of legality based on the virtue of typical characteristics of conducts. Such a method could not be used in an online environment.[11]The "technologization" of competition increases the relevance and interdependence of competing operators: products and services offered by one provider, inevitably relate to products and services offered by other providers, and thus will impact the business of the latter. The standard of competition and business achievement is characterized by competing for its own business results and trying not to disturb others. Such standard increasingly shows its drawbacks in judging the justification of competition since it has wider scope of attack and hampers free competition.[12] Meanwhile, the innovation in area of Internet is frequent, competition is complex and evolving. It is thus difficult to form commonly recognized business ethics timely. It is increasingly difficult to seek an ethical consensus in a fragmented, divided society. The moral evaluation criteria, applied in traditional anti-unfair competition law, is fallen in straitened circumstances, it is thus not an easy task for us to extract stable and clear legal criteria.

Competition in the area of Internet also seriously challenges the applicability of antitrust law. First of all, the difficulty in defining the relevant market. The zero price competition and the platform competition and other features of competition in the area of Internet have brought about greater uncertainty in defining the relevant market. Theorists and practitioners are debating whether the free market under conditions of zero price competition is the relevant market in sense of antitrust law and how to carry out Hypothetical Monopolist Test ("HMT") in this circumstance. Influenced by the platform effect due to the existence of bilateral or multilateral market, the market boundaries in the area of Internet are characterized by the high ambiguity and thus far less clear than that of traditional market. The widely applicable method for market definition in traditional areas cannot therefore be directly applied to define the relevant market in the area of Internet. Another issue is the increasing difficulty to define the abuse of dominant market position. Under the condition of blurred market boundaries the market share has significantly reduced its role of indicators, which used to measure the enterprise market forces. The probability of miscarriage of justice will increase in case of defining the dominant market position based solely on market shares. It is hence an urgent issue, which the justice must resolve, to improve the rationality of definition of the dominant market position and the abuse of dominant market position.

C. New demands of judicial relief

The competition in area of Internet is a far-reaching behavior, it increases rapidly, is hardly eliminated so that the survival of some enterprises will be threatened. The characteristics of Internet competition have proposed new requirements of the timeliness and effectiveness judicial protection. If the innovation and fair competition of an enterprise cannot be promptly protected, the enterprise might fall into the dilemma of "won the lawsuit, but lose the market," even if it could ultimately succeed in the litigation. From the point of view of judicial precedents the most serious problems the Parties complain about are insufficient compensation, delayed temporary remedial measures etc. Among more than 120 cases of disputes of unfair competition in area of Internet, the amount of highest compensation is RMB 5 million, only 4 percent of the claim of the Party of

this case.[13] The case of genuine "Kaixin001" had lasted more than one year, the corporation, though had won the litigation and got RMB 400,000 for compensation, had lost its market share, eroded by its competitors, and had not been able to reemerge. The function of judicial relief, suffering great shortage in the timeliness and effectiveness, cannot yet fully meet the demand of competition in area of Internet.

III. CREATIVE RESPONSES AND ADJUSTMENTS FROM THE JUDICIARY

A. Innovation and breakthrough of competition theory

The new characteristics of competition in the online industry (e.g. competition for attention, cross-market competition etc.) have redefined the competitive relationships and the role of judicial relief in unfair competition cases. Judicial precedents have to break through the limitations of existing theories by resorting to theoretical innovation. In *Baidu Inc. vs. Unicom Qingdao*, Osun Network and others, for instance, the appeal court held:

There exists competition between Unicom Qingdao and Baidu Inc, insofar as Unicom Qingdao has carried out the commercial activity of poping-up ads prior to the result of Baidu search. Thus, Unicom Qingdao competes with the paid search activity of Baidu, although Unicom Qingdao (network provider) and Baidu Inc. (provider of search service) offer entirely different services. [14]

This definition has broken through the theoretic limitation of direct competition and included indirect competition. Summing up precedents, the Supreme Court further points out in its justice policy: "the competitive relationship should be correctly defined, i.e. among all competitors that take part in the market and are impacted by the unfair competition. Between them, there exists competitive relationships, no matter if it is direct competition or not."[15] According to this justice policy, the competitive relationship between operator A and other operators, whose business is impacted by the competitive behavior of operator A, can be defined as such. In *Heyi Information Technology (Beijing) Co., Ltd vs. Security Software Company Kingsoft Corp*. about "Cheetah browser shielded video advertising" the appeal court had proposed two conditions to define a relationship of competition: whether the behavior of the operator can harm the interest of other operators; whether the operator can gain actual or potential benefit by virtue of this behavior. Meanwhile the trial court held that the criterion to define a competitive relationship does not rely on whether competitors are of the same industry.[16] It can clearly be seen that the position of the trial court is actually the specific application of the Supreme Court' justice policy. To a larger extend, competitive relationship means that the importance of a competitive relationship is declining to find unfair competition. Moreover, trial courts do not even carry out particular investigations of the competitive relationship between the parties in many cases, which means that the competitive relationship can no longer be an obstacle to define unfair competition. Thanks to the theoretical innovation the justice has broken away with the legal predicament based on the narrow understanding of competitive relationship, and thus has met the characteristics of competition in the online industry.

B. Adjustments of judging the fairness of competitive behavior

Given the new features of competition on Internet such as technicality, neutralization, and complexity of the effect of interests, courts have proposed new alternatives to judge the fairness of competitive behavior and new methodological adjustments.

First, the criteria of business ethics tend to be objective. In the traditional commercial sectors, business operators have formed commonly accepted business ethics. These ethics become dominant in determining the fairness of competition behaviors. "All competitive behaviors, violating conventional honest practices in commercial activities, constitute unfair competition."[17] The justice policy of the Supreme Court points out:

Any action, even if it is not forbidden by a particular provision of the anti-unfair competition law, can be regulated in accordance of the provisions of the applicable principles, if such action can be defined as unfair by harming the legitimate rights and interests of other operators and violating the principle of good faith and commonly accepted business ethics, and the fair competition order cannot be maintained without ceasing such action. [18]

Meanwhile, to prevent generalization and subjectivity of moral judgment, the judicial practice defines the business ethics as "standards of behavior, generally recognized and accepted in specific business areas, its objectivity is embodied in its common acceptance and commonality." [19] The criterion of business ethics continues to play an important role in the definition of fairness in the new type of competition in Internet. Nevertheless, the commonly accepted business ethics of Internet business is still at the stage of formation and development due to the innovation and rapidly developing competition in this area. The court has to seek a more objective form of business ethics when applying the business ethics as the standard of the competition fairness evaluation. In the cases of "QQ Guards" and "Robots Protocol," the courts had considered the industry standards and self-regulation in Internet as an important origin of the criteria for discovery and definition of standards of conventional industry behaviors and commonly accepted business ethics.[20] The standard of behavior is the means of administration, whereas self-regulation is the means of self-management of operators in the industry, both means do not exactly accord to commonly accepted business ethics. Therefore, the courts emphasizes that it is necessary "to rely on the judgment of their legality, impartiality and objectivity, (the mentioned) relevant means can be taken as references for defining standards of conventional industry behaviors and commonly accepted business ethics in Internet." [21]

Second, evaluating the effect of competitive behavior has become more important in the judgment of its fairness. The objectivity of business ethics in Internet is getting more difficult because of the technicality and neutralization of competitive behavior. Therefore, courts began to pay attention to the evaluation of the effect of the competitive behavior and seek to justify the fairness of the behavior by assessing the impact of the behavior on the legal interest protected by competition law. In the case of "Cheetah browser shielded video advertising," the civil court had investigated and analyzed the harm that Heyi Information Technology (Beijing) Co., Ltd has suffered due to the behavior of "Cheetah browser shielded video advertising" based on the behavior's perspective effects, and assessed the long-term impact on the interest of customers and public interest. Then came to the conclusion that the behavior of "Cheetah browser shielded video advertising" constituted unfair competitive behavior.[22]

More cases demonstrate a new mode of evaluating the fairness of behavior: the judgment is carried out on the basis of comprehensive evaluation of the impact of competitive behavior on the interest of competitors, the interest of customers and the public interest of society. The analysis of the harm that the operator suffers as the result of competitive behavior is set to be the logical starting point. For the operator's interest is the object, directly protected by the anti-unfair competition law. All concerned cases have considered the impact on operators through competitive behavior. The customer is the object of competitive behavior that bears the result of competition and accepts the market products; it is therefore the final aim of justice to enhance consumers' welfare. It should be an integral part of the judgment of fairness of competitive behavior to consider the impact of competitive behavior on the customers' interest with respect of enhancement of

consumers' welfare and their fundamental benefit. The customers' interest is itself multilevel and relative due to differentiation of consumer groups and their divergent interests. Trial courts have been paying attention to this issue and assessing the different interests of consumers with different weights. Trial courts have been following more closely the influence of competitive behavior on the right of customers to know and to choose; to harm this type of customers' interest will more likely be confirmed to constitute unfair competition. Present judicial precedents demonstrate that the positive customer experience and other kind of customers' interest that can be resolved via the market do not have a significant impact on evaluating the fairness of competitive behavior. On this basis, many judicial precedents have investigated the impact of competitive behavior on the public interest of society and analyzed whether this kind of behavior could harm the healthy mechanism of market competition. The method of comprehensive evaluation of negative and positive results is very close to the principle of rationality for antitrust analysis; it indicates the integration and interoperability of the anti-unfair competition law and the antitrust law.

Third, the trend of multi-angle evaluation. Because there is no conflict between criteria of moral evaluation and criteria of evaluation of competition result, the nationality and persuasiveness of the evaluation result will improve if the fairness of competitive behaviors is inspected under various angles, e.g. moral evaluation, efficiency competition, principle of proportionality, assessment of competitive effects etc. The typical cases of application of this method are "QQ guards" and "Cheetah browser shielded video advertising."

C. Innovation in application of antitrust law

The competition in the Internet industry obviously differs from the competition in traditional areas. The logic of analysis and method, widely applicable for monopoly behaviors in traditional areas, cannot be applied directly in the Internet industry. The justice has carried out targeted adjustments and innovation in accordance with the competitive features on the Internet.

First, innovation in the analysis of abuse of dominant market position cases in the Internet industry. In the traditional antitrust law there are three patterns of analysis of abuse the dominant market position: patter 1 "relevant market-market power- competitive effects (R-M-C)", for which the definition of relevant market is the insurmountable starting point of analysis of the monopoly. Pattern 2 "market power - competitive effects (M-C)", for which the starting pint of analysis is the definition of market power that can be tested and verified by virtue of direct or indirect evidence. Under this pattern of analysis the definition of relevant market can be circumvented. Pattern 3 "behavior - competitive effects (C-C)".

For traditional antitrust judicial cases, pattern 1 is currently the leading pattern of analysis in European and American courts, whereas pattern 2 is rarely applied in practice, and pattern 3 has not yet been applied. In Internet, the boundaries of relevant market are obscured even more due to the competition for customers' attention, the platform competition and cross-market competition. Thus, the justice should keep the necessary caution when applying R-M-C patter and apply the two latter patterns as the preferred tool of analysis. Chinese courts have carried out valuable attempt in this relation. In *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd*. of abuse the dominant market position, the trial court, in an in-depth investigation of the relevant market concerned and analyzing the market power of Tencent in this market, had come to the conclusion that Tencent company does not possess the dominant market position. Yet the trial court did not cease the investigation and analysis at this point, but had further evaluated the actual or potential effect of the respondent monopolistic behavior on the market competition and had carried out the final judgment on this basis.[23] For this method of analysis of the relevant market, the market power and the effect of competitive behavior are considered related and referenced factors, but not separate stages of analysis; the rationality of

the definition is thus improved due to a cross-verification of all mentioned factors. For this method of analysis, these three patterns can be flexibly chosen in accordance with a particular case. The C-C pattern could be chosen when it seems to be difficult to define the relevant market and the market dominant position, thus the relevant market could lie beyond a clear definition. The caution should be kept in finding the indicator effect of market share on the basis of features of online competition even when the relevant market and market share are defined by using the former two patterns. In this case factors such as market entry, market behavior and economic results become the focus of attention.

The competition in circumstance of Internet is highly dynamic, the boundaries of relevant market are thus far less clear than that in traditional areas, the indicator effect of market share in this case should not be overvalued, more attention should be paid to those factors such as market entry, market behaviors of operators and their influence on the competition etc. which can help to determine the facts and evidence of dominant market position.[24]

Meanwhile trial courts have applied more flexible methods to analyze various factors with respect to the particularities of the competition in Internet: when defining relevant market of goods and services of relative platform features, possessing certain but not very close substitution, such products and services could be involved in consideration of the influence on the behavior of hypothetical monopolist, no matter whether they can be included in the scope of relevant market or not. When determining the dominant market position, the analysis of the result of competition should not be abandoned even after certain preliminary conclusions, the consideration of the result of competition and the verification of the accurateness of judgment of the dominant market position should be carried out further.

Second, adjustment of Hypothetical Monopoly test ("HMT"). In *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd*., the trial court had explored the applicability of HMT in the online industry and the method of its specific application. The trial court held that, as a method to analyze relevant market, HMT has universal applicability, yet the particular analysis by means of HMT should be carried out in dependence of the area of market competition, concerned in the specific case, and the relevant data that can be obtained. Competitors in the area of Internet pay more attention to quality, services, innovation etc., but not price. Customers have very high price sensitivity, so to them, it would seem a great change of the features of products and the business model, if free products or services would have turned to paid ones. The HMT in terms of price increment is thus not fully applicable in area of Internet, yet the alternative forms of this method, e.g. HMT on the basis of quality degradation, could still be applied.

Third, innovation in the method of analyzing relevant market and market power, related to multi-sided platform cost-free for users. Economists usually apply the method of conversion analysis for defining relevant market of platform products or services for charge-free users by regarding the charge-free basic services as the investment for platform products with the purpose of converting the market of platform product to common and paid single market.[25] This method, though simple and convenient, might not only exaggerate the influence of platform competition, but also to certain extent neglect the connection and interaction of both ends of the platform; it is hence neither scientific nor accurate. In *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd*. the trial court did not apply this method of analysis, but, had investigated whether the features of platform competition can affect the definition of relevant market based on "whether the competition between online platforms, competing for customers' attention and advertisers, totally steps over the boundary determined by the features of products or services and thus imposes sufficiently strong competitive constraint on operators,". The trial court had chosen the free instant messaging service as the criterion to define the relevant market because of the absence of exact empirical data that could prove that platform competition has

imposed sufficiently strong competitive constraint on operators, as well as in case that the competitive behaviors involved in litigation occur mostly at the free users' end. At the same time, the trial court did hot neglect the influence of platform competition by taking it in proper consideration when defining market position and market power. We see that the trial court has flexibly applied the new method of analysis for specific case when economics is not yet able to supply any more persuasive pattern of analysis for relevant judicial cases. The revelation is: for platform-related products or services there is no fixed pattern of analysis, the relevant market and dominant market position should be determined depending on each specific case. What the court has to do is to take into consideration features of platform and the interaction of both ends of the platform, and then accurately identify the actual or potential competitive constraint the operators can face.

Fourth, advocate for an objective and effect-oriented method of analysis. The antitrust action follows closely whether the respondent monopolistic behavior will distort and destruct the healthy, orderly and energetic competition mechanism. Such action "has involved in itself neither moral content nor ethic law, appropriately designed for business."[26] In the antitrust case the important thing is industry reality and economic rationality, the moral thinking must thus be avoided. One should search the original sin of monopoly merely in competition result and economic reality. In *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd.* the trial court did not carry out any moral evaluation of "either-or" and other behaviors of Tencent, but had focused on the effect of the respondent monopoly behaviors. After a comprehensive evaluation of the actual and potential passive and positive results that these behaviors caused, the court came to the conclusion that such behaviors were legal. In this process, the trial court had followed the method of investigation that especially focuses on a specific industry and in a specific behavior. In other words, to investigate a specific behavior of a specific industry with respect to the characteristics of the respondent monopoly behaviors and its impact on the competition, to consider in detail platform effect and network effect on each specific case, and thus to more accurately determine the impact of behavior on the competition.

Fifth, the creative combination of legal judgment and economic analysis. The analysis and judgment of legality of the monopolistic behavior usually relies on the economic analysis, yet the ultimate decision will be carried out by the judge. The economic analysis only makes available different tools for the proper legal judgment; the judge cannot thus transfer the right to rule to economists. Therefore the judge should creatively combine the legal judgment and the economic analysis in the antitrust case by properly applying the conclusion of economic analysis for improving the accuracy of legal judgment of monopoly behavior. In *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd*. the trial court, analyzed whether the acquisition costs of mobile terminal equipment constituted an obstacle for including the mobile instant message service in the relevant market. In doing so, it considered that for the customer who possesses both mobile terminal device and a PC, the acquisition costs of mobile terminal equipment had already become sunk costs. This fact cannot be changed due to any current or future decision of the provider, the acquisition costs cannot any way influence on the customer's choice between mobile terminal device and PC as the preferred equipment for instant message. Thus, the court came to the conclusion that acquisition costs of mobile terminal equipments will not constitute any obstacle for including the mobile instant message service in the relevant market in this case. This is a typical example of applying economic commonsense in a specific case.

According to economists, the trial court has carried out even more professional price-related analysis determining whether social network Weibo and instant message can be included in the same relevant market.[27] This is an example of combination of economic analysis and legal judgment. For a correct and reasonable application of economic analysis, the methodological errors should be prevented and the limitation of data and constraint of conditions should be properly considered. A judge should break away from arrogance and prejudice when applying the method of economic analysis and adopting a conclusion. It is important for

justice that the judge, besides the necessary economic knowledge, maintains the principle of "effect first." In other word, the judge should follow closely the actual or potential effect of respondent monopoly behaviors on competition, and in doing so, adequately apply the economic analysis and stay away from possible methodological errors, limitation of data and constraint of conditions. The more realistic, more rational and more accurate conclusion of the legal identification of monopolistic behavior can finally be drawn as long as the essence of the monopolistic behavior that causes actual or potential negative effect on the competition will be grasped. The result of the economic analysis based on direct evidence will be verified pursuing to the "effect first" principle. This could explain the judicial action in *Qihoo 360 Technology Co Ltd vs. Tencent computer system Co. Ltd*., where the trial court, applying an economic analysis, investigated whether the monopoly's actions will exclude or restrict competition on the basis of almost all testimonies related to the effect of its behaviors.

IV. CONCLUSION

From the point of view of the interpretation and application of substantive law, the analysis abovementioned demonstrates that justice has creatively responded to the competitive behaviors in an online environment. It also clarified legitimacy boundaries of competitive behaviors, and thus effectively regulated competition on Internet. Some responding measures and innovation of applicable judicial methods has had a profound influence on international justice. Yet, needless to say that there are a lot of shortcomings of the responding measures and methods mentioned, e.g., there are many misunderstandings, even mistakes in dealing with the correlation between anti-unfair competition law and antitrust law with respect of applying the substantive law. There exist more or less specious and vague criteria for judging the legitimacy of competition; the economic analysis of monopolistic behavior and the assessment of the competitive effects are not yet well skilled; the lack of timely and effective judicial relief seriously impacts and limits the fully implementation of judicial efficiency. A further improvement is to be planned in the future judicial practice.

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[1] Zhu Li, Judge of the Intellectual Property Division of Supreme People's Court, JD. The article represents only the author's own views beyond the position of its organization. Certain contents of this paper were discussed and reviewed in "Chinese IP judges Forum" of Southwest University of Political Science & Law, № 4, as well as in the second meeting of the Forum Internet Competition Policy and Innovation, organized by the Electronics Intellectual Property Center of Industry and Information Technology Ministry. Thanked the participants of the forum for their comments, certainly the author is responsible for any error in this paper.

[2] "Many network providers are competing in order to obtain the limited attention of consumers, their featured products and services are in fact just the tools to gain the customers' attention in competition." David S. Evans, "Attention Rivalry Among Online Platforms," *University of Chicago Institute for Law & Economics,* no. 627 (2013): 3. Available at SSRN: http://ssrn.com/abstract=2195340.

[3] Cited from David S. Evan, "Market Definition and Market Power for Internet Industries" (discourse in Seminar of Implementation of Antitrust Law in ICT Industry of the Forum Internet Competition Policy and Innovation, organized by the Electronics Intellectual Property Center, 24 march, 2015).

[4] Jian-cai Zhang, "Dynamic competition and enterprise core competitiveness," *East China Economic Management*, no. 4 (2002): 81.

[5] For particularities of dispute of competition in the area of Internet *see* Qin-kun Zhang, "A empirical analysis of unfair competition cases of Internet development in China," *Electronics Intellectual Property*, no. 10, (2014): 26-37.

[6] Rajneesh Narula, *Globalization and technology: Interdependence, innovation systems and industrial policy,* (Blackwell Publishing Ltd., 2003).

[7] Aharon Baraka, *The Judge in a Democracy*, trad. Bi Hong-hai (Law Press, 2011), 17.

[8] *Ltd. vs. Beijing Qihoo Technology Co.,* Beijing Baidu FMCT no. 2668 (Network Technology Co., Ltd. Case of unfair competition dispute (violation of robots protocol), (2013).

[9] *Baidu Online Network Technology (Beijing) Co., Ltd v. Beijing Qihoo Technology Co., Ltd*. (Beijing High Court Civil Judgment (2013) Gao Min Zhong Zi no. 2352)

[10] Xue Jun: Question "the principle of no interference in case of non-public necessity," *Electronics Intellectual Property*, (2015): 66-70.

[11] The so-called typed features of behavior refer to the typical characteristics of a behavior reflected on the subject, object, subjectivity and objectivity which are the four constituent elements of a behavior. Constituent elements of unfair competition are commonly the following: the subject is the participant of various market trade operations; objectivity is the behavior which violates the principle of good faith or generally accepted business ethics; the perpetrator is subjectively fault; the object of the infringement is the interest of the operator, the interest of the customer and the public interest of the society. *See* Wang Xian-lin, *Competition Law*, (China Renmin University Press, 2006), 96-98.

[12] The so-called performance competition refers to the performance of their goods or services at competitive prices or to start competition of their own business activities, also known as the effectiveness competition. *See* Fan Chang-jun, *A study of German Anti-Unfair Competition Law*, (Law Press China, 2010), 114-115.

[13] *Qihoo vs. Tencent of "QQ guards*, civil judgment of CF no. 5 (the Supreme People's Court. 2013).

[14] Shandong Province Higher People's Court, the civil judgment of LCSF №5-2.

[15] Xi Xiao-ming, Vice President of Supreme People's Court, in the forum of national IPR trial courts (28 November, 2011).

[16] The Beijing First Intermediate People's Court, the civil judgment of FICF №3283. (2014).

[17] Paris Convention for the Protection of Industrial Property, September 28, 1979, Article 10.bis.

[18] The Supreme People's Court: "Some advices in consideration of full trial function of intellectual property, promotion of development and prosperity of socialist culture, promotion of the coordinated and autonomy development of economic", Article 24.

[19] The Supreme People's Court, the civil judgment of CTF № 1065. (2013).

[20] The Supreme People's Court, the civil judgment of CTF № 5 (2013) and The Beijing First Intermediate People's Court, the civil judgment of FICF № 2668. (2013).

[21] The Supreme People's Court, the civil judgment of CTF № 5. (2013).

[22] The Beijing First Intermediate People's Court, the civil judgment of FICF № 3283. (2013).

[23] The Supreme People's Court, civil judgment of CTF № 4. (2013),

[24] *Id.*

[25] For specific application of this method *see* Huang Kun, "Economic analysis of the anti-monopoly review," *Research on Economics and Management,* no. 11*,* (2014): 87-97.

[25] Herbert Hovenkamp, *The antitrust enterprise: principle and execution*, trad. Wu XU-liang (University of Finance & Economics Press, 2011), 48.

[26] For price-related method of analysis *see* Peter Davis and Eliana Garcés, *Quantitative Techniques for Competition and Antitrust Analysis*, trad. Zhou De-fa. (China Renmin University Press, 2013), 139.