

# ***Conflict and Balance between Fundamental Rights of Platform Enterprises and Competitive Interests***

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**Abstract:** In judicial practice, judges often refer to the principle of good faith and commercial ethics in Article 2, Paragraph 1 of the \*Anti-Unfair Competition Law of the People's Republic of China\* to determine whether a behavior constitutes unfair competition. It appears that fair competition is prioritized as the primary value in such cases, while the value of free competition receives little attention and is nearly overlooked. Although the \*Anti-Unfair Competition Law\* emphasizes fair competition, this foundation cannot justify restrictions on free competition. In reality, this emphasis is the result of institutional inertia, historical factors, and pragmatism. When adjudicating unfair competition cases, greater attention should be paid to the value of free competition, which is expressed through enterprises' autonomy in business operations. In disputes involving unfair competition, conflicts typically arise between fundamental rights and competitive interests. By analyzing judicial practices in cases involving ad-blocking software, traffic hijacking, and poaching by live-streaming platforms, this article proposes a balanced approach to resolving the conflicts between fundamental rights and competitive interests based on existing theories.

## **1. Introduction**

In judicial practice, judges often refer to the principle of good faith and commercial ethics in Article 2, Paragraph 1 of the \*Anti-Unfair Competition Law of the People's Republic of China\* to determine whether a behavior constitutes unfair competition. It appears that fair competition is prioritized as the primary value in such cases, while the value of free competition receives little attention and is nearly overlooked. Although the \*Anti-Unfair Competition Law\* emphasizes fair competition, this foundation cannot justify restrictions on free competition. In reality, this emphasis is the result of institutional inertia, historical factors, and pragmatism. When adjudicating unfair competition cases, greater attention should be paid to the value of free competition, which is expressed through enterprises' autonomy in business operations. In disputes involving unfair competition, conflicts typically arise between fundamental rights and competitive interests. By analyzing judicial practices in cases involving ad-blocking software, traffic hijacking, and poaching by live-streaming platforms, this article proposes a balanced approach to resolving the conflicts between fundamental rights and competitive interests based on existing theories.

## 2. Platform Business Models and Their Fundamental Rights

### 2.1. The Theory and Scope of Fundamental Rights

In China, enterprises enjoy constitutional and legal rights to operate independently. As key participants and entities in a market economy, enterprises hold numerous legal rights and bear extensive legal obligations. Among these, the right to autonomous business operations is the most fundamental economic right and a constitutional foundation, encompassing rights related to production, supply, sales, personnel, finance, and assets, as well as other market-related rights.

Building internet platforms to provide societal services is how internet enterprises generate profits, and their right to autonomous business operations is legally supported. Article 16 of the *\*Constitution of the People's Republic of China\** explicitly grants state-owned enterprises the right to operate independently, while Article 17 extends this right to collective enterprises. By applying the principle of a fortiori reasoning, private and foreign enterprises, with stronger private ownership than state-owned and collective enterprises, should likewise enjoy the fundamental freedom of autonomous operations. This establishes the constitutional basis for the right to operate independently for all types of enterprises. Furthermore, according to Article 12 of the *\*Administrative Litigation Law of the People's Republic of China\**, infringements by administrative authorities on an enterprise's right to operate autonomously fall under the scope of administrative litigation. This ensures that the protection of enterprises' autonomous business operations is not merely a political declaration but is realized through concrete public law remedies.[1]

The right to autonomous business operations for internet enterprises is also grounded in jurisprudence. The public law protection of enterprises' rights originates from respect for and protection of the basic rights of natural persons, extending constitutionally confirmed basic rights to corporate entities. This framework follows a trajectory of "rights → human rights → fundamental rights → citizens' fundamental rights → enterprises' fundamental rights." It is important to recognize the legal personhood of corporations, which exist as objective rights holders with independent legal status. Internet enterprises, as special entities, enjoy public law rights protection to counter potential rights infringements in the regulation of online information. This protection aims to defend against unlawful state interference and to ensure that internet enterprises can fully enjoy legal economic freedoms, positioning the state as a restrained entity. In other words, the public law protection of internet enterprises' rights at the constitutional level affirms their status as holders of fundamental rights, distinguishing them from ordinary rights holders. However, the scope of these fundamental rights is not unlimited and depends on the legal nature of the specific rights. Typically, corporations can hold rights related to property or economic freedoms, while basic human needs, such as personal freedom or survival, are reserved for individuals.[2]

### 2.2. Business Models of Social Media Platforms

Take social networking platforms as an example. Social media refers to online services that allow users to create public or semi-public profiles within a bounded system, clearly list other users with whom they share connections, and access and traverse these lists.

Social media platforms do not provide content directly but rather offer users ways to interact and create content in the form of profiles, messages, photos, and videos. Mainstream online social media platforms offer free services to consumers while collecting and processing users' personal data, creating user profiles to support personalized advertising revenue. In addition to advertising, platforms have other revenue sources; for instance, Twitter generates revenue from data licensing. In the fourth quarter of 2013, Twitter's data licensing revenue reached \$23 million, while revenue from selling ad space amounted to \$220 million. Until August 2015, Twitter partnered with data

resellers like DataSift and NTT Data, allowing them to purchase access to search and analyze tweets.

China's major social media platforms primarily attract users through free ecosystem experiences, enhance user retention through improved software services, and then generate economic returns through diversified revenue models. Examining the technical logic of mainstream social media platforms, their commercial application typically involves the following stages: (1) building and maintaining an internet social media platform, (2) delivering personalized advertisements based on user needs while improving ad effectiveness for businesses, (3) providing e-commerce services, and (4) offering video creation platforms to satisfy diverse user needs.

### 2.3. The Scope of Fundamental Rights and Competitive Interests for Online Platforms

Online platforms enjoy the right to operate independently, yet the autonomous actions of social media software platforms sometimes conflict with competitive interests in commercial practice. The history and development of the *\*Anti-Unfair Competition Law\** confirm that it seeks to protect competition by prohibiting non-market means of gaining competitive advantage, ensuring broader freedom in competition. This competitive freedom is linked to fundamental rights. In academic discourse, the spirit and principles of competition have been consistently emphasized in the context of the *\*Anti-Unfair Competition Law\**.

The spirit and principles of competition manifest as the adherence to the principles of free competition and minimal regulation. Competition should be free, and competitive behavior should be lawful. Unless there is unfair competition, restrictions on competition are not justified. While market competition should generally remain free, intervention is necessary in exceptional cases where fairness must be preserved. This accurately reflects the importance of fairness standards. If the definition of unfair competition is too broad, it could infringe on free competition and jeopardize the integrity of the competitive order. The *\*Anti-Unfair Competition Law\** is a government regulatory law, where the extent of regulation is inversely related to the protection of market freedom. Historically, this law has been based on limiting regulation and preserving market freedom. The 1993 version of the *\*Anti-Unfair Competition Law\** rejected the functionality of the general provision in Article 2 and instead listed specific behaviors in Chapter 2 while introducing penalties to reduce and limit state intervention. The 2017 revision added no new prohibitions and deleted the government's authority to recognize prohibited behaviors not explicitly listed. It also removed prior powers for preemptive measures like ordering a halt or seizure. By refining the constituent elements and interest-balancing structure in Article 2, Paragraph 2, the revision reflects a spirit of "minimal market intervention" in judicial application.

The right of enterprises to operate autonomously is the legal foundation for free competition, while safeguarding competitive interests is essential for ensuring fair competition. The boundary between autonomous operations and fair competition lies in enterprises making independent decisions and taking action within the limits prescribed by law. Upholding the principle of fair competition and assuming social and environmental responsibility is crucial for effectively protecting and realizing the autonomy of business operations.

## 3. The Conflict and Balance between Fundamental Rights and Competitive Interests

### 3.1. Forms of Conflict

The most common conflicts in the *\*Anti-Unfair Competition Law\** involve clashes between fundamental rights and competitive interests. Unfair competition refers to businesses using improper methods in market competition that infringe on others' legal rights and disrupt fairness

and integrity in the market. The relevant legal provisions impose certain restrictions on both business autonomy and competitive interests, leading to potential conflicts between the two.

On one hand, businesses have the right to operate independently and choose models and strategies that suit their interests, but their autonomy is limited in market competition. For instance, the *\*Anti-Unfair Competition Law\** prohibits certain behaviors, such as false advertising, commercial bribery, and the infringement of trade secrets, and businesses must comply with these rules or face legal consequences. On the other hand, businesses need to protect their competitive interests to ensure their legal rights are not violated. The law also offers protections, allowing businesses to legally defend their rights and seek injunctions against unfair competition. However, in practice, businesses may adopt measures such as extensive advertising, price reductions, or sales expansion to protect their competitive interests, which may conflict with the competitive interests of other enterprises.

### 3.2. Practical Approaches to Resolving Conflicts

Disputes involving unfair competition typically fall into three categories: ad-blocking cases, traffic hijacking cases, and poaching by live-streaming platforms.

In ad-blocking cases, unfair competition may occur. Blocking ads directly impacts the interests of both parties. For the blocked party, the “free video + ad” model is widely accepted in the market, establishing an orderly cycle of profit distribution between website operators, internet users, and advertisers. Blocking ads disrupts this industry norm, reduces the blocked party’s advertising revenue, and harms video platforms. For the blocker, there is freedom to choose a business model. In the case of *Hunan Happy Sunshine vs. Guangzhou Viesoft*, the court held that Happy Sunshine could choose the “free video + ad” model, while Viesoft could add ad-blocking plug-ins to its browser to enhance user experience. The *\*Anti-Unfair Competition Law\** aims to maintain a healthy market competition mechanism, viewing competitive freedom as the highest value. However, the court, through the “three-step method” in Article 2, ultimately ruled in favor of Sunshine’s fair competitive interests.

In traffic hijacking cases, unfair competition often manifests as one party redirecting users or traffic to disrupt the business of another party. Traffic hijacking through software interference may divert users or traffic from one website to another, leading to loss of customers and revenue. Courts must consider the balance between the right of the hijacker to operate autonomously and the injured party’s fair competitive interests. In *Tencent vs. Qihoo 360*, the court recognized Tencent’s claims that Qihoo’s software unfairly hijacked user traffic, thereby violating fair competition principles.

In poaching by live-streaming platforms, platforms may use financial incentives or other measures to lure hosts from competitor platforms. This practice can severely impact the original platform’s ecosystem. Courts weigh the autonomy of platforms to offer competitive compensation against the fair interests of other platforms in maintaining their workforce.

In these cases, it is necessary to carefully balance fundamental rights and competitive interests while considering the specific circumstances, market practices, and business models involved.

### 3.3. A balanced approach to conflict

The Balance between Fundamental Rights and Competitive Interests Should Follow the Principle of “Primacy of Fundamental Rights. The principle of the primacy of fundamental rights is widely endorsed not only by most scholars in our country but also by scholars abroad, suggesting it is a broadly accepted universal viewpoint. This doctrine asserts that fundamental rights are of a higher legal value and should be protected first and foremost. While acknowledging the existence and importance of competitive interests, this doctrine emphasizes that in the case of a conflict between

fundamental rights and competitive interests, fundamental rights should take precedence. Competitive interests should only be considered if they do not infringe upon fundamental rights. Judicial decisions in cases involving ad-blocking and live-streaming platform poaching illustrate that when a platform's autonomy conflicts with another company's competitive interests, prioritizing the protection of fundamental rights is crucial. In practice, respecting fundamental rights of enterprises and cautiously handling cases of unfair competition involving data and fundamental rights is essential.

The Balance between Fundamental Rights and Competitive Interests Should Also Consider the Principle of Proportionality. The principle of proportionality involves addressing specific legal issues that general principles cannot resolve by balancing various factors. This principle examines whether the intervention by state power into citizens' fundamental rights exceeds the necessary limits, emphasizing the connection between “means” and “ends.” Proportionality typically includes three sub-principles: appropriateness, necessity, and strict proportionality. Appropriateness requires that the means of intervention effectively achieve or contribute to the intended goal; necessity demands choosing the method that has the least impact on fundamental rights among various feasible options; and strict proportionality requires that the intervention measures are proportional to the goal, with impacts that are not disproportionate. These sub-principles should be assessed in a specific order: first, whether the chosen means contribute to achieving the goal; second, whether the least intrusive method was used; and third, whether there is a balance between the method and the desired outcome. Only if the preceding conditions are met should the next stage be considered; otherwise, no further examination is necessary.

Determining whether specific competitive behaviors violate anti-unfair competition laws should consider the objectives protected by these laws, meaning that the application of proportionality should take into account the interests of all market participants.[3] Scholars interpret the objectives of anti-unfair competition protection as threefold: the interests of competitors in free competition, the interests of consumers in free decision-making, and the interests of the public. In judicial decisions, constructing a framework guided by the principle of proportionality helps reduce subjective judgment in balancing interests by procedural constraints. In traffic hijacking cases, from the operator's perspective, the hijacked party's competitive interests are harmed; targeted traffic hijacking damages competitive freedom; from the consumer's perspective, it undermines users' freedom of choice and right to information, and interferes with fair trading behavior; from the perspective of social public interest, improper traffic appropriation disturbs innocent users and decreases overall social welfare. Thus, traffic hijacking behavior harms decision-makers' interests in market competition, ultimately disrupting market order.

## References

[1] Zhang Xiang. (2005). *The Dual Nature of Fundamental Rights*. *Legal Studies*, (03):21-36.

[2] See *Snyder v. (1934)*. *Massachusetts*. 291 US 97, 105.

[3] Zheng Xiaojian. (2016). *The application and development of the principle of proportionality in civil law*. *Chinese Jurisprudence*. 02:143-165.