

Dilemma and Way out of Legal Protection Mode of Commercial Data

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Abstract: In recent years, the legal disputes caused by commercial data have increased more and more. China has no special law on commercial data protection; judicial practice mainly uses the copyright law, trade secret, anti-unfair competition law, and other related laws to protect commercial data, but the use of these separate laws to protect commercial data also has its own shortcomings. The commercial data, as a compilation work, is inconsistent with the protection purpose of copyright. The cost of commercial data becoming a trade secret is huge, and the use of anti-unfair competition law to regulate commercial data gives judges too much discretion. Therefore, the practical demand calls on legislators to enact special legislation to give comprehensive protection to commercial data.

1. The Presentation of the Issue

Business data includes, but is not limited to, financial data, market information, customer information, etc. Business data is of great significance to the operation and development of enterprises. Protecting business data by law can protect the legal rights and interests of enterprises and is conducive to maintaining a good market competition environment. How to protect and regulate the use of commercial data to give full play to its value has become an important topic in the field of law. This paper analyzes the problems of three modes of legal protection of commercial data in our country and puts forward the optimization path of legal protection of commercial data.

2. Current Situation of Legal Protection of Commercial Data in China

2.1. Mode and Dilemma of Copyright Protection

Article 15 of the Copyright Law is used to protect commercial data. For example, in the case of *Dianping v. Aibang*, the defendant copied the user's comments about the business to his own website for use, and the plaintiff believed that the defendant's behavior infringed his copyright. The court rejected Dianping's claim that the information was arranged in a common chronological order and lacked originality. Another example is the case of *"Baitu Information v. Dingrong Software,"* in which the plaintiff divided the public information published by the Trademark Administration and manually identified, arranged, and entered the database. The judge held that the mode of arranging

and classifying the trademark information of the plaintiff met the requirement of originality, and the database involved in the case was consistent with the characteristics of the compiled works and should be protected by copyright. Compared with the above two cases, it can be seen that the court protects the originality of the choice and arrangement of data but does not protect the data itself, resulting in problems. First of all, the identification of "originality" lacks clear standards and judgment basis, and the results of database types are often difficult to obtain protection. In practice, there are also many commercial data that are the result of computer processing, and the non-artificial commercial data collection process is difficult to prove that it can meet the requirements of the originality of compiled works. Secondly, the commercial data itself pays more attention to the huge and complete amount of data, pays more attention to the broad degree of data collection, and does not pay attention to the originality of the arrangement. The scope of protection of compiled works is limited to the original selection and arrangement, which makes it difficult to effectively prevent the data set that technical personnel strive to collate from being copied and used. Moreover, commercial data is inconsistent with the purpose for which the copyright protection system was set up. The legislative purpose of copyright law is to encourage the public to actively create literature and art and enrich the spiritual and cultural achievements of society. However, business data is a resource used by enterprises to make profits, mostly for the pursuit of economic value.

2.2. Mode and Dilemma of Trade Secret Protection

Article 123 of the Civil Code of China stipulates that trade secrets belong to the object of intellectual property rights. In practice, infringement of trade secrets is regarded as unfair competition and regulated by relevant laws. Trade secrets have the characteristics of secrecy, value, and confidentiality.^[1] To protect commercial data by means of trade secrets, the following conditions must be met: (1) the commercial data is not known to the public and requires a certain amount of intellectual labor to obtain the data; (2) the commercial data used for operation is a competitive advantage of the enterprise and can bring economic value; (3) Employees who process, hold, and contact the business data shall sign confidentiality agreements, or the business entity shall take technical measures to manage the business data and prevent data leakage. In the case of the infringement of technical secrets between Betong Data and Cui, Cui acted as the person in charge of a crawler platform project and signed a confidentiality agreement, in which the company's database, system source code, and contained information were classified as top secret. In order to prevent unauthorized disclosure of data, the company set up a background monitoring program to monitor the emails sent by employees. Cui was found to have sent the company's technical information to his private email without authorization, and the court found Cui to have stolen technical secrets. The business data in this case is confidential and used for business activities, and the company signed a confidentiality agreement with the employee and adopted post-monitoring measures, which meets the requirements of trade secrets, so it is protected by trade secret legislation.

In order to protect commercial data by means of trade secrets, commercial entities need to pay a high cost to maintain its secret state, such as spending a lot of money on the construction of an encryption layer and background monitoring. With the progress of technology, it is not an infringement of trade secrets for enterprises to recover trade secrets by algorithms or other technical means after capturing open business data through technical means. As for value, the value protected by trade secrets comes from the input to form intellectual achievements or business achievements, while the by-product data has no such protected value.^[2] Raw business data is messy and has no obvious value. It has value only after it has been processed. The two-secret requirement of trade secrets makes this protection mode only applicable to undisclosed data, and a large number of open data cannot meet the protection conditions of trade secrets.^[3]

2.3. Protection Mode and Dilemma of Anti-Unfair Competition Law

In the trial of commercial data infringement cases, Chinese courts mostly cite the "Internet Special Article" of Article 12 of the Anti-Unfair Competition Law, which is mainly used to regulate Internet business activities, or the general provisions of Article 2, for protection of data results that are neither original as required by copyright law nor meet the requirements of trade secrets. The data rights and interests are protected based on the "legitimate rights and interests" in the article. For example, in the case of "Kumike" v. "Cars," in order to improve the number of users of the "Cars" app in the market and the accuracy of information queries, the defendant instructed its employees to use web crawler technology to extract a large number of real-time bus data from "Kumike" and directly use it for the "Cars" app and to query and use it for unspecified members of the public. The court held that the defendant's behavior of extracting data and using the data free of charge had illegally occupied the intangible property rights and interests of others, intentionally destroyed the market competitive advantage of others in order to obtain its own competitive advantage, violated the principle of good faith, and disrupted market order and constituted an act of unfair competition.

The practice of invoking the relevant provisions of the Anti-Unfair Competition Law for judgment is only suitable for the court to solve the derailment of law and practice as a buffer and emergency mechanism, not a long-term plan. First, the application of general provisions, due to the openness of its own provisions, is equivalent to granting judges discretion, which is prone to the problem of expanding the interpretation of the law. The provisions of principle themselves are vague, and there are no clear guidelines for the elements of behavior, infringement, and scope of object protection in judicial practice. Judges need to make a comprehensive judgment on whether they can be applied according to the facts identified in a case, which will vary from judge to judge, and the scope of data information protection is difficult to determine. Second, it can only be applied when there is market competition between the owner and the user of commercial data, and it cannot be applied when there is improper use of commercial data but no competition. Third, the original intention of the anti-unfair competition law system is not to protect commercial data but to ensure the healthy development of China's market economy and maintain market order. It does not provide a definition of the ownership of commercial data and ignores the needs of business entities for commercial data in terms of private interests.

3. A New Path for Legal Protection of Commercial Data

3.1. Establish the Principles of Legal Protection of Commercial Data

The legal protection of commercial data should first clarify the principles of its protection, including the principle of property incentive, the principle of equity, and the principle of market circulation. First, property incentive is the legal protection of commercial data, which should be the meaning, giving full play to the incentive function of the property rights system. During the initial allocation of property rights, the supply of high-quality data elements should be strengthened.^[4] By allocating business data to business entities with high ability to exploit its economic value, we need to achieve the best allocation and full utilization of business data. Second, the legal protection system for commercial data requires that enterprises shall not infringe upon the personal rights and interests of users when collecting, using, and processing data and make proper and reasonable use of commercial data. The principle of equity of interests requires that while enterprises obtain the exclusive right of protection of commercial data, under certain conditions, they should not deprive other social subjects of reasonable and necessary access to commercial data and encourage the open sharing of commercial data. Third, commercial data can exert its social and economic value through

market circulation, and the opening and sharing of commercial data can bring more welfare, not only conducive to enterprises to obtain the expected economic benefits but also conducive to improving social public welfare.

3.2. Building a Specialized Legislative System for Commercial Data Protection

When the current legal system is insufficient to respond to people's demands for new rights, it is necessary to create new laws or new rights to protect the products of the new era. The object of intellectual property is an open system that can be expanded with the needs of practice. Commercial data can be used as the object of new intellectual property, and a special legal system for the protection of commercial data can be designed. The system of specialized legislation for commercial data protection should include five parts: the subject of the right, the scope of the object, the content of the protection, the limitation of abuse, and the remedy for infringement.

First, the subject of rights. The subject of commercial data rights refers to the subject who enjoys the right of control over commercial data according to law. The formation of commercial data includes multiple steps such as preliminary acquisition, arrangement, reorganization, and processing. The collector, controller, and processor of commercial data have a cross-relationship and may be dispersed in different enterprises or from the same business entity. Commercial data controllers are generally enterprises. Enterprises, through user authorization or cooperation with other enterprises, obtain a large amount of data; the value of the data itself is not large. After the use of technical means by the enterprise, screening, processing, optimization, and upgrading can be used in business activities, and commercial data is generated. The subject of commercial data rights is subdivided into the original subject and the successor subject. After the completion of commercial data creation, the direct controller is the original subject of commercial data rights, and the successor subject is the one who obtains the commercial data through the transfer contract and other ways.

Second, the scope of the object. The object of business data right is business data. Commercial data needs to have legitimacy, value, and information. First of all, the requirement for the protection of commercial data is to have legitimacy. Commercial data that divulges state secrets, violates public order and good customs, and seriously damages the legitimate rights and interests of others cannot be protected due to its lack of legitimacy. Moreover, the collection and acquisition of commercial data are required to be legal, and the commercial data obtained by illegal means such as theft are not protected here. Secondly, commercial data should be valuable, which can bring market competitive advantages or realistic economic benefits to commercial entities.^[5] Protection of commercial data can promote the circulation and sharing of data so that commercial entities do not need to worry about the problem of damaging their legitimate rights and interests because of the sharing of commercial data. Finally, commercial data is data related to business activities.

Third, protect the content. The content of commercial data rights includes the right of use, the right of storage, the right of reproduction, the right of profit, the right of disposition, and so on. (1) The right to use means that the right holder has the right to use the commercial data, including analysis, upgrade, reconstruction, collection, arrangement, deletion, etc. (2) The right to storage means that commercial entities can use certain media to store commercial data, such as the use of computers, CDs, and other commercial data storage. Without the permission of the right holder, no person or unit can store commercial data without authorization; otherwise, the right holder has the right to ask the unauthorized depositor to delete the commercial data or confiscate the storage carrier. (3) The commercial entity may make copies of the commercial data, such as printing, video recording, and other means to control the reappearance of the commercial data. (4) The right holder shall have the right to obtain the economic value of the commercial data itself and its added value. Profits can be obtained by directly utilizing the value of the commercial data itself, and profits can

also be obtained by transferring or licensing the commercial data to other entities. (5) The right of disposition means that the commercial entity can process and control the commercial data according to its own will within the scope permitted by law. Specifically, commercial entities have the right to erase commercial data, license others to use commercial data, and transfer commercial data.

Fourth, restrictions on abuse. Compulsory licensing and public order reservations are restrictions on commercial data rights. A compulsory license in the field of commercial data refers to the approval of the competent state authority to allow other subjects to use the commercial data without the consent of the right holder but needing to pay related fees.^[6] A subject granted a compulsory license shall not license the commercial data to another subject again; otherwise, infringement will be constituted. The owner of commercial data rights should abide by the public order and good customs when using commercial data and should identify the moral standard of public order and good customs according to the moral concept of the general public.

Fifth, tort relief. The tort relief of commercial data rights is composed of three parts: the elements of the tort, the principle of liability, and the responsibility to bear. First of all, commercial data infringement is manifested as unauthorized implementation of commercial data without the consent or authorization of the right holder. The components of commercial data infringement are (1) infringement of legitimate commercial data. (2) the infringement of commercial data. (3) The infringement is for profit. Secondly, presumption of fault liability is more suitable for commercial data infringement liability. The reason is that the liability of presumption of fault is matched by the inverted burden of proof rule, and the doer needs to prove that he is not at fault in order to be exempted from liability. After the commercial data is infringed, it is difficult for the right holder to enter the other party's system to obtain evidence. For the perpetrator, no-fault liability is too strict, which is not the purpose of legal protection. Finally, the commercial data tort liability is roughly the same as the tort liability under the Civil Code, but it excludes restitution and return of property on the ground that the commercial data is immaterial, and these two liability methods are not applicable to intangible property. Moreover, the commercial data needs to be presented by the carrier and is easy to copy, requiring the actor to bear the responsibility of returning the property and restoring the original state, and proving that it has borne the responsibility is extremely difficult and lacks operability.

4. Conclusion

The establishment of a specialized legislative protection system for intellectual property rights of business data has a long way to go and requires the joint efforts of all parties. This paper merely touches upon the construction of the specialized system, and there are still many aspects that require in-depth studies. It is expected that scholars will conduct in-depth research to contribute to the establishment of a complete legal protection system for business data in our country.

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