

ECONOMIC ANALYSIS UNDER THE ANTI-UNFAIR COMPETITION LAW IN CHINA: *TENCENT V. XINGHUI*



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I. INTRODUCTION AND CASE BACKGROUND

On December 28, 2018, the Beijing Intellectual Property Court issued the ruling in *Tencent v. Xinghui* and overturned the ruling of the Chaoyang District People's Court of Beijing (hereinafter "Chaoyang Court"), the court of first instance.² This litigation was about whether it's legitimate for browsers to block advertisements on video websites. The ruling of the Beijing Intellectual Property Court provides clear guidance to evaluate this type of conduct pursuant to Article 2 of the Anti-Unfair Competition Law (2017).³

Shenzhen Tencent Computer System Co., Ltd. (hereinafter "Tencent") develops and operates the Tencent Video website (<https://v.qq.com>) to provide online video services. Tencent acquires the copyrights of movies and television works and provides the membership broadcasting service with the business mode of "free video + advertisement."

Beijing World Xinghui Technology Co. Ltd. (hereinafter "Xinghui") is a wholly owned subsidiary of 360 Technology Co., Ltd. (hereinafter "360 Technology"), established in October 12, 2009. The Xinghui's business includes browser service, advertisement, technical consultation, etc. Xinghui develops a browser software called "TheWorld." When using the TheWorld browser, the users can choose to block advertisements.

In 2017, Tencent sued Xinghui at the Chaoyang Court for unfair competition. Tencent claimed that Xinghui's TheWorld browser blocked the advertisement on the Tencent Video website, which violated the principle of good faith and business ethics and hampered the legal interests of Tencent. According to Tencent, the TheWorld Browser developed by Xinghui blocks the advertisements at the movie title sequence and the pause on Tencent's video websites and constituted unfair competition. Therefore, Tencent could not derive the corresponding advertisement revenue and was subjected to economic loss. Besides, Xinghui's misconduct improved its users' experience and increased its own business value, which violated the principle of good faith and business ethics. Tencent demanded a compensation of RMB 4.8 million, plus the lawyer's fees and the notary fees.⁴

Xinghui defended that it did not compete with Tencent directly, and the blocking of advertisements on the browser does not infringe on the interests of the website operators as the users are not obliged to watch the

² Second-Instance Judgment of *Tencent v. Xinghui*, Beijing Intellectual Property Court, December 28, 2018, available at <http://n.iphouse.cn/cases/detail/740492.html?keyword=腾讯公司%20世界星辉公司>.

³ "Anti-Unfair Competition Law of the People's Republic of China," Standing Committee of the National People's Congress of the People's Republic of China, amended on November 4, 2017, effective as of January 1, 2018, available at http://www.npc.gov.cn/hpcc/xinwen/2017-11/04/content_2031432.htm.

⁴ First-Instance Judgment of *Tencent v. Xinghui*, Chaoyang District People's Court of Beijing, January 26, 2018, available at <http://n.iphouse.cn/cases/detail/617971.html?keyword=腾讯公司%20世界星辉公司>.

advertisements. Xinghui also questioned Tencent's business model of "free video plus advertisement," and thought it should not belong to an area of interest under the protection of the laws. Xinghui also indicated that ad block does not necessarily lead to an economic loss for Tencent's video website; and that even if it does, it should be the natural result of normal competition as browser users are free to choose whether or not to block the advertisement.

The Chaoyang Court issued the first-instance ruling on January 26, 2018 and rejected all the claims by Tencent. The Chaoyang Court concluded that the ad block did not constitute unfair competition and that there was no special damage to or fundamental impact on Tencent's business. According to the Chaoyang Court, it was a common practice in the industry for browsers to provide the ad block function, and the ad block conduct would not have fundamental impact on Tencent as the advertisement revenue was not the only source of Tencent's revenues. Regarding public interests, the Chaoyang Court concluded that Internet users demand the ad blocking function, and the ad blocking function may promote technology innovations and maximize the users' welfare. Therefore, the Chaoyang Court ruled that Xinghui's conduct of developing and operating the TheWorld browser did not constitute unfair competition and rejected all the claims by Tencent.

Tencent disagreed with the ruling, and appealed to the Beijing Intellectual Property Court, claiming that, besides the factual mistakes in the first-instance ruling, the alleged conduct did hamper the legal interest of Tencent as the advertisement is still the major revenue source of its video websites. Tencent also submitted an economic report to illustrate the negative effect of ad blocking software on Tencent and consumers.⁵ The economic report provided a quantitative analysis into the video company's welfare loss and impact on consumer welfare and further concluded that the ad blocking function reduced the welfare of all the parties involved in the long run.

Xinghui defended that the ad blocking technology might urge video websites to innovate in advertisement technologies, which increase the total social welfare. Besides, the ad blocking function enables users to freely choose their desired content, which is legitimate, without significant damage to the video websites.

The Beijing Intellectual Property Court issued the second-instance ruling on December 28, 2018 and overturned the first-instance ruling.⁶ Compared to the first-instance ruling, the Beijing Intellectual Property Court concluded that the alleged conduct not only violated business ethics, but also obviously hampered social welfare. The Beijing Intellectual Property Court referred to Article 16 of the *Interim Measures on Administration of Internet Advertisement* issued by the State Administration for Industry and Commerce (SAIC),⁷ which stipulates that "Internet advertising activities should not provide or use features, software, etc. to block, filter, cover, or fast forward the advertisement of properly operated advertising." Xinghui's conduct of blocking Tencent's video advertising presented strong evidence sufficient to prove that such alleged conduct violated business ethics. As far as social welfare is concerned, Beijing Intellectual Property Court disagreed with the first-instance ruling's analysis of the consumers' welfare only, but further investigated the companies' interests as well. The Beijing Intellectual Property Court concluded that in the short run, the video websites may change their business model from "free video plus advertising" to a charging mode as they cannot receive advertisement revenue, which reduced the users' options from paying the membership fee or watching advertisement to paying the membership fee only. In the long run, the video websites may not survive, which will eventually hamper consumers' interest. The ad blocking function may not be favorable to even the advertisers or the browser operators in the long run as it will not increase their benefits, but would increase the cost. The ad blocking function has damages to the total social welfare.

Therefore, Beijing Intellectual Property Court revoked the first-instance ruling and determined a compensation of RMB 1.89 million to Tencent.

⁵ The report was authored by Prof Guofu Tan & Dr. Yejia Xu from the University of Southern California.

⁶ Second-Instance Judgment of *Tencent v. Xinghui*, Beijing Intellectual Property Court, December 28, 2018, available at <http://n.iphouse.cn/cases/detail/740492.html?keyword=腾讯公司%20世界星辉公司>.

⁷ "Interim Measures on Administration of Internet Advertisement," State Administration for Industry and Commerce, promulgated on July 4, 2016, effective as of September 1, 2016, available at http://www.gov.cn/gongbao/content/2016/content_5120707.htm.

II. CASE ANALYSIS

Analysis under the Anti-Unfair Competition Law (“AUCL”) is different from that under the Anti-Monopoly Law (“AML”). Per the AML, parties first need to define the relevant market, analyze if market dominance is present, then argue if the alleged conduct causes any anti-competitive effect to the extent of constituting an abuse, or further assess if legitimate pro-competitive effects would outweigh anti-competitive effects.⁸ AUCL, however, does not require the definition of relevant market, nor a market dominance in the associated relevant market. It puts more weight on the competition relationship and competitors’ interests. The principle of the AUCL is fairness and business ethics. Any evidence, either factual evidence or economic reasoning that could demonstrate the violation of this principle would be the focus of the litigation.

In this case, fair competition means business operators should respect others’ business choice and should not interrupt other operators’ operation without legitimate reason of public interest.⁹ Public interest could be interpreted as whether social welfare is enhanced or harmed, which is the focus of this case. The main difference between the decisions of the court of the first instance and the appellate court is the scope of social welfare. According to the court of first instance, consumer welfare is equal to social welfare. Therefore, as long as Xinghui’s ad blocking conduct is to meet certain consumers’ interests, the court of first instance found that it did not constitute unfair competition. The appellate court, however, found this decision flawed as social welfare should include both consumer welfare and companies’ profits. To the appellate court, there might be some consumers who dislike advertising while watching video. Considering only the welfare of those consumers would be short-sighted as such consumer welfare is merely “current welfare.” In the long run, the negative impact of the alleged conduct might be two-fold.

First, the business model of online video websites might completely change, which will affect consumer welfare. Freemium is a popular business model for most online video websites. It leaves the consumer options to choose from two different menus: (1) free video plus advertising; or (2) paid membership without advertising. If certain consumers dislike advertising, they can choose Option 2 to pay a certain amount of membership fees per month or per year to get rid of advertising while watching videos. If they choose Option 1, they have agreed to watch certain advertising for the exchange of free video. Such a mechanism design clearly separates the consumers’ type according to their tolerance for advertising and willingness to pay. Meanwhile, online video companies will get revenue from advertisers (from Option 1) and consumers who pay membership fees (from Option 2). If advertising were blocked, advertisers’ ads will not reach their targeted audience, and advertisers will no longer pay the online video companies. Losing ad revenue from Option 1, online video companies will switch from two options to Option 2 only, i.e. paid membership. Such a change of business model will hurt Group 1 consumers who initially have chosen Option 1, i.e. free video plus advertising, as they don’t have any choice but have to pay the membership fees to watch videos which initially could have been free of charge.

Second, blocking advertising also directly harms Group 2 consumers who have chosen Option 2, i.e. paid membership, and online video companies, which eventually harms consumer welfare. Group 2 consumers have a lower tolerance of advertising, but a higher willingness to pay. Their membership fees are the exchange of the valued service of watching complete videos without interruption by spontaneous advertising. If Group 1 consumers can also watch complete video without advertising for free, Group 2 consumers will feel that they have overpaid. They will stop paying membership fees and switch to Option 1. As a consequence, online video companies will lose membership revenue. As explained above, ad blocking also makes online video companies lose advertising revenue. Losing both advertising and membership revenues makes it difficult for the online video companies to cover the cost of operating the online video websites. Eventually those companies will get out of business and consumers will worse off.

As a result, the appellate court found that the ad block function will effectively harm social welfare by harming both consumers and online video companies’ interests and will not necessarily improve the advertisers’ and the web browsers’ interests.

⁸ A representative example is the *Qihoo 360 v. Tencent* case ruled by the Supreme People’s Court. For more discussion on how antitrust cases have been handled at the Chinese court, see David S Evans & Vanessa Yanhua Zhang, “Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court,” CPI Asia Column, Oct 21, 2014, available at <https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court/>.

⁹ Shi Bisheng (Beijing High People’s Court), “Principle of No Interfere If Not Necessary for Public Interest to be Followed in Internet Competition,” ChinaCourt.org, June 12, 2014, available at <https://www.chinacourt.org/article/detail/2014/06/id/1314247.shtml>.

III. ECONOMIC ANALYSIS ON THE WELFARE EFFECTS OF THE AD BLOCKING FEATURE

Tencent v. Xinghui is one representative case in which economic analysis plays an important role in AUCL cases. Given that economic analysis has been widely used in antitrust cases under the AML, we haven't seen many anti-unfair competition cases which have used economic reports as admissible evidence to support the arguments. In this case, the appellate court appeared to have fully accepted the plaintiff's economic welfare analysis which obviously identifies ad blocking's damages to the plaintiff and consumers. As the decision by the appellate court does not disclose detailed information of the reasoning in the economic report, we will use the standard research approach to make objective assessment of the conduct at issue.

To explore why the final decision should favor the Tencent rather than Xinghui, we will analyze the total social welfare effects of the ad blocking feature on the online video market. According to the economic decision rule, if the total benefits measured by the social welfare outweigh the total costs resulted from the ad blocking feature, we should uphold the position of Xinghui. Otherwise, Tencent's position should be upheld.

As a starting point, let's assume, if the ad blocking feature is approved by the court, other browsers will follow Xinghui in providing the ad blocking feature through their browser products, given that the development costs for such a feature in a browser is not high. The follow-up question is what will happen if all the browsers start to provide the ad blocking feature through their options in the browser setting. The welfare effects will be assessed from the following aspects:

A. The Welfare Effects on the Online Video Companies

As we all know, the online video industry is an industry in which most players haven't made any profit yet. For example, iQiyi, one of the top two online video suppliers in China, had a loss of 2.58 billion RMB in 2015. Its loss reached 3.07 billion RMB in 2016, and 3.74 billion RMB in 2017, although it has generated around 0.99 billion, 3.76 billion and 6.54 billion RMB of paid revenue from its VIP users for 2015-2017 respectively.¹⁰ According to the statistics in *the Report on China's Business Situation in Online Video* provided by iResearch, advertising revenue and membership fee revenue have become the two major revenue sources for the industry. Although the share of advertising revenue is decreasing since 2014, it still accounts for 49.7 percent of total revenues in 2017. And the share of membership fee revenue is constantly increasing from 4.4 percent in 2014 to 28.2 percent in 2017.¹¹

Advertising is the fundamental source of revenue generation. Once all the users found out that they don't have to pay for the VIP membership to shield themselves from the advertising¹² because the ad blocking browser can do the job, the membership fee revenue would be greatly reduced. The demand for VIP membership depends on the consumers' preference towards the "No Advertising" feature and other features, such as "Access to Some Unique Contents," "High Definition" etc. To carry out sound economic analysis, when the historical VIP membership purchasing data is available for demand estimation, we could try to obtain a reliable estimate for the demand elasticity for the "No-Advertising" feature. According to the estimated demand elasticity, economists could calculate the estimated loss from membership fee revenue due to the ad blocking feature.

On the other hand, with the widespread feature of ad blocking in the browser, the advertising arrival rate decreases, which measures the ratio of audience that are exposed to advertising over the total audience on the platform. It implies that the value added to the advertising is largely deteriorated. There are two potential changes involved in this effect: (1) assuming that the price of an ad is unchanged, as the value of ad declines, the advertisers' willingness to advertise will decrease; only those advertisers who have higher profitability from each targeted consumer would like to advertise, such as luxury goods and consumption. (2) If advertisers successfully negotiate with online video platforms for a lower price, it may not reduce the total number of ads placed on the platform but overall the total advertising revenue is also undermined given the lower advertising price. The extent to which the advertising revenue decreases could be predicted by the percentage of audience choosing the ad blocking setting while watching video.

¹⁰ Registration statement of iQiyi, February 27, 2018, available at http://ir.iqiyi.com/phoenix.zhtml?c=254698&p=irol-sec&secCat01.2_rs=21&secCat01.2_rc=20.

¹¹ iResearch, "The Report of China's Business Situation in Online Video," May 2018, available at <http://www.iresearch.com.cn/Detail/report?id=3216&isfree=0>.

¹² Per iResearch report (2015) "The report of the user-paid market for China's online video industry," "Free from Advertising" is ranked as the most important factor and feature for the users to become VIP members. iResearch, "The report of the user-paid market for China's online video industry," February 2016, available at <http://wreport.iresearch.cn/uploadfiles/reports/635932899870684807.pdf>.

Therefore, both effects could lead to dim prospects for online video market's profitability. As we all know, the current market investment depends on the future profitability and cash flow of the online video industry. If the profitability is undermined due to the ad blocking feature, the investors of online video companies would have concerns given that they are not yet profitable. China's entire online video industry would be in jeopardy.

B. The Welfare Effects on the Consumer Side

Although someone may argue that blocking advertising renders an instant benefit to consumers, as advertising in most of cases is time-consuming and disturbing, this benefit is a second-order effect compared to the risk of the entire online video market diminishing. Without the healthy development of the online video market, no consumer welfare will be realized. Therefore, the consumer welfare effects can be distinguished as two parts: One is the short-run benefits from no advertising with ad blocking, and the other is the long-run losses from the diminishing online video services if the business model is no longer sustainable with the prevalence of ad blocking.

The short-run benefits could be projected with the time incurred by each viewer during their video watching, i.e. the accumulated time spent on ads multiplied by the average opportunity costs of time (say, the average wage rate), which is minimal comparing to the substantial long-run losses. Before quantifying the long-run losses suffered by the consumers, it should be noted that in the *status quo*, a large portion of consumer surplus hasn't been extracted by the online video providers given that only a small number of users are VIP users. The only costs those free users paid is the time spent on the ads. As long as those users are still in use, it indicates that their willingness to pay is higher than the costs spent on the ads. Otherwise, they opt to exit. Furthermore, even for the VIP users' surplus, it hasn't been fully realized by the membership fee revenue because the VIP membership fee is set very low¹³ in order to conform to Chinese consumption habits. Therefore, given the enormous number of users in the online video market,¹⁴ the overall underlying value from online videos is huge.

Although the exact magnitude of long-run losses suffering from the diminish of online video market is still an open question, which requires further detailed information about the consumers' willingness to pay, it's obvious to see that the short-run benefits is smaller than the long-run losses since the benefits from blocking advertising can be regarded as the costs of tolerating advertising. These two values are simply the two sides of one coin. The fact that these free users stay in the market, indicates that benefits from accessing to free online videos is larger than the costs of tolerating the disturbance of advertising. So do the VIP users.

C. The Welfare Effects on the Advertisers and the Browser Company

The online video platform with high volume of audience provides a perfect arena for advertising. The ad blocking feature makes advertisers fail to reach their targeted audience and their advertising expenditure will be wasted. It may also result in additional search costs of advertisers for other similar platforms. Therefore, the welfare effects on the advertisers are negative due to the ad blocking feature.

The welfare effects on the browser company might be positive in the short-run but negative in the long-run. In the short-run, the ad blocking feature lets Xinghui enjoy a certain degree of advantage to attract more users. In the long-run, however, this advantage will diminish with the imitation from other browser competitors given the competition status of the browser market. Meanwhile, if the online video companies run out of business due to the ad blocking feature as we explained above, the browser company will lose their content and users too. Therefore, the browser company Xinghui will be worse off in the long run.

To summarize, by analyzing the welfare effects of the ad blocking feature on the different players in the markets, i.e. the consumers, the online video company, the advertisers and the browser company, we can draw a conclusion that all players' welfare would be harmed, i.e. social welfare will be harmed. The total benefits are far less than the potential losses, therefore, the ad blocking feature should be banned for the browser.

¹³ Most of the online video platforms charge VIP users for no more than 25 RMB per month.

The VIP membership fees are available at <http://vip.youku.com/vips/vipPackage.html?spm=a2h03.8164468.2069755.30> for Youku, <https://film.qq.com/film/p/topic/2019CNY/index.html?ptag=v.focus> for Tencent, and https://vip.iqiyi.com/pcw_vip_privilege.html for iQiyi.

¹⁴ According to the estimates by iResearch, the total number of online video users in 2017 reaches 0.58 billion, which accounts for more than 40 percent of China's population. (0.58/1.39=41.7%). For the total number of online video users, please see page 7 at iResearch Report, "The Report of China's Business Situation in Online Video," May 2018, available at <http://www.iresearch.com.cn/Detail/report?id=3216&isfree=0>. For the total population, please see the National Bureau of Statistics' database <http://data.stats.gov.cn/easyquery.htm?cn=C01>.

IV. INTERNATIONAL COMPARISON

The plaintiff litigated this case under the 2017 AUCL only considered in the context of business ethics under Article 2 of the AUCL.¹⁵ The Beijing Intellectual Property Court (the appellate court) referred to Article 16 of the *Interim Measures on Administration of Internet Advertisement* issued by the State Administration for Industry and Commerce (“SAIC”) as being violated by the defendant, and deemed this action *per se* as adequate enough to constitute a violation of business ethics under Article 2 of the AUCL. The appellate court further added that regardless of the SAIC interim measure, “if a legal business operation can be interfered at will by others, the business entity then cannot decide how to properly operate. And if such an operation cannot be legally protected when it is facing interference or sabotage, the business entity can no longer cast normal expectations over its operations. This will lead to the failing of a legal and orderly market competition.”¹⁶ The appellate court further lamented that this simple argument should be fairly obvious, and in no more need of further reasoning.

Regrettably, it is not so obvious to the authors of this article. But the so-called simple argument places the debate over the ad blocking issue entirely within the realm of a competition matter. And for the purpose of sorting out a competition matter, the appellate court further accepted the defendant’s argument of applying an economic welfare analysis as a necessary basis, albeit by no means implying it was sufficient, for testing if ad blocking constitutes a violation of business ethics. The court overturned the ruling by the court of first instance on this case, partly by pointing out that the previous simple social welfare analysis conducted by the court of first instance has failed to incorporate the provider’s welfare, aka the plaintiff’s welfare.

It might be of interest to investigate the past legal treatment of ad blocking overseas. Outside of China, the history of ad blocking can be traced back decades ago, many years before the Internet-based video, or even the Internet itself for that matter, came into being. Long before the Internet became a viable platform for streaming video, ad blocking and its associated legal battle had already begun in the multichannel television industry. At that time there was a whole set of technologies to support what was then called the commercial-skipping apparatus. For example, the ad blocking function was implemented on a digital video recorder (“DVR”) that allows the viewer to essentially fast-forward in a non-intrusive manner to skip ad commercials, or simply avoid recording the program during time of advertising.

Sony Corp. of America v. Universal City Studios Inc. was the first legal battle to consider the argument against commercial-skipping in the analog age.¹⁷ The case went all the way to the U.S. Supreme Court, which eventually rejected the argument that would hold Sony contributorily liable for a time-shifting function implemented in a video cassette recorder that was only secondary to its legitimate, non-infringing general purpose. The Court conceded that viewers may choose to fast forward through commercials during playback, and that making such a choice was not unlawful in that it did not alter or violate the copyright of the program. In other words, viewers are entitled to alter content and the technology merely automated something that viewers were already doing.

In the digital age, the battle over commercial-skipping continued. Two DVR-enabled devices manufactured respectively by TiVo and ReplayTV in the late 1990s were at the center of the controversy. Ultimately *Paramount Pictures Corp. v. ReplayTV, Inc.* was settled out of court with ReplayTV agreeing to abandon its commercial-skipping feature.¹⁸ TiVo escaped formal litigation by offering to work with advertisers to study the ways in which its viewers could utilize its commercial-skipping feature. The significance of both cases lies in upholding the fundamental copyright infringement argument against truncated duplication, a legal principle that is first manifested in *WGN Continental Broadcasting Co. v. United Video, Inc.*¹⁹ The ruling in that case states:

¹⁵ “Anti-Unfair Competition Law of the People’s Republic of China,” Standing Committee of the National People’s Congress of the People’s Republic of China, amended on November 4, 2017, effective as of January 1, 2018, available at http://www.npc.gov.cn/npc/xinwen/2017-11/04/content_2031432.htm.

¹⁶ Second-Instance Judgment of *Tencent v. Xinghui*, Beijing Intellectual Property Court, December 28, 2018, available at: <http://n.iphouse.cn/cases/detail/740492.html?keyword=腾讯公司%20世界星辉公司>.

¹⁷ *Sony Corp. of America v. Universal City Studios Inc.*, available at <https://supreme.justia.com/cases/federal/us/464/417/>.

¹⁸ *Paramount Pictures Corp. v. Replay TV*, 298 F. Supp. 2d 921 (C.D. Cal. 2004), available at <https://www.courtlistener.com/opinion/2564283/paramount-pictures-corp-v-replay-tv/>.

¹⁹ *WGN Continental Broadcasting v. United Video, Inc.*, 693 F2d 622, available at <https://openjurist.org/693/f2d/622/wgn-continental-broadcasting-company-v-united-video-inc>.

A copyright licensee who ‘makes an unauthorized use of the underlying work by publishing it in a truncated version’ is an infringer – any ‘unauthorized editing of the underlying work, if proven, would constitute an infringement of the copyright in that work similar to any other use of a work that exceeded the license granted by the proprietor of the copyright.’²⁰

Later, the U.S. Seventh Circuit further clarified that conclusion regarding the illegality of commercial-skipping in *In re Aimster Copyright Litigation*, where it stated, “commercial-skipping, amounted to creating an unauthorized derivative work, . . . namely a commercial-free copy that would reduce the copyright owner’s income from his original program, since ‘free’ television programs are financed by the purchase of commercials by advertisers.”²¹

As Internet-enabled video has developed rapidly in recent years, the ad blocking legal battle has expectedly attached to it as well. A recent influential litigation involves Adblock Plus, which is a browser plugin popular in Europe that enables the ad blocking function. Axel Springer filed a court order in Germany for the removal of the Adblock Plus post.²² The case went through trials in the Cologne Regional Court, then in the Regional Court of Appeals, and finally in Germany’s Federal Constitutional Court, which is the equivalent of the Supreme Court. It confirmed again with its ruling that Adblock Plus does not violate any laws in Germany.

The *Tencent v. Xinghui* case in China appears to straddle over two previous lines of legal thinking on both sides of the Atlantic. While the history of jurisprudence in the U.S. courts negate ad blocking with respect to copyrighted materials based on the intellectual property protection argument, the European court appears to have afforded more liberal and broader consumer right protection with respect to more general web content in addition to video. It is worth noting that the American precedents were established requiring no social welfare calculation, nor analysis of business ethics of any kind. As long as the producer’s welfare, that is, the copyright interest of the video platform owner, is in harm’s way, the infringement status is automatically constituted.

V. CONCLUSION

In this paper we visited the most recent unfair competition case, *Tencent v. Xinghui*. After thorough analysis of the case, we found that welfare analysis is the focus of the case to evaluate the fairness and business ethics. Given the limited information disclosed in the final decision, we propose a standard approach for welfare analysis, i.e. assessing the welfare effects on the consumers, the online video company, the advertisers, and the browser company. In this case, the total social welfare will be jeopardized by the ad blocking feature in the long run. A comparison to the U.S. and European on the legal treatment of ad blocking shows that Chinese court takes its own unique approach.

²⁰ *WGN Continental Broadcasting v. United Video, Inc.*, 693 F2d 622, available at <https://openjurist.org/693/f2d/622/wgn-continental-broadcasting-company-v-united-video-inc>, paragraph 8.

²¹ United States Court of Appeals, Seventh Circuit. *In re Aimster Copyright Litigation*. Appeal of: John Deep, Defendant. No. 02-4125. Decided: June 30, 2003, available at <https://caselaw.findlaw.com/us-7th-circuit/1484806.html>.

²² Tom Woolford, “German Supreme Court: Ad blocking is legal, Axel Springer lose final appeal,” Adblock Plus, April 19, 2018, available at <https://adblockplus.org/blog/german-supreme-court-ad-blocking-is-legal-axel-springer-lose-final-appeal>.

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