The unique Chinese legal approach to online ad blocking: Is it in the right direction?

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ABSTRACT

The legal debate around online ad blocking demonstrates a tension between user’s freedom and online content providers’ revenue-generating business model. This paper aims to analyze ad blocking from a unique perspective of the Chinese law and practice. Since ad blocking does not violate copyright law, copyright law cannot be a guardian to the ad-based business model. China takes a different approach to protect the ad-based business model under unfair competition law and bans ad blocking software directly by regulation. The Chinese courts held that providing ad blocking software is anti-competitive under a vague general principle of the Anti-Unfair Competition Law. The special policy reason behind these decisions is that the Chinese government and courts want to maintain this business model and strengthen intellectual property protection. These decisions are reinforced by the regulatory ban of ad blocking software in China. However, the Chinese approach is in the wrong direction. The Chinese courts have applied a principle of “non-interference unless in the public interest” to ad blocking cases but never analyzed the public interest seriously. This paper argues that the “public interest” in the Internet context should be the interests of Internet users. The group of Internet users is large enough to constitute the general public. The public have a compelling interest of autonomy to justify ad blocking. The right approach to solving the ad blocking problem should be flexible, easily adjustable and it should not totally fail one side. Compared to direct regulatory intervention, a flexible judicial approach is better because it could take into consideration a variety of interests and strike a balance in specific cases. And, to regulate new technologies, a soft version of guidelines could be easily adjustable than an immature regulation. The Internet itself is a creative industry developed under the process of “creative destruction”. Any legal intervention shall be careful and not impede the emerging technologies, market structure development and autonomous competition.

Keywords:
Ad blocking
Copyright
Unfair competition
Governmental intervention
Creative destruction

1. Introduction

With the development of Internet and the shifting from traditional media to digital media, the ad-based business model has become conventional for online content providers. In recent years, despite the economic slowdown, online advertising expenditures continue to grow and Internet companies flourish based on this revenue model.¹ The market size of online advertising in China during the first half of 2016 has reached...
118.71 billion RMB, increasing by about 27.3% compared to
2015.2 However, not all online advertising is effective mainly due
to ad-blockers. Ad blocking on the Internet is ordinarily carried
out by software or a browser extension. Such software or ex-
tensions installed at end users’ side can systematically block
online ads. Recent years have witnessed the proliferation of
ad blocking plug-ins. In China, in addition to Adblock Plus and
Adblock, the international famous ones, some varieties of ad
blocking software are available, such as Adsafe and Ad Assistant.3
These tools are usually developed by individuals or small start-
up companies.

The growth rate of people using ad blocking software is rapid
and irreversible. Globally, the number of ad blockers has grown
by 41% from 2014 to 2015,4 and by 30% from 2015 to 2016.5 The
Chinese are among the most enthusiastic adopters of ad block-
ing software. According to a comparative study of the United
States, Romania and China, three countries with different cul-
tural orientations, consumers in China show the least trust
towards online advertising.6 People do not trust online adver-
tising for many diverse reasons. Interruption, too many ads on
webpages, security concerns and privacy concerns are among
the main reasons behind ad blocking.7 The Chinese tend to be
very cautious and mistrust unexpected events. This adds the
fuel to blocking unsolicited ads. Unsolicited and intrusive ads
cannot earn Chinese consumers’ trust. A study by the PHD
network of the Omnicom Media Group found that at least about
10% to 12% of ads delivered to end users were being blocked.8
This estimated number is a conservative one because lots of
ad blocking activities at the end-user side cannot be identi-
fied and discerned.

New business models and new legal issues frequently arise.
Although some activities on the Internet, such as unlicensed
file sharing, are undoubtedly illegal, many others’ legality is
moot. Online ad blocking represents a typical example of such
controversial issues.

The legal debate around online ad blocking demonstrates
a tension between user’s freedom and online content provid-
ers’ revenue-generating business model. On the one hand,
the current proliferation of programming and content online
depends primarily on the ad-based business model. Advertis-
ing is of great significance to provide a stable revenue stream
for online content providers, which also plays a socially im-
portant role in the available of free content online. Ad blocking
may jeopardize the incentive to provide free and quality content
and destroy the old revenue model of advertising-supported
programming and content. On the other hand, the prolifera-
tion of digital ads is at the expense of user experience. Users’
primary purpose of installing ad blocking software is to make
Internet surfing more enjoyable.9 Consumers’ skepticism towards
advertisements is growing due to annoying and even
intrusive ads. By using ad blocking software and extensions,
users get back their freedom to travel in a clean online world.
As one reporter noted, “The Internet has suddenly become a
quieter, more civilized, less commercial place.”10 In addition,
ad blocking software helps users to speed up access to web-
sites and reduce the chance of clicking and picking up malware

Despite the rapid growth of ad-blockers, academic re-
search on this legal issue is by and large lagging behind. This
paper aims to fill the gap by providing a legal analysis of ad
blocking from a unique perspective of the Chinese law and prac-
tice. Following this introduction, Section 2 will first survey ad
blocking legal war worldwide, mainly focusing on what has hap-
pened in two noticeable countries, the U.S. and Germany, and
laying the foundation for evaluating the Chinese approach from
a comparative perspective. Section 3 will discuss whether copy-
right law can be a guardian to the ad-based business model,
focusing on the unauthorized derivate work argument and the
fair use defense. After concluding that ad blocking does not
violate copyright law, Section 4 will present the unique Chinese
approach of unfair competition and regulatory control. Then,
Section 5 will assess the Chinese approach and discuss about
the reasons behind it and problems about it. After establish-
ing that the current Chinese approach is heading in the wrong
direction, Section 6 will suggest the right direction that is not
only suitable for China, but probably also applicable to other
nations.

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2. The ad blocking legal war worldwide

2.1. U.S.

In the U.S., online content providers are yet to initiate law-
suits against ad blocking software. However, according to a
survey of some high-traffic websites, 48% of the surveyed web-
sites indicated they were “somewhat likely to test” and 36%
said they were “definitely/very likely to test” the approach of

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See Ying Wang, Shaojing Sun, ‘Assessing Beliefs, Attitudes, and
Behavioral Responses toward Online Advertising in Three Coun-

7 See PageFair, above n. 5, p. 12.

8 See Angela Doland, ‘Ad Blocking Is an (Unexpectedly) Big Issue
in China’ (4 December 2015). <http://adage.com/article/digital/ad-
blocking-unexpectedly-big-issue-china/301602/> accessed 16 January
2017.

9 According to a survey result of 4000+ Internet users, “Interrup-
tive ad formats and virus/malware concerns were the leading
reasons given for adblock usage.” See PageFair, above n. 5, p. 4, p. 12.

World 142, 142.
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