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

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A B S T R A C T

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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.

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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

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¹ See iresearch, '2016 Annual Monitoring Report on China's Online Advertising Industry' (1 April 2016). <<http://www.iresearch.com.cn/report/2566.html>> (reporting "the market size of internet advertising in China continues to grow year over year, from 77.31 billion RMB in 2012 to 110.01 billion RMB in 2013, and from 153.97 billion RMB in 2014 to 209.37 billion RMB in 2015") (in Chinese); See also eMarketer, 'In China, Advertising Spend Follows Consumers to Digital' (11 October 2016). <<https://www.emarketer.com/Article/China-Advertising-Spend-Follows-Consumers-Digital/1014584>> accessed 10 March 2017. <http://dx.doi.org/10.1016/j.clsr.2017.05.012>

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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 extensions 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 blocking software. According to a comparative study of the United States, Romania and China, three countries with different cultural orientations, consumers in China show the least trust towards online advertising.⁶ People do not trust online advertising 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 identified 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 providers' revenue-generating business model. On the one hand,

the current proliferation of programming and content online depends primarily on the ad-based business model. Advertising is of great significance to provide a stable revenue stream for online content providers, which also plays a socially important 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 proliferation 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 websites and reduce the chance of clicking and picking up malware and virus.

Despite the rapid growth of ad-blockers, academic research 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 practice. Following this introduction, [Section 2](#) will first survey ad blocking legal war worldwide, mainly focusing on what has happened 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 copyright law can be a guardian to the ad-based business model, focusing on the unauthorized derivative 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 establishing 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.

² Analysys, 'A Survey of Digital Marketing Industry in the First Half of 2016' (7 August 2016). <<http://mt.sohu.com/20160807/n463016427.shtml>> accessed 16 January 2017 (in Chinese).

³ There have been some legal disputes concerning ad blocking software in China, including the *Adsafe* mentioned here. For more information on ad blocking software in China, see [Table 1](#).

⁴ PageFair & Adobe, 'The cost of ad blocking: PageFair and Adobe 2015 Ad Blocking Report' (10 August 2015) p. 4. <<https://pagefair.com/blog/2015/ad-blocking-report/>> accessed 16 January 2017.

⁵ PageFair, 'The state of the blocked web: 2017 Global Adblock Report' (February 2017), p. 14. <<https://pagefair.com/downloads/2017/01/PageFair-2017-Adblock-Report.pdf>> accessed 13 March 2017.

⁶ See Ying Wang, Shaojing Sun, 'Assessing Beliefs, Attitudes, and Behavioral Responses toward Online Advertising in Three Countries' (2010) 19 *International Business Review* 333, 343.

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.

2. The ad blocking legal war worldwide

2.1. U.S.

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

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

¹⁰ Stephen Manes, 'Web Ads: A Cat-and-Mouse Game: Overrun by Ads? New Software Is Better at Exterminating Them' (2007) 25 *PC World* 142, 142.

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