

Plaintiff Victory in Chinese Unfair Competition Case

On April 26, 2011, Beijing Chaoyang District Court (the “Court”) ruled against Qihoo, the provider of 360 (a widely used antivirus software) and two other defendants in a case brought by Tencent, the operator of “QQ,” a popular instant-messaging tool in China. On September 26, 2010, Qihoo alleged that its “360” software detected that QQ had engaged in suspicious spying activities in relation to the private files and data of QQ users. Qihoo subsequently launched “360 Privacy Guard,” software designed to detect data that QQ had extracted from users’ computers. Tencent responded by filing a complaint with the Beijing Chaoyang District People’s Court on October 14, 2010, alleging that Qihoo had violated China’s Anti-Unfair Competition Law by fabricating and publicizing false information about QQ. Tencent requested damages of RMB 4 million (~\$616,000; €16,000) and an order for Qihoo to apologize to Tencent.

In addition to filing the complaint with the Court, Tencent also asked its users to uninstall 360, alleging that the software would disrupt certain features of QQ and undermine its information security. A Beijing lawyer filed a complaint with the State Administration of Industry and Commerce, alleging that Tencent had abused its dominant position in the instant messaging software market by forcing its users to uninstall 360 without a valid reason. The dispute between Qihoo and Tencent has received considerable attention in China, prompting the Ministry of Industry and Information Technology (“MIIT”) to propose far-reaching rules to regulate competition between Internet companies in China.¹ The regulatory response from MIIT and the Court judgment reflect the rapid evolution of Chinese law in this sector and the potential for different bodies of Chinese law and different regulatory authorities to apply to competitive conduct.

The Court found that Qihoo’s 360 Privacy Guard software showed a misleading warning – “likely to affect your privacy” – when scanning QQ’s executable files. According to the Court, the public understands privacy to apply to facts that they would be reluctant to

¹ See our previous alert memo on this case, available at:
http://www.cgsh.com/de/chinas_miit_solicits_comments_on_draft_internet_rules/

publicize, and executable files should not involve privacy. Moreover, Qihoo acknowledged in its “360 Privacy Protection White Paper” that executable files do not affect users’ privacy. 360 Privacy Guard’s misleading warning gave users a sense of insecurity, and as a result they might decide to abandon or avoid using QQ. The Court also found that Qihoo made a number of negative comments about QQ on its 360 website. These allegations were unfounded and were used to harm the competitiveness of Tencent.

The Court held that 360 Privacy Guard’s misleading warning and the negative statements about QQ on Qihoo’s 360 website were false allegations that harmed the commercial reputation of Tencent. Accordingly, Qihoo’s conduct constituted commercial disparagement. The Court ordered Qihoo and two other defendants to: (i) halt distribution of the 360 Privacy Protector; (ii) delete the false allegations against QQ from the 360 website; (iii) publicize an apology on the 360 website and the Legal Daily for 30 days; and (iv) pay Tencent RMB 400,000 (~\$61,600; €41,600) in damages.

This is one of the few recent cases involving competitive conduct in which a Chinese court has ruled in favor of the plaintiff. The Supreme People’s Court is currently soliciting comments on a draft judicial interpretation on private antitrust litigation, which should when finalized encourage litigants to pursue competition law claims in Chinese courts.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition in the “Practices” section of our website at <http://www.clearygottlieb.com>.

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