当我们说企业数据权益保护
我们在说什么

When we discuss the protection of corporate data rights, what exactly are we referring to?

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Infringement of
Data Product Rights
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（2018)浙01民终7312号

(2018) Zhe 01 Min Zhi No.7312

以内容为分类依据
Classified on the basis of content

著作权内容（视听作品、文字作品、摄影作品等）
Non-work expressions (brief microblogs, complaint information, etc.)

不构成作品的表达内容（简短的微博、投诉信息等）
Copyrighted content (audiovisual works, literary works, photographic works, etc.)

纯数据（点评赞数值、打赏数值）
Pure data (number of likes and reviews, rewards value)

以产生主体为分类依据

Classified on the basis of the producing entity

用户生成的数据（短视频、微博、评论等）

User-generated data (short videos, microblogs, comments, etc.)

平台自我积累的数据（房源数据、公交数据等）

Data self-accumulated by the platform (property listings, public transportation data, etc.)

平台服务运行过程中产生的数据（转评赞、打赏等）

Data generated during the operation of platform services (shares, reviews, likes, rewards, etc.)

基于原始数据生成的衍生数据（指数、参数等）

Derivative data generated from original data (indices, parameters, etc.)

以使用方式为分类依据
Classified based on the usage method

完全公开（任意访问、获取）
Fully public (accessible and obtainable by anyone)

半公开（允许不特定用户注册、登录后访问）
Semi-public (accessible by unspecified users after registration and login)

不公开（不向任何用户展示，或仅供付费用户使用）
Private (not displayed to any users, or solely available for paid users)

02

企业保护数据权益的必要性

The necessity for enterprises to safeguard their data rights and interests

01 平台内容数据
Platform content data

02 运营管理数据
Operational management data

03 商业数据库、数据产品
Commercial databases and data products

04 市场数据
Market data

05 用户数据
User data

06 研发运维数据
Research and development operational data

数据价值的实际体现：内容变现、流量利益、提升经营绩效、提升用户粘性、研发资源、竞争优势……

Actual realization of data value: content monetization, traffic benefits, improved business performance, increased user engagement, research and development resources, competitive advantages, etc.

削弱竞争优势

Weaken competitive advantage

流量、收益、用户规模被侵蚀

Traffic, revenue, and user base are being eroded.

经营资源被竞对窃取

Operating resources are being misappropriated by competitors.

市场声誉受损

Market reputation is damaged.

03

数据权益保护的路径

The approaches to data rights and interests protection

通过民事诉讼维护数据权益的优劣

Pros and cons of protecting data rights through civil litigation:

优势：Advantages:

诉讼程序基本受当事人自身控制；
The litigation process is basically controlled by the parties themselves;

可最大程度发挥自身诉讼能力；
It can maximize the use of one's own litigation capabilities;

在先判例可成为后续维权参照；
Previous precedents can serve as a reference for subsequent rights protection;

可争取较高经济赔偿。
It can strive for higher economic compensation.

劣势：Disadvantages:

诉讼时间迁延；
Prolonged litigation time;

自行负担举证义务，举证难度大；
The obligation to provide evidence is borne by the parties themselves, making it difficult to present evidence;

可能无法实际执行到高额赔偿。
It may not be possible to actually enforce high compensation.

通过行政执法维护数据权益的优劣

Pros and cons of protecting data rights through administrative law enforcement:

优势：Advantages:

程序启动成本相对较低；

The cost of initiating the procedure is relatively low;

查处打击速度快。

Fast investigation and crackdown speed.

劣势：Disadvantages:

法律责任较轻，威慑程度低；

Legal liability is relatively light, and the deterrent effect is low;

行政调查取证手段和能力相对刑事较弱；

The means and capabilities of administrative investigation and evidence collection are relatively weaker than those of criminal investigations;

经济损失难以弥补。

.It is difficult to make up for economic losses.

通过刑事途径维护数据权益的优劣
Pros and cons of protecting data rights through criminal means:

优势：Advantages:

刑事侦查的调查取证能力极强；

Strong investigation and evidence collection capabilities in criminal investigations;

一旦提起公诉，定罪概率高；

Once a public prosecution is initiated, the probability of conviction is high;

法律责任重大，威慑力强；

Significant legal liability and strong deterrent effect;

刑事追责后可另行追究民事责任。

Civil liability can be pursued separately after criminal responsibility.

劣势：Disadvantages:

启动程序难度大，需负担前期举证义务；

It is difficult to initiate the procedure and requires the burden of providing evidence in the early stage;

侦查、起诉等过程由公权力实施，不确定性高；

The processes of investigation and prosecution are carried out by public authorities, with high uncertainty;

定罪量刑标准高；

High standards for conviction and sentencing;

经济损失不易弥补。

Economic losses are not easy to compensate.

在民事路径上，主要依靠《著作权法》和《反不正当竞争法》维护数据民事权益。

In the civil rights protection pathway, the main reliance is on the "Copyright Law" and the "Anti-Unfair Competition Law" to safeguard data-related civil rights.

维权路径

著作权法
Copyright law

第十条第1-17项
Article 10, Items 1-17

复制权、信网权......
Reproduction rights, information network rights, etc.

第51条
Article 51

未经许可，非法删除权利管理信息（如去水印）
Illegally removing rights management information (such as removing watermarks) without permission

在民事路径上，主要依靠《著作权法》和《反不正当竞争法》维护数据民事权益。

In the civil rights protection pathway, the main reliance is on the "Copyright Law" and the "Anti-Unfair Competition Law" to safeguard data-related civil rights.

维权路径

反不正当竞争法
Anti-unfair competition law

第2条
Article 2

应当遵循自愿、平等、公平、诚信的原则，遵守法律和商业道德，不得扰乱市场竞争秩序，损害其他经营者或者消费者的合法权益

The principle of voluntariness, equality, fairness, and integrity should be followed, and laws and business ethics should be observed. Market competition order should not be disrupted, and the legitimate rights and interests of other operators or consumers should not be harmed.

第12条第2款1-4项
Article 12, Paragraph 2, Items 1-4

不得利用技术手段，通过影响用户选择或者其他方式，实施妨碍、破坏其他经营者合法提供的网络产品或者服务正常运行的行为

No one shall use technical means to hinder or disrupt the normal operation of network products or services legally provided by other operators through influencing user choices or other methods.

第9条
Article 9

以盗窃、贿赂、欺诈、胁迫、电子侵入或者其他不正当手段获取权利人的商业秘密

Obtaining the trade secrets of right holders through theft, bribery, fraud, coercion, electronic intrusion, or other unfair means.

数据抓取的规模大、速度快，包含著作权和非著作权客体

1. Data scraping has a large scale and fast speed, involving both copyright and non-copyright objects.

数据抓取可能损害消费者权益

4. Data scraping may harm consumer rights and interests.

数据抓取可能采用了不正当的技术手段

2. Data scraping may use unfair technical means.

数据抓取对竞争利益可能产生巨大损害

3. Data scraping may cause significant damage to competitive interests.

1
2
4
3
5

著作权法规制数据抓取行为的局限

数据抓取对行业竞争秩序和社会公共利益产生负面影响

5. Data scraping may have a negative impact on industry competition order and social public interests.

刑事司法实践中，针对数据抓取行为，主要通过以下三个罪名予以制裁：

In criminal justice practice, data scraping behavior is mainly sanctioned through the following three crimes

侵犯公民个人信息罪
Crime of infringing upon citizens' personal information

【法律规定】

《刑法》第253条之1：违反国家有关规定，向他人出售或者提供公民个人信息，情节严重的，处三年以下有期徒刑或者拘役，并处或者单处罚金；情节特别严重的，处三年以上七年以下有期徒刑，并处罚金。**窃取或者以其他方法非法获取公民个人信息的**，依照第一款的规定处罚。

Article 217 of the Criminal Law: If someone, for the purpose of making profits, commits one of the following acts infringing upon copyright or copyright-related rights, and the illegal gains are relatively large or there are other serious circumstances, they shall be sentenced to fixed-term imprisonment of not more than three years and shall also be fined; if the illegal gains are huge or there are other particularly serious circumstances, they shall be sentenced to fixed-term imprisonment of not less than three years but not more than ten years and shall also be fined: (1) without the permission of the copyright owner, reproducing, distributing, or disseminating their literary works, music, fine arts, audiovisual works, computer software, and other works stipulated by laws and administrative regulations through the information network to the public…

非法获取计算机信息系统数据罪
Crime of illegally obtaining data from computer information systems

【法律规定】

《刑法》第285条：违反国家规定，**侵入前款规定以外的计算机信息系统或者采用其他技术手段，获取该计算机信息系统中存储、处理或者传输的数据**，或者对该计算机信息系统实施非法控制，情节严重的，处三年以下有期徒刑或者拘役，并处或者单处罚金；情节特别严重的，处三年以上七年以下有期徒刑，并处罚金。

Article 285 of the Criminal Law: If someone violates state regulations and intrudes into computer information systems not covered by the provisions of the preceding paragraph, or uses other technical means to obtain the data stored, processed, or transmitted in the computer information system, or illegally controls the computer information system, and the circumstances are serious, they shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also be fined; if the circumstances are particularly serious, they shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined.

侵犯著作权罪
Crime of infringing upon copyright

【法律规定】

《刑法》第217条：以营利为目的，有下列侵犯著作权或者与著作权有关的权利的情形之一，违法所得数额较大或者有其他严重情节的，处三年以下有期徒刑，并处或者单处罚金；违法所得数额巨大或者有其他特别严重情节的，处三年以上十年以下有期徒刑，并处罚金：（一）**未经著作权人许可，复制发行、通过信息网络向公众传播**其文字作品、音乐、美术、视听作品、计算机软件及法律、行政法规规定的其他作品的……。

Article 253 of the Criminal Law: If someone sells or provides citizens' personal information to others in violation of relevant state regulations, and the circumstances are serious, they shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also be fined; if the circumstances are particularly serious, they shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined. Those who steal or illegally obtain citizens' personal information by other means shall be punished according to the provisions of the first paragraph.

相比民事、刑事而言，行政执法保护企业数据权益的案例相对较少，但杭州已经走在了前列。近期，杭州市场监督管理局对一"店铺搬家"工具运营商依照《反不正当竞争法》第12、24条进行处罚：

Compared with civil and criminal cases, there are relatively fewer administrative law enforcement cases to protect the data rights and interests of enterprises. However, Hangzhou has taken the lead in this area. Recently, the Hangzhou Administration for Market Regulation imposed a penalty on a "store relocation" tool operator in accordance with Articles 12 and 24 of the Anti-Unfair Competition Law:

杭市监处罚〔2022〕43号
Hangzhou Market Supervision Penalty [2022] No. 43

杭州码哝软件技术有限公司开发的"搬家助手"以及杭州彧祺网络科技有限公司开发的"智能管家一键上货"两款应用，在拼多多服务市场内上线，以12-699元不等的价格，向拼多多平台内经营者定向销售。**经营者可在拼多多商家后台，提交天猫、淘宝平台商品链接，直接将天猫、淘宝平台内相关店铺及其销售商品的详细数据爬取，并按拼多多平台的数据格式要求重新整合，上传至拼多多后台服务器，经确认后其拼多多店铺内即上线并开展线上销售。**该过程中没有设置天猫、淘宝平台经营者或平台内经营者授权同意的环节，实际操作中也未取得天猫、淘宝平台经营者或平台内经营者的授权同意。
Hangzhou Manuo Software Technology Co., Ltd. has developed the "Moving Assistant" application, and Hangzhou Yuqi Network Technology Co., Ltd. has developed the "Smart Butler One-Key Upload" application. Both applications are launched on the Pinduoduo market and are sold to operators on the Pinduoduo platform at varying prices ranging from 12 to 699 yuan. Operators can submit Tmall and Taobao platform product links in the Pinduoduo merchant backend, directly crawl detailed data from relevant stores and their sales products on the Tmall and Taobao platforms, and reorganize the data according to the data format requirements of the Pinduoduo platform, uploading it to the Pinduoduo backend server. During this process, there is no step to obtain authorization or consent from Tmall and Taobao platform operators or in-platform operators, and in actual operation, the authorization and consent of Tmall and Taobao platform operators or in-platform operators have not been obtained.

【处罚依据】《反不正当竞争法》第二十四条：**经营者违反本法第十二条规定妨碍、破坏其他经营者合法提供的网络产品或者服务正常运行的**，由监督检查部门责令停止违法行为，处十万元以上五十万元以下的罚款；情节严重的，处五十万元以上三百万元以下的罚款。
Article 24 of the Anti-Unfair Competition Law: If an operator violates the provisions of Article 12 of this Law by hindering or disrupting the normal operation of network products or services legally provided by other operators, the supervision and inspection department shall order the operator to stop the illegal act and impose a fine ranging from 100,000 yuan to 500,000 yuan. In serious cases, a fine ranging from 500,000 yuan to 3,000,000 yuan shall be imposed.

【处罚方式】**罚款120万元**
A fine of 1,200,000 yuan.

GEN
己任

04

行为保全在遏制侵害数据权益中的作用

The role of behavioral preservation in curbing infringements

基于公开判例，虽然行为保全在不正当竞争案件中应用为数不少，但在涉数据抓取类的案件中应用依然较为罕见。

Based on public case judgments, although behavior preservation is not uncommon in unfair competition cases, its application in data scraping cases is still relatively rare. Here are some examples:

| (2019) 京0108民初35902号 | 抖音诉刷宝APP爬取抖音短视频案 |
| (2019) Jing 0108 Minchu 35902 | Douyin sued Shuabao APP for crawling Douyin short videos. |

| (2019) 浙8601民初2435号 | 腾讯诉快忆微信公众号API爬取公众号文章案 |
| (2019) Zhe 8601 Minchu 2435 | Tencent sued Kuaiyi for crawling WeChat public account articles through WeChat public account API. |

| (2019)津0116民初2091号 | 抖音诉多闪APP违反OpenAPI协议获取微信用户信息案 |
| (2019) Jin 0116 Minchu 2091 | Douyin sued Duoshan APP for violating the OpenAPI protocol and obtaining WeChat user information. |

| (2021) 浙0110民初2914号 | 抖音诉"小葫芦"抓取抖音不公开直播数据案 |
| (2021) Zhe 0110 Minchu 2914 | Douyin sued "Xiaohulu" for scraping non-public live streaming data from Douyin. |

| (2021)京0108民初9148号 | 链家/贝壳诉"推推99"抓取、存储、传播贝壳房源数据案 |
| (2021) Jing 0108 Minchu 9148 | Lianjia/Beike sued "Tuitui99" for crawling, storing, and disseminating Beike property data. |

- 一旦下达行为保全裁定，即立即产生强制执行力，复议亦不停止执行。

Immediate compulsory execution: Once a behavior preservation ruling is issued, it immediately has compulsory execution power, and the reconsideration does not stop the execution. This means that the infringing party must immediately stop the infringing behavior, which helps protect the data rights and interests of the rights holder more quickly and efficiently.

- 行为保全程序结束后，诉讼一般仅剩损害赔偿问题未解决，不会导致案件审理因程序而有所延迟。

- No delay in case trial: After the behavior preservation procedure is completed, the lawsuit generally only has the issue of damages compensation unresolved, which will not cause delays in the case trial due to procedural issues. As a result, the overall time spent on the case is shortened, and the rights holder can resolve the dispute more quickly.

- 相比之下，先行判决虽然也可较早地形成强制执行力，但一审判决依然可以上诉，且会在客观上拖慢先行判决之后的诉讼程序。

Comparison with preliminary judgment: Although a preliminary judgment can also form compulsory execution power relatively early, the first-instance judgment can still be appealed, which will objectively slow down the litigation process after the preliminary judgment. In contrast, behavior preservation can effectively maintain data rights and interests without prolonging the litigation process.

- 如果数据权益来源或者生成存在合法性瑕疵，则可能不符合行为保全的基本要件。

  - If there are legal flaws in the source or generation of data rights, it may not meet the basic requirements for behavioral preservation.

- 数据权益目前仍属于《反不正当竞争法》第二条项下保护的"竞争性权益"。由于市场竞争本身是中性的，且必然带来损害，故即便产生较大损害，也难以证明存在"难以弥补"的情况。

  - Data rights are currently still protected as "competitive interests" under Article 2 of the Anti-Unfair Competition Law. Since market competition is inherently neutral and inevitably causes damage, it is difficult to prove the existence of "irreparable" situations even if significant damages occur.

1. 行为保全请求是否有事实基础和法律依据——胜诉可能性

1. Whether the behavior preservation request has a factual basis and legal basis - the likelihood of winning the case:

- 权利基础是否稳定
- Stability of the rights foundation
- 是否构成侵权
- Whether it constitutes infringement

2. 申请人是否存在"难以弥补的损害"

2. Whether the applicant has "irreparable damage":

对市场格局和竞争优势能否造成难以还原的影响，而不是仅考虑经济损失。

Consider whether the infringement can cause irreversible effects on market structure and competitive advantage, rather than just considering economic losses.

3.申请人、被申请人利益以及社会公共利益之间的 "利益平衡"

3. "Balance of interests" between the applicant, the respondent, and social public interests:

不仅仅考虑申请人和被申请人的利益关系，还要考虑行为保全对公共利益、消费者权益的影响。

Not only considering the interests of the applicant and the respondent but also considering the impact of behavior preservation on public interests and consumer rights.

法院会关注整体利益的失衡，重大利益的失衡。所谓整体利益和重大利益，是指对社会公共利益、社会总体福祉、全体消费者的利益，而不是任何一方或者某一群体的利益。

The court will focus on the overall interests' imbalance and the significant interests' imbalance. The so-called overall interests and significant interests refer to the public interests of society, the overall welfare of society, and the interests of all consumers, rather than the interests of any party or a particular group.

法院还会考虑，被申请行为能否被单独禁止，如果作出行为保全裁定，是否会影响被申请人其他正常业务的开展。

The court will also consider whether the respondent's behavior can be separately prohibited, and if a behavior preservation ruling is made, whether it will affect the normal business operations of the respondent.

4. 被申请人在接到行为保全申请后，是否积极停止侵权

4. Whether the respondent actively stops the infringement after receiving the behavior preservation application

目前，政策层面上大力推动数据产权保护，将对日后数据权益保护和运用产生深远影响。在诉讼案件中，在数据权利范围、数据财产价值计量标准、数据开发使用行为边界逐步明晰的前景下，通过行为保全有望更有力保护数据权益，更积极地引导竞争行为和市场秩序。

At present, the promotion of data property rights protection at the policy level will have a far-reaching impact on the protection and application of data rights and interests in the future. In litigation cases, with the gradual clarification of the scope of data rights, data property value measurement standards, and boundaries of data development and use behaviors, behavior preservation is expected to more effectively protect data rights and interests and actively guide competitive behavior and market order.

01 权利稳定性逐步加强

1. Gradually strengthening the stability of rights:

02 数据财产价值和侵权损害程度更易计量

2. Easier measurement of data property value and infringement damages:

03 行为边界逐步明晰

3. Gradual clarification of behavior boundaries:

04 当事人和司法更加积极的尝试和适用

4. More proactive attempts and applications by parties and the judiciary:

05
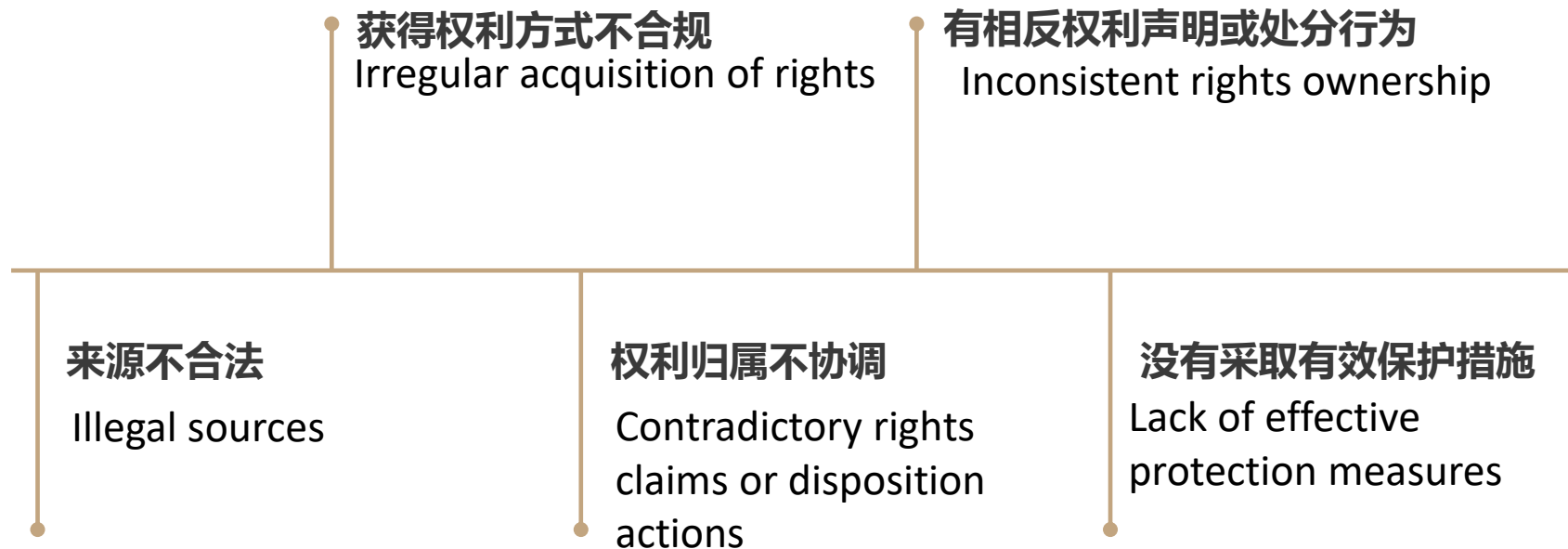
企业保护数据权益的方案

The action plan for enterprises
 to protect their data rights and interests

虽然人们普遍意识到数据权益的重要性，通过司法途径寻求数据权益保护的案件也愈发增多，但实践中，企业在保护数据权益时的瑕疵仍屡见不鲜。

Although people are generally aware of the importance of data rights and the number of cases seeking data rights protection through judicial means is increasing, in practice, defects in enterprises' protection of data rights are still common.

获得权利方式不合规
Irregular acquisition of rights

有相反权利声明或处分行为
Inconsistent rights ownership

来源不合法
Illegal sources

权利归属不协调
Contradictory rights claims or disposition actions

没有采取有效保护措施
Lack of effective protection measures

在维护数据权益过程中，我们经常发现企业的数据权益链条不完整，或有关数据权益保护的声明、条款不一致。这些问题容易导致企业数据权益存在瑕疵，影响维权效果。

In the process of maintaining data rights and interests, we often find that the data rights and interests chain of enterprises is incomplete, or that the statements and clauses related to data rights protection are inconsistent. These issues can easily lead to defects in the data rights and interests of enterprises, affecting the effectiveness of rights protection.

01
企业自身未确定较为稳定的数据权益主体
Enterprises have not identified a stable data rights and interests subject

02
在用户协议、权利声明等文本中，数据权益主体不一致
Inconsistency of data rights and interests subjects in user agreements, rights statements, and other texts

03
劳动合同、合作协议等没有约定数据成果的归属，或约定不一致
Labor contracts, cooperation agreements, etc., do not stipulate the ownership of data results, or have inconsistent provisions

04
缺乏禁止非法数据获取行为的意思表示
Lack of expressions of intent to prohibit illegal data acquisition behaviors

01　**著作权登记**　Copyright Registration

（1）作为著作权权属的初步证明

(1) As a preliminary proof of copyright ownership

（2）在进行著作权转让、许可活动中作为权利证明

(2) As a proof of rights in copyright transfer and licensing activities

（3）作为权利证明帮助后续维权

(3) As a proof of rights to help subsequent rights protection

（4）企业、个人竞争力的显示

(4) Display of corporate and individual competitiveness

02　**区块链存证**　Blockchain Notarization

通过第三方的区块链存证服务，对网络上发布的内容进行同步存证，确定信息发布的时间和内容，明确权利主体

Through third-party blockchain notarization services, synchronize and notarize the content published on the Internet, determining the time and content of information release, and clarifying the rights subject

03　**数据权利登记**　Data Rights Registration

可以分为资源性数据资产登记（也可称为数据要素登记）和经营性数据资产登记（也可称为数据产品登记）

Can be divided into resource-based data asset registration (also called data element registration) and business-based data asset registration (also called data product registration)

对于处于向不特定用户展示的"公开"数据，《反不正当竞争法》保护存在一个"隐性要件"，即对数据采取保护措施。相比于有保护措施的数据而言，没有保护措施的数据的权利强度可能较弱。

For "public" data displayed to unspecified users, the Anti-Unfair Competition Law has an "implicit requirement" for data protection measures. Compared to data with protection measures, data without protection measures may have weaker rights.
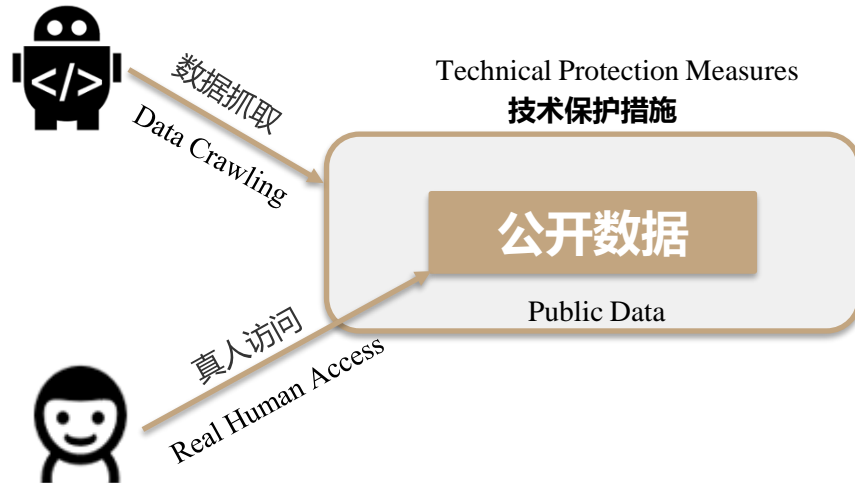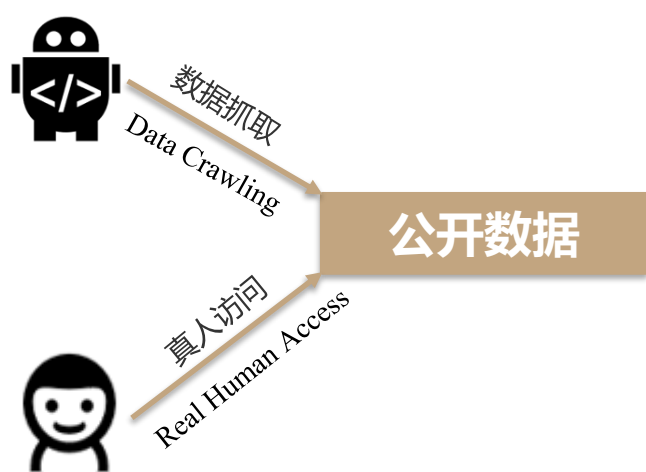
实践中常用的数据权益损害赔偿举证方式包括：

In practice, commonly used methods for proving damages in data rights compensation cases include:

人　　　　　　　　　　　　　　财　　　　　　　　　　　　　　物
. Financial Resources

职工规模　Human Resources　　　工资绩效　Salary and performance pay　　硬件设备　Hardware equipment

招聘　　　　Employee scale:　　　研发投入　Research and development investment　服务器　　Servers

人员培训　Personnel training　　软件开发　Software development　　　工作场所　Workplaces

绩效管理　Performance management　维护成本　Maintenance costs　　　……

……　　　　　　　　　　　兼并收购　Merger and acquisition

　　　　　　　　　　　　　……

未来可能的数据价值计算方式包括：
Possible future data value calculation methods include:

合理的数据许可费	数据资产评估、登记

1.目前，知识产权（商标、专利、著作权）的损害赔偿计算，法律规定可以【参照】许可使用费的【倍数】合理确定：

1. Reasonable data licensing fees: Referring to the multiples of licensing fees for intellectual property rights (trademarks, patents, copyrights), as stipulated by law, to reasonably determine the value of data assets.

《商标法》第63条、《专利法》第71条、《著作权法》第54条：——权利人的损失或者侵权人获得的利益难以确定的，参照该（著作权/商标/专利）许可使用费的倍数合理确定。

According to Article 63 of the Trademark Law, Article 71 of the Patent Law, and Article 54 of the Copyright Law, if the right holder's loss or the infringer's gain is difficult to determine, the value can be reasonably determined by referring to the multiples of the respective (copyright/trademark/patent) licensing fees.

2.数据资产评估已经开始在行业中得到应用：

2. Data asset assessment and registration: Data asset evaluation is already being applied in the industry.

2019年12月31日，中国资产评估协会发布《资产评估专家指引第9号——数据资产评估》，制定了数据资产评估方法和标准，供行业参考。
On December 31, 2019, the China Appraisal Association issued the "Asset Appraisal Expert Guidance No. 9 - Data Asset Evaluation," which established data asset evaluation methods and standards for industry reference.

2021年10月16日，广东省发布全国首张公共数据资产凭证
On October 16, 2021, Guangdong Province issued the first public data asset certificate in China.

2022年8月5日，全国首个数据资产登记中心在北京国际大数据交易所揭牌。
On August 5, 2022, the first national data asset registration center was unveiled at the Beijing International Big Data Exchange.

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Thank you

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