

On the Types and Cognizance of "Knowing" in the Crime of Aiding Information Network Crime

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ABSTRACT

In judicial practice, there are difficulties in determining the degree of "knowing". Some standards are too vague and subjective. Moreover, judicial interpretations fail to specify how to accurately determine the element of knowing. Under the lens of western legal philosophy, when the subjective intention of a perpetrator is difficult to determine, it can be inferred through the perpetrator's objective behavior. In order to improve the judicial system and to solve the ambiguity in determining the element of knowledge as much as possible, we should classify the objective acts of the perpetrator based on three different degrees of "knowing" including "should know" without definite meaning communication, "knowing" without definite meaning communication and "knowing" with definite meaning communication. Through the three judgment criteria for the determination of "knowing", the rules for the conviction of the crime of helping information network criminal activities are refined, helping to solve existing judicial problems and promoting the correct application of legal provisions.

Keywords: helping information network crime, knowing, objective behavior type

1. INTRODUCTION

In the 2015 Amendment (IX) to the Criminal Law of the People's Republic of China, the crime of aiding information network crimes was added. The change would make it a separate offence to knowingly commit a crime and to help others commit it. There are two views on the cognizance of knowing in criminal law. Firstly, to be sure, that is, to know clearly and clearly [1]. "Knowing" is specific and targeted, not abstract "knowing" [2]. Secondly, knowing and possibly knowing (should know). "Knowing" includes not only certainty but also knowing possibility. But knowing that the possibility needs to be proved judicially. In judicial interpretation, "knowing" and "ought to know" are in this sense to explain "knowing". That is, "knowing" in evidence law. This is a judicial presumption of the actor's cognition [3]. It is possible to know and ought to know the same meaning, but in different words. The difference between knowing and should know lies not in the degree of knowledge but in the way of proof [4]. In Peking University, there were 59 cases in 2019, 1058 cases in

2020, and 3775 cases in 2021. It is clear that the number of cases of aiding information network criminal activities has soared. In judicial practice, we should be alert to the trend of "aiding trust crime". The determination of "knowing" is one of the key elements of crime and non-crime. Therefore, this paper discusses the type and identification of knowing well.

2. THE IDENTIFICATION STATUS OF "KNOWING"

Knowing, as subjective intention, varies from person to person and is affected by individual experience, occupation, education level, cognitive ability and other factors. Evidence for true subjective intent is hard to find. Therefore, we need to rely on the objective behavior of the actor to judge. For example, in the "red flag standard rules in copyright law", the red flag principle refers to the fact that if the infringement of information network transmission right is clear, like a red flag waving, network service providers can't pretend not see, or don't know the reason why the infringement to evade a responsibility, if

in that case, don't delete, necessary measures such as shielding, disconnect. We should assume that the ISPS knew of the third-party infringement even though the right holder did not give notice. At the same time, according to the provisions of Article 9 (3) of The Provisions of the Supreme People's Court on Evidence in Civil Proceedings, another fact can be deduced according to the provisions of the law or known facts and rules of experience in daily life, which need not be proved by proof. The "experience rule" refers to the rules or knowledge on the causal relationship or attribute state of things that people obtain from their life experience. It should be noted that is different from the laws, theorems and axioms of natural science. The experience rule is not necessarily a reflection of the internal connection between things, but a kind of external connection with probability, a judgment and conclusion obtained by induction. This kind of inference based on the rule of thumb does not guarantee its absolute truth. Thus, exceptions to the presumption of experience rule are allowed to overturn the presumption. So is the presumption of "knowing well" in this sin. Knowing can be negated if the party reasonably refutes the inference. As for the cognizance of "knowing well", most of the cognizance of knowing well in the judgment of the court is relatively brief, without proof and explanation. we have found only a few arguments for the subjective cognition of the actor. Among them, as it was written in the judgment, perpetrators committing crimes should not only know others the use of information network, also want to know yourself in a crime to provide help for others, that person must be realized by the object of their help is in the use of network crime, and the damage of possible results have a certain understanding of or about the harm results allowed the laissez-faire attitude. The court has made an interpretation of the standard of knowing, which is well argued.

3. JURISPRUDENCE ANALYSIS

Criminal actor's subjective attitude is difficult to clearly define, through many involved "knowing" case analysis. There is a sentence says "subjective intention is difficult to clear, so we need the standard of objective behavior to help clarify subjective attitude.", judicial interpretation is not directly defined from subjective aspects "knowing" this concept. Therefore, through objective behavior to determine whether the criminal perpetrator "know", mastering the perpetrator's criminal intention, for the case, and making the correct decision is crucial.

Just as Hegel's philosophy believes that thinking and existence have the same nature, thinking is the thought and consciousness existing in people's brain. Thinking can be regarded as the subjective intention of the perpetrator in criminal behavior, while existence can be perceived and materialized as concrete manifestations in criminal behavior. In Hegel's view, behaviors and

purposes are consistent with each other. Some kind of behavior always serves a certain purpose, if a behavior does not match the purpose, it cannot be an affirmative content of the purpose [5]. Subjective understanding alone cannot clarify the criminal intention because the understanding has uncertainty and invisibility. In the process of judicial case trial, if the judge only rely on the defendant's self-criminal intention explanation or others' inference of criminal intention, it does not have the justice of the judicial judgment. Therefore, it is not enough to convince two parties and the public. As for the relationship between purpose and consequences, subjective attitude and objective behavior, Hegel pointed out, "In fact, in the process of realizing their purpose, people's goal and consequences, internal will and external behavior, subjectivity and objectivity are unified. A person's subjective inner will produce a series of objective and external behaviors." [6]

Crime is an objective fact [7], which is biased to regard behavior as pure subjective consciousness as dominant. Marxist philosophy is the philosophy of "the Unity of Materialism and Dialectics, Materialism View of Nature and Materialism View of History" [8]. The basic proposition is that existence determines thinking and material determines consciousness [9]. Objectivity and subjectivity are dialectical unity, and the two cannot be separated. It is also applicable to the subjective intention judgment of the perpetrator in judicial practice. If the judge wants to grasp the criminal intention and motive of the perpetrator more accurately and intuitively, it is necessary to consider and combine the criminal preparation of the perpetrator with the implementation. Meanwhile, the judge should comprehensively grasp the subjective psychology, so as to more accurately judge whether the perpetrator "know" the criminal behavior.

4. THE JUDGMENT OF KNOWING

4.1. *The perpetrator concerned passively knows that others commit criminal behavior by using information*

Firstly, after being informed by regulatory authorities, the relevant acts are still implemented, perpetrator concerned may be presumed to have been inevitably aware of it. It is important to note that with the development of information technology, the regulatory notice all adopts the notify method, especially not to notify emergency approach is inefficient, so long as has the related evidence has informed [10]. Secondly, perpetrator fail to perform statutory management duties after receiving a report. For example, if a web hosting service provider fails to shut down, delete, report a case and continue to provide services for the web site after receiving a report that the web site hosted by a certain service object is obscene and pornographic, it can be determined that it is subjective and knowing.

4.2. The network helps downstream crimes in crime

The title of "upstream-downstream" is very appropriate to summarize those crime groups with the causal relationship and the sequential sequence of each crime, that is, the downstream crime is the derivative crime of the upstream crime. For example, helping acts such as destroying evidence or sending letters to the suspect to conceal the crime can be identified as a downstream crime in the network help crime, and identified as its subjective knowledge. Another example is to provide payment and settlement services for upstream customers, and still to provide an interface for them under the confirmation that the funds are obviously abnormal, and to remit the funds into their accounts. It can judge the subjective knowledge of the perpetrator. In "Criminal Judgment No.416 of Guizhou case [11]" as an example, the perpetrator knowingly others telecom network fraud, still illegal to provide Internet access technical support for a long time, is most common mode of provide network technical support behavior in the crime. In other words, the most important behavior regulated by the crime of helping information network criminal crime activities is to provide technical support for network criminal activities [12].

4.3. Knowing can be directly identified

In addition to helping acts with clear intention, knowing can be directly identified, and knowing should also be accurately inferred through other objective behaviors in the judicial process. In cyberspace, the types of crime such as information network as necessary elements of computer information system, namely, traditional crime network, where network factors greatly affect the traditional forms of crime, including fraud, spreading obscene materials, casino opening, infringement, pyramid scheme, insult and slander. Amendment to the criminal law added refused to fulfill the obligation of information network security management crime, illegal use of information network crime and help information network crime, more specific, precise provisions for the information network security management obligations of inaction, network crime reserve actor and network crime help actor criminal responsibility [13]. However, some helping behaviors have a neutral nature and there is no subjective consciousness of crime. At this time, we should judge whether they know or should know it from the experience's actor or common knowledge.

4.3.1. "Should know" without definite meaning communication

In the current judicial practice, there is a special form of "knowing". That is to say, whether the court's judgment is "should know" and whether the perpetrator

should be punished can be judged by combining objective behavior with the perpetrator's cognitive ability, past experience, behavior and means. The Crime of Refusing to Fulfill the Obligation of Information Network Security Management, the Crime of Illegal Use of Information Network and the Crime of Assisting A Criminal Activity of Information Network are the response in criminal law to new types of cybercrimes and the normative reflection of implementing a policy of all-round crackdown on cybercrimes [14]. This kind of objective behavior includes the amount of sales clearly beyond the normal scope to "In the No.1032 Criminal Judgment of Zhejiang Province[15]". For example, the defendant rented a fixed phone number on his Taobao store. When the renter rented a large number beyond the normal range, he chose to ignore the social harm behavior of the tenant for profit, and still provided call transfer, phone recharge and other services. Defender argued in the court trial: "from the subjective perspective, the defendant rented the phone number for fraud is only neutral behavior, do not clearly know that the renter must be the phone number for fraud and other criminal activities, subjectively to the tenant using the information network to carry out the crime. "Then "In the No.1563 criminal judgment of Zhejiang Province. [16]". For example, the defendant's main business is the network payment interface agent of a third-party payment company. Under the circumstance that the network payment interface of illegal agents may be used for criminal funds and money laundering, he still applies for the payment account in the third-party company through the enterprise five card information and false domain name purchased in advance. Its objective behavior exists intentional fraud. Therefore, it can be inferred that it subjectively knows and should know the hidden dangers of the network payment interface agent of the third-party payment company. Such cases are common, but most judgments about "knowing" in the judgment are relatively simple. We combined with its objective behavior subjective presumption, a complete civil capacity perpetrator, for the use of their goods completely unaware of the possibility of almost zero, and in the presence of abnormal sales volume choose to ignore its possible harm results, if the judgment that "perpetrator to others using information network crime does not know", it is biased. To sum up, the court inferred through such objective behavior that the defendant should know that the services he provided are greatly likely to be used for illegal and criminal activities. When there is insufficient evidence to show that the defendant party is indeed ignorant, it can be considered that it meets the subjective requirements of "knowing".

4.3.2. "Knowing" without definite meaning communication

There is a particular circumstance which is also generally recognized by the court as "knowing" that the

defendant's actions can directly prove he has subjective criminal intent. Such actions include taking the initiative to avoid regulatory investigations [17]. For example, using a head covering when retrieving money at an ATM or using anonymous names to conceal one's identity when committing crimes. Furthermore, in absence of any reasonable explanation, providing the principal with technical or other assistance that is directly and causally related to the result of the crime may also amount to having knowledge about the crime.

In traditional joint crimes, the intention connection is used as an important basis for determining the joint crime, and if there is no intention connection between the offenders, it cannot be regarded as a joint crime. But in the internet age, even one-party providing help to the other does not require intentional contact, [18] they can complete the whole process of committing a crime. It is presumed through the abnormal conduct of the perpetrator that he is knowingly committing a criminal behavior. In the No 116 Criminal Judgment of Hebei Province [19], after the defendant lent his or others' bank cards to others for compensation and saw a large remittance into the card, the defendant took the initiative to report the loss of the bank card to obtain illegal benefits. Although the defendant did not express a clear meaning in the whole process of the criminal act, the behavior of "reporting the loss to profit after seeing the remittance" can be presumed to have great subjective malice, enough to determine that he "knew" that this behavior was carrying out illegal criminal activities.

Since the judgment of the subjective intention of the perpetrator is a prerequisite for conviction. In the process of the judge judging the subjective intention of the perpetrator, the subjective intention of the perpetrator cannot be judged in the traditional way, but the subjective intention should also be inferred in combination with the objective behavior of the perpetrator. In the absence of the subjective confession of the perpetrator, the judge reasonably adopts the method of inference and supported by the existing evidence. Although the perpetrator subjectively denies it, there is circumstantial evidence that can be confirmed, it may be concluded that the behavior exists "knowingly" [20].

If the perpetrator aids others' criminal activities, even if there is no clear communication between those criminals, the perpetrator is considered to have knowingly engaged in criminal activities. In the No 373 Criminal Judgment of Sichuan Province [21], defendants Mingtong Tu and Xiaoling Wan, in order to seek benefits, have long acquired bank cards and provided them to others to carry out information network crimes, and the two defendants still provided payment settlement assistance to others when they knew that others were committing criminal activities. The upstream information crime has no conspiracy intention with Mingtong Tu, while there is no clear meaning of communication with

the upstream criminal perpetrators. Therefore, from the objective perspective, there is no specific criminal meaning negotiation between Mingtong Tu and the upstream criminal perpetrators. However, after the two defendants were largely known to use the tools provided to commit the offense, continue to provide support for the profit, the judicial judgment held that the two defendants had subjectively constituted criminal intent. It belongs to 'Knowing' without definite meaning communication.

"Knowing that others are using information networks to commit crimes" is only a subjective constituent element of the crime, as long as the perpetrator is aware that others are using information networks to carry out any of the criminal activities in the sub-provisions of the Criminal Code, the subjective conditions have been satisfied, and if the statutory conditions such as serious circumstances are also satisfied, the crime can be established. [14]

4.3.3 "*Knowing*" with definite meaning communication

In some cases, the defendant took the initiative to provide services related to network crime behavior, and its help behavior itself is illegal, which can be inferred to know from activities dedicated to criminal activities or provide procedural tools specially used for illegal and criminal activities. The court held at the verdict that the defendant's subjective intent was "knowing" with definite meaning communication.

"Acts in which the perpetrator specifically assists in cybercrime" is the most common type of this crime, and it is also the category that is less controversial about "knowing" [22]. In the No 25 Criminal Judgment of Hubei Province[23], the defendant Shaodong Li has repeatedly contacted the last home to obtain the plug-in program of the game and card secret, and then resell to the next home, sell a variety of game plug-in programs for the profit. The defendant's behavior of selling the game plug-ins itself was illegal, so it was impossible not to know that his helping object was carrying out illegal and criminal activities. Therefore, to a large extent, he "confirmed" that others were engaged in criminal acts.

In the No 416 Criminal Judgment of Guizhou Province [11]. For the purpose of illegal possession, the defendant illegally provided technical support such as Internet access for a long time in order to make profits, joined a fraud group abroad, and used telecommunications networks to carry out fraudulent activities. In this case, the scope of defense of "knowing identification" is relatively small. The participation in the illegal behavior of the fraud group shows that the actor has a clear legal understanding of his actions, from an objective point of view, the defendant's behavior has vividly interpreted his subjective intention of the crime. If the defendant does not know that he is engaged in

illegal acts to carry out fraud activities, it is unreasonable. Therefore, the court for such cases, generally determined that the defendant's subjective attitude is in line with "knowing", and is the most accurate "knowing" to the degree of "knowing identification", it is difficult to provide evidence indicating that the defendant is not suitable for the subjective requirements of "knowing".

5. CONCLUSION

The Amendment (IX) to the Criminal Law of the People's Republic of China added the crime of aiding information network criminal activities, this article mainly analyzes the "knowing" in this crime. Most legal scholars define "knowing" as knowing well and ought to know. Regarding the determination of "knowing", most of the judgments of the courts are relatively brief, and the current method of judging "knowing" has a certain subjective color. "knowing" is used as evidence of subjective cognition, which is very difficult to clearly prove in trial practice. Therefore, we infer "knowing" indirectly by typing objective behavior, and the degree of recognition of "knowing" is divided into three categories. The first point is the "should know" without definite meaning communication. This kind of criminal act is mainly reflected in the lack of clear intention between the perpetrators, but "knowing" can be inferred from the objective act of selling the amount obviously beyond the normal range. The second point is the "knowing" without definite meaning communication. In order to prevent the exposure of the case, the defendant voluntarily adopted the act of evading or circumventing the supervision and investigation, or took an anonymous method to conceal his identity when using the network to commit a criminal act, so as to achieve the purpose of evading the investigation, which can directly prove that the perpetrator has subjective criminal intent. The third point is the "knowing" with definite meaning communication. The defendant voluntarily provides services related to cybercrime, and his act of aiding is inherently illegal. Through the method of typicality of objective behaviors, the article can accurately judge "knowing" and the degree of recognition, it will help judges adjudicate cases and improve trial efficiency. At the same time, the determination of "knowing" is conducive to reducing judgment disputes and better realizing fairness and justice.

REFERENCES

- [1] G.S. Cai, (2007) Research on "Knowingly" Elements in International Criminal Law -- Taking Article 30 of Rome Statute of International Criminal Court as an example. Rule of Law Collection (Journal of Shanghai University of Political Science and Law), 5: 64-69.
- [2] L.K. Tu, (2016) Obligations of Network Content Management and Criminal Liability of Network Service Enhancers. Law Review, 3: 66-73.
- [3] B.Z. Zhao, C.L. Xui, (2002) Research on the Crime of Infringing registered Trademark Right. Legal Science. Journal of Northwest Institute of Political Science and Law, 3: 59-73.
- [4] X.L. Chen, (2010) Intention in Criminal Law and its Structure. Studies on The Rule of Law, 06: 3-14.
- [5] W.H. Peng, (2010) Hegel's view of the purpose of crime and its revelation. Journal of the National Prosecutors College, 18(04): 89-95. doi: CNKI: SUN: ZJGX.0.2010-04-014.
- [6] Hegel, (2007) Principles of Legal Philosophy. Beijing Publishing, Beijing.
- [7] Y. Li, J. Dan, (2007) A Preliminary Study of Criminological Epistemology. Journal of Henan Public Security College, 4: 20-24. doi: 10.16231/j.cnki.jhpc.2007.04.004.
- [8] J.X. Ou, (2019) Legal Practice and Philosophical Navigation: A Philosophical Orientation in the Construction of Criminal Composition. Era Jurisprudence, 17(01): 1-15. doi: 10.19510/j.cnki.43-1431/d.2019.01.001.
- [9] X.L. Li, Y. Wang, H.C.Li, (1995) The principles of dialectical materialism and historical materialism (4th Ed). Renmin University of China Publishing, Beijing.
- [10] Z.W. Wang, (2007) On the Minimum from the Minimal From-Japan's Development and Reference from the Attribute Theory. Law, 11: 101-109.
- [11] Guiyang City Procuratorate of Guizhou Province v. Changhua Liu, Yafeng Li. Guiyang City Intermediate People's Court of Jiangsu Province No. (2021)416, 15 November 2021.
- [12] Z. Yu, W. Wei, (2020) The law applies to help the crime of criminal activities. The People's Department of Justice, 7: 81-85. doi: 10.19684/j.cnki.1002-4603.2020.07.016.
- [13] C.C. Chu, Z.X. Hu, (2020) Causes and Distribution Paths to Help Information Network Crime Activities-Discussion Central by Objectiveness. Journal of Shandong Judge Training Institute, 36(01): 90-102. doi: 10.14020/j.cnki.cn37-1430/d.2020.01.009.
- [14] Y. Pi, (2021) A Doctrinal Analysis and Judicial Empiricals of the Independence of Novel Cybercrime. Politics and Law, 10: 91-106.

- [15] Shaoxin City Procuratorate of Zhejiang Province v. Jinggao len. Shaoxin City People's Court of Zhejiang Province No. (2020)1032,4 June 2020
- [16] Jinhua City Procuratorate of Zhejiang Province v. Rui Zhao. Jinhua City People's Court of Zhejiang Province No. (2020)1563,1 January 2020
- [17] H.L. Ni, (2021) Help in the types and identification of "knowing" in the crime of information network criminal activities. *Western Journal*, 15: 78-82. doi: 10.16721/j.cnki.cn61-1487/c.2021.15.025.
- [18] B.Y. Hu, (2021) Help information on cybercrime activity crimes. *Heilongjiang Human Resources and Social Security*, 14: 54-56.
- [19] Shexian county Procuratorate of Hebei Province v. Ping Cai. Shexian county People's Court of Hebei Province No. (2020)116, 10 December 2020
- [20] H. Xiao, (2021) Help in the application of the known justice in cybercriminal activities offences. *Legal Expo*, 3: 77-78.
- [21] Jiangyou City Procuratorate of Sichuan Province v. Mingtong Tu, Xiaoling Wan. Jiangyou City People's Court of Sichuan Province No. (2020)373, 31 December 2020.
- [22] Q.H. Tian, (2021) Help with the review judgment of information in cybercrime offences in "knowingly". *Western Journal*, 19: 42-46. doi: 10.16721/j.cnki.cn61-1487/c.2021.19.013.
- [23] Ezhou City Procuratorate of Hubei Province v. Shaodong Li, Nie zhou. Ezhou City People's Court of Hubei Province No. (2018)25, 6 February 2018.