

Definition of “etc.” Behavior in the Crime of Assisting Information Network Criminal Activities

Jiadong He^{1,a,*†}, Baoling Hong^{2,b,†}, Keying Li^{3,c,†}, and Xianrui Zhang^{4,d,†}

¹College of Political Science and Law, Jinan University, Jinan, 250001, China

²College of Foreign Languages, Xiamen University of Technology, Xiamen, 361000, China

³Institute of International Relations, Tianjin Foreign Studies University, Tianjin, 300000, China

⁴College of Resources and Environment, Shanxi Agricultural University, Jinzhong, 030600, China
a. 022110604453@ujn.edu.cn, b. 1367902022@qq.com, c. 2205543751@qq.com,

d. zxr17636406128@163.com

*corresponding author

†These authors contribute equally.

Abstract: Various kinds of cybercrime have emerged after entering the Internet era. In the Criminal Law Amendment (IX), the crime of assisting information network criminal activities has been added. However, there is an inconsistent understanding of the crime of assisting information network criminal activities among all parties in the practical circles. It is found that the judicial application of the crime of assisting information network criminal activities is more confusing by combing the relevant adjudication documents. For the purpose of eliminating this phenomenon, the “etc.” assistance in the crime of assisting information network criminal activities can be defined through legal norms analysis or case studies. This paper clarifies the boundary between crime and non-crime and between this crime and the other crime based on the following criteria. The objective assisting behavior needs to have the legal benefit infringement. The degree of “scienter” is relatively specific and determined. Meanwhile, the circumstances are severe. Besides, in order to clarify the scope of “etc.”, this paper analyzes the legal norms of the act of “using the account number in online games to transfer money,” which provides a more significant reference value for judicial application.

Keywords: cybercrime, the crime of assisting information network criminal activities, “ etc.” assisting behavior

1. Introduction

As information network technology continues to develop, the quality of people’s lives has improved, but network technology’s dividends and risks coexist. The Criminal Law Amendment (IX) has added the crime of assisting information network criminal activities to better cope with the risks and protect the legal interests. It reflects the transformation of China’s criminal law value position to active general prevention [1]. However, several problems exist in the judicial application of the crime, mainly reflected in the following two aspects. Firstly, the crime is more severe abuse, with the trend of “pocketing,” the second is challenging to meet the needs of judicial practice. Most criminal law scholars in China have different views on the characterization of the crime of assisting information network criminal activities, such as “the sentencing rule,” “the principal offender,” “treating the

accessory with the standard of the principal offender,” and “the cumulative amount of the crime” [2]. This paper takes the dualism of value-free behavior as the primary position, adheres to the viewpoint of “positive criminalization,” and is problem-oriented. In the opening part, this paper raises the problem of confusion in judicial decisions regarding the crime of assisting criminal activities in information networks. It defines the “etc.” assisting behaviors in the crime of assisting information network criminal activities through legal norm analysis or case analysis in the main text. At the same time, to further clarify the types of “etc.” assisting behaviors and the scope of punishment, this paper analyzes the legal norms of “using the account in online games to transfer money” and other behaviors. This paper is an attempt, based on existing research, to explore some of the critical issues of the crime, such as the type of “etc.” help, “scienter”, the legal benefits of infringement, etc. This paper tries to break the ice, hoping to promote the research on these issues to a deeper level.

2. Raise of the Question

After the Criminal Law Amendment (IX) added the crime of assisting information network criminal activities, the trend of the application of the crime of assisting information network criminal activities became more apparent, and it is necessary to clarify it. Combined with the latest judicial interpretation, it only clarifies some types of assisting behaviors, but there are many cases of confusion in practice. For example, in the “Criminal Judgment on the Crime of Fraud by Yu Shanshan”, the second instance court revoked some of the original court’s judgments and sentenced the appellant Yu Shanshan to five years in prison, with a fine of RMB 10000. Among them, the defendant was convicted of the crime of assisting information network criminal activities and sentenced to one year in prison. In contrast, the first instance court ruled that the defendant was a crime of fraud and sentenced him or her to twelve years in prison, with a fine of 100000 yuan. From this, the judgments of the first and second instance courts differ significantly in the characterization of crimes, but also in the sentencing. In judicial practice, there are countless similar situations, and the key to the issue of courts making different judgments on similar situations lies in the varying nature of objective behavior. The key to the correct application of the crime of assisting information network criminal activities lies in the conviction and sentencing of the defendant from the perspective of the modesty and standardization of criminal law, and the reasonable definition of the defendant’s objective behavior, that is to say, the defendant’s objective illegality. At the same time, it is also necessary to grasp the content and degree of subjective “scienter”, that is, to handle the issue of subjective responsibility. In addition, for overseas fraud, the perpetrator of the crime of assisting information network criminal activities is an integral part of its fund transfer. If the crime of assisting information network criminal activities is not clearly defined, overseas fraud may be more rampant in utilizing domestic personnel. Furthermore, formulating more explicit regulations on the crime of assisting information network criminal activities to a greater extent ensures the fairness of judgments against some ignorant or exploited personnel. Simultaneously, only the above situations are challenging to meet regulation needs in practice. This article intends to clarify the type of “etc.” assisting behavior through the interpretation of “etc.” assisting behavior in judicial interpretation to attain the principle of criminal responsibility and meet the needs of judicial practice.

3. Analysis of Reason

3.1. Type of Crime Controversy

Scholars have different views on the crime of assisting and abetting. In terms of the characterization of the crime of assisting to believe, within the framework of common criminality, there are “rules of sentencing”, “positive criminalization,” and “accessory criminalization. “Outside the framework of common crime, there was “accumulation of crime theory” and “crime promotion crime theory.”

Among them, the representative viewpoints were “the theory of the criminalization of assisting behavior”, “the theory of sentencing rules”, and “the theory of cumulative offenders.”

“The theory of the criminalization of assisting behavior” believed that the essence of the behavior regulated by the crime of assisting information network criminal activities was the act of assisting crime. In view of the particularity and prominent social harm of network assistance behavior, the criminal law has made it a new offense on its own and set an exclusive statutory penalty for maintaining network order and security. “The theory of sentencing rules” was the conclusion drawn within the framework of the accessory attribute of accomplices, holding that the crime of assisting information network criminal activities was not a principal offender. Although the sub-provisions of the criminal law set a separate statutory penalty for it, they did not apply the sentencing rules of the general criminal law provisions for assisting offenders. “The Theory of Cumulative Offenders” holds that the crime of assisting information network criminal activities is an independent crime, does not substantially assist the act, is objectively and legislatively independent, and should be recognized as an independent crime. The addition of the crime of assisting information network criminal activities to the criminal law is because the harm of a large number of assisted acts accumulates to the level of crime [3].

The “theory of the criminalization of assistance” is free from the shackles of accomplice and does not need to care about the cumulative amount of social harm. The “theory of the rule of sentencing” is centered on an accomplice and can be convicted if the conditions of common criminality recognized by the General Principles of Criminal Law are met. The “theory of cumulative criminality” must focus on the cumulative amount. Meanwhile, from most of the judgments, two methods can be summarized to deal with the crime of assisting information network criminal activities and related crimes. The first is to apply imaginary competition and choose one felony to be punished. The second is that it should be punished according to the crime of fraud if it meets the elements of both the crime of fraud and the crime of assisting information network criminal activities. The theory of what kind of crime is the crime of assisting information network criminal activities, the lack of unified treatment principles between the crime of assisting information network criminal activities and related crimes, and other reasons resulting in the judicial application of the inconsistency.

3.2. Inaccurate Grasp of Subjective “Scienter” and Its Content

Initially, the degree of “scienter” is uncertain. The crime of assisting information network criminal activities is intentional, and the determination of “scienter” is an essential factor in conviction. In judicial practice, most judicial authorities only explain that the perpetrator “knows that others may commit a crime.” However, the scope of “scienter” has no basis in examples, and there is no discussion of how the perpetrator constitutes a “scienter.” This phenomenon in judicial adjudication shows that there needs to be more certainty about the degree of “scienter” in judicial practice. It has been argued that a party is of “scienter” if it is expressly aware. Another argument is that the parties clearly know, suspect know, and should know that is “scienter” [4]. It can be seen that the current judicial interpretation is inaccurate in the content of the “scienter.”

Additionally, the content of “scienter” needs to be more accurate. The crime of assisting information network criminal activities “scienter” means that someone else uses an information network to commit a crime. In judicial practice, most judgments do not clearly indicate what the perpetrator knows, and there are also situations where the perpetrator is not clear about the criminal act of the assisted person. This situation shows the ambiguity of the content of the crime of assisting information network criminal activities. That is to say, the ambiguity of its appropriate boundaries is due to the lack of definition of “crime” in “others using information networks to commit crimes.”

3.3. Unclear Rules

Severe circumstances are one of the constituent elements of the crime of assisting information network criminal activities. Before the introduction of the Interpretation of the crime of assisting information network criminal activities, there was no unified and transparent standard for determining “severe circumstances.” As a result, judicial practice has some confusion in determining the crime of assisting information network criminal activities.

The issuance of the Interpretation of the Crime of Assisting Information Network Criminal Activities and the Legal Opinion on Online Fraud (II) have provided specific solutions for judicial practice. However, there are still some ambiguities that have caused widespread debate. For instance, all factors, such as illegal gains and the amount of money related to the crime of the person being assisted, are used as the basis for conviction. For another example, according to Article 12, paragraph 1, item 6 of the Interpretation of the Crime of Assisting Information Network Criminal Activities, only the criminal acts committed by the assisted person can constitute “aggravating circumstances.” In practice, the assisted person often commits financial crimes such as telecommunications fraud and opening casinos through the information network. However, there is no relevant degree of “causing severe consequences” in the sentencing criteria for the crime of opening a casino. Therefore, it is difficult to determine whether the assisted person meets the requirements of Article 12, paragraph 1, Item 6 of the Interpretation of the Crime of Assisting Information Network Criminal Activities. In real life, the perpetrator plays a vital role in the entire cybercrime chain and has considerable social harm [5]. However, the aggravated circumstances in the judicial interpretation do not map to similar circumstances, which may lead to the criminal law’s ineffective crackdown on crimes.

In addition, most judgments lack reasoning on the course and outcome of the perpetrator’s crime, especially the discussion of “severe circumstances.” The court simply lists the crime and the amount of the crime committed, which is not conducive to ascertaining the facts. It is also suspected of violating the principle of doubtful interests to the defendant. It is easy to lead to miscarriage of justice and wrong cases.

4. The Solution to the Problem

4.1. The Criteria for Determining the “etc.” Assisting Behavior

In response to the different identification of the crime of assisting information network criminal activities in theory and judicature, the author weighs the value of the “etc.” assisting behavior in the crime of assisting information network criminal activities, focuses on its homogeneity with related cybercrimes, namely, legal benefit infringement of the criminal behavior. Moreover, the author reasonably defines the content of “etc.” behavior with the exact nature and degree of judicial interpretation by solidifying subjective cognition, objective behavior, the seriousness of circumstances and other elements [6].

The First point is subjectively knowing that the assisted object uses information networks to implement criminal activities. “scienter” belongs to the subjective aspect of the perpetrator, which is difficult to prove in practice. It is necessary to adhere to the principle of consistency between subjectivity and objectivity. Nevertheless, in judicial practice, the investigative organization proves the perpetrator’s “scienter” by repeatedly taking the deposition, equating the possibility of cognition with “scienter.” It is too broad, and the striking surface is too expanded, which is not conducive to protecting human rights. “scienter” is different from the possibility of cognition, but a relatively specific understanding. It requires the perpetrator to subjectively have a relatively specific understanding of the possibility of the assisted object committing a crime [7]. Simultaneously, the

perpetrator is not required to have the possibility of foreseeing the result. For example, the perpetrator is not required to know exactly whether the assisted object has committed a crime.

The second point is objectively providing assistance and having legal interest infringement. The help provided by the perpetrator objectively needs to play a role in promoting the implementation of information network crime activities of the assisted person. It is advisable to admit that the crime of assisting information network crime is the criminalization of neutral assisting behavior. Even if the perpetrator provides assistance to the assisted person within the scope of his own business and clearly knows that the assisted person has the intention of committing cybercrime, as long as the act does not objectively contribute to the commission of cybercrime by the assisted person, then the act cannot be recognized as a crime because it is not legally aggressive.

The third point is the severe circumstances. The help provided by the perpetrator objectively needs to play a role in promoting the implementation of information network crime activities of the assisted person. It is advisable to admit that the crime of assisting information network crime is the criminalization of neutral assisting behavior [8].

4.2. Several Types of Acts Should Be Specified

Criminal Law defines the crime of assisting information network criminal activities as a natural person or a unit in the knowledge that others use information networks to commit crimes. However, they still provide Internet technical support for their crimes or provide advertising promotion and other assistance when serious circumstances occur. After reading many judgment documents, it can be concluded that the crime of assisting information network criminal activities has a tendency of “pocket” application. In order to avoid the wrong type of behavior and the cover-up of the actual crime, the following behaviors need to be clearly defined.

4.2.1. The Act of Transferring Money with an Account in an Online Game

Article 7 of the Telecommunications Fraud Opinion (II) points out many situations that can be considered assisting behaviour for this crime, including acquisition and sale. Among them, the controversial one is “Internet account password with payment and settlement function”, because this expression does not specify which aspect of the account password is, but just a general summary. Due to the generality and ambiguity of the concept, this kind of behaviour is controversial in judicial practice [9]. With the continuous expansion of the impact of the Internet on life, judicial concepts in this regard are sometimes unable to keep pace with the times, which leads to uncertainty in the scope of some concepts. This uncertainty also brings much trouble to judicial practice, which cannot simultaneously generalize criminal acts and deter illegal elements.

The author believes the act can constitute the crime of assisting information network criminal activities when it meets the constitutive requirements and has legal interest infringement. The perpetrator transfers money through the account in the online game, mainly showing the transaction behaviour of “equipment” in the game, that is, the transaction of virtual goods. The situation should be recognized as the crime of assisting information network criminal activities are as follow. If the perpetrator clearly understands that the assisted person has a specific understanding of using the information network to carry out cybercrime activities, he or she still carries out assisting behaviours such as interest transfer, payment and settlement. These behaviours objectively play a role in promoting the crime and reaches the standard of severe circumstances [10]. Clarifying illegal assistance in transactions within the game is beneficial for cutting off fraud infiltration, increasing the crackdown on cybercrime, and also maintaining the network environment. In the era of global information integration, controlling illegal transactions within our legal jurisdiction is beneficial to our efforts to curb the infiltration of foreign criminal forces.

At the same time, it should be pointed out that free disposal should not be based on the violation of laws and regulations and public order and good customs, even though civil subjects have the right to dispose of their private property freely [11]. When the perpetrator and the assisted person use the online game account for transfer and payment settlement, if it is determined that the recipient has malicious collusion or damages the interests of others, the transaction contract between the two parties shall be deemed invalid.

4.2.2. Use Alipay to Help

The “network payment interface” mentioned in Article 7 of the Telecommunications Fraud Opinion (II) also does not have specific standards for recognition in judicial practice. The network payment interface is a set of server devices operated by the bank and is also the connection point between the Internet and the banking financial network system. The data transmitted on the Internet can be converted into the internal data of financial institutions, or the payment information and customer’s payment instructions can be processed by the designated third-party merchants, and the company undertaking the payment interface is approved by the People’s Bank of China. In practice, some apps such as Alipay and e-banking are identified as online payment interfaces. Actually, according to banking law, it is not clear that such apps have been approved by the People’s Bank of China, but whether they are derivatives of bank cards is uncertain. The author deems that if the perpetrator acquires, sells or leases the above-mentioned “network payment interface with payment settlement function”, it is considered as the crime of assisting information network criminal activities. Because the act meets the objective aspects of the composition elements at the substantive level, only the way to take a slight difference, and can be classified as an act of assisting in the sense of criminal law [12].

4.2.3. Provide Development and Maintenance Activities for Website Platforms

Those mentioned in the Telecommunications Fraud Opinion (II) that provide assistance and cover such as crime tools, technical support, etc. for telecommunications network fraud fall within the scope of the crime of assisting information network criminal activities. The author believes that the behavior of providing website development and maintenance for fraudsters can be directly identified as assisting criminals in carrying out illegal activities. Among them, there is a little dispute over whether to include “website jump”, and the controversial point is whether the behavior of being invaded by criminals to jump to fraudulent websites constitutes the crime of assisting information network criminal activities [13]. It can be clearly stated that developing a virtual website to induce others to log in to the website for fraud falls within the scope of “scierter” and objectively provides legal infringement. Those with severe circumstances should be sentenced to the crime of assisting information network criminal activities. The author believes that under the condition of knowing that the assisted person may commit network fraud through a particular platform, the perpetrator still provides a platform for the victim to jump to the fraud platform and makes profits or benefits from it. It should be judged as the crime of assisting information network criminal activities [14]. With the new online fraud brought by the digital age, criminal law should be improved accordingly, strengthen the countermeasures, and deter and punish the criminals who want to defraud through the digital platform. If there is no interest exchange between the perpetrator and the assisted person, only technical support is provided, but because it constitutes an objective promotion and assistance to the criminal act, it should also belong to the category of the crime of assisting information network criminal activities. Vigorously cracking down on related acts, warning website developers and improving website security can eradicate fraud technical support from the root, which is a way to clean up cybercrime [15]. The development of new network technology has provided a new cover for some criminal behaviors. In order to crack down on crimes, protect people’s interests and thoroughly

implement the concept of national security, it is necessary to improve the criminal law and comprehensively manage network security.

5. Conclusion

This paper weighs the value of the “etc.” assisting behaviour in the crime of assisting information network criminal activities, highlighting its homogeneity with related cybercrime in response to the problem of different determinations in theory and justice. Namely, the criminal behaviour of legal benefit infringement. Moreover, this paper adopts the way to solidify the elements of subjective cognition, objective behaviour, and severity of circumstances to reasonably define the content of “etc.” behaviour with the same nature and degree as judicial interpretation. Hence, it provides the criteria for determining the “etc.” assisting behaviour in the crime of assisting information network criminal activities, which is conducive to avoiding the fiction of the type of behaviour and the cover-up of the actual situation. To a certain extent, not only can this paper limit the trend of “pocketing” of the crime of assisting information network criminal activities, but it provides a reference for judicial application and have practical significance. At the same time, it should be noted that although the crime of assisting information network criminal activities has been set in law, in the process of applying the law, China should take into account its social stakes. The scope of application of the crime of “aggravated circumstances” should be paid attention to protecting the innovation of the information network industry and combating cybercrime. Otherwise, it will have a negative impact on China’s network technology and the emerging Internet industry.

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