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Digital legacy

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Abstract: Throughout this article we envisioned a brief analysis of the "digital legacy" concept, reflecting the specific case law and its impact on comparative legislation. The fact that we live in a digitized world means that we face challenges unbeknownst to inheritance law. First of all, we need to address the terminology: what is a digital asset or data and in what manner can it be the object of an inheritance. Although digital legacy is a relatively new concept, it is a powerful one, for it involves the future in its most natural surroundings: the digital information seen as a different dimension, based on a physical medium. The "digital" concept relies on two essential features. The first one is a technical one and encompasses the use of data from an electronic standpoint, respectively the data left behind by a user, who is not essentially an individual. The other aspect concerns the cultural and juridical perspective of how someone's data can be considered an asset or property. In this light, we notice the baffling approach of legislators: mainly relying on the good will of those who work with data, this leading to inconsistent or vague legislation. Thus, the aim of the article is to analyze the legal implications of the digital experience in terms of inheritance law.

Keywords: digital inheritance; digital content; digital assets.

Introduction

The virtual world is populated with virtual goods. Their legal nature is somehow different than the one in the tangible world. Thus, owning in the virtual world might mean only having a right to use, even if the good was marketed as being for sale, and the account holder bought it or purchased it with real money.

As a consequence, in most cases, the account holders are not the real owners of these digital assets, but they are merely using licenses that enable them to act like owners. By far, having a license is the most usual right account holders have after accepting the terms of service, either in an explicit manner, by clicking "I agree" button, or in an implicit manner, presumed by the provider's platform. The gaming industry is the perfect example in this area. One can buy different items, characters or money, in order to play the game.

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Moreover, there are intra-world auctions, where users can sell or buy such items from other users, building a sense of property[2].

The service providers offer the account holder a safe haven for expressing a digital identity, through photos, videos or music, both for individual use and for social purposes. In this respect, the digital data gathered from a digital identity might be considered as encompassed in the notion of personal rights, included in the personal identity of the account holder. Therefore, by equalizing the digital identity with the user's real identity, one might consider that the personal rights are terminated at the time of the user's death and therefore are not transmissible. On the other hand, rights that are essentially linked to the personal identity of the account holder (like the name or reputation), can't be transmitted through succession.

Although death means the end of the deceased's legal personality, this aspect is not axiomatic from a digital point of view. In this sense, the user is immortal, even though the person behind it just died. The reason for which a user is immortal resides in the fact that no one defined mortality as related to a user. Therefore, it is what it is: an element of a wider system, that can be closed (as an account) or can be banned (in case of harmful deeds) but that can't be killed, being artificial. As a result, inheriting a user is theoretically not possible, unless the legislator provides otherwise.

Besides other aspects, the debate over the inheritability of digital assets encompasses the subject of receiving access to an account in the context of that account holder's death. In this case, the access covers the digital content, public or private. Many scholars asked themselves in what way inheriting an account is different from inheriting its content[3]. To answer this, we have to distinguish property from access. Property involves rights and obligations, whereas access encompasses some non-exclusive rights, according to the platform's or the service provider's view. Obviously, the purpose of inheriting an account is mainly inheriting the digital assets stored on the account or enabled by accessing the account, observing that property over the digital data is also correlated with the nature of the digital content[4].

Inheriting digital assets is a complex matter, as it appears to bring together different types of provisions: public law, mainly in the matter of privacy or personal data protection, contract law and, of course, succession

[2] Most frequently, the service provider or the platform offers licenses that are individual, limited and revocable, without the option of transfer or sub-license, and therefore cannot be inherited.

[3] M. Grochowski, *Inheritance of the Social Media Accounts in Poland*, *European Review of Private Law* 5-2019, *Kluwer Law International BV*, The Netherlands, 2019, pp 1195 et seq.

[4] For example, downloading items like music, videos or photos, that belonged to the user.

law. Therefore, the manner of enacting the provisions about digital legacy should ideally be supranational, thus achieving a harmonization specific to international law provisions.

As a consequence, one can distinguish some digital inheritance related issues, like the following: albeit the personal information is nowadays mainly stored on digital support, the users generally fail to provide information about what will happen with this digital data in the event of their death. Therefore, the user's heirs are mostly unaware of their existence, lacking either the passwords, the access or even the legal right to benefit from them or to use them, mainly in the case of digital assets that hold some financial value. Also, inheriting an account can lead to the infringement of the individual rights of the people that connected with the deceased.

1. The digital content and the digital assets

The concept of digital asset is a dynamic one, because it includes on daily basis new technologies and as a consequence, a definition fails to encompass all these meanings. Nevertheless, different legal provisions include accounts like e-mails, social networks, blogs, websites, storage sites or digital bank accounts[5].

First of all, we notice that there are two types of data, based on the input or the origin of that data. The first one is the data derived from third parties[6] or from the service provider[7], that the user is able to access. The second one is the data introduced by the user[8] on a platform owned by a service provider.

Entering the digital world of contracts, we notice that the user is in fact a consumer, agreeing to terms of condition of use, drafted in an inflexible form by the service providers. Among other rights granted to the user, we distinguish

[5] S. Kreiczer-Levy, R. Donyets-Kedar, *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power*, 84 Brook. Law Review, 2019, pp. 703 et seq. Available at: https://brooklynworks.brooklaw.edu/blr/vol84/iss3/1, accessed at 15.11.2020.

[6] Third parties can be holders of licensed copyright, implying 2 contracts: a frame one, of license, between the service provider and the third parties, respectively a second one, of sublicense, between the service provider and the user or the account holder. For example, the following triangle: 1: third parties: singer/author/director/composer; 2: service providers: iTunes/Netflix/Deezer/Amazon; 3: users: the account holders.

[7] The classical example is the case of e-books to which the user is granted access on Kindle.

[8] For example, a data file uploaded in a cloud, like a photo or a manuscript.

not only the right to use the data, but also to copy, to distribute it, to analyse it or to transform it[9].

Indeed, if the users involved or the legislators would treat this intangible property in the same manner like the tangible one, providing access and information about what digital data is to be inherited, things would be less complicated. However, albeit digital assets are intangible, this is not a real issue from the perspective of digital inheritance, noting that one can find provisions that encompass inheriting intangible rights, like the copyright.

Correspondingly, digital assets can be divided in two groups: with economic value and without. The economic value can be relative, for example, characters and avatars for games, social media sites or blogs, photos, movies, thoughts, domain names, accounts that generate money, etc. The assets without an economic value might still be of great importance for the heirs. For example, the access to the social media profiles or to storage sites might be essential from a sentimental point of view, as a coping mechanism, in memoriam of the deceased.

It is obvious that financial assets are very different compared to non-financial accounts. However, the latter can become a financial asset depending on the purpose of use. For example, social networks can benefit influencers. Also, if *de cuius* had a blog as a digital business, the impossibility of access post-mortem might lead to bankruptcy or might hurt the business.

However, some digital service providers control their users' digital assets and they have no regulations in the event of the account holder's death, the most frequent outcome being that the account is frozen or left unused.

Although the simple requirement of a password associated to a user id might give the impression that the rights and obligations associated to the account are strictly personal, they are in fact general contractual relations. Being password protected or nominal, typically leads to difficulty in accessing the account, commonly requiring the service's provider's permission. In rare cases, it leads to the impossibility of accessing the account, for example if there are protected files and the encryption can't be broken.

However, even if the terms of agreement would provide a special termination clause for cause of death, the service provider should nevertheless provide access to a legitimate heir[10] as designated by *de cuius*. Also, the service

[9] R.M. Vučković, I. Kanceljak, *Does the Right To Use Digital Content Affect Our Digital Inheritance, EU and Comparative Law Issues and Challenges – Issue 3*, 2019, pp. 726 et seq. A. De Franceschi (ed.): *European Contract Law and Digital Single Market – The implications of the Digital Revolution, Intersentia*, Cambridge, Antwerp, Portland, 2016, pp. 59 et seq.

[10] That has the legal position of a party to the contractual relationship established between the service provider and the deceased. To the digital data such as photos and pictures, writings and music or e-mails.

provider should subsequently[11] delete the data introduced by *de cuius* that still is in its possession, without using it in any purpose. In general, in order to change the terms of agreement, the interested heirs have to press charges, this leading to a significant number of cases that can put pressure on the legislator's silence.

As a result, the service provider has in principle no legal control on the transferring of the account or the assets derived, regardless if the terms of agreement offer a different approach. Moreover, the terms of agreement have the declared purpose of assuring the security of the digital environment. It is obvious that providing access to an account with the purpose of administering the digital assets that can be found in an estate is perfectly legitimate and brings no harm to any of the contractual parties.

Nevertheless, different digital providers have different rules about account flexibility in order to be transferred. For example, the Terms of agreement imposed by Service providers, that users have to accept as they are, in order to open an account and they might limit severely the heirs' rights. In this respect, most service providers have non-transferability clauses, like Yahoo, Google or Microsoft. Still, some service providers give the account holder the option of choosing the finality of the account in the event of one's death, like Google, Facebook or Amazon.

To better analyse the post-mortem policy of the digital platforms, we chose the Facebook social network as an example. Facebook's inheritability policy evolved according to the user's needs, displaying a self-regulatory feature[12]. Noting that a major concern is the legal treatment of intellectual property, the social network revised the disparities between the profile, that must be according to the profile's terms of service, and the content, that is the personal digital space of the user, where intellectual property issues may occur[13].

According to Facebook's Terms of service, the user faces two choices on post-mortem access. As a consequence, in case of the death of a user, the user's profile will be changed into a memorialized one, unless the user chose previously to permanently delete the account. Moreover, the user has the right to choose a person that will have restricted access to such an account.

Nowadays, configuring an account equates to possessing the digital data that the agreement with service provider entitles you to. Though it is not a property, it is perceived this way especially in the context of „user generated data", where the consumer is more of a prosumer and the license to use is perceived more like a property title. Therefore, knowledge is, once more,

[11] Only after saving the data and distributing it to the heir, and after being authorized to do so.

[12] M. Grochowski, *op. cit.*, pp. 1195 et seq.

[13] S. Kreiczer-Levy, R. Donyets-Kedar, *op. cit.,* pp. 713 et seq.

power. The knowledge of the used platform, username and password gives one the power to access the data content.

In this respect, for more clarity, one can divide users' rights into 3 main categories, according to the legal status and noting that not all digital assets are in the account holder's property: copyright, ownership and license.

First of all, when the content is generated by users, they are in general the holders of copyright, like videos, photos or texts published on social media, for example on Instagram or Facebook, as well as data created as user generated data or even documents saved in a cloud. The storage medium has no implications on the legal nature of data inheritability. In this respect, storing data on line or on a tangible medium like a PC or an external hard disk or even on a USB Disk has no impact on inheritance.

The author of the message (sender) holds a copyright of the literary communication, keeping a copy in the "sent" box. The receiver (addressee) of the digital communication receives a copy of the copyrighted work in his inbox. According to the provider's terms of service, the property of the digital communications is reserved by the user only if it implies the copyright aforementioned. As a consequence, retaining the copyright (and not a simple copy, in the addressee's case) could enable the estate to claim the right over the digital content of the deceased user, even in the absence of a will.

The legal literature pointed out that although electronic means of communication had not received the similar legal protection to the usual inheritable goods, this protection will soon be enacted by the legislator. Meanwhile, the legal scholars proposed a new approach for the digital content held by an e-mail service provider through the analogy with the law of bailment. In this respect, the e-mail digital content, virtually located on the service provider's platform, has the same legal status of property of the owner as the assets stored in a deposit or in a warehouse, where solely the possession is transferred. The analogy continues, stressing that being unable to locate the key to the deposit is similar to being unable to retrieve a password, and this has no impact on the nature of property.[14]

Indeed, if the data is stored online under a password, unknown to the heirs, they would have to prove to the service providers that they are the account holder's heirs, in order either to retrieve the password or to be granted access to the account, without retrieving the password. At the same time, knowing the password might help accessing the digital content of the account, without having any relevance from the inheritance point of view. Moreover, using a password without being entitled to do so might be the object of a criminal offense. One standard example of copyright is the data stored in an

[14] J.J. Darrow, G.R. Ferrera, *Who Owns a Decedent's Emails: Inheritable Probate Assets or Property of the* Network, New.York.University Journal of Legislation and Public Policy, Vol. 10, 2007, pp 281 et seq.

account on a social platform, like the videos, texts and photos created by the platform' s user. This data is in fact inheritable, and it is actually an asset.

Secondly, there is the hypothesis of ownership, which implies that the user has not only the possession but also the control of the digital content[15], being able to access it through a platform belonging to the service provider. In this case, owning digital data enables one to transfer it, similarly to the tangible assets. Without a doubt, possessing virtual currency (like Bitcoin) falls within this category.

And, thirdly, the hypothesis of a license. The legal position of the platform's user is of a licensor of the licenses issued to the social platform[16]. One main problem in this case is the inheritability of the licenses issued by the service provider or the platform to the user. The difficulty lies in the agreement between the platform and the user, according to which the licenses are generally deemed non-transferable or are issued under a clause that forbids their transfer. The validity of such a clause is related to the object of the license.

Most licenses are non-transferable, justified by their strictly personal character, they are object to contractual law and that generally expires in case of termination or death. For example, most items purchased on iTunes, Amazon, are in fact non-transferable access licenses, that don't transfer under no circumstance the property over the digital content and that expire in the event of the account holder's death[17]. However, there are some accounts that are not strictly personal. For example, the ones that have the purpose of purchasing music, literature, different programs for studying, dieting, training, etc. Considering them non-transferable is not only unjustified, but also unlawful, as it aims the removal of the license from the civil circuit.

Additionally, the principle of universal succession, recognized by the majority of legislations characterized by the rule of law, states that every single item, tangible or not, that belonged to *de cuius*, will pass on to the heirs, with few exceptions. This guarantees not only the continuity, but also the predictability of the legal circuit, especially in the case of *mortis causa* property transfer. Moreover, this transfer is not reliant on the heir's intent or of the awareness of the estate's assets[18]. The principle of universal succession can be limited according to the will stated by *de cuius* or presumed by law. For

[15] For example, data stored on a server or in cloud and accessed through credentials like username and password.

[16] R.M. Vučković, I. Kanceljak, *op. cit*., pp. 726 et seq.

[17] D. Klasicek, *Digital inheritance*, Interdisciplinary Management Research XIV, Opatija, Croatia, 2018 pp. 1052 et seq., Available at: https://www.researchgate.net/publication/329124760_Digital_inheritance, accessed at 15.11.2020.

[18] T. Mikk, K. Sein, D*igital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law, Juridica International*, no. 27/2018, pp. 120 et seq.

instance, if *de cuius* is the account holder, in order to access the account, the heir needs a user ID and a valid password. The problem in this scenario is the following: some rights or obligations are strictly personal[19], by nature, or non-transferable, by law[20]. In this case, the rights or obligations are commonly terminated. Besides, in the context in which heirs are universal successors, they cannot be characterized as third persons. As a consequence, they will undertake the legal position that *de cuius* assumed in a contract.

2. Legal context. Approaches of Digital Inheritance

Recently, when dealing with the matter of digital legacy, many legislators tried to find a coherent solution for dealing with post-mortem access to digital assets.

In the USA, some of the national legislators used as a prototype the provisions from the Uniform Fiduciary Access to Digital Assets Act (UFADAA), which aims both at augmenting the estate plan by including digital assets and offering fiduciaries access to digital assets, in order to manage the estate. In other states, the legislators were skeptical in recognizing post mortem access to digital assets due to the legal position exhibited by the privacy rights groups and the digital service providers that invoked the incidence of privacy concerns[21].

On the other hand, the European Union's legislation regarding digital content aimed to harmonize the national legislations through comprehensive Directives,[22] thus creating a general framework by defining the concept of digital content. The approach was to offer through the legal provisions a brief definition[23], alongside with examples. However, the definitions of digital

[19] For example, the obligation of painting a portrait is strictly personal, and the deceased's heir cannot be forced to execute it.

[20] For example, the termination of usufruct by death of the beneficiary.

[21] S. Kreiczer-Levy, R. Donyets-Kedar, *op. cit.*, pp. 717 et seq.

[22] *Directive 2011/83/EU on consumer rights,* Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0083, Directive (EU) 2015/2366 on payment services in the internal market,,* Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015L2366&from=HR*, accessed at 15.11.2020, *Digital Content supply Directive Proposal,* Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634,* accessed at 15.11.2020.

[23] *Directive 2011/83/EU defined digital content as data "produced and supplied in digital form". Directive (EU) 2015/2366 on payment services defined digital content as "goods or services which are produced and supplied in digital form, the use or consumption of which is restricted to a technical device and which do not include in any way the use or consumption of physical goods or services". Digital Content Directive Proposal* defines digital content as a "*data which is produced and supplied in digital form, for example video, audio, applications, digital games and any other software (…) a service allowing the creation, processing or storage of data in digital form, where such data is provided by the*

content, found in the European Union's Directives or proposals are actually divergent, making it harder to harmonize them. Nevertheless, it is obvious that the European legislator conceived deliberately the definition in broader terms, in order to secure the option of gradually incorporating different types of digital content, observing that the purpose of the European legislator is designing a high protection for the user of digital services or for the consumer of digital content

Furthermore, the Directive 2011/83/EU on consumer rights is in fact a directive considered to be of maximum harmonization, which means that it must be transposed in the internal legislation by the member states, in a manner that assures the definition of digital content as it is.

According to the Directives, digital content is the data that can be created by three main entities: the providers of digital services, the account holders and, of course, the third parties. In general, the rights of the account holders are regulated by the terms and conditions imposed by the service provider, without any choice of negotiation. Therefore, there is no middle ground for the user or the account holder, that finds himself in a black and white area, facing either the option to accept the terms and conditions *in integrum*, or to refuse.

In general, the service providers are legal entities or traders. In contrast, the account holders or the users are in general individuals, acting as consumers or prosumers, the latter also creating digital content. As stated before, the *ratio legis* for imposing the provisions regarding the consumer's protection, is in fact the latter's weak position assumed when agreeing a contract with a professional (in our case, a service provider), due to either the lack of legal knowledge, or to the reduced prospect of negotiation. The average consumer is therefore the weaker contract party (compared to a professional) because they cannot negotiate the contract nor impose their own terms.[24] In fact, the rights provided to account holders are mainly to use the data only for personal purposes. However, this contract or agreement between the user and the service provider might expand itself, indicating a connection between the user or the provider with third parties.

consumer (...) a service allowing sharing of and any other interaction with data in digital form provided by other users of the service", Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015PC0634, accessed at 15.11.2020.

[24] H. Jacquemin, *Digital Content and Sales or Service contracts under EU Law and Belgian/French Law, Journal of Intellectual Property, Information Technology and E-Commerce Law*, no. 8, 2017, pp.27, Available at: https://www.jipitec.eu/issues/jipitec-8-1-2017/4530, accessed at 15.11.2020.

EU data protection rules[25] cover the safety of personal data mainly in the case of living users. As a consequence, the protection of personal data from a post-mortem point of view, should be stipulated by the national law of the EU member states. However, most EU member states fail to provide a legal framework in the case of post-mortem data protection.

According to article 20 of the GDPR, the data user has the right to receive and to transmit the personal data to another user, and the service provider has to respect the decision. The aim of these stipulations is not to offer the heirs the option of requesting access to the account of their author[26], but to protect the user against the commercial use, by third persons, of the personal data. Hence, the service providers are permitted by the data protection laws to decline the heirs' access to the account of *de cuius*. In fact, the protection of a user's data lasts only for that user's lifetime, since, as we previously pointed out, the data protection legislation concerns only the protection of natural, alive individuals. Thus, the death of the user makes de GDPR unenforceable.

3. Relevant case law

In Oregon, America, *Karen Williams,* managed to access her dead son's Facebook account, guessing the password. After doing so, Facebook, changed the account's password, stating that the account holder's mother actions violated the terms of agreement concerning unauthorized access. As a consequence, the plaintiff filed suit in order to have again access to the account, carrying in the meantime negotiations with the social platform. In the end, after reaching an agreement with Facebook, she also attained a judgment[27], giving the arrangement effect. The judgement stated that the access can be given, but only temporarily, for a period of ten months, after which the account could be terminated[28].

Another important case from the point of view of digital inheritance is *Ellsworth vs. Yahoo!*[29]. In this case, according to the Court's judgement[30], even

[25] *Regulation (EU) 2016/679 (General Data Protection Regulation), Recital 27 states: "This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons*", Available at: https://gdpr-info.eu/recitals/*"*, accessed at 15.11.2020.

[26] In fact, according to the EU data protection rules, only the deceased 'right to consent to the use of the personal data can be passed on to the heirs.

[27] Issued by the Oregon County Circuit Court, in 2007

[28] A.B. Lopez, *Posthumous privacy, Decedent Intent and Post-mortem Access to Digital Assets,* George Mason Law review, Vol. 24:1, 2016, pp. 200 et seq. D. McCallig, *Facebook after death: an evolving policy in a social network, International Journal of Law and Information Technology,* Vol. 22, No. 2, Oxford University Press, 2013, pp. 120 et seq.

[29] *In re Estate of Ellsworth, No. 2005-296, 651-DE* (Mich. Prob. Ct. Mar. 4, 2005).

though the heirs had no password, they could access the digital content of their author, collected in the Yahoo! user's account. Moreover, the service provider had to deliver the plaintiff all the account's digital content (emails, documents, photos) on CD-ROM and on paper. In reaching this judgement, the court observed that the deceased user had indeed agreed with Yahoo!'s terms of service, according to which, not only was the account non-transferable, but also all the rights to the account digital content terminate in case of the user's death, at which date the account can be unilaterally closed and as a consequence, all stored digital content, deleted. The case was indeed controversial mainly because the deceased user did not have a will when he passed away, which enabled the service provider to argue that the digital content cannot be disclosed due to personal privacy issues[31], even though in its terms of service states clearly that it does not own the account content, as it was provided by the user[32].

One more interesting case is *Packingham v. North Carolina*[33]. In the judgement, the Supreme Court stated, among others, that the access of a user to digital platforms like social media sites is in fact under the protection recognized by the First Amendment of the USA Constitution. According to the court's decision, both the idea of an individual's autonomy, by having access to free communication and reliable information, and the idea of living with dignity, by self-expression on a social platform, were the pillars of attracting the application of First Amendment[34].

Another thought-provoking case was *Ajemian v. Yahoo!. Inc*[35]. In this case, the co-administrators of a user's estate demanded access to the information existent in the user's email account. Even though Yahoo! accepted, after negotiations, to make available the title information of the emails, they denied full access to their content. As a consequence, the co-administrators of Ajemian's estate insisted in receiving access to the content of the emails, arguing that the digital content was the property of the user, and therefore part of the estate. In response, Yahoo! pointed out that the emails do not make up

[30] Probate Court of Oakland County, Michigan, 2005.

[31] In the case, the respondent invoked the provisions of *Electronic Communications Privacy Act ("ECPA")*, that establishes certain obligations for the digital service providers in order to keep the privacy of digital communication.

[32] R.G. Cummings, *The Case Against Access to Decedents' E-mail: Password Protection as an Exercise of the Right to Destroy*, 15, Minnesota Journal of Law Science & Technology , 2014, pp. 900 et seq. Available at: https://scholarship.law.umn.edu/mjlst/vol15/iss2/5, accessed at 15.11.2020.

[33] Available at: https://www.supremecourt.gov/opinions/16pdf/15-1194_08l1.pdf, accessed at 15.11.2020.

[34] S. Kreiczer-Levy, R. Donyets-Kedar, *op. cit.*, pp. 700 et seq.

[35] Available at: //law.justia.com/cases/massachusetts/supreme-court/2017/sjc-12237.html, accessed at 15.11.2020.

the user's property, and therefore are not part of the estate. Moreover, providing access to the messages would disregard the terms of agreement between the platform and the user, as well as the personal privacy legal provisions. Nevertheless, the court solved the case on procedural grounds, and as a consequence the merits of the property claim were not analyzed.

The importance of the case resides in the legal context. In USA, The Stored Communications Act[36] prohibited the digital service providers from divulging to third parties, without the user's lawful consent, the content of the digital communications. Also, in recent years (mainly since 2015), most of the USA states have enacted the *Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA),* promulgated in 2015 by *The Uniform Law Commission*, according to which it is presumed that only the deceased's explicit permission amounts to a lawful consent[37]. However, the Supreme Court of Massachusetts held in *Ajemian v. Yahoo!, Inc.* (2017), that not only the deceased can provide the lawful consent, but also the personal representatives, on the deceased's behalf, in case of missing the deceased's explicit permission. The decision is therefore of great importance for paving the way towards access to digital content for the heirs or the fiduciaries and, as a consequence, even though it does not deliver any judgement on the property claims, it has deep implications in the inheritance law.

In Europe, the case law is less diverse than in America. However, we consider of great importance the German judgement from July 12 2018, *III ZR 183/17 – KG68*[38], which stated that the digital inheritance cannot be excluded by unfair contractual provisions. The plaintiffs in this case were the parents of a social network user, while the respondent was Facebook. The deceased user was a minor who died under strange circumstances. As a consequence, the plaintiffs were interested in their daughter's social activity, in this case, her messages, so they would know if their daughter committed suicide. Even though the parents had the username and the password to the Facebook account, because the account was memorialized, they were denied access to messages. The plaintiffs argued that, according to the principle of universal succession, the minor daughter's contractual position was transferable *mortis causa.* The judgement stated that the terms and conditions agreed between the social platform and the user did not imply the non-inheritability of the contractual relationship. Moreover, the memorialized account could be deemed

[36] part of the *Electronic Communications Privacy Act of 1986.*

[37] Obviously, having a will is the best course of action for providing the lawful consent. Available at: http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf, *https://perma.cc/WX8D-MMKV,* accessed at 15.11.2020.

[38] Available at: https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1, accessed at 15.11.2020.

as unenforceable and as a consequence invalidated, because its unfair character.

As a conclusion, even though personal messages exchanged on a social platform can be considered personal data and are *inter vivos* object to the *General Data Protection Regulation*, this cannot by itself exclude the inheritable character of the account[39]. The judgement is very important, because its reasoning was retrieved in subsequent judgements of other European countries that had no special provisions regarding the digital inheritance issue.

4. Romanian inheritance law

Romanian inheritance law remains silent on the matter of providing access *mortis causa* to the digital assets of a user. Nevertheless, where the law is silent, the general theory of law enables the application of the principle of universal succession. In conclusion, the transmission *mortis causa* of digital assets resembles the transmission of property to non-digital assets. Therefore, in the context of the digital legacy, the data associated to an account follows the rule: the rights and obligations that result from the contract (or terms of agreement or of service) between the account holder and the service provider are contained within the estate[40], in spite of a divergent agreement.

Originating in Roman law, the principle of universal succession implies that each deceased can and must pass on the entirety of his estate. This guarantees not only the continuity, but also the predictability of the legal circuit, especially in the case of *mortis causa* property transfer. Moreover, this transfer is not reliant on the heir's intent or of the awareness of the estate's assets[41]. This principle goes together with the presumption of inheritability of all assets that can be found in an estate, regardless of their nature, tangible or not, digital or non-digital. As a consequence, the universal heirs immediately and automatically acquire the legal status of *de cuius*, as if no transfer occurred. Moreover, having the identical legal position that *de cuius* held, the heirs are entitled to the same rights, to claim damages, to execute or to terminate the contract.

From an objective point of view, the purpose of this principle is to guarantee that no asset, claim or liability, belonging to someone, will remain, not even for a second, ownerless, in the event of that person's death. From a subjective point of view, the purpose of this principle is to preserve the estate in its entirety, thus protecting not only the heirs, but also the third parties, mainly the creditors, and the community. Having in mind the above mentioned, we observe that there is no reason for a disparity in the legal

[39] R.M. Vučković, I. Kanceljak, *op. cit.*, pp. 726 et seq.
[40] As long as they are not strictly personal
[41] T. Mikk, K. Sein, *op. cit.*, pp. 120 et seq.

treatment of neither tangible or intangible assets, nor digital and non-digital, no matter the data storage medium.

According to the Romanian succession law, the inheritance can be either *ab intestat* or testamentary, encompassing every item belonging to *de cuius*, tangible or intangible. Because the tangible property is easier to identify, the heirs (*intestat* or *ab intestat*) are in a privileged position: they can make an informed decision in relation to the inheritance. On the other hand, the intangible property has another status, being harder to identify. In this case, dying *ab intestat* can bring prejudices to the heirs' rights and empowers the legislator's presumption that the legal heirs are the ones that the deceased would have wanted as heirs. In Romania, the norm is dying *ab intesta*t. The same is the case with making a will without including provisions about every item that makes up the deceased's property, especially the intangible ones. This is because without specific information, the heirs won't be able to access the accounts with or without economic value.

Making a valid will implies, in most cases, making an inventory of the items that can be found in the author's property. This helps a great deal specifically in the case of intangible property, that can't be traced easily without the author's help. As a conclusion, where intangible property is at stake, it is paramount, for heirs' equanimity, that the author of the estate would register the property and make plans for it, in the event of his death.

This would also clear the dilemma if not sharing the passwords might be interpreted as the author's will that nobody would access the account, not even the heirs in the event of death. For example, sharing the information might hurt third parties involved, like senders, recipients, and others, who are protected by their right to personal life or privacy, or the right to correspondence secrecy. On the other hand, one can embrace the opinion that it should be enabled the presumption that, if the author wouldn't like his private items to be known or transmitted to his heirs, he should dispose of them during his lifetime, just like in the case of tangible items, like personal letters or photos, that pass on to the heirs if they are nor destroyed or alienated.

The Romanian legal system is founded on the following characters of inheritance transfer: universal[42], non– divisible[43], total[44], homogeneous[45],

[42] This legal universality includes the rights, duties or obligations of *de cuius*, as a whole, composing the patrimony.

[43] The indissoluble character applies in the case of acceptance or renunciation of succession, or in the context of inefficiency or ineffectiveness of the testament.

[44] This feature encompasses the legal development of the patrimony *of de cuius*, respectively the fact that it is to be transmitted in its wholesome and no residue can be left aside.

[45] Meaning that a specific inheritance is regulated by the same rules.

legal[46] and mortis causa[47] transfer, encompassing the intestate succession[48] and the testamentary succession.[49] According to art. 953 Civil Code, "*the inheritance is the transmission of a patrimony of a deceased individual, towards one or more living individuals"*. In addition, according to art. 31 Romanian Civil Code, "*any individual or legal person is the holder of a patrimony encompassing all rights and duties that belong to them and can have a financial value*".

As a conclusion, the object of an inheritance includes all the deceased' rights and duties with a financial value, that make up the patrimony[50]. The non-patrimonial rights and duties that belonged to the estates' author usually extinguish after *de cuius* dies. The highlight of this idea is that the inheritance has the main purpose of financial or pecuniary nature.

Nevertheless, according to Romanian law, intellectual property rights include both patrimonial and non-patrimonial rights. The non-patrimonial rights are both non-transferrable and imprescriptible, and therefore the issue of transmitting them through inheritance is intensely debated[51]. Intellectual property rights with economical value are therefore transferable through assignment, license and succession[52]. As a consequence, according to the national legislation, intellectual property rights can be inherited[53], even the non-patrimonial ones, this being an exception from the monetary character, that is specific to copyright as a moral right, and that justifies its immutable, perpetual and imprescriptible characteristic[54].

[46] Meaning that the succession is only defined by law, and de cuius is prohibited from concluding any type of agreement or contract concerning the legacy.

[47] Meaning that the inheritance can only be accessed after the time of death, and that de cuius can be only a natural person, whereas the heirs can be either natural or legal persons, for the latter being able to access only through testamentary succession.

[48] Art. 963 et seq. of the Romanian Civil Code.

[49] Art. 1034 et seq. of the Romanian Civil Code.

[50] In Romanian legislation one can distinguish patrimonial rights and duties that are *intuitu personae*. Being essentially personal, they will extinguish at the time of *de cuius's* demise, for example, the right of personal usufruct.

[51] For the dominant opinion, according to which non patrimonial rights and obligations are not inheritable, see Yolanda Eminescu, *Dreptul de autor, Editura Lumina Lex*, Bucureşti, 1997, ISBN 973-9186-96-3, pp. 240 et seq.

[52] *Law No. 8/1996 on copyright and related rights, Law No. 129/1992 on the protection of designs, 84/1998 on trademarks and geographical indications, Law No. 64/1991 on patents, Law No. 350/2007 on utility models.*

[53] Even though the rights can be inherited, they are only valid for a maximum of 70 years.

[54] We also notice that this moral right encompasses two coordinates. Firstly, the right of disclosure is limited by the duties resulting from the right to the paternity of the work and its inviolability. Secondly, the right of disclosure is understood through the lens of the author's will.

Conclusion

As we have seen throughout this article, heirs can seldom enjoy the data assets derived from their author's existence in the digital world. For example, most accounts imply licenses, that are not transferable to third parties or to heirs, provision which the author approved by agreeing to the inflexible contract with the service provider. Moreover, most users are not aware of this inheritability or non-transferability of digital content at the time of accepting the contractual terms. It seems obvious that the concept of digital identity becomes increasingly important as a consequence of the increase in the number of digital users. However, a digital, virtual identity does not necessarily resemble the user's real, concrete identity.

Because the world of data has all kind of users, professionals or simple consumers that have no understanding of the contracts or agreements they enter, the terminology used should not only be accessible, but should also be homogenous, standardized. For example, the EU legislation should provide a single definition that encompasses all the digital content and digital services meanings, in order to address in an equitable manner, the legislation's addressees, respectively the users, the service providers and the third parties.

Even though it might seem that subsequent to their author's death, the heirs should be entitled to the entire estate of inheritance that comprise all the rights, tangible and intangible that belonged to *de cuius*, this is in fact an inadvertence. As we've seen throughout this article, there is a category of rights that do not make the object of an inheritance and therefore cannot be transferred *mortis causa*. Nevertheless, in the event that a user dies without leaving a comprehensive will or instructions about the inheritance of his digital assets, the legislation should provide a legal frame for inheritability of digital assets. From this point of view, the interests of the heirs should overcome the interests of the service providers.[55].

Digital information can last ages after the account holder's death, generating the feeling of everlasting and the problem of access: who is entitled to manipulate something that can achieve immortality?[56]. The intangible character of digital assets amplifies the legislative vacuum regarding digital inheritance. Privacy should concern both living people and dead ones, because there is a fine line between breaching user's privacy and considering the personal communications as uninheritable because of that. From our point of view, privacy considerations should be taken into account as long as the user is alive. After dying, this privacy protection ceases to be a priority. Nevertheless, one can argue that the other user (the sender or the receiver) can suffer

[55] D. Klasicek, *op. cit.*, pp. 1061, et seq. R.M. Vučković, I. Kanceljak, *op. cit.*, pp. 726 et seq.

[56] A. B. Lopez, *op. cit.*, pp. 200 et seq.

personal damage due to the fact that someone else is accessing his messages. But as a general rule, the protection of personal data post-mortem remains very different to the protection of personal data *inter-vivos*[57], and the digital content can be inherited, as long as there is no obvious breach of GDPR. Indeed, for this kind of personal communication, there can be applied a double measure, as the context is different than the case of personal letters, that can be traditionally inherited with no regard to any GDPR-related issue[58].

Trying to fill the legislative void and fulfill customers' needs, many service providers entered the digital market with different offers. Some of them focus on the users themselves, by providing internet safes for accounts and passwords[59] or even for digital data, with the purpose of ensuring a storing facility in particular for problematic or significant documents. Other service providers focus on the users' heirs, by offering support to the next of kin or to a designated heir to find and to manage a digital estate[60]. Undoubtably, either having a digital estate plan, or writing a comprehensive will that translates into reverence towards the intent of *de cuius*, are good options in tackling the issue of digital inheritance. An effective approach to the "digital estate plans" is offered by private companies, like Safe Haven, SecureSafe or Legacy Locker, that have the purpose of helping manage the digital assets and sustaining the designated heirs' access to the accounts indicated by *de cuius*[61]. However, a legislative upgrade is essential in order to solve the aforementioned debate in a consistent manner.

The issue of digital inheritance under Romanian law lingers in the realm of "what if". We can imagine a lot of theoretical situations as we are confronted with the lack of case law. Nevertheless, observing the way that other legislations tackled the legal issues related to digital assets inheritance, we can generally envision the framework that will be used in our country in order to deliver just judgements. However, the legislator might enact some

[57] *Regulation (EU) 2016/679 on the protection of natural persons, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0679*, accessed at 15.11.2020.

[58] Nevertheless, it is considered a criminal offence to access without permission or right someone else's private communications, no matter their kind: tangible, traditional, or intangible, data communication.

[59] For example, the service providers that enable the preservation of a user's important memories, like the platforms 1000memories or VirtualEternity.

[60] For example, the service providers that enable detecting digital assets through examining the electronic devices of *de cuius*. E. Brucker-Kley, T. Keller, K. Pärli , C. Pedron, M. Schweizer, M. Studer, P. Wohland, *Passing and Passing on in the Digital World - Issues and Solutions for the Digital Estate, IADIS International Journal on WWW/Internet*, Vol. 11, No. 2, Zurich, Switzerland, 2013, pp 34 et seq., *available at: http://www.iadisportal.org/ijwi/papers/2013112103.pdf*, accessed at 15.11.2020.

[61] R.M. Vučković, I. Kanceljak, *op. cit.*, pp. 726 et seq.

specific provisions regarding digital assets, in order to cover an aspect that is part of our everyday life. For example, the digital inheritance trend is to set up some comprehensive "digital estate plans", that would manage the accounts and the passwords associated to them.[62] From a judicial point of view, digital estate planning is in its early stages. Theoretically, its main purpose is to improve the digital estate's transparency and accessibility. This objective also implies access details for the enlisted account, indications regarding the accounts and the beneficiaries.

Having intangible assets is a reality nowadays. Knowing the kind of asset that one owns, whether it's a license, a copyright or a property, is very important. Changing the way that we legally relate to inheritance must be updated according to our changing interests. It is a certitude that both the supranational and the national legislations will soon encompass provisions regarding digital inheritance. Nevertheless, today, holding valuable intangibles of which *ab intestat* heirs have no knowledge, many times equals having no intangibles at all, from the inheritance point of view. As a consequence, the best way to find comfort for a future afterlife is, as we have pondered throughout the article, a simple but proactive approach: having a will and stating the wishes about the digital assets.

[62] In this respect, D. Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism,* 58 Boston College Law Review, 2017, pp. 541 et seq, available at: https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3569&context=bclr, accessed at 15.11.2020