

LEGAL SITUATION OF DIGITAL ASSETS IN THE EVENT OF THE DEATH OF THEIR USER. REFLECTIONS ON THE LAW OF THE FUTURE

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<https://doi.org/10.62140/ZM112024>

ABSTRACT: Reflecting on the future of law as it relates to the legal situation of digital assets is not the easiest thing to do. Indeed, globally, this phenomenon is well recognised but differently understood. The approaches of the legislature and judicature to date to solving the problems arising in this regard are also different. In this text, the author attempts to reflect on the future of this area of law. He presents a solution to Catalan law which, in his opinion, may in the future prove to be an interesting paradigm also for other legislators. It combines a number of aspects of the problem, which are not possible to combine in the application of the traditional instruments of succession law. The article concludes by pointing out that it is necessary to observe the practice of the law in order to be able to assess in time how well this solution works in practice.

Key words: digital assets, succession, inheritance, Catalan law.

1. INTRODUCTION

This statement is devoted to the future and possibly uniform law on the legal situation of digital assets in the event of the death of their user². The issue of the future of law is a complicated one. For it is difficult, if not impossible, to predict what the future will be, what it will bring. Events in recent years have shown that the unexpected is becoming more and more frequent, and the legal system is being confronted with circumstances that could not have been foreseen or were unlikely to occur. From the perspective of many countries, for example, the war in the Ukraine, and before that the COVID-19 pandemic³, were precisely such emergencies that were not foreseen and with which the states had to contend. For obvious reasons, the legislation was unprepared for this, and many issues remained, or even still remain, unresolved. And if some solutions did emerge, they often caused some controversy⁴.

There were many unprepared countries, and Poland was one of them. But of course, Poland was not the only such unprepared country. Admittedly, the distance of the Ukrainian conflict from Portugal, for example, is considerable, but this does not mean that Portugal, too, does not have to face it, if only because of its obligations as a member of the European Union or NATO. The COVID-19 pandemic, on the other hand, had a similar chaotic effect on that country's legislation, just as it did in Poland. Examples of legal chaos in recent years

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² Lilian Edwards and Edina Harbinja, "What Happens to My Facebook Profile When I Die?" Legal Issues Around Transmission of Digital Assets on Death' (2013) 5 CREATE Working Paper 2.

³ Christine Smyth, 'What's New in Succession Law: COVID Conundrums: Consideration Needed on the Question of "Presence"' (2020) 40 Proctor 44.

⁴ David Matyas, Peter Wills and Barry Dewitt, 'Imagining Resilient Courts: From COVID-19 to the Future of Canada's Court System' (2022) 48 Canadian Public Policy 186.

are numerous, in many countries⁵. An interesting example is precisely the COVID-19 pandemic, a global phenomenon that has not led to some kind of uniform legislative standard in individual countries around the world. Thus, despite analogous events, each country adopted fundamentally different solutions. Is it even possible, then, to think about a uniform law to deal with a commonly occurring global phenomenon? In my opinion, yes, although this is obviously a difficult matter. And digital assets is such an area⁶, in particular when we think about the situation of their *mortis causa* legal succession.

2. THE PHENOMENA OF DIGITAL ASSETS AND DIGITAL WORLD

Digital assets is an area that until today has existed for over twenty years now⁷, that has more or less been mastered by mankind, and it is therefore time to regulate it desirably. Undoubtedly today, at least in European or Ibero-American countries, access to the Internet is not something special. Part of our life has moved to the digital world. We set up all sorts of accounts there to use all sorts of services. We make friends, share our insights into how the world works or correspond. Who writes traditional letters today, after all, we write electronic letters, so-called e-mails⁸. The right of access to the Internet has grown into a human right. All in all, this is a very interesting area⁹.

On the other hand, however, the typical situation is that having concluded an appropriate contract with an Internet service provider, we tend to forget the inevitable - we forget, or do not want to remember, that one day our death will occur, the death of an Internet user¹⁰. Will it also be the “death” of the internet account, of the internet service? Does the digital footprint we leave behind in this way have any significance, especially in the context of inheritance law and the possibility of legal succession? What should possible legal solutions for this area look like? Is it even possible to design it? This is exactly what I am going to explore today.

It used to be simpler without the internet, it seems. Traditional letters, photos, memorabilia, were in analogue form, physically constituted things which, irrespective of intangible rights, generally passed on to our heirs on the basis of generally applicable

⁵ Judith Townend and Paul Magrath, ‘Remote Trial and Error: How COVID-19 Changed Public Access to Court Proceedings’ (2021) 13 Journal of Media Law 107.

⁶ Heather Antoine, ‘Digital Legacies: Who Owns Your Online Life After Death?’ (2016) 33 The Computer & Internet Lawyer 15.

⁷ Pawel Sz wajdler, ‘Digital Assets and Inheritance Law: How to Create Fundamental Principles of Digital Succession System?’ (2023) 31 International Journal of Law and Information Technology 144.

⁸ M Esperança Ginebra Molins, ‘Voluntades digitales: disposiciones mortis causa’ in Esther Arroyo Amayuelas and Sergio Cámara Lapuente (eds), *En derecho privado en el nuevo paradigma digital*, vol X (Colegio Notarial de Cataluña-Marcial Pons 2017).

⁹ Haideer Miranda Bonilla, ‘Algoritmos y Derechos Humanos’ (2021) 71 Revista de la Facultad de Derecho de México 705.

¹⁰ Matthew Slaughter, ‘The Barriers of Facebook’s Terms of Service Agreement: Hardships Placed on Fiduciaries Access to Digital Assets’ (2015) 24 Information and Communications Technology Law 183.

regulations¹¹. Traditional inheritance law, which is supposed to be technology-neutral, generally did not consider whether these things should pass to others after the death of their owner. Of course, a certain personal nature, in some situations, may have precluded inheritance, but this was not on the scale we face today. Anyway, in principle, until recently, the issues of privacy and inheritance were not linked, on the assumption that the two were potentially non-conflicting areas. Is this still the case?

A few years ago, there was a famous story of a man from Springfield in the United States of America who was thought to have inherited rare handwritten letters from President John F. Kennedy¹². The story was presented in one of the magazines: Dennis Harkins, for it is about him, is heir of the letters whose mother passed away in 1990, leaving him correspondence with Dennis's uncle Harold. Harold was a sailor who joined the Navy in November 1941, and was aboard the motor torpedo boat PT-109 commanded by Lieutenant, junior grade John F. Kennedy during World War II. Harold, only 19, was lost in the South Pacific following a deadly encounter with a Japanese destroyer. After the loss of Harold, Kennedy wrote to Harold's mother. Part of the letter reads: *"This letter is to offer my deepest sympathy to you for the loss of your son. I realise that there is nothing that I can say can make your sorrow less; particularly as I know him"*.

According to the episode's tale, Harold's mother Jenny responded back to Kennedy thanking him, and asked if Harold could still be alive. Kennedy wrote back that there was no trace of him when the crew was united on the coast. Since then, Jenny and Kennedy kept in touch. Jenny visited Kennedy when he returned to Boston to treat injuries. He wrote to her years later even after he took the White House. But we know how this end: Kennedy was assassinated in 1963. Jenny later died in 1973, and passed on her letters from the president to her daughter and Dennis Harkin's mother, Elaine. When Elaine died in the '80s, Dennis inherited them. They've been in a safety deposit box since¹³. The drama unfolds as Dennis discovers the possible historical value of the letters, and also the likelihood that they're worth a lot of money. Would the situation be the same if John F. Kennedy had written e-mails instead of letters? Would we also be discussing their inheritance and potential economic value today?¹⁴

¹¹ Robert H Sitkoff and Jesse Dukeminier, *Wills, Trusts and Estates* (10th edn, Wolters Kluwer 2017).

¹² Bryanna Cappadona, 'A Man from Springfield Inherited Rare John F. Kennedy Letters', (2015) Boston Magazine of 2/15/2015, <https://www.bostonmagazine.com/arts-entertainment/2015/02/15/strange-inheritance-jfk-letters/>.

¹³ Ibidem.

¹⁴ Ibidem.

What about the Diary of Christopher Columbus' First Voyage to America, 1492-1493?¹⁵ The Diary describes Christopher Columbus' first expedition to the New World. It is the most important source of knowledge about the discovery of America. To this day, its original has not been found, and what we have is only a draft copy of the lost original, made by the greatest historian of the era, Bartolomeo de Las Casas¹⁶. The history of the Diary is as confusing and mysterious as that of Columbus himself¹⁷. A great deal has already been written about its authenticity and significance, including the fact that its authenticity has been questioned and Las Casas has been accused of mystification. However, there are many indications that seem to confirm that the Diary did indeed exist, and that the copy created by Las Casas is faithful.

If the original of this Diary were to be found today, is it a movable item that has a relevant property value? Could his potential heirs derive any economic benefit from it? What if Christopher Columbus had kept the Diary in the cloud instead of a book, as it is possible today? Would we also today be talking about his inheritance and potential economic value, provided, of course, that the cloud, the servers, the Internet were able to survive for five hundred and thirty years.

And finally, let's consider, for example, the gold or other various assets discovered and brought back from that Columbus' voyage. What if they were in digital form - digital assets - would they still be an object of inheritance today? Would the general provisions of the civil codes on inheritance, i.e. as they are usually found in the individual national legal systems, be sufficient in this respect?¹⁸

As we may think, this is not at all obvious. The digital world has its own rules¹⁹. For some time now, we have been observing the development of various legislation in this area, as well as contractual provisions in contracts concluded by Internet users with Internet service providers, which determine the fate of individual digital assets. This fate varies. Sometimes it is claimed that the digital asset in question, associated with the use of a particular online account, expires when the account is not used for a certain period of time. Sometimes, on

¹⁵ Christopher Columbus, "Journal of the First Voyage of Columbus," in *Journal of Christopher Columbus* (during his first voyage, 1492- 93), and *Documents Relating to the Voyages of John Cabot and Gaspar Corte Real*, edited and translated by Clements R. Markham (London: Hakluyt Society, 1893), 15-193.

¹⁶ Wade Frazier, 'Columbus: The Original American Hero', (2001) *Globalization*, passim.

¹⁷ Manuel da Silva Rosa, *Cristoforo Colombo, the weaver from Genoa, was not Don Cristóbal Colón, the navigator from Iberia*, (Ponta Delgada 2023), passim.

¹⁸ de Marinheiro Mota Ana Catharina, *Sucessão de Bens Digitais: A Admissibilidade da Herança Digital* (Universidade de Coimbra 2022).

¹⁹ Mariusz Zalucki, 'Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies' in F da Silva Veiga, P de Brito and ZL Pierdoná (eds), *Future Law, Vol. II* (Instituto Iberoamericano de Estudos Jurídicos-Universidade Lusófona do Porto 2021).

the other hand, it is argued that issues of privacy or secrecy of correspondence should speak for such termination of a given digital asset with the death of its subject - the Internet user. Several concepts have emerged worldwide as to how the law should treat such digital assets²⁰. The most far-reaching concept advocates the application of property law to these objects (rather, however, by analogy)²¹. In this case, the object of ownership would be reduced to the computer code stored on the server of the entity that owns the rights to the online service in question. There are also concepts, which tend to be the majority view, focusing on contract law, indicating that the user of an Internet service is linked to the Internet service provider by a license contract, which should set out the terms and conditions for the use of specific assets²². There are also ideas proposing the use of a deposit contract structure. The latter assumes that, in addition to the license contract, the user and the Internet service provider are linked by a deposit contract, where the user could store the digital assets “belonging” to him. Other positions can of course also be encountered.²³

3. SOME CRITICISM OF THE CURRENT SOLUTIONS

Such solutions, however, do not seem to be appropriate, as shown by some case law, particularly in the US and Europe. In fact, in some countries, the problems of succession to the legal status of digital assets in the event of death of a Internet user have already been considered in practice on a number of occasions. The well-known and published rulings generally led to the conclusion that the heirs gained access to the deceased user's digital assets²⁴. Sometimes it was a long battle, but it was generally successful. However, should this be the case?²⁵

Digital assets are part of the world of the Internet, the digital world. Undoubtedly, in this area, secrecy, anonymity, the right to privacy, are values that cannot be neglected²⁶. For it is on the Internet that we are more direct than in traditional life, it is there - sometimes anonymously - that we lead a digital life. It has many aspects, of which it is the privacy, both our own and that of our communication partners, that must be of importance, including in

²⁰ M Esperança Ginebra Molins, ‘Voluntades digitales en caso de muerte’ (2020) 12 Cuadernos de Derecho Transnacional 908.

²¹ Orhan Gazi Sarıdağ, ‘Antalya Bölge Adliye Mahkemesi 6. Hukuk Dairesi’nin 13.11.2020 Tarihli Kararı Çerçevesinde Dijital Terekenin Kapsamının İncelenmesi’ (2022) 4 Bilişim Hukuku Dergisi 191.

²² Mariusz Zalucki, ‘Contractual Limitations in the Mortis Causa Legal Succession on the Example of the Facebook Contract. The German Facebook Case’ (2021) 13 Istorie, Cultura, Cetatenie in Uniunea Europeana.

²³ These concepts are described in more detail in e.g.: Esperança Ginebra Molins (n 8) 210 ff.

²⁴ Mariusz Frasz, ‘Succession of Digital Goods. A Comparative Legal Study’ (2021) 47 Review of European and Comparative Law 67.

²⁵ Gregor Christandl, ‘La transmission des comptes Facebook, Instagram, iCloud, etc., en Allemagne et en Autriche’ [2023] Graz Law Working Paper 1 ff.

²⁶ Edina Harbinja, *Digital Death, Digital Assets and Post-Mortem Privacy* (Edinburgh University Press 2023).

the context of succession²⁷. If there is electronic correspondence on the internet between two people, of a private nature, whether via e-mail, WhatsApp, another messenger or, for example, on a dating site, is this really an area that should be subject to succession?²⁸ Should successors in title enter into digital rights and obligations regardless of their nature? Even if we think that digital assets are of proprietary nature, should not there be any limits to its succession?

Furthermore, the Internet is an area of massive data processing²⁹. Data processing, and this is what the human presence on the Internet mainly entails, is a relatively new legislative area that is receiving attention³⁰, particularly in European countries. It is an area that is also potentially relevant to the problem of the legal succession of digital assets left on the Internet after the death of one of the users. At the EU level, as is well known, the GDPR has been adopted³¹. However, the GDPR speaks mainly about the processing of data of living persons and the resulting limitations, but leaves the possibility of possible further regulation of data processing of deceased persons to national legislators. To date, rarely has anyone decided to do so. Portugal and Spain, for example, have decided to do so. The recently enacted Portuguese or universal Spanish laws refer to the European General Data Protection Regulation. They imply, among other things, the possibility for the deceased to decide on the status of digital assets *ante mortem*, and the possible prohibition of access to data 'does not affect the rights of the heirs to access the data of the deceased's estate'³².

These are undoubtedly interesting solutions, although not popular enough and not yet so often problematic to speak of any scale of cases and their resolution, to see if the practice is correct. The issue is debatable and exclusive national solutions do not seem to solve the problem. To date, there is no uniform view, if only on a European scale. In turn, the national solutions adopted, which often contradict each other, seems problematic at first glance. After all, the Internet does not know or recognise national borders³³. It seems, therefore, that the law concerning it should also be similar (multinational, global). However, this is not the case.

²⁷ Katharina Seidler, 'Der digitale Nachlass – ein Zwischenstand' (2020) 7 Neue Zeitschrift für Familienrecht 141.

²⁸ Alexandra Indra Seifert, 'Das digitale Erbe im Spannungsfeld von Persönlichkeitsrechten, Fernmeldegeheimnis und Datenschutz in Deutschland' (2019) 27 European Review of Private Law 1169.

²⁹ Guilherme Vargas Puchta and Zilda Mara Consalter, 'Digital Inheritance in the Light of the Fundamental Right to Data Protection' (2023) 3 Scientific Journal of Applied Social and Clinical Science 2.

³⁰ James Grimmelmann and Christina Mulligan, 'Data Property' (2023) 72 American University Law Review 829.

³¹ Silvia Díaz Alabart, *La protección de los datos y contenidos digitales de las personas fallecidas* (Editorial Reus 2020), *passim*.

³² Ana Catharina (n 18).

³³ David Lee Baumer, Julia Brande Earp and JC Poindexter, 'Internet Privacy Law: A Comparison between the United States and the European Union' (2004) 23 Computers and Security 400.

4. THE FUTURE

How, then, can this problem be resolved. On the theoretical side, at least one point, not always noticed, seems interesting. Despite the wide doubts raised in the doctrine of civil law in Europe over the years, the concept of the existence of personality rights after the death of a natural person - how some national solutions may be read - may be of interesting relevance for today's reflections on the theoretical basis of succession of digital assets and their combination with personality rights³⁴. This is because there is a conviction found in many legal systems that these rights (personality rights) are intrinsically linked to the subject and therefore can only function until the subject's death³⁵. Fortunately some scholars seem to question this idea, which, against the background of today's considerations about the post-mortem effects of leaving digital traces, may add some interesting arguments to the discussion.

Reflecting on succession and its, as it were, automatic application in the case of digital assets, while noting the connection between these goods and personality rights, it seems possible to argue in favour of a position against the automatic succession of this kind of property³⁶, although until recently I thought it should be otherwise³⁷. Digital assets are undoubtedly of a proprietary nature, part of functionally understood property, but their character related to the online environment argues for a more hybrid perception of such assets, which can be reflected in its description as so-called personal digital assets (assets for which the privacy of its online user is not an indifferent element)³⁸. Of course, this thought certainly needs to be developed, and the combination of property with personality rights and the resulting limitations in the context of its succession is not a matter of course, but, it must mean, however, that personal data and its protection can be - and seem to be - an appropriate means to guarantee the protection of the natural person's right and fundamental freedoms, especially the right to intimate life, and the right to family and private life, especially in situations regarding the processing of the data with personal character, and such a situation

³⁴ Mariusz Załucki, 'The Approach of Family and Succession Law to Digital Assets', *passim*.

³⁵ Jacek Mazurkiewicz, *Non omnis moriar: ochrona dóbr osobistych zmarłego w prawie polskim* (Uniwersytet Wrocławski 2011), *passim*.

³⁶ Francesca Bartolini and Francesco Paolo Patti, 'Digital Inheritance and Post Mortem Data Protection: The Italian Reform' (2019) 27 *European Review of Private Law* 1181.

³⁷ Załucki, 'Digital Inheritance: Key Issues and Doubts. The Challenges of Succession Law in the Face of New Technologies' (n 19).

³⁸ Nuria Martínez Martínez, 'Reflexiones en torno a la protección post mortem de los datos personales y la gestión de la transmisión mortis causa del patrimonio digital tras la aprobación de la LOPDGDD' (2019) 35 *Derecho Privado y Constitución* 169.

for which the resulting legal constructions seem to be necessary, is the inheritance of the digital assets of the Internet user³⁹.

Looking at today's legal solutions to the digital wealth issue through the prism of the above views, it is important to note the need to contrast personality rights with rights of a property nature. It is therefore necessary to resolve the potential conflict that may arise between such rights⁴⁰. At first sight, this conflict can be resolved by referring to the data protection regulations⁴¹. In the situation when a given good of an economic nature has at the same time a personal character (is strongly connected with a given individual), it is the regulations concerning the protection of personal data that may determine the further fate of this good, the possibility to use it in civil law transactions. These regulations, especially at present, leave the relevant decision to the discretion of the holder of this good. The assessment of whether the good will be able to circulate on the market, whether it will be heritable, is therefore left to the user of this good, his will expressed *ante mortem*⁴².

In this regard, the Catalan law on digital wills, for example, appears to be a pioneer in solving the problem of inheritance of digital assets.⁴³ This law essentially makes the succession of legal heirs to the deceased's rights in the context of digital assets conditional on the deceased's willingness to do so, while also indicating possible competences, including requiring the deceased to delete active accounts or transferring outstanding content to specific individuals. This is a very interesting solution that could perhaps form the basis of a general European project in the future. The consequences of this solution are that it shifts the burden of the decision as to the further fate of the digital assets to the rightholder, who should express the relevant decision *ante mortem*.⁴⁴ This seems an apt solution, especially as it is the rightholder who will generally be in a position to assess the nature of his digital footprint and the possible consequences of making it available to third parties. This is why it is worth looking at the Catalan practice in this regard. As some may think, this might be the direction in which future regulations on the succession of digital goods of a deceased Internet user should go. In order to ensure that these are not exclusive national regulations, it is necessary to complement, for example, the GDPR in this respect, thus counteracting future

³⁹ Nieves I Moralejo Imbernón, 'El testamento digital en la nueva Ley Orgánica 3/2018, de 5 de diciembre, de protección de datos personales y garantía de los derechos digitales' [2020] Anuario de Derecho Civil 241.

⁴⁰ Tina Davey, *Until Death Do Us Part: Post-Mortem Privacy Rights for the Ante-Mortem Person* (University of East Anglia 2020).

⁴¹ Pascal Peña Pérez, 'El derecho a la muerte digital y la protección post mortem de los datos personales: nuevas prerrogativas aplicables al ecosistema digital' (2021) 71 Revista de la Facultad de Derecho de México 733.

⁴² Michael Birnhack and Tal Morse, 'Digital Remains: Property or Privacy?' (2022) 30 International Journal of Law and Information Technology 280.

⁴³ *La Ley catalana 10/2017, de 27 de junio, de las voluntades digitales y de modificación de los libros segundo y cuarto del Código civil de Cataluña*.

⁴⁴ Cf. Esperança Ginebra Molins (n 20) 919 ff.

forum shopping in succession law, which is something that the EU authorities should be keen on. This type of solution might be a bright future for digital assets succession⁴⁵.

5. SOME CONCLUSIONS

The phenomenon of digital assets and its legal succession, which stems from the daily reality of the death of many internet users every day, is not unusual, although the matter seems to transcend traditional legal concepts⁴⁶. That is why legislators need to find new legal solutions, as traditional concepts of succession law seem to be insufficient in this area⁴⁷. There is a need to rethink a number of issues and to come up with a solution that takes into account the specificities of the digital world and the assets that are associated with it. Perhaps the optimal solution is the Catalan proposal, which seems to take many factors into account. Whether this solution will work in practice, the future will tell.

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⁴⁵ Szwajdler (n 7).

⁴⁶ Puchta and Consalter (n 29).

⁴⁷ Batoul Betty Merhi, *L'émergence de l'identité numérique: l'influence de la révolution numérique sur l'environnement juridique* (École Doctorale de Droit de la Sorbonne 2022).

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