

Digital Inheritance: The UK Country Report

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1. Introduction

Digital assets and inheritance have become significantly valuable to online users in the UK. In October 2011, the Centre for Creative and Social Technology (CAST) at Goldsmiths, University of London, released a study of Internet use in the UK entitled 'Generation Cloud'. The study determined that British users have at least GBP 2.3 billion worth of digital assets stored in the cloud. The study shows that 24 per cent of UK adults estimate that they have digital assets worth more than £200 per person in the cloud, which amounts to at least £2.3bn in total.¹ PricewaterhouseCoopers (PwC) conducted a similar survey in 2013 and found that the users value their digital assets at £25 billion.² Given the alleged exponential growth between 2011 and 2013, this figure would be even higher now. However, there is a lack of very recent empirical data to evidence this at the moment.

Despite the growing value and importance, legally, the area is far from clear in the UK. Users, practitioners and service providers struggle to navigate through the complex laws around property law, wills and succession, trusts, intellectual property, data protection, contracts, jurisdiction. All these areas are relevant when discussing digital assets and inheritance.³ It is worth noting, however, that these areas of law are regulated differently across the UK. On the one hand, wills and succession, contract and property law are very different in England and Wales, Scotland and Northern Ireland. Intellectually property law and data protection have been harmonised, on the other hand. This paper will, therefore, mainly refer to the law of England and Wales when discussing legal issues that vary across the jurisdiction within the UK.

2. Concept

Conceptually, the notion of digital assets is a relatively new phenomenon in the UK and globally, lacking a proper legal definition, with diverse meanings attributed to it. For instance, from a lay person's perspective, it could be anything valuable online, any asset (account, file, document, digital footprint) that has a personal, economic or social attachment to an individual. The legal meaning, however, needs a little more precision. Determining its legal definition and nature would enable an adequate legal treatment and regulation. So far, there have been a few attempts to define and classify them. Most of the definitions are, however, inductive and try to theorise starting from the existing assets online, trying to make appropriate generalisations and classifications.⁴ A legislative attempt to define digital assets would be welcome here. However, the Law Commission has recently taken a stance that 'a comprehensive formal definition' is not needed.⁵

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¹ Rackspace Hosting 'Generation Cloud: A social study into the impact of cloud-based services on everyday UK life' (16 November 2011) http://www.rackspace.co.uk/sites/default/files/whitepapers/generation_cloud.pdf accessed 15 May 2016.

² PwC, 'Digital lives: we value our digital assets at £25 billion', (PwC, 2013) available at <https://www.pwc.co.uk/issues/cyber-security-data-privacy/insights/digital-lives-we-value-our-digital-assets-at-25-billion.html> accessed 10 November 2017

³ E. Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (PhD thesis, University of Strathclyde, 2017), 13-18.

⁴ *Ibid* 18-25.

⁵ Law Commission, 'Making a will', Consultation Paper 231, 2017, para 15.5, 239.

3. Legal issues – property and copyright

Some of the key issues in the area relate to the question whether the content and/or user's account can be considered property or not. User accounts are created through contracts between service providers and users, and the account itself and the underlying software is property/intellectual property of the service provider. However, the legal nature of the content itself is not as clear. If the content is an object of property, then the answer is simple for most European jurisdictions: it transmits on death, through one's will or intestate succession. Conversely, if the content is not property *stricto sensu*, then it can be protected by copyright and, arguably transmits on death. For published content protected by copyright, this is again quite simple (heirs inherit copyright for the time of its duration, i.e. 70 years post-mortem),⁶ but the issues arise with the unpublished content on Facebook, for instance. Section 93 of the Copyright, Designs and Patents Act 1988 states that the beneficiary is entitled by a bequest to 'an original document or other material thing recording or embodying a literary, dramatic, musical or artistic work which was not published before the death of the testator', and consequently to copyright embodied in such a medium. The problem with applying this provision to unpublished Facebook content, for instance, is in the fact that Facebook accounts and other social media accounts are not being bequeathed and they most likely cannot be considered material things or property for the purpose of this definition. It would be very difficult to interpret this provision to achieve transmission of unpublished social media works. Also, a lot of the content is merely personal data and information. Heirs may not have the access to this content at all or even be aware of the content included in the deceased's account. Generally, as established in the legal doctrine and theory, this type of content cannot be considered property, and therefore cannot be transmitted through the usual mechanism of succession law and probate.⁷

With regards to wills and succession, the crucial issues related to the restrictive probate and succession laws in England, the Wills Act 1837 and Administrations of Estates Act 1925. Formal requirements for drafting and execution of wills are harsh, and the law currently does not recognise technology as a way of disposing of one's digital assets. The Law Commission is currently consulting to propose reforms on making wills and, inter alia, they consider the introduction and recognition of electronic wills.⁸ In their analysis, however, they shy away from digital assets and post-mortem privacy, arguing that this should be a separate reform.⁹ The Commission's rationale is that digital assets, in their view, relate to contract law issues mainly, so the reform of the law of wills is not a right place to legislate this area. We will discuss this argument further in the below analysis.

4. Terms of service and in-service solutions

With regards to the most common platforms, every 'intermediary' takes a different approach and the law is mainly silent on these issues. Major service providers, such as Facebook and Google, have introduced quite useful policies, which are not free from problems, however.

⁶ Copyright, Designs and Patents Act 1988, s. 12(2), 90 and 95.

⁷ E Harbinja, 'Post-mortem social media: law and Facebook after death' in L Gillies & D Mangan (eds.) *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar Publishing, 2017) 177-200, 188-193..

⁸ Law Commission (n 5) 105-130.

⁹ The commission discusses this area in their chapter entitled "Other things a will could do", Law Commission (n 5) 238-242.

In 2013, Google introduced Inactive Account Manager (IAM), as the first in-service solution to address the issue of the transmission of digital assets on death. IAM enables users to share 'parts of their account data or to notify someone if they've been inactive for a certain period of time'. According to the procedure, the user can nominate trusted contacts to receive data if the user has been inactive for the time chosen by him (3 to 18 months). The trusted contacts are after their identity has been verified, entitled to download data the user left them. The user can also decide to only notify these contacts of the inactivity and to have all his data deleted. There is a link directly from the user's account settings (Personal Info and Privacy section) to the IAM. In addition, the options Google offers the following options if a user does not set up the Inactive Account Manager: closing the account of a deceased user; a request for funds from a deceased user's account, and obtaining data from a deceased user's account. The process is, however, discretionary and Google does not promise that any of the requests will be carried out.¹⁰

Facebook terms of use and privacy policy (known as the Statement of Rights and Responsibilities and the Data Use Policy) provide for the three main options: memorialization, removal/deactivation, and Legacy Contact. Memorialization of an account can be requested by a family member or friend of the deceased user. Facebook advised that any other individual contact the deceased's family first before they make this request. The effects of memorialization are that it prevents anyone from logging into the account, even those with valid login information and password. Any user can send a private message to a memorialized account. Content that the decedent shared, while alive, remains visible to those it was shared with (privacy settings remain 'as is'). Depending on the privacy settings, confirmed Friends may still post to the decedent's timeline. Accounts which are memorialized no longer appear in the 'people you may know' suggestions or other suggestions and notifications. Memorialization prevents the tagging of the deceased in future Facebook posts, photographs or any other content. Unfriending a deceased person's memorialized account is permanent, and a friend cannot be added to a memorialized account or profile. Facebook provides for the option of removal of a deceased's account, but with very general statements and vague criteria. The option is available only to 'verified immediate family members' or an executor and the relationship to the deceased needs to be verified. Facebook only promises that it will 'process' these requests, without giving a firm promise of fulfilling special requests. As of 12 February 2015, Facebook allows its users to designate a friend or family member to be their 'Facebook estate executor', and manage their account after they have died. Legacy Contact has a limited number of options: to write a post to display at the top of the memorialized Timeline; to respond to new friend requests and to update the profile picture and cover photo of a deceased user. In addition, a user 'may give their legacy contact permission to download an archive of the photos, posts and profile information they shared on Facebook.' Legacy Contact will not be able to log into the account or see the private messages of the deceased. All the other settings will remain the same as before memorialization of the account. Finally, an option is that a user decides to permanently delete his/her account after their death.¹¹

These in-service solutions are positive, they empower users and foster their autonomy and choice. However, the main problem with them is that their provisions might clash with one's will, or the rules of intestate succession and heirs' interests. To illustrate this, a friend can be a beneficiary for Google or Facebook services, but they would not be heirs and next-of-kin, who would inherit copyright in one's asset for instance. The author suggests that the law should recognise these service as 'social media wills', and provide for legal solutions embraced by the US Uniform Law Commission in the Revised

¹⁰ E Harbinja, 'Post-mortem Privacy 2.0: Theory, law and technology' (2017) 31(1) *International Review of Law, Computers & Technology*, 26-42, 35-37.

¹¹ Harbinja, 'Post-mortem social media: law and Facebook after death' (n 7) 180-188.

Uniform Fiduciary Access to Digital Assets Act (RUFADAA).¹² The terms of service are also intrinsically unclear and contradictory and service providers need to make more effort to clarify them and make them more solid and coherent.

5. Post-mortem privacy

A separate issue is post-mortem privacy and the protection of deceased's personal data. Most assets include a large amount of personal data, and their legal treatment cannot be looked at holistically if one does not consider data protection laws. UK law does not protect post-mortem privacy as a distinct notion. A protection has similarly been awarded by different legal institutions, such as the laws of breach of confidence, intellectual property, succession, executry and trusts. The protection is, however, even more restricted than that in the US.¹³ In English law, the principle has traditionally been *actio personalis moritur cum persona*, meaning personal causes of action die with the person, (see *Baker v. Bolton*).¹⁴ This principle has been revised by legislation mainly in many contexts for reasons of social policy (see Law Reform (Miscellaneous Provisions) Act 1934, The Race Relations Act 1976, Sex Discrimination Act 1975, Disability Discrimination Act 1995, and Administration of Justice Act 1982).

From the data protection perspective, the UK Data Protection Act 1998 in s. 1. defines personal data as 'data which relate to a living individual', denying any post-mortem rights. The rationale behind not giving protection to the deceased's personal data in the UK is in the lack of the ability to consent to the processing of data.¹⁵ In addition, the UK Government has recently chosen to retain the 'living individual' term in the definition of personal data in Data Protection Bill 2017, thus rejecting the protection of post-mortem privacy once more. The General Data Protection Regulation in recital 27 permits member states to introduce some sort of protection for the deceased's data, and some states have already provided for this protection.¹⁶ This, therefore, is not an ideal situation and does not contribute to the legislative harmonisation within the EU, Brexit notwithstanding.

In her research, this author argues that post-mortem privacy indeed deserves legal consideration in the UK, drawing an analogy with testamentary freedom, where individuals are permitted to control their wealth pre-mortem and their autonomy is extended on death. They, however, are not entitled to do the same for their online 'wealth', identities and personal data.¹⁷

6. Legal practice and the upcoming law reform

A widespread practice in the UK now is that the testators are advised to list their accounts and passwords for their heirs to use after his death. The list may be included in a letter left with the will, but not in the will itself, as it becomes a public document once admitted to probate. This is a practical

¹² Harbinja, 'Post-mortem Privacy 2.0: Theory, law and technology' (n 9), 34-35.

¹³ L Edwards and E Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World', (2013) 32(1) *Cardozo Arts & Entertainment Law Journal*, 83-129.

¹⁴ (1808) 170 Eng. Rep. 1033.

¹⁵ House of Lords Select Committee on the European Communities, *Report of the Protection of Personal Data*, 1992.

¹⁶ France and Hungary have already introduced some sort of protection of post-mortem privacy in their legislation. See L Castex, E Harbinja and J Rossi, 'Défendre les vivants ou les morts? Controverses sous-jacentes au droit des données post-mortem à travers une perspective comparée franco-américaine', 2018, forthcoming, *Réseaux*

¹⁷ Harbinja, 'Post-mortem Privacy 2.0: Theory, law and technology' (n 9).

solution, however, it is in breach of most user agreements (terms of service or ToS). Also, passwords should change over time and testators may not remember to update the list that they prepared at the time they made their will.¹⁸ This, therefore, should be discouraged as a solution.

Legal practice in the UK agrees that awareness is vital in this area and that much can be done by asking testators to consider digital assets when making their wills.¹⁹ For instance, the Digital Legacy Association provides a framework and toolkit for professionals caring for individuals nearing the end of life, to encourage them to make arrangements for their digital legacy.²⁰ A similar approach is taken in an advice from the Law Society.²¹ These suggestions and advice are valuable, however, they do not overcome the issues around conflicting provisions of wills, terms of service, intellectual property and data protection laws, as discussed above.

In their attempt to identify some issues in the area, The Commission rightly points out that digital assets ‘...fall outside the sort of property that is normally dealt with by a will.’²², but it fails to acknowledge conflicts between wills and the disposition of digital assets online, which should be considered during this reform. With regards to copyright, The Commission argues that while the law is clear that the copyright is property of a sort, separate from one’s computer and digital assets, it might not be clear whether the testator intends to give a beneficiary all the hardware and the copyright contained therein.²³ For this reason, as well, The Commission argues that the law of wills is not the best place to address these issues. This is thus quite a disappointing proposal, as it does not help harmonising piecemeal legislation in the area, which is one of The Commission’s general aims in this reform of the law of wills. These issues are interrelated and turning a blind eye to one area of law does not leave an adequate scope for addressing the issues holistically. If the Commission wishes to introduce reform proposal for digital assets separately, however, they should initiate consultations as soon as possible, in order to address some of the burning issues identified in this paper and other relevant research.

7. Conclusion

As explained above, it is clear that the UK law does not address the issues of digital inheritance adequately. The law that is potentially applicable is very unclear and conflicts with terms of service of major service providers. Legal profession has come up with inadequate solutions, attempting to address this muddled area.

Therefore, the stance currently taken by the Law Commission does not contribute to resolving issues in this complex and growing area of concern. It is argued that the Commission should consider digital assets in the ongoing reform, as putting it off just creates more unclarity and confusion. Moreover, a holistic approach does require addressing some of the issues through the law of wills. Other issues can

¹⁸ Law Commission (n 5) para 14.8. 239.

¹⁹ Ibid para 4.11. 240,

²⁰ J Norris, ‘Digital Asset & Digital End of Life Framework, DRAFT Version0 (*Digital Legacy Association*, 2015) Available at https://digitallegacyassociation.org/wp-content/uploads/2015/12/DeadSocial-Framework-DRAFT-website-version-000_05.12.15.pdf accessed 10 November 2017.

²¹ The Law Society, ‘Online accounts, photos, music, emails - what happens to your digital assets after your death?’ (The Law Society, 11 May 2016), available at: <http://www.lawsociety.org.uk/news/press-releases/what-happens-to-your-digital-assets-after-death/> accessed 10 November 2017.

²² And this author argued this on a number of occasions, see e.g. Harbinja, ‘Post-mortem social media: law and Facebook after death’ (n 7); Harbinja, *Legal Aspects of Transmission of Digital Assets on Death* (n 3); E Harbinja, ‘Virtual Worlds – a Legal Post-Mortem Account’ (2014) 11(3) *SCRIPT-ed*, 273-307; E Harbinja, ‘Legal Nature of Emails: A Comparative Perspective’ (2016) 14 *Duke Law and Technology Review*, 227-255.

²³ Law Commission (n 5) para 14.15. 241.

be addressed in a digital asset - specific law reform, including the necessary data protection and copyright reform as argued in this paper. Digital assets reform should be introduced as soon as possible, however, if the UK wishes to follow the examples of France and the US and legislate in this critical area.