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Paweł Szulewski

Transferability of Digital Assets in Case of Death

Constant and rapid development of the Internet, moving human activities from the real world to the digital one and following its impact on human behavior and culture generates a lot of legal questions and dilemmas. One of them is transferability of digital assets in case of death. In this paper the author will search answer to the question what happens to digital assets after the death of their users. It will be also attempted to examine the legal understanding and give a broad overview of the transferability of digital assets in case of death.

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1 Introduction

[Rz 1] Since the invention of the Internet, the Internet is developing rapidly and has changed our life a lot. The Internet has massive impact not only on our everyday life and work, data exchange or communication possibilities, but it has also changed business, markets and economics as a whole. Furthermore, one of its biggest impacts the Internet had on our social life. Nowadays almost everyone is available and active online, sometimes we spend even more time in the digital world than in the real one. More and more people are tended to become so called «Digital Natives» or «Digital Immigrants».[1] Members of the modern society lead almost the whole life digitally, but till now not many of them have ever thought what would happen to their digital life after they die. People do their shopping online, date online, have online bank accounts, play online, watch movies and listen to the music online, they create online, communicate online, conduct business online and store their documents and data in the Cloud. It means that every Internet user produces, uses and collects an incredible number of digital files, accounts, data and other units, which are expressed in bits.

[Rz 2] One of the questions arising in this place is: what is going to happen to all those information, data and assets after the death of their user? Is it possible to talk about «digital legacy»? Which norms and regulations are applicable in these situations? Consequently, is it possible to transfer digital assets in case of death?

2 Digital Assets

2.1 Definition and types of Digital Assets

[Rz 3] To answer the question whether the transfer of digital assets after the death is possible and what happens to digital assets after the death of their user, it is important to begin with the definition of digital assets as such.

[1] See Prensky, Digital Natives, Digital Immigrants, On the Horizon, MCB University Press, Vol. 9 No. 5 (2001).

[Rz 4] There are already plenty of existing definitions of digital assets, starting with the first one created by von Niekerk[2], then the creators of thedigitalbeyond.com[3], Haworth[4] or Herzog[5]. Additionally, the German Bar Association proposed the following definition of the digital inheritance: «*all of digital assets i.a. copyrights, rights to registered websites and domains, but also contractual obligations between the service provider and the deceased regarding the use of the Internet and other Internet services (...) as well as all deceased's accounts and data in the Internet*»[6]. One can observe a similar approach in the U.S., where the Fiduciary Access to Digital Assets Act was prepared by the Uniform Law Commission. This act, from July 2014, introduces in Section 2(9) the following definition of digital assets: «*Digital asset means an electronic record. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.*»[7]

[Rz 5] In the context of this analysis and intention to present existing legal framework related to digital assets, it is important to emphasize that there is no legal or even general definition of digital assets applicable in the EU's legal system. It is not possible to create one common definition of digital assets or digital inheritance in Europe due to the lack of harmonisation of private and succession law at the EU level. All the issues related to digital assets and their various components are regulated not only within different national legal systems but sometimes are also based on different general principles. The EU institutions, especially the European Commission, have not started analysing this issue yet. Solely, in the Consumer Right Directive 2011/83/EU the legal definition of «digital content» can be found.[8] However, it is not equal to the term «digital assets» and covers only a minor part of its meaning.

[Rz 6] Overall, digital assets is a general term covering all types of content in a digital form, but also the right to access such content, different types of Internet accounts and online services, as well as data stored in the Cloud and digital footprints of a user's activity. Digital assets embody also different types of contractual rights and obligations acquired in the Internet. The second criterion ignored here, but very important in the context of the transferability, is the value of digital assets, which may be either economic or sentimental.

[Rz 7] Based on the broad definition of digital assets created above, it is necessary to distinguish the following types of digital assets: (1) social networks profiles like Facebook, Google+ or LinkedIn; (2) mailbox services; (3) digital goods, for example e-books provided by Amazon or digital music provided for example by iTunes; (4) accounts and User Generated Content in online computers games and other forms of virtual worlds, for instance League of Legends or Second Life; (5) credits and points collected in customer loyalty programs, for example Payback and HappyPoints; (6) virtual or real means of payments and financial accounts like PayPal or BitCoins; (7) accounts used for commercial activities and shopping online; (8) blogs and microblogs like Blog-

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2 See von Niekerk, The Strategic Management of Media Assets; A Methodological Approach, Allied Academies, New Orleans Congress (2006).

3 See Romano, A Working Definition of Digital Assets, thedigitalbeyond.com (2011).

4 See Haworth, Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act, University of Miami Law Review, Vol. 68:535 (2014).

5 See Herzog, Der digitale Nachlass — ein bisher kaum gesehen und häufig missverstandenes Problem, NJW 2013, 3745 (2013).

6 See Deutscher Anwaltsverein, Stellungnahme des Deutschen Anwaltsvereins durch die Ausschüsse Erbrecht, Informationsrecht und Verfassungsrecht zum Digitalen Nachlass, Stellungnahme Nr.: 34/2013, Berlin (2013).

7 See Uniform Fiduciary Access to Digital Assets Act (2014), sec. 2(9).

8 See Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, L 304/64 (2011), art. 2(11).

ger.com, Twitter or Instagram; (9) rights to used certain domain address and other contractual obligation, for instance contract for hosting; (10) data stored in the Cloud.

2.2 Value of Digital Assets

[Rz 8] As it was already mentioned above, it is important to emphasize that digital assets have their value. The value may be either pure economic or non-economic[9].

[Rz 9] Domain names expressing the company name and brand are the most prominent example of the significant economic value of digital assets. Another good example would be unpublished works (poems, photos, songs) of famous artists stored in the Cloud. Nevertheless, an economic value of digital assets is not only related to some of these particular examples. Certain economic value could be also granted to a digital collection of music or e-books, online games and games accounts, virtual items in games or even the user's avatar. From the economic point of view, there is also a great economic value of databases, online shops or accounts on eBay associated with business activities, as well as the clients' contact lists or business e-mails.

[Rz 10] From the microeconomic perspective, according to the PricewaterhouseCoopers's report, «average» British person was in the possession of 42 e-books, 30 TV shows, 2'678 individual songs and 28 digital films in 2013[10]. Leaving aside the controversy regarding to the ownership and the right of free disposal of e-books or digital music at this stage, it is obvious that digital assets have certain economic value.

[Rz 11] In 2013, McAfee conducted the «Digital Assets Survey». Results are surprising. According to the survey, an average internet user possesses digital assets at value of over $35,000. This assets may be divided and valued as follows: personal memories — $17,065, personal records — $6,400, career information — $4,381, hobbies and projects — $3,318, personal communications — $2,147, entertainment files — $1,721[11]. The above-mentioned amounts may be a bit extortionate, they confirm, however, that each digital file or account have economic value.

[Rz 12] Digital assets such as private pictures, movies from birthdays or weddings and family events, personal Facebook accounts or twits on Twitter might not have economic value, however, they have non-economic value, also called the dignitary, sentimental or personal value[12]. Such digital assets are worthless for the business, but all of them are priceless for the family or friends of the deceased. They keep the memories about the deceased still alive, but also from the psychological perspective may be very helpful in the mourning[13].

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9 See Edwards/Harabinja, Protecting Post-mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World, Cardozo Arts & Entertainment Law Journal, Volume 32, Number 1 (2013).

10 See PricewaterhouseCoopers LLP (PWC UK), The value of a digital life (2013), available at http://www.pwc.co.uk/cyber-security/insights/digital-lives-we-value-our-digital-assets-at-25-billion.jhtml, accessed: December 2014.

11 See McAfee/Siciliano, How Do Your Digital Assets Compare (14 May 2013), available at http://blogs.mcafee.com/consumer/digital-assets, accessed: December 2014.

12 See Edwards/Harabinja, supra note 9.

13 See McEwen/Scheaffer, Virtual Mourning and Memory Construction on Facebook: Here Are the Terms of Use, Bulletin of Science Technology & Society, vol. 33(3—4), 64—75 (2013).

3 Digital Assets in case of death

3.1 General overview

[Rz 13] As evaluated above, digital assets have their value, in some cases even significant. It could be also argued that the user have the property right to some of digital assets. Therefore, it is very important to determinate what may happen to digital assets after the death of their user.

[Rz 14] Regardless to the currently binding legal regulations, without determining at this stage which solution would be the best one, it is crucial to distinct what might happen to digital assets after the death of the user. From the logical and practical point of view, there are four possible scenarios. The first one is (1) an abandonment of digital assets in the Internet. The second solution is (2) complete deletion of digital assets from the Internet without granting the heirs any access to digital assets. The third one is (3) memorizing some of digital assets and using them for the mourning purpose. And the last one is (4) transferring digital assets to someone else or at least making them available to the heirs[14].

[Rz 15] The first three solutions, although very popular, have some disadvantages from the historical, psychological, sociological and economic perspectives. Therefore, the concept of transferability of digital assets in case of death, also called «digital estate planning» or «digital inheritance», is currently promoted by many scholars and is being introduced into legal systems and contractual obligations legal frameworks.

3.2 Arguments for transferability

[Rz 16] At first, from the business perspective, generally death of one of contract parties should not have any influence on the deal closing. In the age of e-commerce and the dominance of the online market, the heirs or other authorised persons should have access to the commercial digital assets of deceased such as e-mails, clients lists, company documents, shipping lists or electronic invoices. Without immediate access to this data it is not possible to continue business activity or even its closing and settlings of accounts would be not possible[15].

[Rz 17] From the economic point of view, there should be no loss in the legacy and estate and, moreover, the law should be efficient. Digital assets have certain economic value which should not be wasted by abandonment or deletion of digital assets.

[Rz 18] Possibility to transfer digital assets after the death would make the heirs aware of the assets owned and make them possible to be inherited. This awareness would have a positive impact on the digital assets management and would decrease number of situations when heirs even do not know about existence of some digital assets. Consequently, it would make the succession process quicker and easier for the family, friends and executors.

[Rz 19] The transferability of digital assets would also solve the problem of amendment of digital assets in the Internet and consequently restrict misuse of digital assets and cybercrimes like identity theft.

[Rz 20] Last but not least, the possibility to transfer digital assets is also crucial from the family

14 See Brucker-Kley/Keller/Kurtz/Pärli/Schweizer/Studer, Sterben und Erben in der digitalen Welt. Von der Tabuisierung zur Sensibilisierung. Crossing Borders., ZHAW School of Management and Law (2013).

15 For instance to comply with the so called «Impressumpflicht» in Germany, according to § 6 of the TDG.

and friends perspective. Before the technological revolution, memories and family stories was preserved for future generation in letters, diaries, family chronicles, paintings and photographs, sometimes VHS tapes and other devices. All that objects are of great sentimental value, create person's identity, save the memories and are part of the legacy. In the digital age, most of the Internet users, especially the Digital Natives, would never have hard copy of data stored in the Cloud like digital photos, e-mails or Facebook's walls. Therefore, lack of transferability of digital assets might lead to the situation when the next generation will not have any memories and relics of their forefathers, thus all data were stored digitally and lost at the moment of their death[16].

3.3 Arguments against transferability

[Rz 21] There are many advantages of transferability of digital assets in case of death. On the other hand, there are many doubts and concerns about this issue, especially in terms of data protection and privacy issues, as well as copyright protection. The transferability of digital assets in some cases might be a violation of right to privacy due to the fact that the heirs can get access to exclusively private information or data, which have not been shared with them or kept a secret for purpose. Nevertheless, these concerns are not something new and they could be expressed also regarding the classic legacy. Likewise, the traditional letters or diaries may, and in many cases did, also contain information about affairs, health conditions and other personal secrets. Even so, they are not particularly protected or excluded from the inheritance. Consequently, per analogy, one can state that heirs should also have access to the digital legacy of the deceased and privacy issues should be treated as minor.

[Rz 22] Foregoing conclusions should not, however, completely exclude the data protection and questions about privacy from the analysis of this important issue. This argument should be re-evaluated bearing in mind the nature of the Internet. Information and secrets incorporated in a physical copy are available only to a certain group of people such as the heirs, close family or friends, and only after their consent it is allowed to be published or made available to the public. In case of digital assets the situation is different and unprotected digital assets are available almost to everyone who has access to the Internet.

[Rz 23] Another argument against the transferability of digital assets is the possibility of violation of the copyright law. Digital assets, like digital music or e-books, are protected by the exclusive rights of authors and producers, mainly the right to reproduce the copyrighted work, as well as communicate and making the copyrighted work available to the public. Consequently, the possibility of transferring digital copies of such works may be violation of copyright law.

[Rz 24] In addition to all the foregoing, digital assets in most cases are provided by service providers based on the contractual obligation. The user during the registration agrees on the service terms and conditions. In some cases it may simply restrict the transferability of digital assets or accounts.

16 See Beyer/Cahn, Digital Planning: The Future of Elder Law, NAELA Journal, Vol. 9, No. 1 (2013).

4 Transferability of Digital Assets

4.1 General overview

[Rz 25] The transferability of digital assets is a forthcoming issue in the European Union and still has not drawn the full attention of the European Commission. It is quite surprising that in the Digital Agenda for Europe, especially in «Pillar VI: Enhancing digital literacy, skills and inclusion»[17], referring to Internet Use, Digital Skills and Online Content, there is no information concerning inheritance of digital assets.[18]

[Rz 26] The European Commission claims that the Digital Agenda does not address these issues directly, however, some of its initiatives, such as the data protection reform (right to be forgotten or data portability), may have impact on transferability of digital assets. Similarly, the Commission has taken some steps regarding cloud computing and established an expert group working on safe and fair model of terms and conditions for the cloud computing contracts[19]. The main purpose of this group is to identify best practices for cloud computing contracts for consumers and small companies, as well as to work towards ensuring that terms and conditions in cloud computing contracts are safe and fair. The results of such activities may influence also the transferability of digital assets. Nevertheless, the Commission is also stating that «*the subsidiarity principle requires the Commission to take actions only if and in so far as the objectives of the proposed actions cannot be sufficiently achieved by the Member States.*»[20] Such statement means that, according to the Commission, transferability of digital assets should be regulated at the national law level.

[Rz 27] In the national legal systems, the relevant regulations and possible limitations to the transferability of digital assets can be found in four different branches of law: (1) contract law, (2) succession law, (3) copyright law and (4) data protection law.

4.2 Contract Law

[Rz 28] Evaluation of general principles of the contract law in Germany and in Poland as well as regulations concerning the transferability of rights and obligations in case of death shows that such rights and obligations do pass on the heirs[21]. Apparently, if the contract is still binding, the service provider is obliged to render the services to the heirs. It would be the way to transfer digital assets provided as a service.

[Rz 29] Nevertheless, it may be only a partial solution. According to Hopkins, «*users should own their digital assets and have a clearly defined right to transfer these assets upon death. Furthermore*,

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17 See European Commission, Digital Agenda for Europe. A Europe 2020 Initiative., available at http://ec.europa.eu/digital-agenda/en/internet-use-digital-skills-and-online-content, accessed: December 2014.

18 The research request asking for the Commission's position in this topic have been also send by the author to the European Commission via Digital Agenda for Europe Contact (June 2014).

19 See European Commission, Cloud Computing Strategy Working Groups, available at https://ec.europa.eu/digital-agenda/en/cloud-computing-strategy-working-groups, accessed: December 2014.

20 So an e-mail's statement on the research request send by the author to the European Commission (June 2014).

21 Especially interesting is analogy to transfer of digital assets to giro account contract («Giroverhältnisse») and tenancy agreement («Mietvertrag»), see Herzog in: Deutscher Anwaltverein, Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Erbrecht, Informationsrecht und Verfassungsrecht zum Digitalen Nachlass, Stellungnahme Nr.: 34/2013 (2013), p. 34—35; see also Martini, Der digitale Nachlass und die Herausforderung postmortalen Persönlichkeitsschutzes im Internet, JZ 23/2012, (2012).

(. . .) legislation should prohibit service providers from attempting to destroy this right of transferability upon death through the use of their terms of service agreements.»[22] Nowadays, freedom of contracts has more significance than the principles defined by Hopkins and it is possible to regulate the future of digital assets after the death in the text of contract, i.a. to exclude the transferability of digital assets.

[Rz 30] The review of the most popular service providers' practice shows that there are many different approaches to this issue and some regulations are not always in compliance with national law of particular users. As Edwards pointed out, in many cases the terms and conditions (T&C) or end user licence agreement (EULA) provided by service providers have a global character and are not adapted to particular national laws.[23] Some of them allow to transfer content of accounts when the deceased dispose so (Google), others are going towards passive usage of an account and memorialization (Facebook), then some exclude the heirs from any access to digital assets (Yahoo!). The most common challenge and practice is lack of officially binding regulations and it leads to dealing with this problem on the case-to-case base. Some service providers seems to be a bit lost between their contractual obligations, data-protection or copyrights issues. Moreover, some of them realised that giving the heirs access to personal e-mails or social media accounts may jeopardise their business model and visibility, especially for young users and Digital Natives who extremely appreciate and expect privacy or even the «anonymity» in the Internet.

[Rz 31] Moreover, lack of general principles and common standards regarding digital assets, which would be followed by service providers in their T&C agreements, is unfavourable for users, causes confusion and makes digital estate management and inheritance proceeding very slow and complicated.

4.3 Succession Law

[Rz 32] From succession law perspective, the analysis of German and Polish law shows that transfer of digital assets stored on hard drives owned by the deceased is a fact and does not arouse any controversy. However, transfer of digital assets stored on the service provider's servers should also be possible due to the succession of the deceased's rights and obligations representing economic value. Whether the service provider is obliged only to make the content of the accounts available to the heirs or transfer the whole account as such is disputable and may be determined in different ways.

4.4 Copyright Law

[Rz 33] From copyright law perspective, the transfer is differently regulated in various national copyright legal systems. Nevertheless, the work is always protected for a certain period of time and the heirs are responsible for taking care of them. Regarding digital assets which are creation of someone else than the deceased, they are subject to copyright and, in principle, the exhaustion doctrine is not applicable to them. Consequently, whether such digital assets are transferable or

[22] See Hopkins, Afterlife in the Cloud: Managing a Digital Estate, Hastings Science and Technology Law Journal (2013).

[23] See Edwards, supra note 9.

not, it is determined by the author and the scope of the license agreement.

4.5 Data Protection Law

[Rz 34] From data protection and post-mortem privacy perspective, digital assets are not subject to data protection law. The data of the deceased are not protected by law, some of them, however, are subject of post-mortem personality rights and, as such, are protected. Moreover, content of communication means is protected by the rule of communication confidentiality.

5 Conclusions and recommendations

[Rz 35] Digital assets do have economic value along with non-commercial or sentimental meaning to heirs. They are part of legacy of the deceased and should be available and transferable to the heirs or other persons authorised by the deceased. Transferability of digital assets in case of death has not been completely regulated by law yet and there is no existing unified legal system within the European Union. Nevertheless, some national law systems are trying to apply general private law principles to digital assets.

[Rz 36] The most important principles of law in this context are the right to property, self-determination, freedom of testation, freedom to conduct business as well as protection of privacy and family life. Development of the Internet and new technologies has a very positive impact on our life, it should respect these principles though. Currently, only small number of service providers regulate, in terms and conditions documents, what happens to digital assets in case of death of their users. Such regulations are not easy to enforce, sometimes they are not complete, or even in breach of national laws. In most cases these provisions are also not sufficient in terms of user interests.

[Rz 37] Importance of the transferability of digital assets will be increasing and the law should adapt to the needs of the society and adjust range of available measures to provide them with the rights and freedoms they should have. Some discussions and work has already started in this area, for instance in the U.S., UK, Switzerland and Germany.

[Rz 38] European Union should prepare a European framework and guidelines in the area of the transferability of digital assets. It would be the next step in slow and difficult process of the unification of European succession law, as well as civil law. From the pragmatic point of view, succession of digital assets seems to be a new area of law, not regulated by any national law and beyond any existing frameworks. New directives should set the minimum level of harmonisation and oblige the Member States to adjust their national succession laws, not only to the European law in this area, but mainly to the changing environment and digital world in which we are living.

[Rz 39] The analysis of the transferability of digital assets in case of death and evaluation of possibilities of its inheritance in particular legal systems leads to the conclusion that it is the highest time to recognize the transferability of digital assets, especially for digital assets with economic value or used for commercial purposes. Some exemptions would be related to highly personal assets and those, whose transfer might intrude on the post-mortem privacy of the deceased. Therefore, in case of some digital assets like private e-mail, pictures, some notes or blogs, the permanent data deletion and right to be forgotten should be applicable.

[Rz 40] Consequently, there is a question arising — who would decide which content can or

cannot be transferred, i.a. which e-mails or data are highly personal and which are not, etc. Giving such authority to service providers would be a significant misuse and might increase, the already many challenges in this area. Moreover, service providers are private entities which might not have such type of power. The solution would be to let the courts decide about the future of a particular digital asset, however, it would make the courts overloaded with digital assets cases and would not solve the problem.

[Rz 41] With all these arguments in mind, it is crucial to come back to one of the main principles of succession law — freedom of testation. There are services allowing their users to manage their digital assets and prepare the digital last will, like Inactive Account Manager provided by Google or ziggure.me. These services make it possible to list out all digital assets of a given user and determine what happens to them in case of death. It is a good measure to solve the problem of the heirs' lack of information about digital assets and allows to decide which digital assets should be classified as non-transferable and deleted immediately after the death and which should be transferred, and to who. Every Digital Native should use such services to manage their digital after-life. In the situation when the deceased have not used such service, all digital assets belonging to this user should be transferable and post-mortem privacy concept should not be applicable.

[Rz 42] Lastly, the post-mortem privacy and data protection should be introduced to our legal systems. Privacy protection should be extended also to protection after the death of the data subject. The data of the deceased should be protected and the processing of such data, especially for commercial purposes by third party, should be forbidden.

Paweł Szulewski, PhD Student, University of Wroclaw, Research Center for Legal and Economic Issues of Electronic Communication (CBKE), Uniwersytecka Street 7/10, 51-136 Wroclaw, PL, LL.M. EULISP European Legal Informatics Study Programme, pawel.szulewski@lawict.pl; follow me @lawICT