Digital Inheritance, Right of the Heirs to Access to the Deceased User's Account, Non-Transferability Clauses: An Overview in the Light of Two Judgments Issued by Italian Courts

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Abstract

The transferability of digital assets is becoming more and more important due to increasing importance of digitalization of assets. In legal terms, this issue is progressively more challenging due to the difficult coordination between inheritance law – which differs between jurisdictions – and the general terms and conditions imposed by operators providing digital services in the global market. From this perspective the article examines the issues arisen in two recent decisions issued by the Court of Milan and the Court of Bologna related to the heirs' right to access to a deceased's account.

I. Introduction

In the last twenty years, Scholars and courts around the world have been called to question the fate of digital inheritance and in particular the boundaries of private autonomy in disposing the inheritance of digital assets.

Until a few years ago, the Internet, for the majority of users, had a dual purpose: sending and receiving e-mail and consulting websites. The (r)evolution that the online world has undergone in recent years is inestimable but, as far as relevant here, this article will focus on the circumstance that the Internet allows access to digital materials, stored on remote servers (the so-called 'clouds') that have an intrinsic economic – or even moral – value.[1]

In the current 'digital age', the real world is overlaid by a virtual reality that coexists in parallel and is made up of all the data and information circulating on the web which has been named, with a neologism, the 'datasphere'.[2]

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[1] U. Bechini, 'Disposizione di beni digitali' in *Tradizione e modernità del diritto ereditario nella prassi notarile*, Atti dei Convegni Roma, 18 marzo 2016 - Genova, 27 maggio 2016 - Vicenza, 1 luglio 2016, 1 *I quaderni della Fondazione Italiana del Notariato*, 241-246 (2016)

[2] V.Z. Zencovich, 'La "datasfera". Regole giuridiche per il mondo digitale parallelo', in L. Scaffardi ed, *I 'profili' del diritto. Regole, rischi e opportunità nell'era digitale* (Torino: Giappichelli, 2018), 99-109. The importance of the virtual reality in the nowadays life is testified by the interest demonstrated by the European Union in its general regulation. On this purpose see A. Maniaci and A. D'Arminio Monforte, 'La prima decisione italiana in tema di "eredità digitale": quale tutela post mortem dei dati

The digital age registers new economic items (represented by data, which are produced and conveyed in the context of the 'digital ecosystem') that have joined the list of assets to be handled after death.[3]

Since a wider proportion of wealth in modern economies will be made up of intangible goods, a clear legal framework regulating the handling of digital assets would be essential.

As it is known, Italian inheritance law, as well as inheritance law of all modern legal systems, developed in a different socio-economic environment that did not contemplate digital assets.[4] However, in the modern economy delicate questions arise about the treatment thereof after the death of their owner: in the absence of a legislative framework, a fundamental role is played by courts.

Starting from this perspective, the two Italian Courts' decisions herein discussed[5] are particularly relevant since they represent the first Italian rulings on the heirs' right of access to the digital data of a deceased.

It is also interesting to note that the matter at stake in such decisions is not the digital inheritance itself, but rather the transfer of the right to access to the accounts containing the data saved and stored in the server of an Internet service provider.

II. Facts of the Cases and Rulings

1. Factual Background

On 9 February 2021, the Tribunal of Milan[6] ruled on a case submitted by the parents of a twenty five years old chef, died in a car accident, against Apple Italia (an Apple Group company), in order to obtain the access to their son's cloud accounts and to all the files, photos and digital data stored in his smartphone for the purpose of collecting the memories of the son and publish a collection of his culinary recipes.

personali?' *Il Corriere Giuridico*, 658, 661-670(2021). The two authors point out the 'whereas clause' no 1 of the UE Regulation no 1807/2018, that states: 'The digitisation of the economy is accelerating. Information and Communications Technology is no longer a specific sector, but the foundation of all modern innovative economic systems and societies. Electronic data are at the center of those systems and can generate great value when analyzed or combined with services and products (…)'.

[3] Y. Mandel, 'Facilitating the intent of deceased social media users' 39 *Cardozo Law Review*, 1915, 1909-1943 (2018).

[4] C. Camardi, 'L'eredità digitale. Tra reale e virtuale' *Il diritto dell'informazione e dell'informatica*, 65-93 (2018).

[5] Tribunale di Milano 9 February 2021, available at https://dirittodiinternet.it; Tribunale di Bologna 25 November 2021, available at https://tinyurl.com/2yevrczu (last visited 30 June 2022).

[6] For other contributions concerning the decision issued by the Court of Milan, see beside A. Maniaci and A. D'Arminio Monforte, n 2 above, also I. Maspes, 'Morte "digitale" e persistenza dei diritti oltre la vita della persona fisica' *Giurisprudenza Italiana*, 1601-1609 (2021) and F. Pinto, 'Sulla trasmissibilità mortis causa delle situazioni giuridiche soggettive digitali' *Rivista del notariato*, 701 (2021).

Upon Apple's refusal to provide access to their son's account,[7] the applicants took legal action pursuant to article 700 of the Italian code of civil procedure to obtain an order to provide such access against Apple.

The case decided by the Tribunal of Bologna on 25 November 2021 is very similar to the previous one. It concerns the mother of a boy who committed suicide, which sued Apple to get access to the digital accounts associated to the ID Apple of her dead child.

In this case too, Apple had rejected the mother's request, alleging that it could not authorize such requests in the absence of a judicial order.

Once Apple was admitted in the proceeding, it totally deferred to the Court's decision except for pointing out some specific items the Judge's order had to set out in order for Apple to allow access to the deceased's accounts.[8]

In both cases Apple did not oppose to the claimants' request. In the proceedings before the Tribunal of Milan, Apple did not even take part in the proceedings; in the proceedings before the Tribunal of Bologna, Apple only took part to the proceedings to sue Apple Distribution International (the Apple group company that could have complied with the plaintiff's requests) and to indicate some specific items the Judge's order had to set out in order for Apple to allow access to the accounts of the deceased.

2. Ground for the Judgments

Both decisions upheld the plaintiffs' request and ordered Apple to provide access to the digital data and accounts of the deceased relatives.

It is interesting to note that, in the absence of any reference to digital succession in Italian inheritance law, both decisions, in granting access to digital data, referred to the provisions contained in Data Protection Code (decreto legislativo 30 June 2003 no 196) as amended by decreto legislativo 10 August 2018 no 101, which implemented in Italy the discipline provided by European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016on the protection of natural persons with regard to the processing of and on the free movement of such data personal data (General Data Protection Regulation the

[7] Apple required compliance with a series of procedures that did not belong to the Italian system and that were instead typical of the US Law, as well as the fulfilment of certain requirements set out in the Electronic Communications Privacy Act; it also required that the request come from an 'administrator or legal representative of the deceased's asset'.

[8] As explained in the previous note, the requirements Apple asked for in the case decided by the Court of Milano have been considered not admissible according to the Italian legal system. In the second case, decided by the Tribunal of Bologna, Apple asked the applicants to obtain a Judge's order indicating the following information: name and Apple ID of the deceased; the name of the relative requesting access to the deceased's account; confirmation that the deceased was the user of all accounts associated with the indicated Apple ID; confirmation that the applicant is the legal trustee, representative or heir of the deceased and that the applicant's authorization constitutes legal consent; confirmation that the Court requires Apple to provide assistance in accessing the deceased's account data.

so called 'GDPR').

The Tribunal of Milan pointed out that GDPR did not apply to the case since the recital no 27 of the GDPR states, on one hand, that 'the Regulation does not apply to the personal data of deceased persons' and, on the other hand, that 'Member States may provide for rules regarding the processing of personal data of deceased persons'. In light of this last provision, decreto legislativo no 101/2018 has introduced in Data Protection Code article 2-*terdecies* specifically dedicated to the issue of *post-mortem* protection and access to the personal data of a deceased person. Pursuant to the aforementioned provision, the rights to access to the personal data of a deceased person may be exercised by those who have an interest of their own, or who act to protect the data subject, as its representative, or for family reasons, unless the deceased person had expressly prohibited it in a written statement.[9]

The Court outlined in this respect that it is not clear whether Art 2-*terdecies* concerns a matter of *mortis causa* acquisition or of a legitimation *iure proprio*. The Court, therefore, referred to what the Scholars have defined as the 'persistence' of rights beyond the lifetime and it concluded that the general rule laid down by our legal system is that the rights of the interested party survive after death and that they can be exercised, *post mortem*, by certain persons entitled to exercise such rights.

In the Court of Milan case, it was highlighted that the parents of the dead boy had the right to obtain access to the data of the smartphone precisely because of the '*family reasons deserving protection*' (ie the family relationship and, in particular, the commemorative interest) granted under the (new) Art 2-*terdecies* of Data Protection Code. As already highlighted, the only limitation to this right is a written declaration by the deceased prohibiting the exercise of such rights, which was not the case in the situation at stake.

Likewise, the Court of Bologna, which decision is based on the same grounds developed by the Court of Milan, recognized that the mother had an own interest in exercising the rights to access to digital data belonged to her son, based on 'family reasons deserving of protection', granted by the Art 2-*terdecies* of Data Protection Code.

[9] The Art 2-*terdecies* of the decreto legislativo no 101/2018 provides the following rules: 1. The rights encompassed within articles 15-22 GDPR which are related to deceased persons could be exercised by a person who acts in their own interest or acts to protect the interests of the deceased, as an agent, or for familial reasons that are worthy of protection. 2. The exercise of the aforementioned rights is not admitted in certain cases indicated by the law or, solely with respect to direct offers by information society services, where the data subject has expressly prohibited the exercise through a written statement presented or communicated to the controller. 3. The will to prohibit the exercise of the aforementioned rights must be unambiguous, specific, freely given and informed; the prohibition could affect only the exercise of some of the rights encompassed within articles 15-22 GDPR. 4. The data subject has the right to revoke or modify the prohibition at any time. 5. At any rate, the prohibition cannot be detrimental to third parties' exercise of patrimonial rights deriving from the data subject's death, nor to their right to defend their interests in court.

These two decisions clearly show the complexity of the issue relating to the transmission of digital inheritance: due to the regulatory vacuum regarding digital inheritance, both the Milan and Bologna Tribunals decided the cases from the mere perspective of the processing of personal data, leaving out aspects strictly connected to the digital inheritance.

Indeed, as will be discussed below, the issue not only involves aspects of inheritance law, but also those relating to the protection of privacy.

III. Digital Goods and Digital Asset

Before moving on to the merits of the issues raised by the two judgments, it is necessary to clarify the meaning generally attributed to the concept of 'digital heritage' (*patrimonio digitale*) and 'digital goods' (*beni digitali*).

Starting from the definition of good provided by Art 810 of Italian Civil Code, there is no doubt that digital goods can be considered assets according to the Italian legal system. In particular, the notion of digital goods can extend to a wide range of categories of 'things' with the peculiarity of being located in the virtual reality.

These goods can be classified according to their nature, either patrimonial or non-patrimonial.[10] Non-patrimonial digital goods are all those assets that can only be valued in terms of their relevance to individual, family, emotional or social interests, such as, for instance: e-mails, family photographs, intimate or personal computer writings (including online diaries, blogs, personal notes, SMS messages, messages sent and received via chat, text or voice messages sent via Whatsapp, etc), personal e-mail correspondence, personal and family photographs, personal and family audiovisual recordings (films) and, in general, all digital memories that have an emotional or sentimental value.[11]

Digital goods with a patrimonial content, on the other hand, are characterized by their intrinsic economic value and the related faculty of their owner to use them on an economic level (eg software, digital photographs taken by a professional photographer, an architect's plan drawn through Computer Aided Design programs, etc).[12]

Considering the subject of digital inheritance and the decisions of the two

[10] See also the definition provided by A. D'Arminio Monforte, *La successione nel patrimonio digitale* (Pisa: Pacini Editore, 2020), 70: digital goods are basically those that can be represented in binary format, deriving by 'binary digit', that is a sequence composed of a series of numbers, namely series of 0 and 1, which can be read by a computer. C. Camardi, n 4 above, 68, specifies that the definition of 'digital goods' includes documents stored in the cloud, accounts, emails, passwords, electronic goods purchased on the net (music, films, software), digital investments (bitcoins and cryptocurrencies), e-books, software and, more generally, data entered on the Internet and referable to an individual; alternatively, and maybe more simply, may be considered as digital assets all data existing on a computer support (PC, USB pen drive, etc).

[11] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

[12] S. Allegrezza, 'Il problema dell'eredità digitale nella trasmissione di archivi e biblioteche personali' *Bibliothecae.it*, 355, 352-400 (2020).

Italian Courts, also the account appears to be of great importance. The account may be defined as a set of functionalities, tools and contents, attributed to a single user, who is provided with access credentials (username and password). It describes, therefore, a virtual private place, in which each user has his own space for storing his files and in which he can perform those activities related to the peculiar service offered by the Provider.[13]

Notwithstanding that the account may be part of the digital asset, usually it is not a digital good in the strict and technical sense, but rather the result of a contractual relationship between the Service Provider and the user, by virtue of which the latter can make use of a service and a specific virtual environment, usually customizable, having certain contents and specific functionalities.[14] The propriety of the account belongs to the Service Provider and its use is regulated by the contract that the user signs by registering. Since it is always protected by access credentials, the account is often equated with a safety deposit box.[15]

What is very important is to avoid confusion between 'account' and 'access credentials': accounts refer to the goods and services made available by a Provider, whereas access credentials are the mechanism needed to access those goods and services.[16] Thus, even though access credentials are not technically digital goods, they are supposed to have a fundamental role for the inheritance process, given that they allow, beside the transmission of any kind right (real or personal) over the digital asset, also the traceability of the digital assets to the deceased. The transmission of credentials is one of the most complex aspects in the context of succession of digital assets: in fact, they are generally known only to their creator, they are often composed of complex characters, they can be updated periodically and be associated with another instrument, such as a OneTime Password (OTP) produced by the authentication system and then delivered on another device (eg via SMS or e-mail).[17]

Besides, to obtain some useful hints that may be taken into consideration within the Italian debate on these subjects, it seems interesting to look to other classifications and definitions raised in other legal systems and provided, for instance, by the American doctrine, that first that had to face these matters as the majority of the Internet Service provider are precisely based in the US. It was outlined that a new kind of assets had emerged, which are different from other categories of digital and intangible assets (such as royalties, online banking and investments): the income-generating digital accounts (IGDA's). The so called 'income-generating digital account' refers to accounts which may generate an earning for their owners, such as YouTube. This provider accounts allows users

[13] V. Barba, *Contenuto del testamento e atti di ultima volontà* (Napoli: Edizioni Scientifiche Italiane, 2018), 284.

[14] S. Allegrezza, n 12 above, 356-357.

[15] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

[16] S. Allegrezza, n 12 above, 357.

[17] n 16 above.

to upload their own digital content (ie videos), granting money earning by displaying targeted ads and with no need for further input by the user. Under inheritance law, the transfer of IGDAs to the heirs of the user may cause issues, considering that IGDAs depend on a contractual agreement and for this reason they are regulated by the general terms and conditions between the Internet service provider and the user.[18]

IV. The Concept of 'Digital Inheritance'

The notion of 'digital inheritance' usually refers to all data and digital goods, belonging to a determined subject, circulating in the virtual reality.[19]

This concept has been developed by Scholars in an attempt to frame the problem of the destination of digital asset after the death of the person they used to belong to. Moreover, it has been used to refer to different situations: the *post mortem* management of digital identity, the criteria for the *post mortem* allocation of rights to digital goods and also the inheritance of data.[20]

The interests that come to the fore with regard to digital assets – and to accounts in particular – have a twofold nature: interests in accessing digital contents (eg e-mail, attachments, images, files of various types) and interests in managing (maintaining, supplementing, deleting) such contents. These interests are not necessarily patrimonial: for example, the management of digital content may pursue lucrative goals (eg web sites run by famous bloggers or web pages that are part of a corporate organization), but also ideal and memorial goals, as it happens – and it actually happened in the two cases decided by Italian Courts – when family members feel the need to keep alive the digital identity of their relative represented on the page owned by a social network Provider.[21]

[18] L.T. Reed, 'Contractual Indescendibility: examining inheritance of income generating digital accounts' 20 *Columbia Science and Technology Law Review*, 93, 94-98 (2018). The author outlines that 'the term "income-generating digital account" refers to an account with a digital service provider, usually online, that can generate income without input from the account holder. For example, YouTube accounts allow users to upload their own video content. Once the video is uploaded, the user can earn money by displaying targeted ads. As soon as the video begins to earn money, the account requires no further input or work on the part of the user to continue generating revenue. The account holder can, of course, upload more videos to increase their earnings, but they can also simply continue to earn revenue on their existing content. Advertising revenue is the most common method of generating income from a digital account, but it is not the only one. IGDAs arise from a contractual agreement between a user and a service provider. As such, they are governed primarily by the contractual terms of service between the service provider and the end user (…)'.

[19] See C. Camardi, n 4 above, 75. According to the author, the notion of digital inheritance generally collects data and information that are not stored by the deceased on supports which are in his/her direct availability, but on the web, on specialized sites or on servers controlled and owned by third parties.

[20] J.A. Castillo Parrilla, 'The legal regulation of digital wealth: commerce, ownership and inheritance of data' *European Review of Private Law*, 826, 807-830 (2021).

[21] S. Delle Monache, 'Successione mortis causa e patrimonio digitale' *La nuova giurisprudenza*

The differentiations described above, as well as the distinction between digital assets with a patrimonial content and digital assets with a non-patrimonial content are of particular importance if referred to the Italian inheritance law, since that the doctrine posed the question whether the inheritance includes only assets with patrimonial content or also those with a mere emotional value.

Some Scholars recognize that the will may always express the deceased's wish beyond patrimonial and non-patrimonial aspects: in this perspective, any disposition with a non-patrimonial content should be valid under the Italian legal system.[22]

At the same time some Scholars point out that goods with only a personal and non-economic content could not be included in the *strictu sensu* concept of 'inheritance' and they may be at the most transferrable to relatives who bear a familiar interest.[23]

Indeed, it was highlighted[24] that the term 'inheritance', under a technical and juridical point of view, refers to a process of circulation of rights and of goods that are referred to them. Moreover, the *mortis causa* succession has always had, according to the legal tradition, the role to solve the issue of *vacatio* in the ownership of legal relationships that exists only in relation to tangible or intangible assets (eg domain names, blogs, web pages) with an economic value.[25]

This is why, according to some Authors the expression 'digital inheritance' or 'succession in the digital asset' should be used, in the majority of the cases, only in a 'descriptive' sense, considering that the real matter related to digital goods concerns the identification of those who have the right to access or manage the deceased's digital goods themselves.[26]

The difficulties involved in solving succession issues related to digital assets emerges in the two cases decided by the Court of Milan and the Court of Bologna.

civile commentata, II, 460-468 (2020).

[22] A. Magnani, 'Il patrimonio digitale e la sua devoluzione ereditaria' *Vita notarile*, 1304,1281-1307 (2019), who considers valid under the Italian legal system also wills with a non-patrimonial content in accordance to an extensive interpretation of article 587 of the Civil Code referring to non-patrimonial dispositions. On this purpose, see also V. Cuffaro, 'Il testamento in generale: caratteri e contenuto', in P. Rescigno ed, *Successioni e donazioni* (Padova: CEDAM,1994), I, 763, who outlines that testamentary dispositions represent the individual's autonomy in expressing their will and, moreover, that the inheritance law does not forbidden dispositions with a 'atypical' non-patrimonial content. The same opinion is sustained by G. Perlingieri, 'Il ruolo del giurista nella modernizzazione del diritto successorio tra autonomia ed eteronomia' *Diritto delle successioni e della famiglia*, 2, 1-12 (2018): the author states that it makes no sense to distinguish between typical dispositions (with a patrimonial content) and atypical dispositions (with a non-patrimonial content), given that the best criteria of evaluation should be based on the legitimacy of the dispositions themselves and the protection they deserve according to the legal system.

[23] L. Carraro, 'Il diritto sui ricordi di famiglia', in Studi in onore di A. Cicu (Milano: Giuffrè, 1951) I, 159; A. Zaccaria, Diritti extra-patrimoniali e successioni. Dall'unità al pluralismo nelle trasmissioni per causa di morte (Padova: CEDAM, 1988), 236-239.

[24] C. Camardi, n 4 above, 65.

[25] S. Delle Monache, n 21 above, 468.

[26] ibid 468.

In such cases, the courts, in order to avoid going into the intricate aspects of inheritance law, have based their decision on the legislation on the protection of personal data which, as explained above, the Italian legislator has also regulated for data concerning the deceased.

V. The Italian Legal Framework on Matters Related to 'Digital Inheritance'

Notwithstanding the legislative vacuum in the area of inheritance law, in Italy a first relevant legislative intervention was made with the above-mentioned Decreto legislativo no 101/2018 that has introduced a specific provision regarding the processing of personal data concerning deceased persons.[27] It may therefore be considered the first provision of the Italian legal system setting the basis for a protection of the 'digital inheritance' phenomenon.

In particular, as already noted above, Art 2-*terdecies* of Data Protection Code states that the rights provided by Arts 15 to 22 of GDPR, related to deceased persons, could be exercised by a person who acts in their own interest or acts to protect the interests of the deceased, as an agent, or for familial reasons that are worthy of protection. Under the subjective profile, among the persons that may exercise these rights we find the agent (*mandatario*), appointed in virtue of a previous disposition of the deceased, and those who act for an 'own interest' and 'familiar reasons'. This second cause is the one that was recognized by the Court of Milan and of Bologna in the two above-mentioned cases. It is interesting to note that beyond the specific 'family interests', Art 2-*terdecies* primarily refers to a broader and undefined interest of the entitled party. In this respect, the provision leaves wide margins for case law to identify the 'interests' considered relevant and it will therefore be interesting to see how Courts will apply it.

Thus, in Italy the regulation on data protection does not represent an obstacle, differently from what happens abroad, especially in the American legal system (below para VI), and instead it seems to represent, so far, the only element to cling to with the aim of regulating the transfer of personal digital data of a deceased person.

VI. General Terms and Conditions Provided by the Internet Service Provider on Digital Data Transfer

One of the main issues regarding the transmission of digital assets concerns the conflict between inheritance law and the general terms and conditions imposed by the Internet service providers, which are necessarily accepted by the user with a simple click when creating an account to use the service.

[27] For the text of art 2-terdecies, see n 9 above.

This situation is becoming much more complicated due to the contrast between the transnational nature of the market in which the network service providers operate and the territorial extent of the legal system to which the user of the service belongs.[28]

As a matter of fact, as it is well known, the main providers are based in the United States, and mainly in the Silicon Valley, and consequently the contractual conditions imposed to the users are based on US law and, in particular, on California law.

Besides, it is undoubted that for a global market player it is almost impossible to establish rules or practices that meet the requirements of the inheritance law of each possible jurisdiction.

Due to these reasons, the general terms and conditions often contain provisions aimed at limiting or excluding the transmission of digital data. The result is that each social network has a different way of dealing with the users' death:[29] the most stringent solutions bar any transfer of the account after death (and also during life);[30] in other cases, attempts have been made to regulate the post-mortem transfer of digital data: transforming the account into a 'memorialized profile', deactivating the profile with the definitive deletion of all data and content, giving the chance to identificate a person entitled to manage the account in case of death, as for instance the 'legacy contact' (*contatto erede*) regulated by Facebook[31] (and more recently also by Apple).[32] However, in most cases the account and all the digital data are deleted after a certain period of inactivity so that the possibility for heirs to obtain access is practically prevented from the outset.[33]

[28] Because of the difficulties that the heirs may encounter in obtaining access to – and dispose of – the digital data of the deceased, part of the doctrine believes that the ordinary instruments already provided by law are the best way to regulate the transmission of digital assets: M. Cinque, 'La successione nel "patrimonio digitale": prime considerazioni' *Nuova giurisprudenza civile commentata*, 654, 645-655 (2012); U. Bechini, 'Password, credenziali e successione mortis causa' *Consiglio Nazionale del Notariato Studio 6-2007/IG*, available at https://tinyurl.com/bp93jmfj (last visited 30 June 2022).

[29] L.T. Reed, n 18 above, 98-99, remarks that 'any request to change the standard contractual provisions would likely go unanswered, making this option ultimately unrealistic'.

[30] Yahoo's terms of service (clause 3a) expressly exclude the transferability of the account and provide that any rights related to them terminate upon the account holder's death.

[31] Facebook (clause 5.5) recognize the possibility to appoint a legacy contact (*contatto erede*), who may manage the memorialized account once the user is dead. The legacy contact is defined as the person chosen to manage account if it is memorialized. According to the Facebook terms of use, the legacy contact can: make a featured post of the deceased's profile (eg share a final message on his behalf or provide information about a memorial event); view posts, even if privacy was set to 'Just Me'; decide who can see and publish commemorative posts, if the memorial account has a section for such posts; delete memorial posts; edit who can see posts in which the deceased has been tagged; remove the deceased's tags published by someone else; respond to new friend requests; edit the profile; update profile and cover images; request for removal of the account itself.

[32] See Apple's terms and conditions available at https://www.apple.com/legal/internet-services/itunes/.

[33] For an accurate analysis of the terms of use of the biggest and common service providers and

The main reason that leads the Internet service providers to exclude the accounts from the succession of a deceased user appears to be related to the alleged protection of the deceased's privacy,[34] although much more likely it is related to the need to avoid costs related to the succession of users.

Undoubtedly the impossibility of obtaining the transfer of an account *post mortem* could represent a problem not only with regard to income generating digital accounts (ie YouTube), but also with regard to other kind of social network's profiles (ie Facebook or Instagram) created and managed in order to promote brands and various businesses, since that nowadays marketing has become primarily focused on these communication channels.[35]

From a legal perspective, it is necessary to verify whether the non-transferability clauses and other modalities of transfer of digital assets unilaterally imposed by service providers are valid in light of the rules on inheritance law and protection of privacy of individual legal systems and, specifically, of the Italian one.[36] In fact, as it can be easily imagined, the conflict between the general terms and conditions imposed by Internet service providers and the inheritance rights of users governed by the various national laws has generated numerous disputes worldwide.[37]

social networks (Facebook, Instagram, LinkedIn, Twitter), see Y. Mandel, n 3 above, 1922-1928.

[34] Very often the sources of law Internet service providers cling to are the Stored Communications Act (SCA) and the Computer Fraud and Abuse Act (CFAA). According to the SCA, unauthorized access to stored communications is forbidden and it represents a criminal offence, for companies providing Internet services, to disclose digital communications to third parties, unless there is a Court order or the owner's consent. On the other hand, the CFAA prohibits to access and obtain information from a service provider's computer with no authorization. It is evident that both the SCA and the CFAA have different objects and aims in comparison with inheritance Law. On this purpose, in order to have a point of view on the US legislation, see always L.T. Reed, n 18 above, 102-103: 'The SCA was enacted in 1986, before email use became common, and long before major digital services like Facebook and Google were founded. The drafters were mainly concerned with privacy protection and did not consider the Act's impact on the probate process. (…). The Stored Communications Act and the Computer Fraud and Abuse Act (CFAA) work in conjunction to make IGDAs and the income they generate effectively uninheritable (…)'.

[35] See, Y. Mandel, n 3 above, 1929-1930: '(…) Accounts with such a purpose, rather than one that is used solely as a personal account, should be able to be passed to someone else, especially where there is value or potential value in the account, and when the account holder would have wanted someone else to have such access. (…)'. See also L.T. Reed, n 18 above, 101: 'In the case of many IGDAs (…) if an account holder dies, the heirs are not automatically entitled to the current or future income that the copyrighted content generates. Even if the will devises control of the account to the copyright heir, such a transfer would violate the terms of service, which explicitly prohibit transferring the account. The copyright heirs' legal options at this point are limited (…)'.

[36] As remarked by S. Delle Monache, n 21 above, 466, the French Law (article 40-1, Loi 78-17 of the 6 January 1978) could be a model to follow: in fact it excludes that the particular dispositions of the person concerned on the post-mortem processing of his personal data may result just from the signing of general conditions of the service (*conditions généralés d'utilisation*).

[37] Lot of authors went deeply through the cases arisen in the last years from abroad jurisdiction (mainly USA and Germany) on the matter of the heirs' right to access to the accounts of a deceased person, see S. Allegrezza, n 12 above, 367-374. With particular regard to the well-known decision issued by the German Supreme Court (BGH, 12.7.2018, Case III ZR 183/17), see F.P. Patti, F.

These problems are not only due to the incompatibility of individual clauses with the inheritance legislation of the various European legal systems, but more generally to the different economic-legal model of the American system on which Internet Services Providers tend to be based.[38] In order to provide an idea of the possible different approaches, the e-mail provider Yahoo (based in the United States) prohibits in its general conditions the transfer to the heirs of the mail account of the deceased,[39] while the email provider Libero (based in Italy) allows heirs to obtain access credentials to the account of the deceased through a simple procedure requiring the filing of some documents (such as death certificate of the account holder; identity document of the deceased; identity document of the heir; self-declaration certifying the name of the account being requested and the applicant's qualification of heir).[40] In fact, according to Italian law, heirs have the right to receive the deceased's correspondence, and this rule applies also to e-mails.

In this context, we are probably witnessing the arise of a new form of transnational law, fed by a multitude of different sources, which is not implemented by uniform rules but no less able to guide the behavior of operators at global level. However, the desirable trend, especially from the Italian point of view, should move towards the regulation of the right of access of the heirs to all the elements that make up the digital asset.[41]

Bartolini, 'Digital inheritance and post mortem data protection: the Italian reform' *Bocconi legal studies research paper series*, n 3397974, 1-12 (2019), available at https://tinyurl.com/yc5wdsdn (last visited 30 June 2022). See also I. Maspes. n 6 above, 1607-1608.

[38] G. Resta, 'La successione nei rapporti digitali e la tutela post-mortale dei dati personali' *Contratto e Impresa*, I, 94, 85-105 (2019), who affirms that in the US Law the thesis according to which '*actio personalis moritur cum persona*' is still predominant, as demonstrated by the Restatement of Torts 2nd (1977) that in § 652 stated that 'except for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded'.

[39] In reEllsworth, No 2005-296, 651-DE (Mich.Prob. Ct. 2005). The first case on the issue of post-mortem transmission of digital assets was decided by the Oakland County Probate Court and it concerned the general terms and conditions imposed by Yahoo. In this case the parents of a prematurely deceased boy made a request to Yahoo who managed their son's e-mail account to obtain the access passwords and the transmission of all the communications contained therein. The provider rejected the request on the basis of certain provisions contained in the general terms and conditions of the contract accepted by the deceased when he created the account and, in particular, the clause of 'no right of survivorship and no transferability', which provided for the 'non-transferability' of the account and the termination of the service upon the death of the user, and the clause prohibiting the provision to third parties of the information and data contained in the mail account, except in virtue of a Court order. After a long proceeding, the Court partially granted the parents' request by issuing an order for the provider to hand over the e-mails received by their son and saved on the account, but rejected the request to transfer the account's access keys due to the no-transferability clause in the contract.

[40] On this regard, see S. Allegrezza, n 12 above, 379-380.

[41] U. Bechini, n 1 above.

VII. General Terms and Conditions Provided by the Internet Service Provider on Post-Mortem Digital Data Transfer in Light of Italian Inheritance Law

It is clear that one of the main issues at stake is the compatibility of the conditions imposed by internet service providers on the *post mortem* transfer of digital assets and accounts' access keys with Italian inheritance law.

A clear example of the difficulties that may arise from the compatibility with Italian law of general terms and conditions designed on the American legal model is the provision of Facebook regarding the 'legacy contact'.

In order to regulate the management of accounts after the death of its users, Facebook has in fact provided the option to memorialize the deceased users'. After an account has been made commemorative, it becomes inaccessible (even through the passwords of the deceased user) and unchangeable. The account then becomes a 'wall of posts' that only user-friends can continue to visualize and on which is possible to leave messages to remember the deceased user. Furthermore, clause 4.5.5 of Facebook terms of service states that users can designate a person (the so called 'legacy contact') to manage their account once it has been made 'memorialized'.

Even though the aim of this Facebook's provision is to allow the users to guarantee a management of their account after death, it is necessary to analyze its consistency with Italian inheritance law.

On this last point, it is problematic to legally frame and define according to Italian law the figure of a 'legacy contact': it could be ascribed to the figure of an agent (*mandatario*), in relation to a *post mortem mandate ad exequandum*, or to the figure of the will executor (*esecutore testamentario*).[42]

The question is not only theoretical due to the following arguments. In the first case, the appointment mechanism of the legacy contact, that does not entail notification and subsequent acceptance by the person identified - who would acknowledge the appointment only once the succession has been opened - would lead to exclude the configuration of a mandate.[43]

In the case of the will executor, it may be justifiably doubted whether the

[42] I. Maspes, n 6 above, 1606. The Author here remarks that the Facebook legacy contact is hardly reconcilable with the general figure of the mandate as well as with the institute of the will executor pursuant to article 700 of the Civil Code.

[43] ibid 1606. The Author notes that the modalities of appointment of the legacy contact of Facebook differ from those of the contract of mandate as a bilateral *inter vivos* agreement. The legacy contact is not aware of his designation, which is only made known to him upon the user's death. Pursuant to Italian legal categories the legacy contact appointment would not be an *inter vivos* agreement, but a unilateral act with an after-death efficacy. The figure could not even qualify as a testamentary mandate (*mandato testamentario*); in fact, Italian scholars sustain the invalidity of a mandate contained in a will, because of the lack of bilateralism and the invalidity of a mandate proposal expressed by will, which would lose efficacity once the proponent is dead pursuant to article 1329, comma 2 of the Civil Code. In this terms, see E. Betti, *Teoria generale del negozio giuridico* (Napoli: Edizioni Scientifiche Italiane, 1994), 312.

appointment of an executor[44] (albeit limited to the management of the Facebook account), made not by will, but through its designation on the social network is to be considered valid under Italian law.

This provision is emblematic of the problems that characterize the cases underlying the digital inheritance matter: the contrast between the contractual regulation, drawn up by providers on the basis of US law (or other foreign law) and the rules of the legal systems in which it must be implemented.

If we then consider that, with reference to the Italian system, Art 2-*terdecies* of Data Protection Code widens the range of subjects entitled to have access to the digital data of a dead person, the framework becomes even more complicated. In fact, theoretically, we cannot exclude a possible conflict between the subject appointed as legacy contact and the subjects who, on the basis of inheritance law or the aforementioned Art 2-*terdecies*, claim rights on the digital assets of the deceased.

In this context, some Scholars have suggested that, in order to avoid inheritance issues, the best solution would be to dispose of one's digital inheritance in a will.[45]

The suggestion, which may be acceptable in principle, instead appears simplistic and inconclusive.

First of all, from a factual point of view, the tendency to make dispositions through wills is more and more rare in modern society and, above all, concerns a very restricted circle of people, generally with considerable assets.

The problem of digital inheritance, on the contrary, concerns the generality of the population, the majority of which is not in the economic and cultural conditions to dispose of a will, also considering the average age of social network users.

Secondly, from a strictly legal point of view, there would be doubts about the coordination between the provisions of the will and the general contractual conditions imposed by the providers and accepted by the user.

In light of the above, it could be moreover discussed whether one can transfer his own social account by will.

Beyond the problem of non-transferability clauses often provided for in the general terms and conditions of Internet service providers, doubts arise since, as explained, the account is not a digital good in the strict and technical sense,

[44] On this subject, see. G. Giampiccolo, *Il contenuto atipico del testamento. Contributo ad una teoria dell'atto di ultima volontà*, (Milano: Edizioni Scientifiche Italiane, 1954), 127.

[45] S. Allegrezza, n 12 above, 387. See also, more recently, V. Putortì, 'Patrimonio digitale e successione mortis causa' *Giustizia Civile*, I, 163-193 (2021) and M. Cinque, n 28 above, 654-655. This last author points out that at present the only effective means of disposing of one's own digital assets is a will. She analyzes the contractual conditions of sites offering services for the transmission of digital heritage and dealing with digital death and she expresses doubts about the validity of the operations of management and transmission of the digital patrimony offered by these sites and the legal consequences of the use of these services.

but rather a digital space made available by the provider (who owns it) in which the user can carry out a series of activities, such as publishing posts, photos, videos, etc. Digital assets of the user are the posts, photos, videos that are published online and only of these we can at least think of disposing of by will.

While it is clear that accounts cannot be transferred, there has been some debate as to whether access keys to accounts can be transferred by will.

A first problem that arises concerns the qualification of a testamentary disposition by which access keys are attributed. It is discussed whether it can be configured as a legacy (*legato*) and be subject to the relative discipline.[46] The negative thesis is to be preferred, considering that the object of the attribution are usernames and passwords, which lack of a patrimonial content, that is a necessary requirement for a legacy.[47] Credentials have no economic value and are important only as tools for the exercise of activities and rights on digital assets that the deceased intends to transfer to the beneficiaries.

Consequently, in order to be able to speak of a legacy it is necessary to configure a complex object attribution that includes not only the credentials to access the account, but also the transmission of digital goods accessible through these credentials. In fact, it is only in the presence of an act of patrimonial content, capable of granting an enrichment for the beneficiary, that the provision can be qualified as a legacy and be governed by the rules provided for it.[48]

Anyway since the will may also contain non-patrimonial provisions, according to some Scholars, the testamentary attribution of the access credentials and the relative instructions to someone, although it cannot be neither qualified as a mandate, since it lacks the requirement of bilaterality,[49] it seems to integrate the extremes of an authorizing act, unilateral, receptive and freely revocable, aimed at giving the third party the power (and not the obligation) to act for the implementation of the will expressed by the testator.[50]

[46] In favor of the configurability of the 'password legacy', see L. Di Lorenzo, Il 'legato di password' *Notariato*, 147, 144-151 (2014), who qualifies access credentials as assets in a legal and technical meaning when their communication directly attributes ownership of the assets to which they allow the access. See also S. Delle Monache, n 21 above, 466-468 and G. Bonilini, 'Dei legati, artt. 649-673' in F.D. Busnelli ed, *Il Codice civile. Commentario* (Milano: Giuffrè, 2020), 167. The authors outline that the case concerning the access to digital goods with a patrimonial value (eg access credentials to home banking) is totally different from the case of attribution of username and password which do not have by definition a patrimonial content in themselves.

[47] V. Putortì, 'Gli incarichi post mortem a contenuto non patrimoniale tra testamento e mandato' *Persona e mercato*, 137-149 (2012).

[48] ibid, who refers to other authors on this peculiar aspect: V.D. Greco, 'La disposizione mortis causa delle credenziali di accesso a risorse digitali', in M. Bianca, R. Messinetti, A.M. Gambino eds, *Libertà di manifestazione del pensiero e diritti fondamentali. Profili applicativi nei social network* (Milano: Giuffrè, 2016), 199; G.F. Basini, 'L'oggetto del legato e alcune sue specie', in P. Perlingieri ed, *Trattato di diritto civile del Consiglio Nazionale del Notariato* (Napoli: Edizioni Scientifiche Italiane, 2003), 165.

[49] See I. Maspes, n 6 above.

[50] V. Putortì, 'Gli incarichi post mortem' n 47 above, 139.

VIII. Final Remarks

The cases submitted to the Court of Milan and Bologna show the complexity of the issue related to the *mortis causa* transmission of digital goods. Such problems have obviously not only arisen in the Italian system, but also in other legislations. The different solutions that have been given to the same questions prove the impossibility of providing a uniform response to the problem. This is due both to differences in inheritance law and the different approaches to privacy issues in different countries.

The courts of Milan and Bologna used the data protection regulations as a legal basis for their rulings, thus avoiding dealing with the more delicate issue of succession. Some Scholars have criticized this judicial approach as a missed opportunity.[51]

Furthermore, the Italian legislation on data protection failed to provide for a coordination with inheritance law. As explained, Art 2-*terdecies* of Data Protection Code increased the number of subjects entitled to access to the digital assets of the deceased, including agent and, more generally, anyone who has a private interest. This could also give rise to conflicts between those entitled to have access to digital patrimony under Art 2-*terdecies* of Data Protection Code and the legitimate heirs of the deceased.

This legal vacuum is at the basis of the tendency of Internet service providers to regulate the succession aspects of digital data in their general terms and conditions of contract, which validity, as discussed above, is often debatable.

Often the terms and conditions of the contract include the so called non-transmissibility clauses. This is obviously due to economic reasons: if the access credentials to the account or the transfer of the digital data and all the e-mails of the deceased were automatically granted to the heirs, the providers would have to bear huge costs related to assessment of the compliance of the requests with the succession rules of the various legal systems.

Moreover, it is clear that these clauses respond to the need for Internet service providers to keep themselves out of inheritance disputes related to the transfer of digital assets.

For the reason explained above, Internet Service providers tend to prevent the problem by denying the transmissibility of such data or by requiring, as in the two cases decided by the Court of Milano and of Bologna, a judicial order establishing who is entitled to receive such assets.

The economic motivations underlying this approach emerge clearly in both the analyzed cases: in fact, Apple did not oppose the request of the plaintiffs and in the case before the Court of Milan it did not even appear in court. It seems that there are no other reasons for the Internet service providers' refusal to transfer digital assets other than those related to the need not to bear the costs

[51] A. Maniaci and A. D'Arminio Monforte, n 2 above, 665.

and risks associated with the verification of the legitimacy of the applicants.

As can be seen from these brief considerations, the issues surrounding digital inheritance are many and varied and, for the most part, lack an undisputed solution.

In the absence of a normative regulation, invoked by most of the interpreters, case law plays a fundamental role that will be destined to play an increasing importance since, according to several predictions, by the end of the century the main social networks, as Facebook, will consist more of 'memorial accounts' (belonging to died people) than of living people accounts.[52]

[52] I. Sasso, 'Privacy post mortem e successione digitale', in E. Tosi ed, *Privacy digitale, riservatezza e protezione dati personali tra GDPR e nuovo Codice Privacy* (Milano: Giuffrè, 2019), 559. See also G. Resta, n 38 above, 86, who shows some data on the basis of which 'about 10.000 Facebook users die every day; 312.000 every month; the 5% of the existing accounts belong to 'digital zombie' '.