The Digital Afterlife on Social Media
(Legal Opinion)

Abstract

With the continuous demise of account holders, social media platforms are slowly but surely becoming massive digital graveyards. The consequent issue is a myriad of personal data and intellectual property on these platforms without any protection or proprietors. Although this problem is looming, no industry standard has been established so far, and governments only reluctantly implement statutory measures. This paper aims to highlight shortcomings in today's policies of Facebook, Instagram, YouTube, Twitter and TikTok and proposes policy and legislative improvements. The dissertation suggests that governments need to strive for innovative legislation that governs the transferability of digital assets and the protection of personal data of the deceased. However, mere legislative action is insufficient. Social media platforms, as the first point of contact to the personal data and intellectual properties, have to be innovative, too. No social media platform currently employs an entirely acceptable solution. Their policies should be adjusted to encourage users to engage with digital afterlife schemes more frequently, to clarify the transferability of digital assets, and to handle communication data in a more balanced fashion.

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A. Introduction

The Digital 2020 Report estimates that at the start of 2020, more than 4.5 billion people were using the internet, 3.8 billion of which were using social media platforms ('SMP').[1] It further estimates that by mid-2020 half of the world's total population will hold a social media account of some sort.[2] The importance of SMPs for today's society is indisputable. Consequent to SMP's growth is an increase of user-generated content ('UGC') and personal data stored and processed on these platforms. While websites are permanent (so far), users are not. Öhman and Watson estimate that within 50 years, Facebook could host more accounts of deceased than of living, and before the year 2100, there will be 4.9 billion dead Facebook accounts.[3] The future problem of inactive accounts bursting with intellectual property and personal data permeating the internet is evident. Nevertheless, there is neither an industry standard to deal with this issue nor widespread legislation that regulates the digital afterlife.

SMPs and legislative bodies should adequately take account of this imminent issue. In computer sciences, 'Thanatosensitivity',[4] as first coined by Michael Massimi and Andrea Charise,[5] refers to a human-centred approach to research and design that recognises and actively engages with the issues caused by the passing of a user.[6] The legal and non-legal factors involved in the effective management of digital afterlife are manifold, and a comprehensive presentation would go beyond the scope of this dissertation. While Massimi's and Charise's research is concerned with the computing side of this issue, this dissertation discusses possible legislative and policy-based measures that should adequately take humanity's impermanence into account – ie legal thanatosensitivity. In doing so, this dissertation aims to answer how SMPs and legislative bodies should best prepare for the demise of account holders on a policy and statutory level, respectively.

[1] Simon Kemp, 'Digital 2020: Global Digital Overview' (*Datareportal*, 30 January 2020) <https://datareportal.com/reports/digital-2020-global-digital-overview> accessed 24 June 2020.
[2] ibid.
[3] Carl J Öhman and David Watson, 'Are the Dead Taking over Facebook? A Big Data Approach to the Future of Death Online' (2019) 6 Big Data & Society 1.
[4] The word 'thanatosensitivity' derives from 'Thanatos', the ancient Greek personification of death and a term associated with the Freudian notion of the death drive.
[5] Michael Massimi and Andrea Charise, 'Dying, Death, and Mortality: Towards Thanatosensitivity in HCI' (CHI Conference on Human Factors in Computing Systems, Boston, April 2009) <http://portal.acm.org/citation.cfm?doid=1520340.1520349> accessed 29 June 2020.
[6] ibid.

Mangold and Faulds define SMPs as

> a wide range of online, word-of-mouth forums including blogs, company-sponsored discussion boards and chat rooms, consumer-consumer email, consumer product or service rating websites and forums, Internet discussion boards and forums, moblogs (sites containing digital audio, images, movies, or photographs) and, social networking websites.[7]

The underlying action, inherent to all SMPs, is human interaction which manifests in various forms: pictures, commentaries, status-updates, temporary stories, videos or blogs.[8] Depending on these various forms, users interact either publicly or privately. The public and private profiles of SMPs, in turn, enjoy different legal protection. A by-product of public interaction is user-generated content ('UGC'): 'media content created or produced by the general public rather than by paid professionals (…).'[9] UGC can be protected by intellectual property rights (particularly copyrights) whereas data on the private profile usually is protected by data privacy laws.

This dissertation covers the current digital afterlife policies of Facebook, Instagram, YouTube, Twitter and TikTok, the five most prominent SMPs in the western hemisphere.[10] Although those are all separate platforms, Facebook Inc owns Instagram and applies Terms of Services ('ToS') identical in content and a nearly identical digital afterlife scheme on both platforms. Therefore, Facebook and Instagram will be considered jointly as Facebook without continuously mentioning both, unless Instagram is mentioned separately. YouTube's digital afterlife will be discussed with regard to Google's Inactive Account Manager ('IAM').[11] Every SMP features a public and a private profile and the respective conclusions, thus, are relevant for every SMP.

The content is organised as follows: To lay a foundation for later discussions, firstly, the SMP's respective content management and digital afterlife policies are presented. The second chapter will focus on what is structurally hindering most people from predetermining their digital afterlife and how the policies could be more thanatosensitive. The issues concerning

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[7] W Glynn Mangold and David J Faulds, 'Social Media: The New Hybrid Element of the Promotion Mix' (2009) 52 Business Horizons 357, 358.
[8] Angella J Kim and Kim KP Johnson, 'Power of Consumers Using Social Media: Examining the Influences of Brand-Related User-Generated Content on Facebook' (2016) 58 Computers in Human Behavior 98, 98.
[9] Terry Daugherty, Matthew S Eastin and Laura Bright, 'Exploring Consumer Motivations for Creating User-Generated Content' (2008) 8 Journal of Interactive Advertising 16, 16.
[10] 'The Most Popular Social Networking Sites In 2020' (*BroadbandSearch.net*) <https://www.broadbandsearch.net/blog/most-popular-social-networking-sites> accessed 31 August 2020.
[11] Alphabet Inc (ie Google) owns YouTube.

the public and private sides of social media profiles diverge regarding the intellectual property considerations and personal data and, thus, they generate a distinct set of legal issues. Consequently, the third and fourth chapter deal with policies and statutes regarding intellectual property and data privacy issues, respectively.

B. Content Management on Social Media Platforms

No SMP claims ownership of any content posted on their platforms.[12] Thus, to legitimately process content, the user has to grant the SMP a license for the use of their UGC. A license is a permission to do something which the licensor is usually authorised to prevent or control.[13] The ways to structure a license are diverse and an exhaustive categorisation impossible.[14] As a consequence, all SMPs have slightly differing arrangements. As a common denominator, all SMPs stipulate a non-exclusive, sub-licensable, royalty-free, and worldwide license.[15] Whereas Facebook's, YouTube's and TikTok's license agreements also include transferability, only TikTok requires the license agreement to be unconditional and irrevocable.[16] Concerning their duration, normally, if the content is deleted on a platform, the exploitation and license end.[17] Again, TikTok is the exception, demanding a perpetual license.[18]

C. Digital Afterlife Management on Social Media Platforms

A plethora of private providers trying to tackle digital afterlife management has emerged in the last century. The services range from digital asset[19] or account information archives[20] over

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[12] 'Facebook - Terms of Service' (*Facebook*, 31 July 2019) para 3.1 <www.facebook.com/legal/terms/plain_text_terms> accessed 24 August 2020; 'YouTube - Terms of Service' (*YouTube*, 22 July 2019) <www.youtube.com/static?hl=en&template=terms> accessed 24 August 2020; 'Twitter - Terms of Service' (*Twitter*, 18 June 2020) para 3 <https://twitter.com/en/tos> accessed 24 August 2020; 'TikTok - Terms of Service' (*TikTok*, February 2019) para 9 <www.tiktok.com/legal/terms-of-use?lang=en> accessed 24 August 2020.

[13] Reto Hilty, 'License Agreements', *The Max Planck Encyclopedia of European Private Law* (2012) vol 2, 1098.

[14] ibid 1099.

[15] 'Facebook - Terms of Service' (n 12) para 3.1; 'YouTube - Terms of Service' (n 12); 'Twitter - Terms of Service' (n 12) para 3; 'TikTok - Terms of Service' (n 12) para 9.

[16] 'Facebook - Terms of Service' (n 12); 'YouTube - Terms of Service' (n 12); 'TikTok - Terms of Service' (n 12).

[17] 'Facebook - Terms of Service' (n 12) para 3.1 with some minor exceptions; 'Twitter - Terms of Service' (n 12) para 4 implied by the possibility to end agreement upon deletion of the account; 'YouTube - Terms of Service' (n 12) with minor exceptions.

[18] 'TikTok - Terms of Service' (n 12) para 9 see for discussion ch E.I.1.

[19] For example, AfterVault, Chronicle of Life, Digi. Me, LifeNaut or SecureSafe.

[20] For example, Directives Online, DocuBank, MyMoriam for Life or SafeBeyond.

services that allow for the preparation of pre-written gifts and messages to the bereaved[21] to tools that generally allow the planning and charting of one's digital afterlife preferences[22]. Although engagement with these private providers certainly is advisable, it remains imperative for SMPs to provide on-platform schemes because SMPs innately are the direct point of contact with one's personal data and UGC. Today's digital afterlife schemes will be described in the following.

I. Facebook and Instagram

Facebook's memorialisation scheme[23] is activated by notification containing either an obituary or a memorial card and a proof of authority. If an account holder predefines their digital afterlife, two options are available: removal or memorialisation. When choosing the latter, the account holder can predetermine a Legacy Contact ('LC') with limited power to change the memorialised profile. An LC will, however, not be granted access to the private profile. If a user does not predetermine what happens to their account, the bereaved are again offered the above choices; however, without the possibility to appoint an LC, ie the account remains frozen.

Memorialisation is like creating a digital grave. Facebook suspends the account in large parts, and only the LC is entitled to change some features of the front page. These powers, however, are limited: While an LC has restricted influence over the public profile (eg changing the profile picture once, writing one last post or deleting unwanted posts on the timeline) they have no access to the private profile (ie to private conversations) at all.

Instagram also employs the memorialisation scheme; however, it does not feature an LC.[24] Consequently, upon memorialisation, the account is suspended permanently.

II. YouTube

Google manages YouTube-accounts; thus, Google's IAM is applicable.[25] After a predefined timespan and an unsuccessful attempt to contact the account holder, Google deactivates the account and sends an email to a predetermined contact who gets full access to the deceased

[21] For example, Ghost Memo, Gone Not Gone, Knotify.Me, Leg8cy, MyGoodbyMessage, Postumo or SayGoodbye.
[22] For example, Directive Communication Systems, Everplans, LegacyArmour, Lexikin, My Wonderful Life, MyWishes, Parting Wishes, RocketLawyer, Vivala.
[23] 'Memorialized Accounts - Facebook Help Center' (*Facebook*, 2020) <https://www.facebook.com/help/1506822589577997> accessed 31 August 2020.
[24] 'What Happens When a Deceased Person's Instagram Account Is Memorialized? - Instagram Help Center' (*Instagram*, 2020) <https://help.instagram.com/231764660354188?helpref=hc_fnav> accessed 31 August 2020.
[25] 'About Inactive Account Manager - Google Account Help' (*Google*, 2020) <https://support.google.com/accounts/answer/3036546?hl=en> accessed 31 August 2020.

user's account. Since a Google account gives access to a variety of services, an account holder may choose which accounts can ultimately be accessed. For example, access may be granted to the YouTube profile, but not to Gmail. However, if a user chooses to grant access to a service, it is granted unconditionally – ie the bereaved is granted access to the public and private profile of YouTube.

If a user failed to prearrange an IAM, Google promises to work with immediate family members and offers, on a case-by-case basis to either close the account or obtain funds and data from it. However, Google provides no guidelines in this regard at all. It is, thus, entirely at Google's discretion to serve such a request.

III. Twitter

In contrast to Facebook and YouTube, Twitter's afterlife management is somewhat rudimentary.[26] The only option available is for the bereaved to request the deactivation of the account. No data may be retrieved, and the whole account will be irrevocably deleted.

In 2019, Twitter was heavily criticised consequent to the self-directed deletion of inactive accounts.[27] In reaction to this criticism, Twitter announced to implement a memorialisation scheme similar to Facebook's.[28]

IV. TikTok

Remarkably, TikTok does not offer any information on how to deal with deceased account holders. There is neither information about how to proceed nor whom to contact.

D. Accessibility – A Thanatosensitive Approach to Digital Afterlife Governance

The impermanence of life is a subject a user is likely to avoid. Because of this avoidance paired with the common sense of insignificance of our online life, social media afterlife often remains undermanaged. According to a survey conducted by the Digital Legacy Association,

[26] 'How to Contact Twitter about a Deceased Family Member's Account' (*Twitter,* 2020) <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> accessed 31 August 2020.

[27] Dave Lee, 'Twitter Account Deletions on "pause" after Outcry' *BBC News* (27 November 2019) <https://www.bbc.com/news/technology-50581287> accessed 31 August 2020.

[28] Darrell Etherington, 'Twitter to Add a Way to "Memorialize" Accounts for Deceased Users before Removing Inactive Ones' (*TechCrunch,* 27 November 2019) <https://social.techcrunch.com/2019/11/27/twitter-to-add-a-way-to-memorialize-accounts-for-deceased-users-before-removing-inactive-ones/> accessed 31 August 2020.

only 11.8 % of 519 asked people have predetermined an LC on Facebook;[29] nearly 90% of users have not set up Google's IAM.[30] The vast majority of social media users do not express their explicit digital afterlife will. Given the paucity of research in this area,[31] the causes for these remarkably low numbers are uncertain. This section will explore if the problem could be rooted in flawed policies to predetermine one's digital afterlife and what possible solutions exist.

Accessibility, in the context of this dissertation, is considered through the lens of thanatosensitivity; in other words, how does the platform's afterlife architecture support or incentivise the user in setting up their digital afterlife preferences, or how does it support the bereaved in managing their relatives' digital remains.[32] Therefore, it can be considered from two perspectives: User setup accessibility and third party account management.

Accessibility, both from a user's and post-mortem standpoint, is significant concerning the data retention caused by today's default settings. Given that most people ignore digital afterlife settings, the default options will be activated in most cases. Currently, every SMP retains data on the platform by default. Only if the bereaved take action is data deleted or withdrawn. Notably, SMP's business models revolve around exploiting data; hence, it is their primary interest to retain data for as long as possible.[33] Although it seems as if SMPs only have little commercial interest in retaining personal data of deceased, their worth illuminates when considering genealogy – genetic information of an individual also contains information about their children or parents. Analogously, the profile of an individual regularly contains information about their acquaintances that can be mined.[34] Consequently, it is unsurprising that the default settings are more approving for SMPs as opposed to the user, specifically concerning data retainment and continuous usage of these data points and copyright licenses[35]. As digital afterlife management usually involves deletion of data and termination of licenses, it conflicts with their business model. It follows that a transparent

[29] 'The Digital Death Survey 2017 Overview Report' (*The Digital Legacy Association*, 2017) <https://digitallegacyassociation.org/wp-content/uploads/2018/07/Digital-Death-Survey-2017-HQ.pdf> accessed 29 June 2020.
[30] ibid.
[31] Massimi and Charise (n 5).
[32] ibid.
[33] Sarah Joseph, 'Why the Business Model of Social Media Giants like Facebook Is Incompatible with Human Rights' (*The Conversation*, 2 April 2018) <http://theconversation.com/why-the-business-model-of-social-media-giants-like-facebook-is-incompatible-with-human-rights-94016> accessed 31 August 2020.
[34] Carl Öhman and Nikita Aggarwal, 'What If Facebook Goes Down? Ethical and Legal Considerations for the Demise of Big Tech Platforms' [2019] SSRN Electronic Journal 8 <https://www.ssrn.com/abstract=3494144> accessed 24 August 2020.
[35] The duration of which is typically bound to the data being available on the profile; cf ch B.

predetermination of one’s digital afterlife could contradict the interests of SMPs; they are not intrinsically incentivised to nudge users to manage their digital afterlife.

On the other hand, next of kin have a strong interest to have clear guidelines of the deceased concerning the estate. Managing a relative’s estate is a cumbersome, intricate and not least a highly emotional task. Although users can alleviate some of these encumbrances by pre-setting their preferences, the vast majority does not. As a consequence, relatives are left with limited options and non-compliance with the deceased's will is somewhat probable. Consequently, for an individual to most adequately express their will and to pre-empt the next of kin from having to make difficult decisions with only limited options, predefined digital afterlife management is essential. In essence, with regard to accessibility of a user to manage their digital afterlife, the two colliding interests are the business model SMPs and the adequate representation of an account holder’s will.

The balancing of these interests undoubtedly is favouring the user’s interests for three reasons: First, it is necessary to establish clarity as to the deceased's will who should be able to dispose of one’s rights – does one want their data to be destroyed, bequeathed to their relatives or memorialised? Secondly, although it can be detrimental for SMPs to lose a user’s data, the business model does barely inflict any damage due to the sheer mass of other user's joining daily. Lastly, the economic interests of SMPs do not outweigh the interests of a grieving family to have clarity of decision for the estate. It seems immoral to base parts of one’s business model on omitted will expressions and the subsequent remnants of data points.

It follows that rather than merely pursuing their business interests, SMPs should adequately design their digital afterlife schemes to be as accessible as possible. Notably, SMPs have not established unnecessary complexities when setting up one’s preferences. For example, on Facebook and Google, it takes merely three clicks to define one’s digital afterlife settings. Also, the concepts are relatively straightforward and should be comprehensible. Thus, if one wants to plan for their digital afterlife, the difficulties to do so are not overwhelming. Given the insufficient numbers of actual engagement with the digital afterlife and the ensuing consequences of absent settings thereof, the current digital afterlife organisation by way of a mere option is not enough and tends to favour the interests of SMPs. It follows vis-à-vis the weightier interests of bereaved and deceased as well as effective thanatosensitivity, that SMPs should, in general, either obligate users to predetermine their digital afterlife or at least regularly remind them to do so, just as they remind every user to update their profile regularly.

If the digital afterlife has been predetermined, the issue of access for the bereaved is only partially alleviated since activating it still requires some proof of passing (eg obituary or memorial card) on Facebook, Twitter, and (ostensibly) TikTok. Google, in contrast, is proactive as the IAM provides a predefined contact with the necessary information to log in to the deceased's account after a predefined timespan of inactivity by the user. In terms of thanatosensitivity, Google's solution most adequately takes account of the encumbrances connected with someone's death and shifts the responsibilities accordingly.

Facebook's LC allows for relatives to maintain the memorialised profile. While the memorialisation idea certainly is an intriguing idea, it is no perfect solution at all. What if the LC dies? After the demise of the LC, nobody could manage the memorialised profile anymore. It would be perpetually frozen, and the problem of accessibility arises anew. However, if the user has not appointed an LC, their memorialised timeline is vulnerable to nefarious actors.[36] Although memorialisation allows for an in-between solution that tries to respect the various involved interests, it is still error-prone and not an optimal solution at all.

By only giving the option to have the account deleted, Twitter does not offer any innovative contribution to this discussion in any way. As bereaved still have to provide some proof of passing and identity, the drawbacks from Facebook's solution are reflected. Although it certainly is the most comprehensible concept, it is insufficient from a thanatosensitive perspective.

TikTok does not offer any solution. Neither does TikTok provide users with any sort of afterlife settings, nor does it provide bereaved with guidance as to how an account can be deactivated or deleted. TikTok fails to take account of human's impermanence and is in dire need to catch up with the other platforms.

In summary, accessibility is not a question of how to provide the most comfortable access to a possible option; it should instead be considered to be a necessity to plan for the inevitable and users should be actively approached to define their preferences. Moreover, adequate account should be taken of the impediments of afterlife planning, and bereaved relatives should be offered the most comfortable solution as already implemented by Google.

[36] Whitney Phillips, 'LOLing at Tragedy: Facebook Trolls, Memorial Pages and Resistance to Grief Online' (2011) 16(12) First Monday <https://firstmonday.org/ojs/index.php/fm/article/view/3168/3115> accessed 25 August 2020.

E. The Public Profile and Intellectual Property

This section concerns issues with the public side of social media accounts. On every SMP discussed in this dissertation, content can be made available to one's network; intellectual property matters are the ensuing consequence. In the given context, particularly copyright protection is relevant. The following discussions will be premised on the assumption, that UGC amounts to works and, indeed, enjoys copyright protection.[37] The section is built according to the two principal sets of rights attributed to copyright: economic and moral rights. Regarding economic rights, the license duration and intrinsic inconsistencies, as well as transferability issues connected with the user (and thus license) agreements, are discussed. Regarding moral rights, only the right of retraction is pertinent.

I. Economic Rights – Licenses, Duration and Transferability

Economic rights allow the owner to exploit the work in different ways and, thus, furnish the owner with the fruits of labour.[38] Notwithstanding national particularities, economic rights can broadly be categorised into reproduction, adaptation, distribution and communication rights.[39] Excluding any exemptions, economic rights are initially granted to the author of a work;[40] ie the 'individual who, by creative activity, produces a work'.[41] To pursue economic interests in their works, authors can assign or license some or all of the economic rights.[42] Every SMP under scrutiny expressly refrains from an assignment of economic rights;[43] its usage is governed by the license agreements enshrined in the respective ToS.[44] However, in general, and under national laws, one is free to license parts or all their economic rights. Consequently, the remaining issues concern the term of the license and transferability of the copyright by way of succession.

[37] Consequently, protection will be assumed irrespective of varying national approaches to originality or categories of copyright protectable works; see Tanya Frances Aplin and Jennifer Davis, *Intellectual Property Law: Text, Cases, and Materials* (3rd edn, Oxford University Press 2017) 107.
[38] ibid 177.
[39] ibid; JAL Sterling and Trevor M Cook, *Sterling on World Copyright Law* (5th edn, Sweet & Maxwell : Thomson Reuters 2018) para 9.01.
[40] Aplin and Davis (n 37) 132; Sterling and Cook (n 39) para 5.13.
[41] Sterling and Cook (n 39) para 5.11 notwithstanding national particularities as, for example, the US work made for hire doctrine 17 U.S.C. § 101 making the legal entity the author of a work.
[42] ibid paras 12.06ff; Aplin and Davis (n 37) 150.
[43] Every SMP emphasises the retention of all ownership rights; cf ch B.
[44] Corinne Tan, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features.* (UCL Press 2018) 99ff.

1. License Terms and Inconsistencies

Currently, only TikTok imposes excessive license terms. The Berne Convention[45], the most comprehensive international agreement governing copyright protection,[46] requires member states to generally implement copyright protection for at least 50 years after the death of an author (Article 7).[47] As a consequence, the license agreement survives the death of an author for at least 50 years.[48] While most license terms herein are limited to the availability of the content on their website, TikTok stipulates a perpetual and irrevocable license. It is difficult to substantiate why the TikTok license should be perpetual as opposed to other SMPs. It seems excessive and devoid of any clear purpose to disallow an author to permanently delete their UGC and thereby withdraw from the license agreement. To adhere to market standards maintained by all other SMPs, TikTok should allow users to withdraw content from their application permanently.

The broader problem, however, are the policy-intrinsic inconsistencies concerning the term and transferability. All SMPs terminate the licenses to use their services upon the account holder's death.[49] Consequently, the account itself cannot be bequeathed according to SMP's ToS. However, the licenses to use UGC persist in spite of the account holder's death. These policy points are diametrically opposed. If no predeterminations have been arranged, there frequently is no way to access these accounts and the intellectual property as the laws governing these issues oftentimes are not clear as best illustrated in the *Ellsworth* case[50] or the *Facebook Germany* case[51]. In the former, Yahoo! denied access to the email account of a deceased family member on the basis that its ToS were designed to protect the privacy of its users. The Court ultimately required Yahoo! to provide a CD with copies of the email communication but did not grant access to the account. In the latter, upon a teenager's suicide, her parents, who were unable to establish the suicide reasons, requested access to the communication data of their child on Facebook. The German Federal Court of Justice ('BGH') forced Facebook to grant parents access to the account of their deceased daughter

[45] The Berne Convention for the Protection of Literary and Artistic Works.
[46] Claude Masouyé, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO 1978) 3.
[47] For all works except photographs and cinematographic works whereas the former has a minimum term of protection of 25 years after the death and the latter has special regulations regarding the regular multiplicity of authors.
[48] Anjelica Davis, 'What Happens to Your Copyrights After You Die?' (*Copyright Alliance*, 15 October 2019) <https://copyrightalliance.org/ca_post/what-happens-to-your-copyrights-after-you-die/> accessed 27 July 2020.
[49] 'Facebook - Terms of Service' (n 12) para 3.1; 'YouTube - Terms of Service' (n 12); 'TikTok - Terms of Service' (n 12) para 7; 'Twitter - Terms of Service' (n 12) para 4.
[50] *In Re Ellsworth*, No 2005-296, 651-DE (Mich Prob Ct 2005).
[51] BGH 12 July 2018 III ZR 183/17.

despite the competing ToS.[52] Essentially, the ToSs are intrinsically inconsistent and create a muddy legal relationship between the SMP and the user that is not reliably regulated by coherent legislation.[53]

2. Transferability and Legislative Action

Transferability issues connected to digital assets are a matter of controversy and merit legislative attention. For example, the legal circumstances often are unclear if a will and the digital afterlife settings oppose each other.[54] An excellent legislative example that tackles this issue is the Uniform Law Commission's Revised Uniform Fiduciary Access to Digital Assets Act ('RUFADAA') in the United States of America ('US') which is now enacted in more than 40 states.[55] The legislation equalises tangible and intangible assets and thus allows relatives to access intangible digital assets as a fiduciary. This solution resolves the ambiguities concerning the transferability of these accounts.[56] It further clarifies the rank between on-platform settings and colliding wills by giving priority to the former.[57] It is highly desirable to regulate access to digital assets in such a way to establish legal clarity.

The *Facebook Germany* case further illustrates why legislation is required to tackle this issue.[58] The BGH held that the user accounts are, indeed, transferable and access should, thus, be granted. German inheritance law recognises the universal succession principle which states that, in general, every right and obligation will be inherited as a whole.[59] The BGH interpreted this principle to be applicable to social media user agreements which consequently should be bequeathed to the next of kin.[60] However, this decision, by no means creates sufficient legal clarity. First, the memorialisation process was found not to form part of the user agreement as it was at the time of the ruling not mentioned in Facebook's ToS.[61] The Court further held the afterlife scheme as such is inconsistent with German law.[62] Thus, while the user agreement

[52] ibid para 94.
[53] Edina Harbinja, 'International: Digital Inheritance and Post-Mortem Privacy in Europe' (*DataGuidance*, 19 June 2019) <https://www.dataguidance.com/opinion/international-digital-inheritance-and-post-mortem-privacy-europe> accessed 26 August 2020.
[54] ibid.
[55] Brian J Barth, 'The Digital Afterlife' (*The Walrus*, 8 April 2020) <https://thewalrus.ca/the-digital-afterlife/> accessed 25 August 2020.
[56] Edina Harbinja, 'Emails and Death: Legal Issues Surrounding Post-Mortem Transmission of Emails' (2019) 43 Death Studies 435, 442.
[57] Edina Harbinja, 'International: Digital Inheritance and Post-Mortem Privacy in the US and Canada' (*DataGuidance*, 2 September 2019) <https://www.dataguidance.com/opinion/international-digital-inheritance-and-post-mortem-privacy-us-and-canada> accessed 30 August 2020.
[58] *Facebook Germany* (n 51).
[59] ibid paras 30, 78.
[60] ibid para 22.
[61] ibid para 23.
[62] ibid paras 28ff.

was inherited, the memorialisation scheme was not. Moreover, the BGH did not refer the case to the CJEU.[63] Today, the memorialisation process is referred to in Facebook's ToS and should now form part of the user agreement.[64] Also, despite this decision, Facebook still employs its afterlife scheme in Germany; however, with adjustments to accommodate this decision.[65] While the BGH clarified some positions, it did not manage to create complete legal clarity. For example, would it have decided similarly if Google's IAM were involved? It would be a cumbersome task for individuals to repeatedly go to Court to clarify all the open questions in this regard. Legislative action is the simplest and most straightforward way to clarify transferability issues.

Legislative action can hopefully be awaited in the UK: In 2017, the Law Commission published a report on a reform of the law governing wills.[66] It held that digital assets currently fall outside what is being dealt with by a will and a contemplates a separate law reform governing digital assets.[67] The Law Commission appropriately recognises this predicament and attempts to clarify transferability issues by way of legislative action.

In essence, the problem of transferability not only stems from flawed policies and license agreements but also legislative shortcomings. It follows that both need to be adjusted. SMPs should provide clear and coherent policies, whereas states need to clarify the legal environment to guarantee a smooth inheritance process.

II. Moral Rights – The Right of Retration

In contrast to economic rights, which concern the commercial exploitation of a work, moral rights refer to a set of non-pecuniary rights aimed at the protection of an author's personality embedded in their work as their brainchild.[68] Since moral rights intend to protect the personal bond between a work and its creator, they should belong to the author exclusively.[69] As a consequence and as opposed to economic rights, moral rights usually are inalienable and can,

[63] ibid para 94.
[64] 'Facebook - Terms of Service' (n 12) para 5.5.
[65] Facebook adjusted its LC settings and today allows parents of minors to appoint themselves as LCs without the users predetermining it: <https://about.fb.com/news/2019/04/updates-to-memorialization/> accessed 25 August 2020
[66] Law Commission, *Making a will* (Law Com No 231, 2017).
[67] ibid paras 1.27 and 14.4ff.
[68] Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press 2006) para ln.07; Gillian Davies and Kevin Garnett, *Moral Rights* (Sweet & Maxwell 2010) para 1.014; Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford University Press 2011) 14; Aplin and Davis (n 37) 163; Sterling and Cook (n 39) 8.01.
[69] Davies and Garnett (n 68) para 1.014; Sundara Rajan (n 68) 16; Frederick W Mostert, *From Edison to IPod: Protect Your Ideas and Profit* (2nd edn, Portable Magic 2016) 122; Aplin and Davis (n 37) 163.

thus, not be assigned or licensed.[70] Since they usually are not governed by the license agreement, they are considered independently in the following.

The amount of moral rights is exhaustive; there are only five to consider: the right of paternity, integrity, disclosure, retraction and access.[71] However, in the following, only one is relevant: the right of retraction (sometimes also right of withdrawal or right to recall).[72] Although, in principle, all moral rights are usually transferred by succession,[73] the death of an account holder and the associated consequences only affect the right of retraction. Therefore, it will be the only moral right considered in the following.

The right to retract accurately points to an ethical problem concerning the heir's access to a deceased's intellectual property. Given the earlier point as to the inheritability of moral rights, discussing the right to retract is, prima vista, paradoxical; it is the only non-transferable moral right and ceases upon the death of the author.[74] It is, however, the rationale for the non-transferability of this moral right which renders it pertinent in this context. The especially close connection the right draws to the personality of an author substantiates its non-transferability: If a work no longer reflects an author's personality, one should be allowed to retract it, subject to damages.[75] An heir should not be able to make a decision this personal for the departed and is, thus, excluded from exercising this moral right.[76] Ostensibly, by providing the sole option to delete an account, SMPs give heirs a *de facto* right to decide if the work should be public or withdrawn from circulation and, thus, seemingly transfer the right to retract to the heirs. Although the right to retract is hardly significant in practice,[77] this situation might be in conflict with this moral right's rationale and, therefore, has to be discussed.

Evidently, giving heirs the right to have UGC of a deceased deleted is not in conflict with this right itself, but possibly with its rationale. The rationale's point of attachment is the author's personality. If the work violates the personality, it should be withdrawn. Because the heirs cannot ascertain a personality violation for the deceased, they should not be allowed to

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[70] Davies and Garnett (n 68) para 1.014; Sundara Rajan (n 68) 16; Sterling and Cook (n 39) para 12.03.
[71] Davies and Garnett (n 68) para 1.002.
[72] It is particularly prevalent in Europe; for example, Germany, France or Italy.
[73] Mostert (n 69) 122.
[74] Brad Spitz, *Guide to Copyright in France: Business, Internet and Litigation* (Kluwer Law International 2015) ch 3.01[C]; Sterling and Cook (n 39) para 8.37; Adeney (n 68) para 8.145; for country-specific examples see Davies and Garnett (n 68) paras 12.027, 13.033 or 15.026.
[75] Davies and Garnett (n 68) para 13.033.
[76] ibid the exception being Germany; however, the heir is burdened to prove that the author was entitled to retract but was prevented from doing so, which gives the same result.
[77] Michel Vivant and Jean-Michel Bruguière, *Droit d'auteur et Droits Voisins* (4th edn, Dalloz 2019) para 490 calling the right to retract 'une fantasie de théoriciens' due to the indemnification owed upon its exercise.

exercise this right. Consequently, it is the supposed will of the account holder to have the work accessible to the public. The given context differs insofar as the author's personality is not damaged by the retraction, but the work could be withdrawn against the author's will. For the moral right, the author's will is not relevant; only the author's personality is. For example, a client can buy a painting and decide to store it in the attic anytime, even if it is against the painter's will. Although the right of retraction and its rationale is not infringed, the ethical question that remains is if the next of kin should be allowed to withdraw the works of the author.

Essentially, this is not a question to resolve for SMPs or governments. If an author values the work they publish online and wishes for them to rest accessible after their demise, they can arrange to do so. Most SMPs already provide the instruments to pre-set one's will, and if this is not being taken advantage of, the decisions will be left to the next of kin, subject to their determination. The exceptions are Twitter and TikTok that only offer the option to delete an account. However, the bereaved can still opt for not having the account deleted, and an author could have expressed this will offline, too. Although alternatives to make digital afterlife management more accessible should be explored,[78] the non-engagement with it should not be a legal issue for SMPs.

III. Interims-Conclusion and Results

It has been found that the current licenses are intrinsically inconsistent and should be revised as to their duration and transferability so as to guarantee legal clarity. Moreover, the policies and judgements alone do not achieve enough legal clarity as the transferability issues are too varied. Legislative changes, as, eg the RUFADAA, are desirable and should be pursued more widespread.

F. The Private Profile and Post-Mortem Privacy

As opposed to the public profile that is subject to intellectual property protection, the private profile is permeated by personal data which is governed by data privacy laws. To determine the legal boundaries set by data privacy laws, the General Data Protection Regulation[79] ('GDPR') will be discussed in the following. It is considered to be one of the most far-

[78] As discussed in ch D.

[79] Regulation (EU) 2016/679 on the protection of natural persons concerning the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC (Data Protection Directive) [2016] OJ L119/1.

reaching and comprehensive privacy legislations in the world, owing to its extensive applicability standards and the substantive responsibilities bestowed on data controllers.[80]

In a social media context, two categories of private information, communication data and purely personal data,[81] create two fields of discussion. Concerning communication data, particularly the following situation is legally significant: Whereas the deceased's data is not GDPR-relevant due to Recital 27 GDPR, communication data which consists of personal data of a living account holder might still be protected by data privacy laws and their processing has to be lawful. As a consequence, if the next of kin want to have access to the private profile of a deceased account holder, this kind of processing has to comply with the obligations of the GDPR. Initially, this situation will be assessed concerning possible policy changes to adequately balance the interests of bereaved, deceased and still living account holders. Concerning purely personal data, privacy laws' widespread non-applicability to personal data of deceased will be assessed, taking into account contemporary legislative approaches.

I. Lawfulness of Processing

The GDPR regulates personal data involved in communication data. It applies to the processing of personal data by wholly or partly automated means.[82] 'Processing' involves any operation performed on personal data[83] and SMPs automate these actions on their websites. Data processed on an SMP innately relates to a natural person; a profile on any SMP necessarily identifies someone, either by name or picture. The issue concerning 'personal data' is not whether the quality of the data amounts to personal data as, in fact, most data processed on SMPs is personal data.[84] The issue is the non-applicability to personal data of deceased.[85] As a consequence, the GDPR only applies to communication data which is

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[80] Nadezhda Purtova, 'The Law of Everything. Broad Concept of Personal Data and Future of EU Data Protection Law' (2018) 10 Law, Innovation and Technology 40; Michael Baxter, 'How GDPR Is Shaping Global Data Protection' (*PrivSec Report*, 24 August 2018) <https://gdpr.report/news/2018/08/24/how-gdpr-is-shaping-global-data-protection/> accessed 8 July 2020; Rob Sobers, 'GDPR's Impact So Far: Must-Know Stats and Takeaways' (*Inside Out Security*, 27 June 2019) <https://www.varonis.com/blog/gdpr-effect-review/> accessed 8 July 2020; Anastasia Petrova, 'The Impact of the GDPR Outside the EU' (*Lexology*, 17 September 2019) <https://www.lexology.com/library/detail.aspx?g=872b3db5-45d3-4ba3-bda4-3166a075d02f> accessed 8 July 2020.

[81] Communication data refers to a set of data that is created by interpersonal communication and, thus, consists of personal data of two or more people. Purely personal data, however, only consists of personal data of the account holder, eg one's preferences, stored interests or unpublished statuses.

[82] Article 2 GDPR.

[83] Article 4 (2) GDPR.

[84] particularly because of the extensive notion of 'personal data'; cf Purtova (n 80).

[85] Recital 27 GDPR.

comprised of personal data by several people that, presumably, are still alive and data subjects to the GDPR.

Processing of personal data has to be in adherence with the principles stipulated in Article 5 GDPR. The critical issue to consider is that of lawfulness of processing[86] according to Articles 5 (1) a and 6 GDPR. Any processing performed on personal data has to be legitimised by a legal basis.[87] According to Article 6 GDPR, processing shall be lawful if and only to the extent that at least one of the listed and legally equal requirements is met.[88] It, thus, has to be determined if there is an appropriate legal basis for SMPs to provide personal data to the bereaved, and which is the most appropriate for SMPs to rely on when providing bereaved access to communication data. Two lawful bases, according to Article 6 GDPR are considered in the following: consent and legitimate interests by a third party.

1. Consent

According to Article 4 (11), consent means any freely given, specific, informed and unambiguous indication of the data subject's wishes. The four requirements, according to Article 4 (11) and 7 GDPR of valid consent have to be examined to determine its appropriateness: Voluntariness, informed consent, specificity and unambiguity.

Voluntariness requires consent to be freely given; it should be a free choice by the data subject absent of an imbalance between the data subject and the controller.[89] Consent should not be made a condition for the performance of a contract.[90]

Article 4 (11) requires a specific and informed declaration of consent by the data subject. In order to ensure appropriate information, the data subject should, pursuant to Recital 42, at least be aware of the controller's identity and the purposes of the processing. A data subject should have the possibility to give consent to one explicit purpose to ensure specificity.[91]

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[86] 'Processing' entails virtually every action performed on personal data, including passing it along to bereaved people.
[87] Lukas Feiler, Nikolaus Forgó and Michaela Weigl, *The EU General Data Protection Regulation (GDPR): A Commentary* (Globe Law and Business 2018) 19.
[88] Article 29 Working Party, 'Opinion 06/2014 on the Notion of Legitimate Interests of the Data Controller under Article 7 of Directive 95/46/EC' (WP 217, 2014) 10 <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf> accessed 12 June 2020.
[89] Recital 43 GDPR.
[90] Article 7 (4) GDPR; Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR)* (Springer Berlin Heidelberg 2017) 95.
[91] European Data Protection Board, 'Guidelines 05/2020 on Consent under Regulation 2016/679' (Version 1.1, 2020) para 42 <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf> accessed 11 June 2020.

According to Article 7 (2) GDPR, unambiguity in the context of a written declaration also concerning other matters, requires controllers to present the option for consent distinguished from other matters in an intelligible and easily accessible form. The controller shall further ensure that consent is given in a clear affirmative act.[92]

In a digital afterlife context, two concepts of acquiring consent to provide communication data to bereaved can be imagined: The affirmative action could be entailed in the setup of one's account, namely in the ToS, or it could be given on a case-by-case basis, ie SMPs could contact every communication partner of a deceased individually to obtain consent.

The first option evidently is more straightforward, but in conflict with data protection laws for at least two reasons: First, consent shall be given unambiguously. However, by solely including a paragraph in the ToS, it would not be demarcated from other matters; consent would only be given equivocally. Second, the option for consent should be presented granularly.[93] A data subject should be allowed to give consent for every deceased communication partner individually instead of broad consent regarding all communication data, irrespective of the partner.

Despite being more onerous for SMPs, the second option is more reasonable from a legal point of view. As every communication partner is free to provide their data to the bereaved, consent can be given on a case-by-case basis, and an accompanying text could inform the data subject about the purpose and circumstances which also allows for an unambiguous, affirmative act. It is an option that is compliant with the requirement of lawful processing.

Unfortunately, consent as a legal basis comes with drawbacks and often is not the most attractive legal basis for processing in a business context. Owing to the high standards imposed by the legislation, and the possibility for data subjects to withdraw consent at any time without the data controller being able to shift their legal basis freely;[94] consent often is reduced to an unreliable factor in business circumstances.[95] As a consequence, other legal bases regularly prevail.[96]

Despite these drawbacks, consent as a legal ground for processing is particularly relevant in practice and a valid option in this context.[97] With the realisation of the GDPR its scope has

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[92] Voigt and von dem Bussche (n 90) 94.
[93] European Data Protection Board (n 91) para 42.
[94] Article 7 (3) GDPR; ibid 25.
[95] Daniel Rücker and Tobias Kugler (eds), *New European General Data Protection Regulation, a Practitioner's Guide: Ensuring Compliant Corporate Practice* (CH Beck - Hart - Nomos 2018) 76.
[96] ibid; Voigt and von dem Bussche (n 90) 100.
[97] Feiler, Forgó and Weigl (n 87) 20.

been copiously described,[98] making it the most tangible legal basis for processing in the GDPR.[99] In a digital afterlife context, the high standards could also be adhered to, on the condition that the consent concept is correctly implemented as described above. Moreover, no business is dependent on personal data to pursue their goals, and it does not come with an economic drawback if consent is not given. Hence, an SMP can obtain valid consent when adhering to these requirements.

The persisting disadvantage is the possibility to decline consent or withdraw it at any time. Consent essentially suggests that the privacy interest of a communication partner outweighs the interest of bereaved to have full access to the account of their dead relative. In order to rely on legitimate interests as a legal basis, this suggestion has to be inverted so as to uphold the bereaved people's interest. This balancing of interests will be discussed in the next paragraph.

2. Legitimate Interests

For data processing to be based on legitimate interests of third parties, [100] those interests should prevail over the need to protect data subjects. In pursuit of this balancing test, the WP29 proposes to, inter alia, assess the controller’s (or third parties) legitimate interest, and determine their impact on the data subject’s interests.[101] Evidently, to rely on legitimate interests as a legal basis, the third party’s interests should prevail.[102]

The interests involved in the balancing tests are manifold, and a general formulation is inopportune; a case-by-case analysis is required. Generally, in order for an interest to be legitimate, it has to be lawful, sufficiently specific and representative of a real and present interest[103] – regardless of their nature (economic, legal, idealistic or others).[104] Moreover, the processing must be necessary for the intended purpose.[105] In the digital afterlife context, it is the interest of bereaved to access personal communication of their late relative, which is in accordance with these criteria. Nevertheless, a legitimate interest alone does not suffice to rely on Article 6 (1) f. as a legal ground of processing.[106] The significance of the interest's legitimacy has to be assessed to weigh it against the competing interests appropriately. An

[98] Articles 4 (11) and 7, Recitals 32, 42 and 43; cf Stephen Breen, Karim Ouazzane and Preeti Patel, ‘GDPR: Is Your Consent Valid?’ (2020) 37 Business Information Review 19.
[99] Rücker and Kugler (n 95) 76.
[100] Article 6 (2) GDPR.
[101] Article 29 Working Party (n 88) 33.
[102] Voigt and von dem Bussche (n 90) 103.
[103] Article 29 Working Party (n 88) 25.
[104] Voigt and von dem Bussche (n 90) 103.
[105] Article 29 Working Party (n 88) 29.
[106] ibid 25.

'interest can range from trivial to very compelling, and be straightforward or more controversial'[107]. An interest is more compelling, the more explicitly recognised it is in the law.[108] The WP29 differentiates between three kinds of interests: fundamental rights, public interests, and other legitimate interests. Fundamental rights refer to the fundamental rights and freedoms enshrined in the European Charter of Human Rights and the European Convention of Human Rights.[109] Public interests refer to situations where a controller acts in the interest of the wider public.[110] Evidently, neither can be invoked. It should, therefore, be relied on other legitimate interests.[111] Because the interests involved in the disclosure of communication data can range from trivial to compelling themselves, a case-by-case analysis is required. The broad range of possible interests involved is aptly illustrated in the *Facebook Germany* case.[112] Notably, the Court found overriding interests of the bereaved to unconditionally access their late daughter's account based on other legitimate interests.[113] The interests involved reasons as the defence of a damages claim or the interest to have transparency of the ominous suicide circumstances.[114] Moreover, the BGH expressly referred to this balancing test as being a case-by-case analysis.[115]

II. Thanatosensitive Digital Afterlife Policy

Based on the elucidations in the previous chapter, it is tolerable for SMPs to provide communication data to bereaved if either legitimate interests are presented, or consent by the communication partner has been obtained. In the assessment of legal bases, it has been found that consent certainly is a suitable option for an SMP. Whereas the chief drawback for consent is the possible legitimate interests of bereaved, legitimate interests require a case-by-case analysis which renders it difficult to be applied broadly.

A combination of both legal bases would off-set some of these disadvantages. The optimal solution would look as follows: As a rule, a data subject should be asked for consent to disclose their conversations. If this request is not granted, bereaved should file for a case-by-case examination and substantiate their legitimate interests to gain access. Evidently, the majority of cases are incontestable; a consent-scheme, therefore, strikes a fair balance

[107] ibid 34.
[108] ibid 36.
[109] ibid 35.
[110] ibid.
[111] Article 6 (1) f. GDPR.
[112] *Facebook Germany* (n 51).
[113] ibid paras 74ff.
[114] ibid paras 80ff.
[115] ibid para 75.

between the competing interests of data subjects and bereaved. However, by proving overriding interests, the bereaved could still be given access to the communication data. In doing so, the impact on the SMPs is minimised, and the interests of all parties involved can be respected.

Unfortunately, it is an option that is incompliant with GDPR. The European Data Protection Board ('EDPB') stipulates in its latest guidance on consent that shifting from consent to another legal basis is fundamentally unfair.[116] The choice offered by the consent-scheme would be entirely fictional as it could be overthrown in the next instance. Therefore, the policy proposal above needs to be adjusted slightly insofar as the bereaved should be offered a choice, namely to either assert legitimate interests or not. If there are no legitimate interests, the communication partners still could be asked for consent and access could still be granted. While this option respects all the interests involved, SMPs are burdened with more effort as the requests would not be previously filtered by the consent that could be given beforehand.

An inevitable problem of this policy is the judge-like position SMPs would hold over highly personal questions. SMPs would have the authority to decide what interest is legitimate or not. However, SMPs regularly find themselves in such positions already. For example, in the field of content moderation or the pursuance of intellectual property infringements, SMP's have already developed rather sophisticated schemes to regulate these areas effectively. Inevitably, SMPs are the direct connection between the user and the data, and they should certainly be involved in these processes rather than just relying on legal proceedings that will force them on a case-by-case basis. In the described process, the SMP could act as the first instance for bereaved. It certainly would be the quickest and cheapest option available. However, the determination of legitimate interests has to materialise as transparent as possible. SMPs should provide detailed guidelines to bereaved under which circumstances they intend to grant access to the private profile for legitimate interests. If still no consensus can be found, escalation to a court could still be pursued.

Nowadays, SMPs digital afterlife settings insufficiently take account of these considerations. Google's and Facebook's approaches fail to strike a fair balance between all the interests involved: Google grants the option to unconditionally access private messages, depending on whether the user has pre-set the IM, whereas Facebook categorically precludes access to private messages. However, in contrast to Google, which offers a case-by-case hardship review, Facebook does not offer any possibility in this regard; moreover, they are prepared to

[116] European Data Protection Board (n 91) para 123.

go to Court to maintain the privacy of their users' profiles. Unfortunately, Google's case-by-case review is somewhat opaque because of absent guidance as to what constitutes legitimate interests. Predictably, Twitter's and TikTok's less sophisticated schemes fail to offer any nuanced solutions as mere deletion amounts to no access being granted.

III. Legislative approaches

Concerning the non-applicability of data privacy laws, critique should be added on a statutory level. Two of the most comprehensive and influential contemporary data protection laws, the GDPR and the California Consumer Privacy Act of 2018 ('CCPA'), do not extend to dead people. However, given the vast amounts of stored online data that will, in the near future, be connected to inactive accounts, society will inevitably face data-driven problems.

For example, in Öhman's and Aggarwal's paper on the consequences of an insolvency by Facebook, particularly the issue of selling off their assets, including the deceased's data, states a substantial concern that cannot be resolved by merely good policies but requires regulatory action.[117] These perils of how personal data can be exploited are the foundation of why personal data ought to be legally protected. However, the exclusion of legislative protection of deceased reduces their data to commodities and makes them susceptible to nefarious actors – it could render the internet the Wild West of data soon.[118] It is, therefore, due diligence to tackle this issue before it arises and apply data protection laws at least partially to the deceased's data, too.[119]

Although it is not widespread, there already exists innovative national legislation governing post-mortem data privacy. For example, in France, Article 63(2) of the Digital Republic Bill 2016 ('DRB')[120] grants users the right to set directives for the preservation, deletion, and disclosure of the personal data after their demise when registered with a third party. It is a somewhat reluctant approach that still manages to create legal clarity as the legal playing-field is aptly defined when registered with a third party. In Spain, the Organic Law 3/2018 of 5 December, on the Protection of Personal Data and the Guarantee of Digital Rights,[121]

[117] Öhman and Aggarwal (n 34); cf ch D concerning the worth of deceased's personal data.
[118] Charles Pidgeon, 'In the Digital Afterlife, Should Big Tech Become Our Cultural Stewards?' (*TechTribe Oxford*, 29 June 2020) <https://oxford.techtribe.co/in-the-digital-afterlife-should-big-tech-become-our-cultural-stewards/> accessed 24 August 2020.
[119] Jason Mazzone, 'Facebook's Afterlife' (2012) 90(5) North Carolina Law Review 1643, 1681; Edina Harbinja, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31 International Review of Law, Computers & Technology 26, 37.
[120] Loi no 2016-1321 du 7 October 2016 pour une République numérique.
[121] Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y garantía de los derechos digitales [2018] BOE 294 Sec I Pag 119788.

despite generally being inapplicable to personal data of deceased, recognises the right to a digital testament and gives heirs the right to access, rectify and erasure of the deceased's data.[122] In so doing, Spain grants limited but nevertheless sufficient protection to personal data of deceased. Both the French and the Spanish solution are innovative steps toward legal certainty. However, it remains unclear how the SMPs will respond to their legislation. Supposedly, the GDPR's enormous potential penalties will nudge SMPs into compliance.

The RUFADAA in the US does not only deal with transferability issues,[123] but also addresses communication data. Unlike in the former Uniform Fiduciary Access to Digital Assets Act ('UFADAA') communication data is excluded from the transferability and the privacy of account holders is protected.[124] Although the privacy of the account holders is protected, this solution is only balanced if SMPs complement this legal space with adequate policies that protect the overriding interests of the respective individuals.[125] If SMPs simply disregard competing interests, the solution would not be nuanced enough to tackle digital afterlife abundantly. Notably, the United Kingdom, like many other countries, does not grant any post-mortem data protection due to the traditional *action personalis moritur cum persona* principle that persists for privacy and data protection.[126]

Whilst these laws still have to stand the test of time, they certainly are a step in the right direction. Even if they are not the *ne plus ultra* yet, they still contribute to a more consistent legal environment governing the digital afterlife. A more pervasive enactment of such innovative legal approaches is desirable to enhance this discussion further.

IV. Interims-Conclusion and Results

Neither approach in this chapter, policy-based or legislative, should prevail over the other; they should rather coexist and complement each other to entirely address the thorny issue of digital afterlife management. An adequate digital afterlife policy allows for a more flexible solution and is able to regulate the post-mortem privacy of still living users granularly. The legislation, however, is aimed at the protection of deceased users and further grants the policy-makers a transparent legal environment to avoid conflicts. Because the amount of data of the deceased is mounting immensely, protecting it is a precautionary measure to ensure adequate handling of personal data of the deceased in the future. Government and SMPs are

[122] Harbinja, 'Post-Mortem Privacy in Europe' (n 53).
[123] cf ch E.I.2.
[124] Harbinja, 'Post-Mortem Privacy in Europe' (n 53).
[125] cf ch F.II.
[126] Harbinja, 'Post-Mortem Privacy in Europe' (n 53).

both responsible for granting account holders and deceased utmost consideration and legal certainty.

G. Conclusion

SMPs are today more than just ordinary, they form a central part of our daily life and are as such co-responsible for the revolution in our daily social interactions. Getting to know people and staying in contact has never been more convenient, and society should continue to benefit from these platforms. However, to preserve these benefits, SMPs and governments have to act prophylactically to avoid insurmountable problems in the future. This dissertation exposes some of these impending challenges and also provides ideas for how they should be addressed adequately.

Conclusions have been attained on a legislative and a policy level. Concerning legislative changes, ch F.III found a lack of protection of the deceased's personal data. This legal gap may not be a grave problem today, but it most certainly will aggravate with the accumulation of dead accounts over time. Preventive legislative action, therefore, is indispensable. Further legal deficiencies have been found on the matter of transferability of accounts. Because the legal situation regarding the succession of social media accounts is vague in many jurisdictions, legislation like the RUFADAA or the DRB, that adequately balances the interests in digital assets, and privacy concerns are highly desirable to create a safe legal environment.

Policy-wise, SMPs need to design their digital afterlife procedures more thanatosensitive. On the issue of accessibility, account holders should be incentivised to more clearly manage their digital afterlife. As of today, no SMP reminds or obliges account holders to take regard thereof. Furthermore, SMPs should uniformly implement Google's inactivity settings, whereas no proof of passing or similar is required anymore. It, further, is short-sighted to appoint an LC as they will die, too. Concerning afterlife policies on private profiles, no SMP has achieved a model solution, yet. Whereas Facebook, Twitter or TikTok all grant no access, Google grants full access (if predetermined). The former solution, however, inadequately takes account of legitimate interests of bereaved, whereas the latter inadequately takes account of the privacy interest of communication partners. The optimal solution that is still compliant with GDPR and balances all the interests involved is the choice between a consent-scheme and the consideration of hardship cases. Communication partners can consent to their personal data being disclosed, or bereaved can request the assessment of a hardship case that again would outweigh the privacy interests.

Whereas Facebook and YouTube feature rather sophisticated but not yet optimal solutions, Twitter and TikTok have rudimentary digital afterlife structures at best. Both should implement structures that allow users to predetermine their digital afterlife. As opposed to TikTok, Twitter at least guides bereaved to take action. Moreover, with Twitter's announcement to revise their digital afterlife scheme, hopefully, a more innovative solution can be awaited. TikTok, on the other hand, entirely overlooks this issue and provides no solution whatsoever. Given that TikTok is within the most popular SMPs today, action should be taken as soon as possible.

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