

DIGITAL HERITAGE THROUGH THE PRISM OF LEGISLATION IN THE REPUBLIC OF MACEDONIA¹

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ABSTRACT

Very few people think about what will happen to their digital legacy, that is to say to their data, content, information, personal messages and everything else that they have left on the social networks that they use.

We often forget that online communication leaves a mark and that despite numerous things that are not important, it may contain many valuable things for our descendants. We have to mention the photos, the letters and the messages about a particular event, but also the asset that we acquire with internet sale, and even the obligations that we leave if we are doing electronic transactions.

We usually care about our property that we physically possess (moveable and immovable) to be regulated during our lifetime. The same should be done with our property located in the virtual online space.

Given that this is a relatively unknown field and there is not so much investigation done about it, this paper aims to define the concept 'digital heritage', because it is very important to be aware of its existence, and it will try to offer appropriate ways for its legal regulation.

Key words: digital heritage, social networks, protection

¹ review scientific paper

INTRODUCTION

Social networks and online communication have been broadly accepted by the entire population of the planet Earth in the last twenty years. With the emerge of the smart phones things have turned around for 360 degrees no matter how much we opposed the online communication enabled by the computers,. Nowadays, not only young people, but also older population posses numerous handy tools for using the benefits of the modern lifestyle, that among other things include creation of numerous digital information stored in electronic (digital) form.

Hence, the dilemma about the legal protection of the digital heritage of each person appears, that is to say, the means that the legislation of the Republic of Macedonia offers. A particular challenge of this study is to acknowledge how much citizens know about how to protect digital data on the social networks, whether they need to include them in their wills, whether the potential successors can treat them as a heritage with value and so on.

Having in consideration the fact that this issue can be considered from several aspects, this paper will pay special attention to the analyses of the relevant articles of the Law on Inheritance, Law on Obligations and Law on Copyright and Related Rights.

RELATED WORK

Beyer and Naomi [1] explain the digital assets as a new species of property and discuss the importance of planning of these assets. They also analyze the legal context for digital asset disposition of the few laws implemented and focus on future law suggestions. Acknowledging the difficulty of predicting the future, the authors feel quite confident that, as Elder Law moves forward, planning for a client's digital assets will assume an increasingly important role.

Dickson [2] focuses on the different types of digital assets as well as the main companies that offer the services. He raises the question of who legally owns a deceased's digital files, whether they are transferable and if they are can a person lawfully give other people access to their accounts. Dickson also addresses the question of what can be done to protect ones digital assets.

Howe and MacKay [3] describe digital planning categorize inventorying digital assets into: personal and sentimental items, financial information and items that already have a value or may acquire value in the future. They also address the valuing and preserving digital assets. Focus has also been laid on the complications to digital planning regarding the social networking and

policy issues on which they offer the possible solutions such as releasing the contents of an accounts instead of the account. Finally they offer a series of questions that the act as a guide for the issues and potential solutions relating digital estate planning.

Edwards and Harbinja [4] explore how far the new digital assets fall into the existing paradigms of property, the interactions between property, succession, privacy and contract in this domain, whether we need a notion of "post mortem privacy" and finally offer some solutions regarding emerging legislation and services such as Lagacy Locker.

Maciel in his book Digital Legacy and interaction [5] among other topics introduces the legal issues around transmission of digital assets on death.

WHAT IS DIGITAL HERITAGE?

The simplest definition that we can offer is that digital heritage is our online presence, that is to say, it is everything that will remain in the cyberspace after we die. More precisely, it would include all our social profiles, e-mail addresses, accounts for online shopping, and libraries of digital music, movies and books.

Data from previous studies in the territory of the USA show that only 13% of people using social networks have a plan for their concept of digital heritage. However, having in consideration the realization of that plan, there is almost no measurable percentage for those who have already realized their planned activities.

Global Web Index Agency² continuously monitors the habits of the internet users, so that they were interested about the phenomenon of social networks too. According to their data, even 93% of all internet users in the world have created at least one profile on the social networks.

Predictably more common are the younger users – even 95% of the population aged 16 to 34 have a profile on the social networks, while the same applies to those 82% of the population aged 55 to 64. There are almost no differences between men and women: according to a survey conducted in late 2015, 93% of women and 92% of men use social networks. The average time that users spend on the social media is less than 2 hours (more precisely an hour and 53 minutes) a day.

² <http://www.globalwebindex.net>

According to the data of the State Statistical Office, 69.4% of the households in the Republic of Macedonia had access to Internet at home in 2015. 69.2% of the total population aged 15 to 74 years used computer, and 70.4% of the total population used internet. Internet was most used by students, that is to say, 94.7% of them used internet. 71.2% of the internet users used a mobile phone or smart phone for access to internet from work or away from home. 15.4% of the people who ever used internet ordered/bought goods or services via internet. 28% did not buy anything via internet because of security concerns in payment or because they wanted to protect their privacy (for example, provision of credit card data or personal information online).³

These data show that despite the fact that our presence on cyberspace is significant, the recognition of the need is not sufficient to regulate the right to access to digital heritage after our death, the way of its usage, etc. This is probably due to insufficient awareness of digital property, which unlike the physical property (which is considered as material property with a specific value) gets the attribute of immateriality and invisibility for potential successors.

Also, the aspect of sentimental value is forgotten, although certain numbers of institutions worldwide gradually start to become aware of the digital life of the individual in the community and they start to become aware of the local history too. Such institutions are The British Library, The Europeana Digital Library, and Library of Congress, where most important digital contents for the country and the local history are stored. Also, a number of important projects from all around the world are stored in special collections of their libraries.

HOW TO PREPARE RECORDS OF THE DIGITAL HERITAGE

The aspect from which we examine the digital heritage is its treatment as new type of personal property. Digital contents and resources may have economic value for the one who created them, but also for their successors. In 2011, in a survey conducted on 3 000 customers in ten countries in the world, it is estimated that the value they have as digital assets in more digital devices is almost 55 000 dollars.⁴

³ <http://www.stat.gov.mk/PrikaziSoopstenie.aspx?rbtxt=77>

⁴ Mcafe.com/ca/aboutnews/2011/q3/20110927-01.aspx, September 27 2011

One UK study, known as ‘Generation Cloud’ from 2011, estimated that the total value of the digital assets of the British online users is 2.3 billion pounds.⁵

These data clearly show that although ownership, which is defined as physical (moveable and immovable property), is regarded as property, the users of the social networks have a large property on the social networks too. This property may be treated as a form of ownership which can be transferred or it may be part of the legacy of the families (successors).

The right of ownership, control and access to digital media is intertwined with the complexity of the privacy and data security as integral part of the policies of the provider of the services.⁶ That is why it is necessary to have guidelines in terms of legal rules, so that the digital assets and their potential ownership (user) structure, which would be actualized after death of the holder of the digital assets, will be respected.

On the basis of determination of the digital resources, it is necessary to consider the following contents:

- Access to information (account numbers, login information, method of access)
- Material digital assets (files, which can be displayed in printed form, to get physical form)
- Intangible digital assets (profiles, comment, criticism posted to profiles)
- Meta data or data stored in electronic form in one document or web site regarding access history, location, hidden text, author history etc.

Once these contents are developed, it is necessary to approach and to clarify any practical problems which our successors would face. These are in fact legal and moral problems for gaining access to the digital assets and management of other people’s assets.

The approach can be difficult to a great extent for several reasons:

- Using the technical means (camera, computer, mobile device)
- Registration of e-mail, banking, online shopping, sharing photos, hosting and so on
- Storing files on hosting server, network or other kinds of services.

The fact that unlike paper records, for which there is a family member or executor who would like to take the responsibility for its management in the

⁵ Generation Cloud: A Social Study into the Impact of Cloud Based Services on Everyday UK Life; Centre for Creative & Social Tehnology University of London ;2011

⁶ Although we must admit that when creating profiles on social networks we rarely read the policies of the service provider

digital sphere is unquestionable, in the digital form only the owner is responsible for its management.⁷ In urgent situations (illness, death) no one can access information for any account, except if they have the necessary data (password, access).

Having in consideration that there are several types of digital assets: personal, social, financial, business accounts, etc., their planning should be appropriate for each category. The reason for regulating this is to allow the transfer and management with digital resources, but at the same time to avoid or to prevent identity thief, loss of digital property, loss of sentimental memories or keeping someone's secret.⁸

FORMS OF PROTECTION OFFERED BY PROVIDERS

Digital files placed on the social media are treated as private intellectual property. The policy of the operators most often is to take care for them to be protected and to be kept in a safe manner. Sometimes, in the policy of the operators, they state what happens in case of death of the owner of the account, the profile and so on, that is to say, whether the family members are allowed to remove, to empty or to receive a copy of the account of that transmission medium. Some of the operators require a proof of death.

Yahoo expressly states that the user accounts are non-transferable, as well as all rights to Yahoo.⁹ The ID of the user or contents of the user within an account end with his/her death. By submitting a death certificate, the account may be annulled and all contents may be permanently deleted.

Facebook allows the profile of the dead person to be put in 'memorial', which means that one can see and leave messages on this profile, but it is not possible to send messages from that profile.

However, in general, the opinion of the experts is that most of the orders on the social networks cannot be included in a will, because the holder of the warrant is not their owner. The holder of the warrant owns them only on the basis of license, that is to say, after someone's death this contract is terminated and the one who manages the account also controls what happens with it.

⁷ Sharing passwords for special accounts, also sharing profiles that we do not want to be really available and so on, is not a common practice. Because of this reasons, after someone's death it is hard to access these digital contents.

⁸ In the Technology blog, in March 2012, it was reported that over 30 million facebook profiles belonged to death people (Technoraty.com/tehnology/article/over-30-millions-account-on-facebook)

⁹ Info.yahoo.com/legal/us/uahoo/utos/terms. Jan 2016

Expression of personal faith may be what happens with these accounts, but there is no way the ownership to be transferred to another person.

WAYS OF PROTECTION OF THE DIGITAL HERITAGE OFFERED BY THE LAWS OF THE REPUBLIC OF MACEDONIA

Analyzing the legislation of the Republic of Macedonia, the term ‘digital heritage’ is not mentioned anywhere. So we cannot refer to it if we want to regulate this matter, as previously mentioned, and the legal successors can be interested about this if they want this digital asset to be available for them.

Because of these reasons there are some Laws, where one can start to regulate this issue.

Law on Obligations¹⁰: Although, there are more than 1100 articles in this Law on Obligations, it could be used in the part for signing a contract for transfer of property during a lifetime. Article 1023, paragraph 2 states that: the contract for transfer of property during a lifetime must be made in written form and certified by a competent court or by a notary public. The Article 1024, paragraph 1 states that the transfer can cover only the existing property of the person who leaves that property. However, the question about whether the digital property will be accepted as ownership or it has to be physical property, that is to say, to download the data on paper, is questionable. This would make the process more complex, and for sure a lot of owners of internet orders will give up this way of regulation of the law.

The Article 754 and Article 746 could be used, because they regulate the law on license in general, as a subject of usage with spatial restriction, which implies that the holder of the warrant during his/her lifetime should provide access to his/her online data.

Law on Inheritance¹¹: Article 2 of the Law on Inheritance states that only objects and rights that belong to a specific person can be inherited. That implies rights and obligations, but also all assets and liabilities of the dead person which are eligible for inheritance. However, the current legislation as property represents set of rights and objects which belong to one person and which have material value (that is to say, can be expressed in money). Because of these reasons, the inheritance is considered to have the same meaning as the term ‘property’.¹²

¹⁰ Law on Obligations, Official Gazette of R.M. 161/2009, December, 30 2009

¹¹ Law on Inheritance, Official Gazette of R.M. 47/1997, November, 12 1996

¹² Legacy does not include personal easements, claims on the basis of legal support, the right of pre-emption, but it includes items of personal and family photos, memories, moral copyrights but of limited duration, etc.

Article 6 of this law regulates that the succession may be based on a law and a testament, whereupon only the inheritance by a will comes into consideration for this paper.

Law on Protection of Copyright and Other Related Rights¹³:

This law regulates the rights of the authors on their works (Article 1). However, in Article 12, which determinates the author's work, there are eleven categories:

- 1) written work (book, article, manual, booklet, argument and other similar works);
- 2) computer programme, as written work;
- 3) voice work (lecture, speech, sermon and other similar works);
- 4) musical work, with or without text;
- 5) dramatic, dramatic- musical, choreographic and pantomime work;
- 6) photographic works and works created in a process similar to photography;
- 7) audiovisual works (cinematographic and other works expressed with moveable images);
- 8) works of fine art (painting, drawing, graphic, sculpture, etc.);
- 9) architecture works;
- 10) applied art and design works, and
- 11) cartographical work, plan, sketch, technical drawing, project, table, plastic work and other work with same or similar character in the field of geography, topography, architecture and science.

Closest to the issues that this paper takes into consideration are the subsidiary points 2, 3,4,6,7. However, there is no form of its recognition in digital form in the further text of the law, as potential form of protection of the digital heritage.

In the section about management of copyright and other related rights, there is a possibility for individual and collective management, whereby again we do not recognize a model which could involve protection and application of the digital heritage without transformation in a different form (paper, sound recording and etc.).

¹³ Law on Protection of Copyright and other related rights 51/2011

CONCLUSION

Digital contents may be seen as a new form of personal property. Despite the economic value, they also have sentimental value and that is why their inheritance should be regulated more precisely and not as previously analyzed in several laws, in order the possibility to be recognized, but there are no expresses items in the laws which would define that.

Although most of the population use cyberspace for communication, they are not sufficiently informed about the rights that they have for everything they put on the social media. Providers defend their interests by its policies of working, and in the present moment only through their policies they regulate what will happen with the internet orders of a person after his/her death.

The data presented above was that only 13% of the users know what will happen with their internet orders. In this way the legislator can enact such rules and promote them to the public to avoid inconveniences, even to avoid financial struggles between potential successors. The sentimental moment is important for a certain number of citizens. However, it only does them harm, and it is in favor of the providers that only have the right to close their orders and to remove them from the cyberspace.

One thing a person should consider is to create a “deactivation document” which will contain the accounts usernames or ids and passwords to the websites, social networks or cloud services. This document can be included in the will and later be used to deactivate the listed accounts. This method is always faster compared to contacting the online services that almost always require a death certificate as a proof. It is very important that any information of this type to be included in a separate document rather than the will itself, because the will can be public.

Having in mind the experiences and also confirmed by a US study carried out during July 2016 the possibility of regulating this matter to be made by means of agreements that would be done with the stakeholders is unlikely to give result.¹⁴

Another option that may be considered by the legislature is to transfer to another individual in which the user gives trust to that person to terminate the user's account after his death.

¹⁴Namely, the working document of the study, its authors Jonathan Obar and Anna Oeldorf -Hirsh reported that, in their experiment, 98% of users noticed clauses placed in the part of the contract that referred to the privacy policy for dummy created social networking. One of the clauses of which almost all respondents agreed was that by agreeing to the terms of the agreement, the customer will immediately assign first-born child of the company!

In a way this is now regulated in some providers of such services. For example the contract services by Yahoo in Article 28 states that: You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents of your profile will be discontinued upon your death. But this is still debatable in terms of protection of copyright and related rights law; in terms of moral rights remain valid after the author's death, and the material also in favor of his successors. How will it be protected if the provider has deleted it after the user's death?

Given the fact that the US is first in terms of research in the field of regulation of inheritance - legal relations in the digital heritage, our recommendation is to review possible options for change in our legislation. It should not be a major obstacle to incorporate certain legal norms in the laws that were mentioned above, and those are the Inheritance Law, the Law on Copyright and Related Rights, the Law on Obligations, which are part of civil legal matter, and in terms of the fact that in our country under development is the new Civil Code. Perhaps, this is why this is the right moment to insert this issue, which as time passes will become more and more important.

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