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Review article

MANAGING CROSS-BORDER "DIGITAL SUCCESSION" IN THE DIGITAL ERA: PRELIMINARY REMARKS ON THE NEW CHALLENGES FOR THE CURRENT LEGAL FRAMEWORK*

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ABSTRACT

This paper aims to answer to a rather common question: what happen to our digital estate when we die? To do so, after analysing the composition of a digital estate, the paper will determine, firstly, the legal framework applicable to a cross-border succession to a digital estate. It will then investigate: (i) which assets are transferable upon death and to what extent; (ii) under what conditions heirs have access to the deceased's accounts; and (iii) which interests on the digital content created by the deceased are protected and how. The analysis will be conducted through the lens of the current private international law framework in force in EU Member States, in order to formulate some preliminary remarks on its adequacy to manage this new succession phenomenon and the issues it raises.

Keywords*: Digital estate, Characterisation, Cross-border successions, European Succession Regulation, Personality rights*

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1. INTRODUCTION

It is a common experience that, in today world, Internet is a constant reality and has given birth to a person's digital life side by side his/her real life, creating new phenomena and situations that seek to find their legal regulations, whether it is an *ad hoc* one or an adaptation of existing rules. Once data are created or uploaded in the cloud, they can live in the virtual world regardless of their creator's natural life.

On the other hand, succession law, a branch of law perceived as highly resistant to changes and innovations, traces its roots in the traditions and in the values of any given society. As it is well-known, it is aimed at solving, at a legal level, an ancestral anthropological problem:[1] that of the fate of a person's estate at the time of his/her death, in order to avoid, to the greatest extent, any legal uncertainty.

On this premises, this paper aims to formulate some preliminary remarks on whether the current legal framework in force in EU Member States for cross-border successions is adequate to manage the succession to digital estate and the issues it raises.

2. SETTING THE SCENE

Before addressing the private international law regime of digital heritage,[2] three preliminary caveats have to be considered.

The first one deals with the notions of digital inheritance/digital assets. These notions are becoming more widespread and relevant in today societies, where digital devices and Internet play a dominant role in our lives. Everyday, in the cloud, we leave digital footprints or traces. These might be worth a lot from different points of view: economical (e.g. domain names), personal and emotional (e.g. digital picture or videos, data in social media accounts) or due to the efforts of time and resources in creating it (e.g. youtube videos).[3]

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1 Marino, M., *Mercato digitale e Sistema delle successioni* mortis causa, Edizioni Scientifiche Italiane, Napoli, 2022, p. 11.

2 On the matter, see, Merchán Murillo, A., *La sucesión digital internacional y el Reglamento sucesorio europeo 650/2012*, Anuario español de derecho internacional privado, Vol. 21, 2021, pp. 327-357.

3 Maeschaelck, B., *Digital Inheritance in Belgium*, European Journal of Consumer and Market Law, Vol. 4, No. 1, 2018, pp. 37-41; Mackenrodt, M.-O., *Digital Inheritance in Germany*, European Journal of Consumer and Market Law, Vol. 4, No. 1, 2018, pp. 41-48. For the purpose of this paper, digital asset is defined as "an electronic record which is capable of being subject to control". On the matter, see Principle 2(2) of the Draft UNIDROIT Principles on Digital Assets and Private Law, available at [https://www.unidroit.org/wp-content/uploads/2023/01/Draft-Principles-and-Commentary-Public-Consultation.pdf],, Accessed 5 July 2023.

Furthermore, a digital estate is comprised of assets and goods with different features. Some goods are the online version of traditional ones, such as bank and investments accounts. Other goods are created online, like digital paying instruments who have deposit account functions (Paypal). Again, there are general accounts used for a number of services or as a gateway to a person's virtual life (Google and Apple accounts for Google and Apple services), or single and different social media accounts, being them personal or professional ones (e.g. Instagram and Facebook, for the first group, or Linkedin, for the latter) or having a combination of both aspects (like Youtube, especially in the event of a person making a living out the video uploaded). Moreover, a digital heritage may be comprised of in-cloud storage (Dropbox, Google drive) or online entertainment services (e.g. Spotify or Netflix), as well as crypto assets.[4] The variety of types of assets that form a person's digital estate, each with different economic or personal value, makes it clear from the outset that a uniform solution as to their transferability upon death might be difficult to reach.

The second preliminary warning deals with the problem on how the aforementioned estate affects the nature, national or international, of a succession. It is clear that digital estate is, by its very nature, ubiquitous and escapes and transcends the borders of a single State. So, a question arises on whether a person's digital life, in itself, makes his/her succession cross-border, thus subject the private international law regime of cross-border succession.[5]

In this regard, it might be noted that, if the question is to be answered in the affirmative, given the widespread reach of the phenomenon, every succession to estate that are comprised of digital goods or services should be characterised as cross-border, even if, in the real world, the deceased's estate and his/her personal connections are located in a single State. This result would lead to debasement of the *raison d'être* of private international law rules themselves, as a system of rules

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4 See, for a similar classification, Merchán Murillo, *op. cit.*, note 2, p. 351 f. It is worth noting that, recently (31 May 2023), the European Union legislator has adopted Regulation (EU) 2023/1114 of the European Parliament and of the Council on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L150/40. According to Art 3(1)(5) of Regulation No 2023/1114, crypto-assets are defined as "a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology". On this Regulation see Villata, F.C., *Il regolamento (UE) 2023/114 relativo ai mercati delle cripto-attività: prime note con un occhio al diritto internazionale privato*, Rivista di diritto internazionale privato e processuale, Vol. 59, No. 3, 2023, forthcoming.

5 On the private international law rules and techniques in succession matters see, for all, Bonomi, A., *Successions internationales: conflits de lois et de juridictions*, Recueil des Cours, Vol. 350, 2011, pp. 71-418.

governing private relationships that have points of connection with several States, geographically definable.[6]

So, at a first appraisal, entering into digital contracts – that creates digital goods and services and that may be characterised, themselves, as cross-border – do not internationalise a domestic succession. In this direction, it does not seem improper to consider the digital estate to be located by the deceased in order to assess the international character of a succession.[7]

The previous findings leave the floor open to the third and last problem. Once a person's succession is characterised as international – for having connections, in the real world, with at least two different States – it might be asked if the solutions provided by the private international rules of a legal system are applicable to the digital estate too.

From the perspective of European Union's Member States, an affirmative answer seems to be favourable, in the light of the relevant legal framework: this consists, on the one hand, of the European Succession Regulation,[8] and, on the other hand, of the General Data Protection Regulation.[9]

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6 On the object and functions of private international law see Mosconi, F., *Oggetto e funzione*, in: Baratta, R. (a cura di), Diritto internazionale privato, Giuffrè, Milano, 2010, pp. 262-273; Rühl, G., *Private international law, foundations*, in: Basedow, J., Rühl, G., Ferrari, F., de Miguel Asensio, P. (eds.), Encyclopedia of Private International Law, Edward Elgar Publishing, Cheltenham-Northampton, 2017, pp. 1380-1390. On the impact of Internet on private international law see de Miguel Asensio, P., *Conflict of Laws and the Internet*, Edward Elgar Publishing, Cheltenham-Northampton, 2020.

7 *Mutatis mutandis*, a similar reasoning can be glimpsed in Court of Justice of the European Union, Joined Cases C509/09 and C161/10, *eDate Advertising GmbH*, [2011] ECR I-10269, par. 48-49, where, in a claim over infringement of personality rights, the Court of Justice gave jurisdiction to the Court of the place where the alleged victim has his centre of interests – i.e., the place of his habitual residence – since it is the closest one to the place where the harmful event occurred. Furthermore, in most jurisdictions that adopt the system of scission – which differentiate between movables and immovables property – a not dissimilar reasoning underlies the rule that the succession to movables is governed by the personal law of the deceased, on the premise that *mobilia persona sequuntur*. See, Grahl-Madsen, A., *Conflict between the Principle of Unitary Succession and the System of Scission*, The International and Comparative Law Quarterly, Vol. 28, 1979, p. 598 f.

8 Regulation (EU) No 650/2012 of the European Parliament and of the Council on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

9 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1. On the connection between privacy and digital death see Harbinja, E., *Digital Death, Digital Assets and Post-Mortem Privacy*, Edinburgh University Press, Edinburgh, 2023.

As it is well known, Regulation No 650/2012 adopts the unitary approach.[10] According to Recital No 42, Arts 4 and 21, the competent Court of the Member State where the deceased has his/her habitual residence at the time of his/her death and the law of the State of his/her habitual residence at the time of the death govern the succession as a whole. Moreover, the reach of the Succession Regulation, is defined, in negative, by the exclusions listed in Art 1(2) and, in positive, by the scope of the applicable law, as provided in art Art 23. Although those Articles do not consider expressly digital estate, the very nature of the unitary approach – which determines the competent judicial authority and the applicable law regardless of the nature of the estate, being it movable, immovable, and, it might be added, digital – stands for the application of private international rules to the digital estate as well.

From the perspective of the protection of personal data, relevant in the case of digital heritage, it is worth noting that Regulation (EU) 2016/769 does not apply to the personal data of deceased persons. However, as stated in Recital No 27 of the Regulation, Member State may adopt and implement national rules on the matter.[11]

After having assessed that, in principle, private international law rules are applicable to a cross-border succession in the deceased digital estate, the investigation will be conducted along the following lines.

On the one hand, proprietary rights in digital goods and services have to be differentiate from personality rights, since only the former fall within the scope of succession law. This scrutiny is quite complex with regard to digital goods, as the proprietary element of digital data is, often, intimately connected with the identity of the person. However, it might be sensible to point out that some digital assets have a (predominant) proprietary nature: this is true for online bank/investment accounts; digital payment instruments and in cloud storage. For other assets, such as general accounts (Google account, Apple ID) and social media accounts, the two sides of the problem are so intertwined that it might be difficult to rest on the usual division between proprietary and personal rights in order to assess their transmissibility upon death.[12]

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10 On the difference between the unitary and scission approach, see Bonomi, *op. cit.*, note 5, pp.99-133.

11 See, for example, Art 63 of the French Law 7 October 2016 No 2016-1321 for a Digital Republic (pour une République numérique), Official Journal No 235/2016; Art 2-terdecies of the Italian Legislative Decree 30 June 2003 No 196, Personal Data Protection Code (Codice in materia di protezione dei dati personali), Official Journal No 174/2003, as modified by the Legislative Decree 10 August 2018 No 101, Official Journal No 205/2018.

12 Marino, M., *La successione digitale*, Osservatorio del diritto civile e commerciale, No. 1, 2018, pp. 167-204.

On the other hand, the digital estate of the deceased is created by a network of contracts – each of which is governed by its own applicable law and its own general terms and conditions – that, independently, might influence the transmissibility of the contract upon death.

Lastly, the succession in digital heritage can be intended both as succession in the accounts, or as protected interests on the digital content created by the deceased.

3. SUCCESSION IN DIGITAL PROPERTY AND IN THE ACCOUNTS

When digital assets embed proprietary rights or have an intrinsic economic value, these are, *prima facie*, transferrable upon death. To uphold this solution, a general principle of law can assist the interpreter. The principle of functional equivalence – according to which digital/intangible estate is equivalent to tangible estate, so that the former should not be discriminated against in relation to any other type of manifestation – can place digital estate within the rules regulating succession as a whole.[13] From a comparative perspective, many legal systems regulate the transferability upon death of digital assets with economic value as inheritance rights.[14] Thus, the widespread universality principle of substantive law, coupled with the unitary approach of the European Succession Regulation, contribute to confirm the aforementioned statement.

Therefore, in a cross-border situation, considering that the European private international regime regulates digital assets too, it is sensible to affirm that the law applicable to the deceased's succession – being it, the law of his/her habitual residence at the time of death, as per Art 21 of the European Succession regulation,[15] or the law of his/her nationality, in case of a valid *professio iuris* under Art 22 of the Regulation[16] – will determine the succession on his/her digital estate, when the

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13 Merchán Murillo, *op. cit.*, note 2, p. 352.

14 In Belgian law, see Maeschaelck, *op. cit.*, note 3, p. 38; in German law, see Mackenrodt, *op. cit.*, note 3, p. 42; in the law of the Netherland, see Berlee, A., *Digital Inheritance in the Netherlands*, European Journal of Consumer and Market Law, Vol. 3, No. 6, 2017, pp. 256-260; in the law of the United Kingdom (and its legal systems), see Harbinja E., *Digital Inheritance in the United Kingdom*, European Journal of Consumer and Market Law, Vol. 3, No. 6, 2017, pp. 253-256. See, moreover, Fras, M., *Succession of digital goods. A comparative legal study*, Review of European and Comparative Law, Vol. 47, No. 4, 2021, pp. 67-81.

15 See, Re, J., *Where Did They Live? Habitual Residence in the Succession Regulation*, Rivista di diritto internazionale privato e processuale, Vol. 54, No. 4, 2018, pp. 978-1009; Pazdan, M., Zachariasiewicz, M., *The EU succession regulation: achievements, ambiguities, and challenges for the future*, Journal of Private International Law, Vol. 17, No. 1, 2021, pp. 74-113.

16 See, Viarengo, I., *Planning Cross-Border Successions: the Professio Juris in the Succession Regulation*, Rivista di diritto internazionale privato e processuale, Vol. 56, No. 3, 2020, pp. 559-582.

assets comprised embed proprietary rights or have an intrinsic economic value. As a result, succession in online bank/investment accounts; digital payment instruments and in cloud storage would follow the well-established path laid down by succession rules.

From another perspective, since digital assets are usually created by contracts, a limitation on their transmissibility *mortis causa* might derive from the law applicable to the contract or from their general terms and conditions. This might be relevant for general accounts, such as Google account or Apple ID, and social media accounts, assets in which the digital estate includes both proprietary and personal rights; hence the problem of devolution, which traditionally excludes the latter.

For these assets, the shrewdest legal scholarship, as well as the earliest national case-law, points to a different treatment of the problem of the succession to the account, on the one hand, and that of the protection of interests on the digital content created by the deceased.[17]

With regards to the first problem, three different regulatory schemes seem to emerge for the early and available practice.[18] The first one, the proprietary approach, is based on the application of the universality principle, combined with the principle of equivalence. In line with the traditional approach and the concept of the succession as *universitas*, this approach emphasises the proprietary or strictly inheritance profile, by virtue of which the heir, succeeding in all the active and passive relationships of the *de cuius*, must also succeed in the contractual relationship already concluded between the latter and the service provider.

The second one, the personalistic approach, admits the extended enforcement of some aspects of the deceased's digital personality, but does not allow for the succession in the ownership of the account.

The third (and last) one, the voluntarist approach, confers importance and effectiveness to the general terms and conditions of the contract signed by the user at the time he/she opened the account (and to the following modifications): in this context, it is not rare that the digital service provider includes either a non-transferability agreement of the data to the heirs or the possibility for the user to designate a so-called "heir contact" – to be called in the event that the user's account is not active for a certain period of time – that will have access to the content indicated by the user and with the power vested by him.

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17 See Marino, *op. cit.*, note 12, pp. 179-189; Fras., *op. cit.*, note 14, pp. 70-71.

18 See, Spangaro, A., *La successione digitale: la permanenza* post mortem *di aspetti della personalità*, Giurisprudenza italiana, No. 6, 2022, pp. 1363-1370.

The three approaches may appear, at a first glance, mutually exclusive. However, it might be argued that they can be combined in order to manage smoothly different situations.

The starting point are the rules of the *lex successionis* governing the succession to the contractual obligation of the deceased. If, according to that law, heirs succeed to the deceased in the contractual positions held by him, they are entitled, in principle, to succeed in the account, unless, by way of exception, the nature of the contract itself, or other rules of the legal system, do not allow for its transferability upon death.[19]

However, due attention has to be payed to the general terms and conditions of the contract concluded between the deceased and the service provider and to the law applicable to that contract. Indeed, the general terms and conditions of the service provider can qualify the contractual relationship as granting limited, non-exclusive, non-transferable right,[20] or can state expressly the termination of the account upon the user's death.[21]

In these cases, even if the law applicable to the succession provides for the transferability upon death of contractual obligations, the will of the parties as to the nature of the rights and their transferability, as agreed in the general terms and conditions of the contract signed by the user, prevails. Therefore, when the contractual framework states the termination of the contract upon the user's death or qualifies those rights as non-transferable by way of succession, those digital assets – and the ownership of the account – do not fall into succession.[22]

Conversely, when the general terms and conditions of a given digital asset do not consider the death of the user, and no exception is provided for in the *lex succes-*

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19 For example, in Italian substantive law, the general rule is for the succession in the contracts concluded by the deceased, except for those characterised by *intuitus personae*. See, Palazzo, A., Sassi, A., *Trattato della successione e dei negozi successori*, Vol. 1, *Categorie e specie della successione*, Utet, Torino, 2012, p. 590. Moreover, in a comparative perspective see Fras., *op. cit.*, note 14, p. 77 ff.

20 See Netflix Terms of Use No 4.2, available at [https://help.netflix.com/en/legal/termsofuse], Accessed 5 July 2023, according to which "During your Netflix membership we grant you a limited, non-exclusive, non-transferable right to access the Netflix service and Netflix content. Except for the foregoing, no right, title or interest shall be transferred to you".

21 See iCloud condition No IV.D, available at [https://www.apple.com/legal/internet-services/icloud/], Accessed 5 July 2023, according to which "Except as allowed under Digital Legacy and unless otherwise required by law, you agree that your Account is non-transferable and that any rights to your Apple ID or content within your Account terminate upon your death. Upon receipt of a copy of a death certificate your Account may be terminated and all content within your Account deleted".

22 Needless to say, the contractual aspects of the relationship between the user and the provider are governed, as to the applicable law, by Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6.

sionis, the combined effect of the universality principle and unitary approach leads to the transferability upon death of the digital asset and of the account. This result seems justified – combining the proprietary approach with the voluntarist one – both by the aforementioned principle of functional equivalence and, lacking any *ad hoc* rule for digital asset, by way of analogy.

The lack of any express provision on the non-transferability upon death of the ownership of the account has been evaluated by the German Federal Court, in its well-known judgment of 12 July 2018.[23] The judgment settled a dispute between the parents (and heirs) of a 15 years old girl, who died in a tram accident, and Facebook. The parents wanted to obtain access to the user account of their deceased daughter and to the messages stored within, in order to clarify the circumstances of her death, and to learn whether she intended to commit suicide or if she was victim of a tragic accident. However, Facebook denied access to that information. While the first instance Court granted access to the Facebook account of the deceased daughter, on appeal, the second instance Court rejected the claim of the parents, on the ground that allowing access to the account would be contrary to the provisions protecting the secrecy of telecommunications.[24]

The Bundesgerichtshof characterised the plaintiff's claim as hereditary. Although the dispute raised serious questions on *post mortem* protection of personal rights and personal data, secrecy of correspondence, and protection of the personal interests of partners in communication, the German Court found that in the "contract between the deceased and the portal's administrator the possibility was not excluded of the heirs entering into the rights and obligations of the former", therefore allowing access to the deceased's account.[25]

Thus, in the light of the above, in a cross-border situation, it might be advanced that it is for the *lex successionis* to regulate the succession to digital estate not only when the assets have proprietary aspects or an intrinsic economic value, but also when the general terms and condition of the contracts creating them do not exclude their transferability upon death.

From another perspective, it should not be overlooked that the enjoyment and enforcement of such rights may not be easy if the law of the country in which the digital service provider is located does not permit the transfer of such assets and rights *mortis causa*.

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23 Bundesgerichtshof, 12 July 2018 III ZR 183/17, NJW, 2018, pp. 3178-3187.

24 Mackenrodt, *op. cit.*, note 3, p. 42.

25 Fras., *op. cit.*, note 14, p. 73.

Lastly, should a dispute arise between the deceased's heirs and the digital provider, given that the European Succession Regulation applies to digital assets too, the competent Court will be determined in accordance with Arts 4-11 of the Regulation.[26] In this respect, the Regulation sets up an autonomous and sufficient system of rules, suitable for preventing positive conflicts of jurisdiction, structured along two precise lines. On the one hand, the Regulation seeks to identify a single Court with jurisdiction for all disputes arising from a given succession. On the other hand, it provides for mechanisms enabling, as far as possible, jurisdiction to be conferred on the Court of a Member State whose law governs the succession. The general head of jurisdiction (Art 4) is the deceased's last habitual residence at the time of his/her death. However, should the deceased have chosen his/her *lex patriae* as the law regulating his/her succession, and that law is the law of a Member States, Arts 5-9 provides various techniques to restore the *Gleichlauf* between *jus* and *forum*. Subsidiary jurisdiction (Art 10), in the case the deceased's last habitual residence was not located in a Member State, rests on the Courts of a Member State in which assets of the estate are located in so far as the deceased was a citizen of that State at the time of the death, or, failing that, the deceased had his previous habitual residence in that Member State, provided that, at the time the Court is seised, a period of not more than five years has elapsed since that habitual residence changed. A provision on *forum necessitatis* completes the Regulation jurisdictional rules (Art 11).

4. PROTECTED INTERESTS ON THE DIGITAL CONTENT CREATED BY THE DECEASED AND THE ROLE OF THE DIGITAL HEIR

When the general terms and conditions of the digital asset do not allow the succession in the account, there might be, nevertheless, protected interests of the heirs to access to the digital contents created by the deceased and posted or stored in the account.

On the one hand, heirs might have a right to the intellectual property rights on the deceased's intellectual works conveyed by the digital medium (such as app, photos, videos, software, domain name) and their related economic use (e.g. videos on Youtube having high views rates). Given the scope of succession rules – that is to avoid, to the greatest extent, any legal uncertainty to the fate of a person's

[26] On the jurisdictional rules of the European Succession regulation see, for all, Queirolo, I., *Jurisdiction in succession matters: General rules and choice of court*, in: Bariatti, S.; Viarengo, I.; Villata, F.C. (eds.), EU Cross-Border Succession Law, Edward Elgar Publishing, Cheltenham-Northampton, 2022, pp. 219-243.

estate – it has been argued that it would be contrary to a rule of public policy for the digital server provider not to grant access to those assets.[27] Therefore, it would be for the *lex successionis* to regulate the transferability *mortis causa* of these assets.

On the other hand, the personalistic approach might have some room when the interest of the heirs to access to the digital data is not justified by a proprietary or economic nature of the asset, but by other reasons.

As already mentioned, Regulation No 2016/769 does not apply to the personal data of deceased persons, but, according to Recital No 27, Member State may adopt and implement national rules on the matter. In Italy, for example, Art 2-*ter-decies* of Legislative Decree No 196/2003, as modified by the Legislative Decree No. 101/2018, allows anyone who has an interest of his own, or acts to protect the deceased, as his/her representative, or for family reasons worthy of protection, to exercise the rights conferred by Arts 15-22 of the GDPR. On this ground, some Italian judges granted access to the digital content stored in a general account (i.e., iCloud).[28]

In a cross-border situation, a problem of characterisation of these remedies might arise. Since Art 3(1)(a) of the European Succession Regulation defines succession as "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession", and since the access to digital content non having proprietary or economic nature cannot be granted always by their transferability upon death, due to the limitation provided for in the general terms and conditions, a characterisation as matter related to a succession seems to be excluded.

Indeed, these remedies find their private international law regulation both on other EU Regulations and on national rules. Applying the autonomous notion of civil and commercial matters, it might be argued that Regulation (EU) No 1215/2012 is applicable for claims arising out of an infringement of personality rights.[29] In

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27 Marino, *op. cit.*, note 12, pp. 182-183.

28 The interest of the family members might be of different nature: the will to celebrate the life of the deceased, or the desire to keep family memories, or, again, the urge to know the circumstances of the *de cuius*' death. In these cases, against Apple's objection to allow access to the deceased's account, Italian Courts granted this right to family members on the basis of the national implementation of GDPR rules. See: Tribunale di Milano, 10 February 2021, Giurisprudenza italiana, 2022, No. 6, 1363; Tribunale di Bologna, 25 November 2021, De jure, Tribunale di Roma, 10 February 2022. On the last two judgments see, Maniaci, A., d'Arminio Monforte, A., *"Eredità digitale" e accesso ai dati personali del defunto*, Diritto di Internet, No. 3, 2022, pp. 561-573.

29 See, Kuipers, J.-J., *Personality rights*, in: Basedow, J.; Rühl, G.; Ferrari, F.; de Miguel Asensio, P. (eds.), Encyclopedia of Private International Law, Edward Elgar Publishing, Cheltenham-Northampton,

this perspective, both Art 4 and Art 7(2) can serve as grounds for jurisdiction. However, should the defendant be not domiciled in a Member State, national rules on jurisdiction apply. As per Art 1(2)(g) of Regulation No 864/2007, Rome II Regulation does not apply to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". Therefore, it is for the national private international law rules on personality rights to provide for the applicable law. Eventually, recognition and enforcement of judgments delivered by any Court of a Member State will be subject to Chapter III of Regulation No 1215/2012; conversely, judgments for third Countries will be recognised and enforced according to national rules.

From a different perspective, the family members' interest in accessing to the digital content might find two limits. On the one hand, the deceased might have expressly prohibited the exercise of aforementioned rights during his/her life. On the other hand, he/she might have designated a "heir contact" to whom the digital service provider has to grant access to the account.

In this perspective, it is not uncommon to find – in the general terms and conditions of use of Internet services – a contractual clause by which the user can indicate the "heir contact", who will have access to the contents of the account and can dispose of them.[30] In a cross-border situation, this clause might be qualifiable as a *post-mortem* mandate. Should the designated heir accept the mandate, it is sensible to characterise the relationship as having a contractual nature, therefore falling into the scope of Regulation No 1215/2012 and Regulation (EC) No 593/2008, that will provide for the relevant private international law regime.

2017, pp. 1351-1359. See also Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1. Moreover, since Regulation No 2016/769 does not apply to the personal data of deceased persons, it follows that the rule provided in Art 79(2) of the Regulation can not serve as a ground for jurisdiction. On Art 79(2) of Regulation No 2016/769 see de Miguel Asensio, P., *op. cit.*, note 7, pp. 152-162.

30 See iCloud condition No II.L, available at [https://www.apple.com/legal/internet-services/icloud/], Accessed 5 July 2023, according to which "With Digital Legacy, you can choose to add one or more contacts to access and download certain data in your account after your death. If your designated contacts provide proof of death to Apple and have the required key, they will automatically obtain access to that certain account data and activation lock will be removed from all your devices". In the United States, a first regulation of the rights and duties of the "heir contact" has been provided for by the Uniform Law Commission with the Fiduciary Access to Digital Assets Act, Revised of 2015. Its status and implementation in State law are available at [https://www.uniformlaws.org/committees/community-home?communitykey=f7237fc4-74c2-4728-81c6-b39a91ecdf22], Accessed 5 July 2023. On the Fiduciary Access to Digital Assets Act, Revised see, among others, Woodman, F.L., *Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation*, Canadian Journal of Law and Technology, Vol. 15, No. 2, 2012, pp. 193-227.

5. CLOSING REMARKS

The digital era poses new challenges to the traditional succession rules with regards to the transferability upon death of the digital estate. As it has been outlined, the first challenge is to clearly differentiate the digital assets having a proprietary and economic value – which, *prima facie*, fall into the scope of succession rules – from those that have an intrinsic personal value.

In a cross-border succession, the fate of the first type of assets is regulated by the *lex successionis*, being it either the law of the deceased's last habitual residence at the time of death, or the law of his/her nationality, should the deceased have chosen it. However, the transferability upon death of the digital assets created by contract can find a limit in the general terms and conditions agreed with the digital service provider if the terms provide for the termination of the contract upon the user's death. Conversely, when the terms and conditions do not regulate the matter, the principle of universality, coupled with the unitary approach, seems to confirm the transferability upon death of the digital assets.

When there is no succession in the deceased's account, and the digital assets have an intrinsic personal value, national law provisions regulate the heirs' rights – and the rights of everyone who has an interest in digital content – to access to those contents.

Lastly, an important planning role may be exercised by the deceased during his/her lifetime, since many digital service providers grant their users the rights to dispose to their digital content, either by prohibiting access to their data after their death or designating an heir contact.

As the digital society is at the dawn of its life, the law has not yet provided for all the solutions in order to manage smoothly the succession in the digital estate. Nevertheless, the field seems already well ploughed for further legislative actions and fruitful studies on the subject.

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