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THE SUCCESSION OF DIGITAL ASSETS IN THE EU

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ABSTRACT

The amount of personal information and property stored digitally, including on the Internet, is constantly growing yearly. Representing specific value, this information, like any property, needs to be categorized in terms of the legal position and regulated during the transfer, particularly after the death of its owner, including in the absence of unequivocal expression of the will of the deceased. The recent LG Berlin Facebook[1] lawsuit and decision, which expectedly would have been provided the topic with some clarity in the legal perspective, have instead demonstrated the complexity and ambiguity of the digital inheritance issue within the context of existing legislation, sparking a new wave of legal debate and research on managing the succession of digital assets in EU.

The purpose of this study was mainly to investigate the current state of legislation regulating the process of inheritance of digital property both at the level of the European Union and within the legal systems of the Member States, as well as to define critical legal issues of regulation of this matter from the position of succession and intellectual property law perspective.

Keywords: Digital inheritance; Succession of Digital Assets; Digital Legacy; Universal Succession

[1] Landgericht Berlin, Urteil vom 17.12.2015, Az. 20 O 172/15.

1. INTRODUCTION

1.1 Digital Inheritance

Traditionally, the law of succession deals with the definition and transfer of property rights from one owner to another, respectfully called predecessor and heir in terms of inheritance. At the same time, from the very beginning of humanity, property was considered an integral part of human society, developing and transforming its meaning through centuries foot to foot with humankind. In the age of the Internet, the use of digital media and social networks in everyday life has become an essential feature of the developed part of humanity, moving our life to the virtual environment[2] and thus creating a challenge to property and succession law at the same time.

There is no secret, all of our online activities, carrying information that always comes at a price, inevitably become part of our footprint and part of our digital heritage, from online-banking to commenting on photos of friends on social media, from watching films through streaming platforms to sending emails or buying a new virtual item for a character in a videogame. Usually being represented in digital form only, all this content represents a certain value, whether monetary or non-monetary, and in case of the *mortis causa* has to be succeeded and someway accessed.[3]

Considering the succession of digital assets from different perspectives, many scholars agree on the opinion that digital inheritance in its current state within the context of legislation is a very indefinite concept which at the same time affects many critical legal aspects including human rights, data privacy and protection, property rights and contract law.[4]

[2] Toygar, A., Rohm Jr, C. E., Zhu, J. (2013). A new asset type: digital assets. *Journal of International Technology and Information Management*, 22 (4), 7, 113.
[3] Agarwal, S., Nath, A. (2021). A Comprehensive Study on Scope and Challenges in Digital Inheritance. *International Journal of Scientific Research in Computer Science, Engineering and Information Technology*, 7 (2), 100.
[4] Conway, H., Grattan, S. (2017). 'The 'New'New Property: Dealing with Digital Assets on Death'. *Modern studies in property law*, 9, 102.

According to a Facebook quarterly report from 3rd February 2022, the amount of Facebook monthly active users as of December 31, 2021, accounted for 2.91 billion representing an increase of 4% year-over-year.[5] A load of data generated within this and other platforms, it could be said, is itself incomprehensible for a common human mind, so it is the for the digital succession considering that by the year 2065 the number of deceased user accounts will surpass those of the living individuals.[6]

And while the amount of data is growing by the minute, making issues more and more urgent, the existence as such of a unified approach to the process of regulating this data after the death of the owner is a big question, as well as the ability to define and categorize the processes which occur with our data in terms of the law. Having made efforts to analyze the current state and approach of European Union legislation on digital heritage, this work will try to contribute to the understanding of the succession of digital property, namely digital property accounts and social media accounts with exclusion of digital currency accounts in the event of the death of its owner within the framework of current laws, regulations, principles of law and interpretations of the concepts related through the prism of relevant literature answering to the essential questions and raising those, to which unambiguous answers are not yet possible.

1.2 Significance of the study

Since the constructs of traditional European civil law were developed long before the heyday of digital technology, which we are witnessing now, its legal regulation of digital heritage cannot be called complete in terms of coverage.[7] Given the obvious lack of proactivity within law in this regard, it could be said, that the regulation of digital assets is primarily based on rules developed directly by the digital service provider and not the legislature, while the law in some cases, such as LG Berlin Facebook he lawsuit does not directly regulate the status of assets but decides on the legitimacy of the actions of the digital service provider within the particular case. Thus, until the direct legislation for regulation is updated, the relevance of research on this topic within the European Union can not be overestimated. Given the speed with which technology is evolving and

[5] Meta Platforms, Inc. (2022) Annual report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2021.
[6] Wong, K. (2020). Digital Graveyard: The Dead is Taking Over Facebook Infographic. *Making Knowledge Public*, 4.
[7] Załucki, M. (2020). Digital content left on-line after death of a user. on the research that needs to be conducted. *Studii Juridice şi Administrative*, 22 (1), 53.

digital service providers are updating their terms of use, it can be argued that, like any topic related to the interaction of technology and law, it is crucial.

Also, at present, the number of works that have addressed the issue of inheritance of digital property at the level of European law as a whole, rather than reviewing regulations in the context of individual legislation, or even more so in individual cases, is quite small.

Much of the legal literature in the light of the relatively recent creation of the GDPR, which does not apply to the data of the deceased,[8] focuses on the issue of post-mortem data protection, which is someway related to digital inheritance but still deals not directly with inheritability. In contrast, this paper examines the topic directly in the context of existing legal principles and their understanding to determine the state of current and potential regulations. Specifically, understanding the succession of objects and legal regimes can directly benefit a wide variety of groups and individuals including regulators involved in the process at both the legislative level and specific private service providers' regulations as well as consumers of those services.

1.3 Research and its methods

This research aims to answer two research questions:

- How is the process of digital inheritance of property within digital property accounts and social media accounts regulated in the EU?
- What are the key legal principles regulating the transferability of digital assets, from the intellectual property law perspective, in the event of the death of their owner?

Thus, the abovementioned aim will be achieved through analysis of relevant legislation and specialized legal literature using the structural and functional analysis method including the system analysis method and interpretation of legal standards within the Section 2 and 3 of this work.
The sample of legislation within this part is due to the limitations of the system within the legislation of which this analysis is conducted. As this system is EU law, universal principles of law and legislative acts at the European Union level have been used.

[8] Resta, G. (2018). Personal Data and Digital Assets after Death: a Comparative Law Perspective on the BGH Facebook Ruling. *Journal of European Consumer and Market Law*, 7 (5), 204.

The study within Sections 4, 5 and 6 will be conducted through the means of doctrinal research, a kind of qualitative research, and analysis of the status and approaches to the legislative regulation of the issue. The study of the regulation of inheritance of digital property will be based on an in-depth and comparative analysis of specific pieces of legislation and their comprehension in the context of the discourse of the legal literature of each separate state, taken as a model for analysis.

2. DIGITAL INHERITANCE THROUGH THE PRISM OF LEGAL LITERATURE

2.1 The notion of digital property(assets)

Both for the means of this particular work and regulation in general, the definition of digital property and digital inheritance as such is a crucial fundamental issue. Thus, the fact that there is no single definition of digital property at the legislative level is definitely adding to the complexity of its cognition in the current phase of research; however, it is naturally and rationally explained by the relative novelty of the concept as such.[9]

Nevertheless, as conditional categorization is still vital for understanding, the search in the first place should turn to already existing legal acts to clarify at least the fundamental pillars of the concept, which will later develop into a full-fledged comprehensive picture of digital property.

Such a basic concept can be considered "digital content", where the characteristic of "digital" will allow us to conditionally separate part of the property by the characteristics of belonging to the intangible components of the property in the general direct concept of "digital property". To gain better awareness, we can turn to the current EU legal instruments containing references or definitions of "digital assets", namely, the Directive 2011/83/E.U., which describes digital content as that "produced and supplied in digital forms, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means"[10] thus extending the notion of "digital form" with several examples. In turn, Directive (EU) 2015/2366 defines digital content as the one being produced and supplied in a digital form, characterizing it by such factors as the use or consumption of restricted to a technical device and trough exclusion reflected as "in any way the use or consumption of physical goods or services".[11]

[9] Conway, H., Grattan, S. (2017), *supra nota*, 102.
[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights
[11] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

"Property"("asset"), the second part of this term, according to the legal definition, is characterized by the presence of a person's objective rights to own an object. In turn, this definition, despite its relatively unambiguous meaning in the context of classical property rights, i.e., ownership of tangible things, will have certain features of detection in the digital field. In other words, in comparison to ordinary tangible items for which it is possible to claim the existence of property rights by default, digital property, which is regulated in cyberspace, is a much more complex concept.

For instance, considering such an object as an account, in one of the various Internet platforms, it is relatively easy to define it as a digital asset as such deriving from the definition of digital content in the first place; however, due to the complexity of the contract of supply, usually granting the access for performing specific manipulations with this content, it is not always so easy to define the content as property unequivocally.[12]

It could be argued that much of the problematic aspects and the legal framework for an inheritance, in general, do not stem from, as stated in most papers on the subject, the issues of conflicting relations between succession and data privacy or the discussions of the possibility to inherit the contract of the original owner of the account with a service provider, but the legal position of the user regarding the digital content and the platform on which this content is contained.[13] Similarly, the problem of regulating the inheritance of digital property should be addressed not only by filling gaps in data privacy or intellectual property inheritance but the platform user's rights to the content posted there during the lifetime of the original account holder.

Unfortunately, the current EU legal instruments, despite the constant addressing of data protection or intellectual property rights, do not contain as such a clear definition of user rights to digital content or services directly. Instead, the definition and range of rights are governed mainly by each direct platform's specific "Terms and Conditions", an equivalent of a contract. Respectfully, by agreeing to them and thus establishing an account, the person becomes a party to such a contract.[14] The peculiarity of this legal phenomenon is that when entering into a legal relationship with a

[12] Conway, H., Grattan, S. (2017), *supra nota*, 104.
[13] Mikk, T., Sein, K. (2018). Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law. *Juridica International*, 27, 120.
[14] Załucki, M. (2021). Contractual Limitations in the *mortis causa* legal succession on the example of the Facebook contract. The German Facebook Case. *Istorie, Cultura, Cetatenie in Uniunea Europeana*, 13 (1), 106.

digital service provider, the person, in fact, agrees to the terms of the contract without being able to make any amendments or changes. Thus, all contracts of this type within one platform, a digital service provider, are identical.

Besides, it is worth mentioning that digital platforms themselves and the needs for their use are different. Thus, the legal nature of the account and rights within owning this account, for instance, under the streaming service platform, where a person can only consume content provided by the provider and social network and where the creator (generator) of content to a greater extent is the person themselves, differ. Similarly, in the case of social networks, it would be rational to assume that even the relationship between the content of a particular person falls under different property regimes in relation to, for example, the platform and third parties, i.e., other users of the platform.

In turn, in the context of intellectual property rights, user rights in certain situations in the context of each platform can be divided into categories based on specific characteristics of the digital content in question.

2.2 IP law categorization of the digital assets

We often access various digital assets through our accounts on internet platforms. From an EU legislation perspective, in particular, Directive (EU) 2019/770, the actions performed by a user while accessing data through such an account are accessing digital content through the use of the so-called digital service. [15] Digital service within the meaning of this legal instrument is the one allowing the consumer to create, process, store or access data in digital form or the sharing of or any other interaction with data in digital form uploaded or created by the consumer or other users of that service. Thus, deriving from this definition, we can conclude that a digital service is a virtual unit often referred to as a digital platform.

As was already stated above, the rights of the user in relation to the platform and content stored there as well as the functions the platform grants in relation to the content in question largely differ from case to case.

[15] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

For example, an Instagram account allowing a user to post photos and interact with other users through the means of messaging etc., to a great extent differs from a person's user account in Apple Music, allowing an individual to consume licensed production. Respectfully, the legal regimes applicable to these accounts and the possibility to inherit the data in question would vary as well. For this reason, the study of these rights and the consequences of possession of these rights are vital.

In their work, researchers Romana Matanovac and Ivana Kanceljak propose a conditional division of rights related to digital assets within accounts into copyright, ownership, and license depending on the purpose, which defines their legal nature.[16]

2.2.1 Ownership

Having direct ownership over a virtual unit of property is usually associated with files that a person keeps on specific portable data storage, i.e. carriers of the digital content such as USB sticks, internal hard disks, DVDs, CDs, and memory cards[17] and sometimes even virtual storage such as cloud storage.

Ownership of data, in most cases, refers to the possibility to exercise complete control of a person over them, including the ability to delete and provide to third parties, which is almost equivalent to ownership of tangible objects.[18]

Unlike physical assets, data held in the abovementioned storage can be additionally protected with passwords. This phenomenon is also widespread for cloud storage.

However, in the case of transfer of the files both during the lifetime of the original owner and posthumously as inheritance, such data often constitutes affirmed property of the party and thus is fully inheritable and transferable.

[16] Vučković, R. M., Kanceljak, I. (2019). Does the Right to Use Digital Content Affect Our Digital Inheritance?. *EU and comparative law issues and challenges series (ECLIC)*, 3, 724-726.
[17] Within the definitions provided by Directive (EU) 2019/770 these items in relation to digital content are defined as goods with digital elements.
[18] Hoeren, T. (2014). Big data and the ownership in data: recent developments in Europe. *European intellectual property review*, 36 (12), 753.

The only case obstacles that can appear in the event of a transfer of owned digital assets is the possible additional measures the legal predecessor created to protect the data, such as passwords, which were not transferred to the heirs. However, this does not in any way impact the inheritability of the object itself.

In case of transfer of data required upon the proper authorization of the heir, owned data is transferred relatively easy. This is due to the fact that usually, in cases of data owned and stored in a separate place, the access to which is mainly restricted by physical, not the informational means or agreement with a specific provider, in contrast to social accounts networks and accounts of platforms that provide the user with content, the interests of third parties such as the rights of the provider itself, or the privacy of persons with whom a person has had private correspondence are not involved.

In addition to cloud storage, examples of the transfer of directly owned objects often include the example of various online currencies, the mechanism of which is quite balanced and simple.

2.2.2 Copyright

According to some classifications and conditions of the agreement with the service provider platform, in some cases, the data stored in the cloud storage, as well as user-generated content (texts, photos, videos) on social networks, fall under the classification of data protected by copyright.[19] It is important to mention thus, that more than one property regime can be applied to the same data at the same time.[20]

And although, in some cases, the nature of copyright and the direct ownership regimes are different when it comes to the inheritance of such data, the principle is quite simple and applies identically to these two types of property.

Namely, copyright and objects in direct physical ownership, in general, should be inherited automatically, except in cases of non-inheritance caused by the particular will of the owner reflected in a documented form.

[19] Babovic, M. (2015). The Emperor's New Digital Clothes: The Illusion of Copyright Rights in Social Media. *Cybaris Intellectual. Property Law Review*, 6 (1), 141-145.
[20] *Ibid.*

Besides, it is essential to note that, similarly to the property within a direct ownership regime, the absence of access to the account in the form of lack of data required for authorization, i.e., passwords, in itself, can not state the will of the deceased to not to transfer the object to the heir.

As it was already mentioned, the availability of access to the object of inheritance in fact, does not affect the inheritance and is exclusively procedural specific to the process.

2.2.3 Licenses

Licenses are the third category of property rights in relation to virtual assets. Referring to the tendencies within contractual provisions set out in the "Terms and Conditions", they are a prevalent type of those.

It should be noted that this type of legal position is often applied both to the classification of consumer rights of the users regarding the access of the specific copyright-protected content provided to the user of the account by the service provider and in the case of some social networks that can use user-generated content for free. When it comes to inheriting licenses associated with a particular account, the situation is often very ambiguous, as the provisions of the "Terms and Conditions" of many platforms contain provisions on non-transferability and the impossibility of sub-licensing. Such a policy is often justified by the need to protect, inter alia, the service provider's interests, as, for example, in the case of streaming services that provide the exclusive right to consume certain, often copyright-protected content on an exclusive basis. Despite the apparent rational grain in such conditions of use, these provisions in the context of posthumous inheritance are more than controversial. Despite the general tendency of streaming platforms to include non-transferability of licenses in their contractual terms and the important, in essence, the goal of protecting the provider's interests, there are precedents in European law where the court finds such terms of the contract invalid in themselves. Thus, the apparent tendency of the legal literature on the topic is an argument that, based on the general principles of inheritance and directly the legislation of specific countries, which will be reviewed in this paper in one of the following parts, licenses that do not expire after the death of the owner must be inherited and, accordingly, transferred to the heir despite the non-transferability clause in the contract.[21]

[21] Załucki, M. (2021), *supra nota*, 107.

2.3 Inheritability

As was already stated, some online platforms, in an attempt to avoid the issue of digital assets transfers within their platform, state in their "Terms and Conditions" contracts that digital assets within their platform are non-transferable.[22]

Nevertheless, despite the fact that inheritance issues themselves are not directly related to providing access to inherited objects, it can be argued that, in the absence of unambiguous legislation and the presence of only comprehension of the issue in the theoretical plane, the procedural part, which is currently managed by the service providers themselves through the provisions of the "Terms and Conditions" may be vital in determining the legal approach to future regulation at the legislative level. N.M. Banta, in her work "Inherit the cloud: the role of private contracts in distributing or deleting digital assets at death", states this problem is more obvious for common law countries, where precedents for interpreting laws are given more weight in the formation of tradition.[23] However, although not so precise, for civil law systems, both the legal approach to regulation and regulation in the dismantling of platforms, which are currently, in fact, the only regulatory bodies for the transfer of digital assets contained within them, current rules of use regarding inheritance can influence future laws as by the pure fact of their existence and enforcement they are forming a tradition.

This aspect is problematic because, in essence, such contracts are an attempt to change the very nature of the right of succession with regard to digital estate, eliminating its automatic status of the object within the legal relations. In particular, such contracts try to move away from digital asset value as a full-fledged unit of property of a particular individual in favour of defining them as licensed goods owned by the platform.[24] Considering a broader perspective, the question of who, in fact, owns digital assets determines the inheritability of such data. In this regard, as some scholars suggest, the question of who is the owner of the data is the key one not only within the area of sole inheritability of assets but the whole scope of the rights of the user within the platform itself. Consequently, an approach according to which an online account should be considered not inheritable inviolately leads to the consequent order, according to which the data in question is an asset in possession of the provider, granting to him a wide range of rights related to the assets.

[22] Vučković, R. M., Kanceljak, I. (2019), *supra nota,* 725.
[23] Banta, N. M. (2014). Inherit the cloud: the role of private contracts in distributing or deleting digital assets at death. *Fordham Law Review*, 83 (1), 799.
[24] Beyer, G. W., Cahn, N. (2013). Digital planning: The future of elder law. *NAELA Journal*, 9(1), 140-142.

It can be argued that at present, in the context of European legislation, with the exception of some countries that have taken a legislative step toward regulating the inheritance of digital property, this branch of ownership is still in the so-called "grey area", which currently allows Internet platforms to handle this aspect entirely at their discretion, which in most cases obviously does not include an approach oriented on supporting user's right to inherit data.[25] It could be said, Facebook's policy on converting a page into a "in memoriam" status and further examination of this issue within the IG Berlin case would serve as a great example of such a policy.

2.4 Principle of universal succession

The principle of universal succession derives from Roman law and, in essence, ensures that each inheritance has its automatic universal heir, thus preventing certain objects from becoming nobody's after the owner's death.[26] The same applies to liabilities, debts and other things associated with the previous owner. The principle of universal succession in this connotation is to some extent traditional for the right of inheritance in Europe and is reflected in one form or another in almost every law of the Member-States.[27]

According to this doctrine, the "universal heir" is, from the point of view of law one subject, which in fact can be either one heir or several together; however, the situation where the inheritance with direct material effect received by different persons-recipients is impossible. The essence of the principle is, in fact, "automatic" inheritance, where the heir actually replaces the predecessor in all its legal relations with respect to the objects of inheritance as if he were him, that is, as if no transfer of rights took place.[28] The same applies to all contractual obligations, which in the case of digital inheritance, i.e. concluded with the relevant platforms, are quite significant due to their partial function of ensuring ownership. It is important to note that the heir's succession takes place simultaneously for all positions and is not regulated by specific lists or any restrictions on the scope. According to the doctrine, the heir inherits absolutely everything except the direct identity

[25] Nemeth, K., Carvalho, J. M. (2017). Digital inheritance in the European Union. *Journal of European Consumer and Market Law*, 6 (6), 253.
[26] Pelletier Jr, G. A., Sonnenreich, M. R. (1966). A Comparative Analysis of Civil Law Succession. *Villanova Law Review*, 11 (2), 323.
[27] *Ibid.*
[28] *Ibid*, p.326.

of the deceased, which is interpreted as the replacement of the deceased by the heir in all legal relations with the objects of property.

As for digital property, most academics, as well as jurisprudence, agree that there are no objective reasons for digital assets not to fall under the doctrine of universal succession.[29] Nevertheless, the current approach of service providers instead falls under the classification of defining the inheritability of assets based on the data carrier rather than the nature of the legal position.

2.5 Potential exceptions from the principle of universal succession as a reason for further categorization of digital assets.

Sections 2.1 and 2.2 of this work contained a consideration in support of the categorization of digital assets as a measure to determine their legal position and consequent inheritability based on this legal position instead of disposition and inheritability determined by the data carrier that is an online platform. In further sections, this argument was supported by the principle of universal succession, the main pillars of which, it could be said, govern the transfer of property within the notions of modern legislation. However, as it was stated above, there are exceptions within the notion of the universal succession principle, one of which should be considered a key one while discussing succession of the accounts. And that is the right of an heir to inherit only property, but not the personality of the legal predecessor. This component of the principle may seem obvious at first glance; however, in fact, it is fundamental with regard to the question of whether personal accounts can be entirely inherited, and as further argumentation will show, once again confirm the importance of categorizing digital assets.

As was previously stated, accounts are vital objects that give us access to other information in the digital dimension: both to its distribution, i.e., publication, and to the recession, i.e., collection. An apparent feature of private accounts, i.e. those that are directly related to the individual, his personality, such as an individual's personal account on social networks, is that the aim of their utilization is the interaction between individuals and their self-expression through account tools, including publication of materials related to the individual. [30] This functionality radically

[29] *Ibid.*
[30] Grochowski, M. F. (2019). Inheritance of the social media accounts in Poland. *European review of private law, 27*, 1196.

distinguishes an account on a social network from, for example, a bank account or an account linked to a licensed subscription to a streaming platform by the involvement of the so-called "personal factor".[31]

This "personal factor", acquired through a person's self-expression on a social network, can essentially be equated to a person's identity and cannot be passed on to another person. Thus, when it comes to private user accounts on social media platforms, the full inheritance of such an asset with no restriction to use the entire functionality of the account, i.e. publish records or send messages on behalf of the deceased, seems very questionable both ethically and in the context of universal succession.[32] Based on the consideration that the user's private account, which potentially constitutes his identity, cannot be entirely inherited, there is a need for further categorization based on this conclusion, namely the conditional division of accounts into those used for private and private purposes. Since non-private accounts are often used for commercial purposes and constitute digital assets with monetary value, this classification becomes vital.

Thus, such differentiation is also significant for the question of whether accounts are inheritable in general, constituting non-private accounts not attributed to an identity of a person inheritable as such, while private accounts should be rather inheritable partially based on legal positions of separate parts of the information associated with an account.

Besides, considering separate assets of the account still should be deemed inheritable, the question of the procedural part, that is, the transfer of these assets, arises.

[31] *Ibid.*
[32] Mikk, T., Sein, K. (2018), *supra nota*, 120.

3. PRINCIPLE OF UNIVERSAL SUCCESSION: PRACTICAL IMPLICATION RESULTS ON THE BASIS OF LG BERLIN FACEBOOK CASE

If to consider the notion that a great number of legislations of European Union Member States have a high level of identity with regard to the legislation of Germany, the most famous case concerning digital inheritance, namely the LG Berlin Facebook case appears to be vital for the understanding of how relevant law can be interpreted and utilized to regulate both the process of inheritance and gaining access to the inherited accounts within the platforms.

In the context of this work, the first 2 Sections of which were dedicated to the research of the notion of digital inheritance in the field of legal literature, the importance of digital heritage as a legal concept, and forecasting of potential ways to classify its various components based on relevant universal legal definitions and principles. This section, in turn, will focus on attempts to analyze a particular decision of the German court to find a relative equilibrium point in relation to the above interpretation of the principles, in particular the principle of universal succession through the prism of legal literature.

In addition, given that the defendant in the case was Facebook Ireland, namely, the legal entity originating and acting as a party of the contract between Facebook and a user enabling the user to utilize the service, the case is also a potential source for analysis in the context of international civil law.

In accordance with the facts of the LG Berlin Facebook case, a 15-year old girl committed suicide, after which her parents with an aim to clarify certain facts related to the death of their daughter, possessing the data required for authorization, committed an attempt to access her Facebook account through the log in.[33] However, in accordance with Facebook policy, the page was already converted into "in memoriam" status meaning that the account can no longer be used in the usual

[33] Landgericht Berlin, Urteil vom 17.12.2015, Az. 20 O 172/15.

way. After the failure to access the information needed through the means of logging in, parents requested access to the content of the account directly from Facebook, but the request was denied.[34] The principle of universal succession is part of German law, namely the civil code. It is reflected in section 1922 BGB in the wording corresponding to the above description of the principle of universal succession, namely, stipulating that after the death of a person, his property must pass to the heir or heirs. This principle, in accordance with the court's ruling and became one of the main arguments in favour of the succession of the account.

In particular, despite Facebook's argument regarding the presence of the non-transferability clause in the contract in question, i.e. the "Terms and Conditions", the court ruled[35] that the contract, as all agreements of similar type[36], are inheritable according to the principle of universal succession, so the nature of the contract itself is not implicit that the contractual relationship was not inheritable.

Besides, it's notable that even though the case, due to appeals from both sides went through the courts in various instances, there were no differences in the decisions regarding the point if account is inheritable by the heirs under the principle of universal succession. According to the German Federal Court of Justice court decision, the contractual clause, according to which the page acquires " in memoriam " status after the predecessor's death, preventing access to user data by the heirs, if any, should be considered invalid, as such clauses unreasonably disadvantage the other party to the contract.
Thus, following the court's decision, the platform has no right to prevent access of the successors of the account to the account.[37]

Moreover, the Federal Supreme Court's decision[38] included an explanation, in essence, stipulating that the normative base regulating inheritance of a person's digital estate should, in principle, be equivalent to that of physical property. Thus, Facebook's argument about a potential breach of privacy concerning third parties, for example, by providing access to correspondence between the deceased and third parties, was rejected on the grounds of the counterargument that equivalent

[34] Fuchs, A. (2021). What happens to your social media account when you die? The first German judgments on digital legacy. *ERA Forum*, 22, (1), Springer Berlin Heidelberg, 2-3.
[35] Landgericht Berlin, Urteil vom 17.12.2015, Az. 20 O 172/15.
[36] Bundesgerichtshof, BGH, Urteil vom 12. Juli 2018, Az. III ZR 183/17.
[37] *Ibid.*
[38] *Ibid.*

data in material form rather than digital form are legally inherited, which practically repeats approach to understanding this aspect in the already analyzed above legal literature: the assets should be examined with regard to questions of their inheritability or non-inheritability based on their legal position instead of the data-carrier factor.

However, the case did not end on the decision regarding inheritability and continued in the dissent of the issue of execution of the court order, namely providing the plaintiffs with access to the account. Instead of providing the plaintiffs with full access, the defendant, Facebook, addressed them with a USB flash drive, which contained, according to the plaintiff, information from the account in an unstructured form.[39] Although the analysis of subsequent judgments in the case does not address the issue of heredity, it can shed light on several details about procedural factors and help us delve deeper into how exceptions to the principle of universal inheritance affect inheritance in practice.

The issue of the form of "granting access" was also considered in three instances, the third of which, namely the Federal Supreme Court[40], ruled in favour of the plaintiff, supporting the decision of the Berlin Regional Court.

The critical notion in the context of these decisions is the rather detailed elaboration of the Berlin Regional Court on ways to "grant access" to heirs: a potential option of granting full access could be to create an alternative to " in memoriam " status within which the descendant could access all possible information but would not be provided with a technical the possibility to directly use the account, that is, with all the functionality that was previously used by the original owner.
The Federal Supreme Court's ruling[41] stated that access to the account should be such that the person who inherited the account could receive information about the content in the same way as the legal predecessor of the account could.

Interpreting this argument of the court in conjunction with the examination and conditional division of obligations of the contract with the platform into those that are purely technical and related to the account, not the person, and those directly related to the user, namely the right to

[39] Fuchs, A. (2021), *supra nota*, 5.
[40] BGH, Beschluss vom 27.08.2020 – III ZB 30/20.
[41] BGH, Beschluss vom 27.08.2020 – III ZB 30/20.

send posting and posting content, it can be assumed that not all rights with regards to it are inheritable.

Thus, the rather unambiguous statement that there is no need to grant the heir the right to direct active use can potentially be interpreted as the above exception to the principle of universal succession[42], namely, the inability of the descendant to inherit the identity of the predecessor, but only his legal positions within his contracts and obligations

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[42] Vučković, R., M., Kanceljak, I. (2019), *supra nota*, 735.

4. THE CURRENT STATE OF REGULATION OF THE INHERITANCE OF DIGITAL ASSETS IN EU AND EU MEMBER STATES

4.1 Germany

As is already clear from the above analysis, the inheritance of digital property in Germany is mainly governed by the principle of universal succession, as reflected in section 1922 of the BGB[43]. The term "digital inheritance" is not a separate legal category in Germany and is regulated on the basis of general provisions regarding succession in Germany.[44] In turn, the practical application of these provisions has been demonstrated in the LG Berlin Facebook case in the context of the three instances of the court. This process has provided a space for a careful examination of the interpretation of the principle in the connotation of German law in relation directly to the inheritance of a contract for a digital account within the dimension of the non-transferability clause. Subsequently, the decision also led to Facebook changing its policy regarding the " in memoriam " status of accounts in Germany to comply with the relevant law.

In addition, the case allowed inheritance in the context of third-party privacy rights, deceased users' post-mortem personal rights and privacy of telecommunications.

Besides, the significance of German legislation and the LG Berlin case can also be regarded through the prism of current and possible future impacts on other cases and legislations. For instance, its reasoning was reportedly referred to in a similar Austrian case concerned with provision of access by Apple iCloud service to the wife of the deceased man.[45]

[43] German Civil Code, BGB.
[44] Mackenrodt, M. O. (2018). Digital inheritance in Germany. *Journal of European Consumer and Market Law, 7*, 41.
[45] Bezirksgericht Dornbirn, Urteil vom 03.03.2020, 18 C 943/19v.

4.2 Estonia

Due to historical and social peculiarities, Estonian legislation has adopted the German legal tradition in many of its legislative acts. The same applies to the principle of universal succession, which is to some extent identical to the German version and is implemented in Estonian inheritance legislation. [46] This once more emphasizes the importance of the German experience and interpretation in the course of court proceedings. Both in terms of literary understanding of digital inheritance and in developing the approach to regulation may be useful in a practical dimension for Estonia.

As to the particular provisions of Estonian legislation, inheritance, including digital property, in Estonia is regulated by such legal acts as the Estonian Law of Succession Act (LSA)[47] as well as the General Part of the Civil Code Act (GPCCA)[48].

The provisions of the LSA expressly reflect the principle of universal succession, while the GPCCA regulates the enforcement of rights through the relevant definitions. According to Estonian law, the successor in law inherits the entire property of the deceased in full, and the law as such has no provisions which prevent the inheritance of digital property, at least based on its legal nature, at least because there is no differentiation in the context of the principle between digital and non-digital objects. As the legal literature suggests, the approach to the definition of inheritance in Estonia and Germany described above is identical in theory.

At the same time, an evident difference in Estonian law is the clear differentiation of assets into inheritable and non-inheritable. This distinction is based primarily on the justification, already stated in Section 2.5 of this work, stipulating that the heir can inherit only the legal position with regards to the objects of legacy but not the identity of the previous owner themself. Considering the fact that the significant number of services in technologically advanced and successful e-governing[49] of Estonia are fully based on ID card identification, which is very functional even in terms of non-public services, this policy looks more than logical. Nevertheless, the lack of direct presence of the respective provision in the German law, as practice shows, namely the LG Berlin

[46] Mikk, T., Sein, K. (2018), *supra nota*, 120.
[47] Law of Succession Act RT I 2008, 7, 52, 01.07.2002.
[48] General Part of the Civil Code Act, RT 2002, 35, 216 01.07.2002.
[49] Azzopardi, D., et al. (2020), "Seizing the productive potential of digital change in Estonia", *OECD Economics Department Working Papers*, No. 1639, OECD Publishing, Paris, 3.

case already reviewed in the context of this work, does not mean that this exception to the principle of universal inheritance does not apply in Germany. Both the analysis in the context of this paper and the position of a large proportion of German scholars in this field converge on the idea that the court's controversy in the decision on the ambiguity of the heir's right to use the personal account of the predecessor "actively" relates specifically to the issue of the inability to inherit "identity" within the principle of universal succession.

In their work, Estonian legal scholars, giving examples of non-transferability of assets, although asserting the ambiguity of this legal construct and the need to treat each individual case on an individual basis, name as one of the most prominent examples of legal relationships where obligations cannot be performed by the successor of the legal position, as this requires the direct participation of the predecessor.[50] This argument can as well be supported by already existing examples within the scope of the principle of universal succession where there is and is no need for the predecessor to fulfil the obligations in person. For instance, in the case of obligations where the person obliged would have to invoke personal intellectual capacity in order to fulfil the obligation can unambiguously be categorized as non-inheritable, whereas debt obligations are general in this connotation and can be fulfilled by anyone, thus not including a "personal" factor.

This raises the legitimate question of how much weight the "personal" factor carries in the context of the inheritance of personal accounts. As mentioned above, the decision of the German court in this context has been relatively explicit, and it is nevertheless reasonable to assume that in different legislation, such as that of Estonia, where the factor linking accounts to identity on a technological level is in a non-cardinal but probably distinctive position. Thus, the approach to inheritance on this basis may also be different.

4.3 Poland

Polish law in matters of inheritance, including digital assets, is governed by Book 4 of the Civil Code, including primarily Article 922, which regulates the assets that may be inherited. The definition within this Article according to which all "property rights and obligations of the deceased are inherited" by no means excludes, though not separately marks digital assets, thus being a kind of the equivalent of the abovementioned principle of universal succession.

[50] Mikk, T., Sein, K. (2018), *supra nota*, 123.

In Mateusz Grochowsky's opinion, laid down in his work "Inheritance of the Social Media Accounts in Poland", this rather neutral provision, to some extent identical in its semantic content to legal acts of other states in relation to this aspect, in the context of Polish law specifically, is one of the critical positions in the context of digital inheritance, as the very concept of succession is based on the patrimonial nature of the asset.[51] This approach of Polish law, in turn, may lead to the impossibility of considering the entire content of an online account in the context of inheritance. Although, in theory, such a possibility exists, as the Polish case law does not yet contain court cases allowing unambiguous conclusions, this approach may not be considered entirely appropriate in the context of the "flexibility" of inheritance law. Therefore, taking into account the abovementioned, a differentiation of the legal status of the assets with regard to intellectual property rights may be appropriate in this particular case.

Article 922 § 2 of the Civil Code, on the other hand, excludes from the inheritance "the rights and obligations of the deceased directly and personally connected with him/her" and rights based on identity, i.e., those that may only pass directly to a particular person. From the wording of the text of the Article, one can conclude that it is similar to the corresponding articles in the codes of the two countries analyzed above, namely Estonia and Germany, and suppose that the Article is consistent with the principle of universal succession. Also, drawing parallels with LG Berlin, namely with regard to the inheritance of the account as such, in the Polish context, considering the peculiarities of its legislation, the prospects of such a case are somewhat ambiguous. The Polish legal literature cannot give an unequivocal answer when discussing this aspect as well.[52] The main contradictions arise at the point of determining whether a social network account may be considered as a tool to satisfy solely individual purposes, or is simply an element of the Internet platform.[53] Nevertheless, given the standardized usage rules of most networks and the lack of a personal approach at this stage in their functionality, most agree that, as it stands, most personal accounts do not fall within the scope of the exception under Article 922 § 2.

Polish law, namely Articles 747 and 750, also leave room for a non-transferability clause in contracts with platforms related to account maintenance. Thus, the terms of such contracts could potentially include provisions whereby the contract could be terminated immediately upon the

[51] Grochowski, M. F. (2019). *supra nota*, 1196.
[52] *Ibid.*
[53] Grochowski, M. F. (2019), *supra nota*, 1201.

death of the service recipient i.e. the user. Such clauses may seem unfair to users, as all power to determine contractual provisions usually belongs to the platform and is not subject to personalization. Moreover, as the German case shows, such provisions can technically be invalidated for this reason.

An understanding of Art. 922 § 2 regarding the inheritance of social media accounts includes the difference between granting access to the account's assets and inheritance of the account entirely, in which all rights and legal positions are transferred, including the full use of the account identical to the one guaranteed by the contract to the original owner. This perspective echoes the German court's approach of questioning the admissibility of the use of private accounts by heirs "actively", i.e. with all the functionality. Still, it's important to note that in the context of the Polish discussion, this issue has been carefully considered from the perspective of the legal concept of "personal rights (private interests)" in Polish law.[54] Inadmissibility of inheritance, within which a private account, i.e. an account directly connected with the person's identity, may be used by an heir in full functionality, i.e. actually on behalf of the person, is explained by the importance of preserving "personally connected assets" of the account owner, including reputation and identity. As part of this reflection, the categorization of digital property, namely, accounts into private and non-private, already outlined earlier in this paper, becomes the one of paramount importance. Based on this statement and the peculiarity of Polish law, one of the categories for differentiation could be directly the criterion of the need to protect the honour and reputation of a legal predecessor.

4.4 Italy

The Italian legislation in relation to digital inheritance, as well as the previous legislation reviewed, partially relies on the principle of universal inheritance, included in the articles of its Civil Code. Nevertheless, to draw unequivocal conclusions based solely on this part of the regulatory apparatus on this issue would be fundamentally wrong, especially considering the significant reform in digital inheritance issues through the implementation of Legislative Decree No. 101 of 2018[55], dedicated to the rights of deceased persons. This Act was developed on the basis of the GDPR,

[54] *Ibid.*

[55] Decreto legislativo 10 agosto 2018, n. 101: 'Disposizioni per l'adeguamento della normativa nazionale alle disposizioni del regolamento (UE) 2016/679 del Parlamento europeo e del Consiglio, del 27 aprile 2016, relativo alla protezione delle persone fisiche con riguardo al trattamento dei dati personali, nonché alla libera circolazione di tali dati e che abroga la direttiva 95/46/CE'.

which is a tool applicable at the EU level, but importantly, exclusively in relation to the protection of data of living persons. Another important characteristic of Legislative Decree No. 101 of 2018 is that, to some extent, it was the consequence of a long legal discourse in Italian Legal Literature, where digital inheritance issues have been explored and discussed in various addresses [56] Nevertheless, it is essential to remember that this statute does not directly regulate the property transfer process from the perspective of the right of inheritance or ownership but adjusts the protection of data related to the deceased in the framework of his interests. Also, actions with regard to the data can be carried out by persons directly related to the deceased, who act in their own interest.

According to the decree, the list of the rights of these persons in relation to the data includes the right to access the data for the purpose of its correction, erasure or transfer to other storage. Considering this detail of the wording of the law, we can say that access to the data of the deceased after his death in Italy is automatically guaranteed by Italian law.

Besides, analyzing this law in the context of the LG Berlin case, if the case took place in Italy, with an application of Italian law respectively, the issue of access would have been resolved identical to the precise decision of the German court, only within the provisions of the decree. In this regard, the state's proactivity regarding data access issues also potentially regulates the issue of transferability and pre-emptively solves the issues identical to those of the LG Berlin Facebook case. Nevertheless, even in view of the existence of legislation, some potentially problematic aspects concerning both the theoretical and the procedural parts still remain. In particular, the provisions do not determine how to regulate the issue of two conflicting expressions of will from different family members of the deceased regarding the management of the account after his death. The option, in this case, is considered to be the will of the person whom the deceased, before his death, appointed an "agent" according to the terms of the same legislative decree No. 101 of 2018. Still, in the absence of such a person, the problem invariably remains.

Regarding the inheritance of the account directly, if to observe the wording, it could be assumed, that the interpretation of the Italian legislation concerning the inheritance of the service contract, i.e. "Terms and Conditions", would lead to similar consequences as were observed in LG Berlin Facebook case.

[56] Patti, F. P., Bartolini, F. (2019). Digital Inheritance and Post Mortem Data Protection: The Italian Reform. *European Review of Private Law (ERPL), Forthcoming, Bocconi Legal Studies Research Paper*, 1189.

In addition, Italy, within the framework of its legislative development, has gone further in terms of the possibility to recognize the contractual provisions concerning the non-transferability between the person and the platform as unfair and respectfully void. This is guaranteed directly by the GDPR provisions successfully implemented in the Italian legislation and the adoption of Articles 15-22 GDPR within the legislative decree No 101 of 2018.[57] The regulation applies to both living and deceased individuals.

Thus, the argument of the German court regarding the disproportionality and unfairness of the non-transferability clause in relation to the user within the contract between the user and the platform, in the framework of the Italian "scenario" in some cases allows referring directly to the assessment in terms of the decisions of the Italian Data Protection Authority for the reasoning in the regulation. The use of GDPR provisions, in fact, was a part of the court reasoning in the Italian court Tribunale Ordinario di Milano with regard to the conduct of Apple, namely the refusal to provide access to information stored on Apple iCloud service to the parents of a deceased man in absence of the will. [58] The other part of the consideration, at the same, time dealt with the issues of possible privacy violations in case of granting access and was resolved similarly to LG Berlin.

[57] Kadenić, D. S. (2021) Planning For a Digital Death. *Property Law–Challenges of the 21 century st*, 33, 44.
[58] Tribunale Ordinario di Milano, N. R.G. 2020/44578.

5. EU LEVEL LEGISLATION KEY LEGAL ISSUES AND PERSPECTIVES

To date, there is no single document at the level of the European Union regulating the inheritance of digital property directly, let alone documents that could balance this process directly in the context of all borderline legal aspects, namely data protection, contract law, intellectual property rights, etc.

Some states are adopting legislation to control the issue within their own country. Currently, there is no evidence of a critical gap between the level of development of legislations as such, but private tendencies of some states, not necessarily directly related to the regulation of a particular topic, for example, the tendency to link non-state accounts directly to identity documents in Estonia, may theoretically constitute the presence of prospective hurdles in harmonizing it with the measures of other states in this direction. The prolonged absence of regulation at the EU level may only increase this gap.

It is also worth noting the contribution to the solution of some states, such as Italy, in the issue of attempts to regulate the inheritance of digital assets not only in the post-factum regulation but also in the adoption of measures to simplify procedures to decide their fate after the death of the owner during his lifetime. Even though simplification of the access to estate planning does not solve the problem of lack of adequate regulation of the disposition of assets in the absence of a will, it potentially decreases the potential pressure on the judicial system with regard to the issue.

However, there was no significant effective regulation at the EU level; the existing attempts should also be listed and examined attentively. The first one of them is directly related to previously examined within this work LG Berlin Facebook case, as is the legislative proposal in the German Bundestag to draft a specific law on "regulating access to digital heritage and harmonizing it in the EU".[59] The essence of the document in question is to introduce several measures regulating the conduct of internet platforms by introducing the so-called unified "digital certificate" of succession

[59] Fuchs, A. (2021), *supra nota, 6.*

and proclaiming the clause of non-inheritability in "Terms and Conditions" contracts between a user and the service-provider invalid.[60] The draft was rejected by the German Ministry of Justice explaining the decision by the absence of adequate reasons to amend the current legislation, i.e. the General Terms and Conditions Act.[61]

Another important EU-wide initiative in this regard is the study conducted by the European Law Institute (ELI) called "Access to Digital Assets", a project mainly concerned with the examination of the possibility of adapting principles used in the US, namely Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) for the European Legal Infrastructure.[62] The research aims to bring clarity to the understanding of the assets within the EU and approaches to managing them both in the legal-field perception of the term and legislative levels. The project started in 2019 and is still ongoing.

Besides, the issue of jurisdiction in regulation within the EU remains vital from the perspective of the possibility of influencing this area in the legal dispensation.[63] Cases, where the place of residence of the heir and the place of the direct operation of the platform that provides the service complicate both the process of legal regulation of disputes and processes, as well as the direct transfer of data. Given the existence, as this analysis has shown, of different approaches to the regulation of this issue by different states-countries, it can be, to some extent, complicated to harmonize this aspect. The perspective of harmonization in international law is even more complex, considering that the United States, for example, has its own legal Act that comprehensively regulates the issue in a specific way.

Besides, at the EU level, there is no regulation concerning privacy, data protection and defamation of the dead, given that the GDPR only applies to living individuals. A potential solution to this issue could be the Italian example of adopting specific provisions of the GDPR for post-mortem cases.

The overall outcome of this analysis could be the conclusion that legal regulation in the context of information technology development and a proactive approach to legislation should become the EU's main objectives.

[60] *Ibid.*
[61] *Ibid.*
[62] Council Decision CD 2019/4 of 1 March 2019 on the Approval of a New Project on Access to Digital Assets.
[63] Załucki, M. (2020). *supra nota*, 61-62.

Given that, for law, digital assets are a relatively new form of property, a vital basis for the development of their regulation is first and foremost the creation of an unambiguous definition of this form of property.

6. OTHER LEGISLATIONS OUTSIDE THE EU

When comparing the European approach to foreign regulatory approaches, including from a practical point of view, it is important to take into account a large number of diverse factors, especially the current legal frameworks of the countries in question and their proximity and adaptability in the context of European legislation. Following this, we can see that the approach of Turkey, for example, is quite close to the EU. In particular, in the example of *Antalya BAM Apple case*, where the court established applicability of the general succession provision in Turkish law to digital property, namely Article 599 of the Turkish Civil Code we can trace there the development of the relatively similar approach to deal with digital assets and approximately same stage with regard to possible developmental shifts.[64]

The situation in Great Britain, the former EU Member-state, in turn, is as follows: in general, legislation does not specifically regulate the issue of digital legacy, but after the decision of Central London County Court in *Rachel Thompson vs. Apple* lawsuit ordering Apple to grant access to the deceased husband account digital inheritance gained considerable publicity being advocated by both official and activist organizations.[65] However, no significant legislative step was taken since the date of the decision in 2019, while the need for legal regulation is evident by the rising amount of lawsuits related to digital assets including the one taking place in 2022, where The U.K.'s High Court of Justice ruled in favour of recognition of NFT`s the type of digital property.[66]

As already stated in this work, US laws regulating digital assets are currently regarded by some members of the European legal discourse as a potential basis for developing respective legal instruments within the EU. Thus, many academics agree that the US approach to regulation is more rational, sound and advanced than the current EU one. It is important to note that US policy on this issue, however, is also more focused on promoting preventive regulation of digital assets

[64] Antalya BAM - 6. Hukuk Dairesi. Esas No.: 2020/1149. Karar No.: 2020/905.
[65] Mali, P., Prakash G, A. (2019). Death in the era of Perpetual Digital afterlife: Digital assets, Posthumous legacy, ownership and its legal implications. *National Law School Journal*, 133.
[66] *LLC* (Rev2) [2022] EWHC 773.

by users to avert post-factual legal disputes in the absence of guidance from the legal predecessor on his/her/their assets.[67] However, a significant difference from European regulations, such as Italy's legislative initiative on access to the account by relatives of the deceased, is the scope of US legal regulation. The only consolidated legal instrument that regulates the behaviour of both consumers and trustees, as well as Internet service providers, is the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA). The Act determines the regulatory framework for the actions of fiduciaries, i.e., persons to whom the legal predecessor, i.e. the owner of the account, transfers access to the account for further disposal and correct execution of the will.[68]

It is important to note that the law, unlike EU legislation, RUFADAA contains a direct definition of a digital asset in the dissent of inheritance law, defining it as "electronic records, not including an underlying asset or liability unless the asset or liability is itself a record that is electronic" and guarantees the fiduciary full, i.e., equivalent to that which was the original owner, access to the account. The motivation of the law, instead, is not only to ensure an adequate inheritance transfer procedure but also to protect the deceased's rights to the account, including protection against theft of personal data. In general, the document can be called quite balanced and detailed, given the number of nuances it includes: the conditions for the disposal of digital assets in different ways, the existing system of priorities for fiduciaries in case of inaccuracies or inconsistencies in content instructions and the hierarchy of personal rights and representatives of heritage management.[69]

In turn, the US jurisprudence in the form of a series of cases both before and after the introduction of UFADAA, RUFADAA, shows a pro-user approach to regulation, i.e., in favour of inheriting assets within the account, even in cases of conditional non-compliance of previous actions of the deceased with the conditions of RUFADAA. Thus, even in the absence of a documented will of the predecessor in the case of *Ajemian v Yahoo! Inc.* the Supreme Judicial Court of Massachusetts ruled that the data of the deceased from his e-mail can be accessed by his relatives.[70] Characteristically, often, similarly to the case laws within European law, the stumbling block, i.e., the main line of argument against granting access is the issue of post-mortem privacy and secrecy

[67] Cahn, N., Kunz, C. L., Brown Walsh, S. (2016). Digital Assets and Fiduciaries. *Research Handbook on Electronic Commerce Law, John A. Rothchild, ed., Edward Elger*, 2015-18, 101.
[68] *Ibid.*
[69] Conway, H., Grattan, S. (2017), *supra nota*, 113.
[70] 84 N.E.3d 766 (No. SJC-12237).

of communications, which in most cases is counter-argued by the identity of the person requesting access. Thus, when a person has the right to inherit, access is usually also granted.

At the same time, according to the court ruling in the *In Re Scandalios* case, not all objects within the account, as such, need legal regulation through RUFADAA.[71] For example, according to the abovementioned court decision, there are no objective reasons in the framework of the security of pricavy for the heirs not to have access to such objects as photos within cloud storages such as iCloud, and therefore, access must be provided.[72]

At the same time, in the case of the Canadian judiciary, which partially adapted the American RUFADAA under its legislation, we can also talk about a clear distinction between the issue of inheritance of the account itself and inheritance of its contents, where the regulatory approach is more inclined to the latter.[73]

However, according to experts, despite the widespread implementation of the law in the United States and detailed elaboration, it has its drawbacks and omissions, such as the existence of situations in which the service provider can delete or delete individual records unilaterally or situations where the right to confidentiality and copyright conflict with other provisions and limit the fiduciary's actions with respect to content.[74]

In general, as already mentioned, the possibility of borrowing certain aspects of US law to build a regulatory framework in the EU is currently being studied in depth in comprehensive research of the European Law Institute, but the adoption of a positive regulatory experience, even considering the significant differences in the very nature of some EU and US instruments, it is somewhat likely.

[71] 2017-2976/A N.Y. Surr. Ct. 2019.
[72] *Ibid.*
[73] Lynch, E. (2020). Legal Implications Triggered by an Internet User's Death: Reconciling Legislative and Online Contract Approaches in Canada. *Dalhousie Journal of Legal Studies*, 29, 161.
[74] *Ibid.*

CONCLUSION

This research aimed to define the process of digital inheritance regulation in the EU and vital legal principles regulating the transferability of digital assets in the event of the death of their owner. Based on the analysis of both legal literature and specific legislations of EU countries, it was concluded that the common factor unifying the outlines of approaches of EU countries is the principle of universal succession. Because of socio-political factors shaping the formation of European countries' legislations, this principle is incorporated into most of them; however, the interpretation of the principle may vary when it comes to the process of succession depending on the laws and approaches the state authorities are exercising in conjunction with it. This fact is not surprising, given the complexity of the legal field of inheritance of digital assets as such, due to the intersection of numerous and diverse legal fields, and underdeveloped industry due to the lack of a significant regulatory step at the level of European legislation.[75] This fact also explains the existence of many perspectives from different positions on how we should approach the issue of regulating the provision of access to an account, which involves a lot of legal aspects such as contract law, data protection law and directly the law of succession. The issue of access was not discussed in detail in this paper, as it was more focused on legal relationships such as "nature of the asset - inheritance" rather than "service-provider platform - inheritance" or " service-provider platform - heir". Nevertheless, given the close interrelation of all these factors, the question of the impact of the participation of the service provider's platform on the nature of the asset and the possibility of its inheritance was raised. In the course of this review, taking into account both the opinions of leading experts in this field and the direct involvement of the legal regulator, namely the understanding of concepts by the court in the case of LG Berlin Facebook case, according to the universal succession principle, "discriminating" against an asset by regulating its status based on a data carrier, i.e. a platform instead of the nature of the legal position is unacceptable.[76] Tangible and intangible property must be regulated identically.[77]

[75] *Ibid.*
[76] Landgericht Berlin, Urteil vom 17.12.2015, Az. 20 O 172/15.
[77] *Ibid.*

However, the principle of universal succession alone is not enough to regulate the inheritance of digital assets, primarily due to exceptions to the principle itself, namely the impossibility of inheriting the legal predecessor's personality by a successor, which causes difficulties in inheritance and access to private accounts and requires more detailed categorization of assets within the account, namely, on subgroups-units of digital property including within the framework of the intellectual property rights. Thus, from the current state and understanding of the potential legal framework, it follows that it is important to conditionally divide the objects within the account into those covered by the license, direct ownership and copyright. For some jurisdictions, direct division of accounts and objects within them on private and non-private is relevant.

In general, the abovementioned concepts exist in the direct interpretation by the legislator only in part, while more represent a theoretical understanding of potential ways of regulation within the legal discourse, thus reflecting the general state of regulation: despite attempts, there is a critical lack of a comprehensive Act at European level to control digital inheritance.[78] At the same time, given the first attempts and the fruits of these attempts at regulation at the level of individual Member States, today may be considered a suitable time to analyze the experience of countries to create pan-EU legislation on digital heritage: otherwise, there is a risk of widening the gap between approaches and the development of regulation in different EU countries, which will significantly complicate the inevitable harmonization in the future.

[78] Aniței, A. C. (2017). Digital Inheritance: Problems, Cases and Solutions. *Conferința Internațională Educație și Creativitate pentru o Societate Bazată pe Cunoaștere-DREPT*, 11(XI), 37.

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