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DIGITAL INHERITANCE IN THE EUROPEAN UNION

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TABLE OF CONTENTS

ABSTRACT

This work on the Digital Inheritance in the European Union seeks to understand how digital asset inheritances are managed in the European Union, which countries have laws dealing with digital inheritance and the similarities and differences between the approaches. As the digital economy is in constant expansion there's still no harmonious European digital inheritance law but there are some countries as Estonia, Netherlands, Poland, Italy and Croatia where the topic is handled by scholars publicaly with Estonia taking the lead with addressing the various concerns of digital succession. The methods of achieving this aim are done through a qualitative inquiry using the single case study design.

Keywords: data, digital assets, inheritance law, European Union.

1. INTRODUCTION

1.1. Digital Inheritance in the European Union

The law of succession is an integral part of civil law because it is a mode whereby a decedent's property, rights, as well as obligations are transferred to one or more people through a will or by the operation of law. Conventionally, succession involves tangible and intangible properties and rights. Tangible properties can be real or personal, such as lands and personal effects. Intangible properties include trademarks, patents, and franchises, among others. Over the years, the law of succession in general has been accosted by challenges by evolving circumstances, may these be social, economic, and/or family-oriented, in nature.[1] Mary Ann Glendon published "The New Family and the New Property," tracing the shift from traditional property and family forms.[2] After three years, John Langbein's relating work, "The Nonprobate Revolution and the Future of the Law of Succession," emphasized the difficulties on traditional succession law rules resulting from new forms of wealth, including, insurance policies, pensions, and joint assets.[3] Today, nearly four decades after, succession law continues to be challenged by evolving phenomena and family structures that have led to the emergence of will substitutes. Today, a new set of challenges have come to the fore due to legal challenges arising from digital and electronic data and footprints that virtually all citizens, regardless of age and where they reside, leave behind when they pass away.[4]

As of 2017, there were nearly 4.15 billion Internet users around the world, which is more than half

[1] Conway, H., & Grattan, S. (2017). The 'New' New Property: Dealing with Digital Assets on Death. In H. Conway, & R. Hickey (Eds.), *Modern Studies in Property Law, Volume 9* (1st ed., pp. 99-115). Hart Publishing, Oxford.
[2] Glendon, M.A. (1981). *The New Family and the New Property*. London: Butterworths.
[3] Langbein, J. H. (1984). The Nonprobate Revolution and the Future of the Law of Succession. *Harvard Law Review*, *97*(5), 1108.
[4] Conway & Grattan (2017), *supra nota* 1; Hawkins, D. T., & Kahle, B. (2013). *Personal Archiving : Preserving Our Digital Heritage.* Information Today, Inc.

of the world population.[5] In 2019, these Internet users spent an average of 122 minutes online using their mobile devices, which is triple the Internet consumption using desktop computers, or an average of 40 minutes per person daily.[6] Many of the Internet users spend most of their time on social media, viewing films popular mobile internet activities are watching movies or videos, email, social networking, reading the news and shopping. Currently, 49% of the world population uses social media.[7] Indeed, as the digital age continues to impact the world, societies have been spending more time on social media, creating their online presence and at the same time, accumulating digital assets.[8] However, a compelling issue at hand is what happens to these digital assets when their owner passes away.[9] This issue raises a host of legal concerns pertaining to ownership, privacy, access to usernames and passwords, as well as, obligations of personal representatives when administering the assets when the owner dies – all of which do not clearly fit into current succession law and property law concepts. Aside from these issues, digital estate planning is also necessary because once a person passes away, his or her digital footprint can be used for foul purposes. For instance, the person's online accounts and passwords can be become the subject of identity theft. Those who want to steal another's identity can search for online obituaries, find information about those who have been listed as deceased and use the information they can gather to open credit card accounts, purchase items, and even access financial accounts. Further, the determination of location of the assets complicate the matter even more, leading to complex jurisdictional legal issues, although, at this point in time, there is no unified international law addressing these issues.[10]

Aside from identity theft, digital inheritance is also important because of the values ascribed to digital assets. For instance, in a study conducted by McAfee in 2013, it found out that its respondents had a total value of $37,438 while those in the U.S. value their digital assets at about $55,000. A similar study conducted by PwC in the same showed that the respondents valued their

[5] Clement, J. (2019). Internet usage worldwide - Statistics & Facts. Retrieved from https://www.statista.com/topics/1145/internet-usage-worldwide/

[6] Ibid.

[7] Clement, J. (2020). Daily time spent on social networking by internet users worldwide from 2012 to 2019. Retrieved from https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/

[8] Kreiczer-Levy, S., & Donyets-Kedar, R. (2019). Better Left Forgotten: An argument against treating some social media and digital assets as inheritance in an era of platform power. *Brooklyn Law Review*, *84*(3), 703–744.

[9] Bacchi, U. (2019). Lack of rules leaves experts puzzled about data ownership after death. Retrieved from https://www.reuters.com/article/us-britain-dataprotection-privacy-analys/lack-of-rules-leaves-experts-puzzled-about-data-ownership-after-death-idUSKCN1Q304F

[10] Conway & Grattan (2017), *supra nota* 1

assets at £25 billion. Considering how data use exponentially grew since that point, the said value would also have increased exponentially. Upon the death of these users or owners, what could happen to their digital estates? For countries that have already put in place laws concerning digital assets, the heirs and even those in the legal profession will know how to approach the issue. But for those that have not yet faced this issue, many potential legal problems could arise not only on the side of the heirs but also on the side of those that store these digital assets.

The term digital inheritance is applied in reference to the body of assets and data left behind when a person passes away, as well as, the operating rules dealing with these matters.[11] Digital inheritance encompasses multiple issues, that aside from the aforementioned legal concerns, include authorization for requesting and receiving sensitive data such as passwords for bank accounts, medical, and social security information. Another problem is where email contents should be entrusted when the owner dies, as well as, photographs and documents stored in the cloud, all of which may contain secrets that may involve other persons apart from the deceased. Here, an important question is whether the right to privacy remains after a person dies. There are many other questions: what is the ownership of digital assets when the person dies? Is this ownership transferred to another person and if yes, according to what legal framework? What about other digital assets such as, written texts, images or other media that may be protected through intellectual property rights? There have been many instances when a person assigns ownership to rights to these digital assets while still alive but what if this is not done and the person dies?

It is important to note that digital inheritance is relevant for different areas of law, including, in the European Union (EU).[12] For example, what issues may be addressed through the use of contract law? Is it possible to use contracts with providers of digital services contain clauses regarding death, including, the automatic cancellation of personal data when the owner of the electronic asset dies? Facebook is an example of a platform that provides for digital inheritance. One part of a user's

[11] Conway & Grattan, *supra nota* 1; Kreiczer-Levy & Donyets-Kedar (2019), *supra nota* 8; Post, K. C., Bayless, M. L., & Grubbs, J. K. (2014). Digital Assets: Law and Technology Collide - a Dilemma Needing a Solution. *Southern Journal of Business & Ethics*, *6*, 47–56; Walker, M. D. (2017). The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age. *Real Property, Trust & Estate Law Journal*, *52*(1), 51–78.
[12] Nemeth, K. & Carvalho, J.M. (2017). Digital Inheritance in the European Union. *Journal of European Consumer and Market Law* 6, 253–260.

profile pertains to digital estate planning, particularly the assignment of an executor or administrator who would inherit the Facebook account of the deceased. Thus, once a user dies, the person named in the page will be sent an email, which likely contains the username and password of the deceased. From this perspective, what should be the scope of inheritance law? What other areas of law are impacted? Can these legal concerns be addressed using traditional legal systems and frameworks or is there a need for new legislative action? In the EU, these issues have been untouched although there has been anticipation that many issues may arise across borders. This is why some EU member states have been dealing with the problems related to digital inheritance.

In the EU, a problem at hand is the fragmentation of laws pertaining to digital inheritance, or the lack of laws applying to this matter at hand.[13] For example, the EU's General Data Protection Regulation (GDPR), a landmark privacy law implemented in 2018, enables individuals the right to obtain their own copies of their data that internet service providers (ISP) hold, or alternatively, request that these be deleted.[14] However, the GDPR does not touch upon digital inheritance because it applies only to living persons, which also means to say that it does not cover bequeathing of rights to heirs.[15] This is not surprising considering that this is just an emerging area of succession. Against this backdrop, this study seeks to address these research questions using the case study research design.

1. How is digital inheritance being managed in the EU?
2. What European countries have laws dealing with digital inheritance?
3. What are the underpinning legal frameworks, and similarities and differences between these approaches to digital inheritance?

[13] Fennelly, D. (2019). Data retention: the life, death and afterlife of a directive. *ERA-Forum*, *19*(4), 673–692.
[14] Bacchi (2019), *supra nota* 9
[15] Ibid.

1.2. Purpose of the Study

Death has always held a legal significance, signifying the end of a legal personality, marriage, contractual obligations, certain personal rights and it initiates property transfer post mortem.[16] Succession laws typically determine who, and in what manner, inherits a dead person's property. However, conventionally, inheritance laws address tangible assets, which is why, over time, there have been no significant issues. Whatever issues there may have been in the past, these were all resolved a long time ago. These new type of assets, namely digital assets, have emerged as a result of the universality of the Internet and computer technologies, and owners, lawyers, and legislators seem at a loss about the appropriate steps to take in dealing with succession of digital assets.[17] These assets are usually stored in online accounts, such that after considering the ISP's rules, it is important to legally determine who should make the decision about digital contents once its owner dies.

In the past recent years, people have been accumulating more information than in any other years in human civilization, and the majority of this information is now in digital form.[18] Credit card companies, banks, retailers, news agencies, healthcare providers, utility providers, ISPs, and even schools, are now transacting online, with many of them incentivizing customers to go paperless by using electronic or digital forms. Consequently, people have a collection of photos, music, and videos, that are in digital form. Digital assets are relatively new, they continue to evolve, and nobody exactly knows what the term digital assets would encompass in the near future.[19] However,

[16] Nemeth & Carvalho (2017), *supra nota* 17
[17] Bacchi (2019), *supra nota* 9; Nemeth & Carvalho (2017), *supra nota* 17; Fennelly (2019), *supra nota* 13; Hawkins, D. T., & Kahle, B. (2013). *Personal Archiving : Preserving Our Digital Heritage.* Information Today, Inc.; Zastrow, J. (2017). Online Legacies and Digital Estate Planning. *Computers in Libraries*, *37*(5), 12–15.
[18] Walton, D. J. (2014). Why Big Data is a Big Deal for Lawyers. *Claims*, *62*(3), 12–13.
[19] Klasicek, D. (2018). Digital inheritance. Retrieved from https://www.researchgate.net/publication/329124760_Digital_inheritance

not many people think about what will happen to their digital assets when they pass away, such that they hardly make plans for succession or inheritance.[20] These digital assets, their ownership, as well as, their succession should be legally regulated simply because of the need to have some semblance of control over these important assets. Nonetheless, it cannot be overstated that current law dealing with digital inheritance is sparse and the problem worsens if the owner of digital assets dies intestate. Just as importantly, most of these important digital assets are under the control of ISPs, the relationship of which with customers should be taken into consideration.

1.3. Significance of the Study

As mentioned earlier, digital inheritance is a relatively new construct. Therefore, there are only few empirical studies and/or legal analyses on the topic, most of which are in the United States setting. For example, McCallig conducted an analysis of Facebook's digital inheritance policies, while Banta investigated the digital inheritance for minors on social media, in light of the large percentage of this population on social networking sites.[21] Collins and Shafron, as well as, Byrd also discuss legacy planning in this digital era.[22] Other studies have been conducted on a range of topics related to digital inheritance, including, the United States' New Uniform Digital Assets Law; and, legal analyses pertaining to possible reasons why digital assets should not be inheritable.[23] There is a shortage of studies on the EU as a whole, although there are fragmented studies on member states, as will be discussed be more fully in this paper. The gap in knowledge about a unified law or legal framework for digital inheritance in the EU warrants further examination, which this paper seeks to achieve. Insights gained from this study will be helpful for different entities, including, social media

[20] Ibid.
[21] Banta, N. M. (2019). Minors and Digital Asset Succession. *Iowa Law Review*, *104*(4), 1699–1746; McCallig, D. (2014). Facebook after death: an evolving policy in a social network. *International Journal of Law & Information Technology*, *22*(2), 107–140.
[22] Collins, V., & Shafron, J. (2014). Legacy Planning in the Digital Age. *Trusts & Estates*, *153*(5), 21–25; Byrd, G. (2016). Immortal Bits: Managing Our Digital Legacies. *Computer (00189162)*, *49*(3), 100–103.
[23]Kreiczer-Levy & Donyets-Kedar (2019), *supra nota* 8; Walker (2017), *supra nota* 11

users and online consumers, lawmakers, social media operators, and the public in general.

2. LITERATURE REVIEW

In Europe, a major challenge in dealing with digital assets is that there is no straightforward, definition in English law.[24] Even in the regular context, standard definitions of digital inheritance are difficult to find, although one would find descriptions of what fall within the sphere of digital assets. As stated earlier, the more obvious examples of these include emails and email accounts, blogs, social media profiles and social media accounts on Facebook, Twitter, MySpace, and LinkedIn, among others, digital music collections, archives of digital photographs and videos not uploaded to social networking sites, bank accounts, and other financial investments.

2.1. Definition of Digital Assets

Except for institutional settings, people do not usually take into account digital archiving.[25] Typically, institutions archive digital materials of those who pass away or retire. However, digital assets, due to the novelty of the construct, have not yet been fully taken into account, except perhaps in the United States. The term digital asset is difficult to accurately define but encompasses items such as email, audio visual content, and documents.[26] (Reid, 2017). In the state of Oregon in America which has laws for digital inheritance, digital assets refer to "text, images, multimedia information, or personal property stored in a digital format, whether stored on a server, computer, or other electronic device which currently exists or may exist as technology develops, and regardless of the ownership of the physical device upon which the digital asset is stored."[27] It encompasses "without limitation, any words, characters, codes, or contractual rights necessary to access the

[24] Conway & Grattan (2017), *supra note* 1
[25] Hawkins & Kahle (2013), *supra nota* 4
[26] Reid, B. (2017). Legal Life After Death: Publicity, Physical, and Digital Assets. *Southern Journal of Business & Ethics*, *9*, 108–122.
[27] Ibid., p. 116.

digital assets."[28] These mean to say that digital assets do not encompass only personal and social media items, but also financial and business accounts, domain names and blogs, loyalty program benefits, and a range of online game virtual property. Laws that protect digital assets and inheritance are utterly important because it is no longer surprising to learn that even the deceased are victimized by identity theft.[29] People on social media such as Twitter and Facebook, as well as, those who blog, tell very personal stories that are stored in computer devices and hardware in the form of digital assets. Sometimes, there are also digital content that have to be kept utterly private even to one's own family, especially if the contents are sexually explicit in nature and may affect an uninformed third party. User agreements and terms of service agreements usually constrain ownership, raising an important question about what happens to digital content when the owner passes away. In light of these, estate planning should clearly inform the provider and other parties, including, heirs, what needs to be done with digital asset and align these with the terms of service. It may also be necessary to build an automatic back-up system for digital content into some stand-alone tangible media such as an external hard drive.

2.2. Key Legal Issues

In the European Union, the first legal issue related to digital inheritance is that of jurisdiction. Since the EU does not yet have a comprehensive law that governs that entire bloc, a likely problem could arise when banks, social media owners, and other repositories of digital assets are located in a state that is different from the decedent's residence or the residence of his or her heirs.[30] Technically, asking the internet platform to turn over digital data could become problematic if there are different laws. Another legal concern is on ownership of content.[31] This is a problem when the platform is for free, such as those provided by social media companies. Who then is the owner of the user's contents

[28] Ibid.
[29] Hawkins & Kahle (2013), *supra nota* 4
[30] EURACTIV.com. (2017). Death on Facebook: Lawyers push for EU rules on digital inheritance. Retrieved from https://www.euractiv.com/section/data-protection/news/death-on-facebook-lawyers-push-for-eu-rules-on-digital-inheritance/
[31] OneTrust Data Guidance. (2020). International: Digital inheritance and post-mortem privacy in Europe. Retrieved from https://platform.dataguidance.com/opinion/international-digital-inheritance-and-post-mortem-privacy-europe

and whether these contents are considered property, and are thus, governed by property law of the decedent's domicile. There is problem considering that the software used to run the platforms are owned by the service provider. A possible solution to this is to categorise digital assets as copyrighted materials, such that they can be protected under Section 4 of the Copyright, Designs and Patents Act 1988. Post-mortem privacy is another gray area in digital inheritance. EU law, in general, does not protect privacy after a person dies.[32] While a person, while alive, enjoys protection against breaches of confidence, data, and defamation, the same do not apply post-mortem. This is simply because these laws were promulgated prior to the age of information.

2.3. Current Laws Outside the EU

The United States is much more advanced than the EU in dealing with digital inheritance and digital assets. Owners of digital assets may not have the foresight to plan for their assets in the event that they pass away. On the other hand, some may have included particular provisions on the disposition of their digital assets. In the EU, there are no legal frameworks that can provide sufficient guidance to such individuals and their lawyers. Even if they do, the instructions may contradict custodians' terms-of-service agreements.[33] There are also certain ISPs that have clear policies pertaining to what will happen when an account owner passes away and even if these policies cover terms-of-service agreement, consumers may not fully understand the ramifications of these policies in the event of demise or how courts will resolve conflicts between such policies and a will, trust instrument, or power of attorney.[34]

In the United States, there are currently different legislation that differ in their respective treatment of digital inheritance and digital assets, rights and categories of fiduciaries, as well as, coverage of an account owner's death or incapacity. In light of these, a uniform approach was built to accommodate all of the states in America to ensure that there is certain and predictable legal approach for digital inheritance, which citizens and the courts can use. Along with these, laws also

[32] Ibid.
[33] Reid (2017), *supra nota* 26
[34] Ibid.

guide consumers of Internet services, fiduciaries, and ISPs. The overarching law relevant to digital inheritance is the Revised Fiduciary Access to Digital Assets Act (RFADAA) provides accurate, comprehensive, and easily accessible guidance on questions pertaining to fiduciaries' abilities to access digital assets, including, electronic records of a decedent, protected person, principal, or a trust.

The RFADAA provides broad coverage although one of its flaws is its limited definition of "digital assets."[35] The RFADAA governs digital assets over which a person has a property right or interest, but does not encompass underlying asset or liability unless it is an electronic record. The RFADAA has 21 sections and Section 4 identified the different ways that users may dispose or delete of their digital assets at their demise, and establishes a priority system in case of conflicting instructions.[36] Another important section is Section 5, which deals with the terms-of-service of an online account that is applicable to fiduciaries as well as to users, and clarifies that a fiduciary cannot undertake any action that the user has not authorized. Sections 7 to list the rights of personal representatives, conservators, agents acting according to a power of attorney, and trustees, and their roles in administering succession planning or digital inheritance.

[35] Ibid., p. 118.
[36] Ibid.

3.RESEARCH METHOD

This study is a qualitative inquiry using the single case study design. The qualitative method is appropriate for this study because the researcher seeks to obtain a deep understanding about legal issues surrounding digital inheritance in the EU, that the quantitative method cannot enable.[37] However, this research does not directly engage with participants like the usual qualitative study but instead, harnesses extant literature as basis for analysis.[38] Nevertheless, this qualitative study uses the case study design where no numerical or statistical analyses are performed to understand digital inheritance, or even test a hypothesis. Instead, the form, substance, and scope of this study is determined by the research question, study purpose, and the data collected.[39]

3.1. Research Design

The case study design is typically used for the purpose of generating in-depth, multi-faceted understanding of a complex issue in its real-life context.[40] According to Yin, case studies are appropriate for either describing or explaining phenomena, as well as, explore phenomena, such as in a case history, or to test explanations for why certain phenomena occur.[41] Yin emphasizes that case studies, to be successfully completed, should encompass a variety of sources that, in turn, allow the researcher to obtain deep analysis of a given topic. Therefore, case study evidence may come from observations in the field, archival records, verbal reports, observations, interviews, focus groups, and even surveys or any combination of these. Case studies utilise research strategies that make it comparably scientific, just as if the researcher conducts an experiment, historical analysis, or

[37] Creswell, J. W. (2003). *Qualitative inquiry & research design: Choosing among five approaches*(2nd ed.). Thousand Oaks, CA: Sage Publications.
[38] Ibid.
[39] Morse, J. M., & Richards, L. (2002). *Readme first for a user's guide to qualitative methods*. Thousand Oaks, CA: Sage Publications.
[40] Yin, R.K. (2014). *Case study research: Design and methods*. Thousand Oaks, CA: Sage Publications.
[41] Ibid.

a simulation. Yin characterizes the case study design as a research strategy according to two purposes. First, it is an empirical study that investigates a contemporary phenomenon in the real-life context, especially when, second, boundaries between the phenomenon and context are not clearly evident.[42] This definition is suitable for this study on legal issues on, and surrounding, digital inheritance in the EU.

3.2. Population and Sample

In case studies, sampling is based on the rationale that cases are to be selected according to the depth of insight that may be gained throughout the investigation. Yin, whose comprehensive scholarship on the case study design, does not establish a standard number of samples in a case study. However, he refers to two sampling rationales in case study, namely, the single case study and the multiple or comparative case study. Typically, a researcher chooses the single case study for five rationales. These are to test a theory, such as in a critical single case study; investigate a unique or extreme case; (c) capture the essence of commonplace circumstances; (d) explore a phenomenon that for the first time, is available for social science inquiry, such as in the revelatory single case study; and investigate the same single case from at two different timeframes.[43]

Of these five rationales, this single case study on digital inheritance in the EU is a critical single case study. The critical single case study provides an "opportunity to determine whether the propositions of theory are correct" or whether there are alternative explanations or views regarding the phenomenon being studied that could be more relevant.[44] Hence, the critical single case, if carried out well, significantly contributes to knowledge and/or theory because it confirms, challenges, or expands, a given theory. For this critical single case study, the relevant theory pertains to succession law in the form of digital inheritance, which is an emergent phenomenon in today's societies.

[42] Ibid.
[43] Ibid., p. 49.
[44] Ibid., p. 51.

Meanwhile, this critical single case study uses the embedded design.[45] To note, an embedded case study covers at least two units, or objects that are to be studied. As will be discussed in the next section of this paper, the case study design, to be well-executed, should reflect a merging of different sources of evidence that is studied in subunits in order to be able to concentrate on various aspects of a case. For this single case study on digital inheritance in the EU, the smaller units being studied are EU member states that have been addressing issues on digital inheritance through legal frameworks and/or legislation – in light of the absence of a unifying legal approach in the EU. With the embedded design, the researcher gives equal importance to each subunit of design.[46] These subunits, the EU member states, enable extensive analysis, such that the researcher achieves the goal of obtaining a deep understanding of the phenomenon being explored in the single case study. Here, the term subunit is underpinned by the rationale that each of entails its own analysis. Therefore, in this single case study, digital inheritance in the EU is the single case and the subunits are the EU member states. Sampling for this case study is limited only to the EU because of the noted fragmentation in efforts to address the phenomenon being studied, as well as, because does not seek to generalize to a broader population, which is the norm in qualitative studied. However, by using the single case study design, the researcher can achieve analytical generalization to theoretical propositions.

3.3. Data Collection

According to Yin, data collection in case studies should come from different data sources, to result in a merging of said sources, data, and information. This could be the most difficult aspect of performing case studies although it is also of utmost importance due to need to thoroughly understand the phenomenon being studied. Yin provides examples of possible data sources for the single case study, which includes, personal or telephone interviews with key participants; demographic data; project documents and memoranda; empirical studies; scholarly analyses; and, illustrative materials, such as, professional documents and on-site observations.[47] Because of the

[45] Ibid.
[46] Ibid.
[47] Ibid.

need for converged sources, the case study researcher's main task is to determine whether evidence from different sources converges on similar facts.[48] For this case study, convergence is achieved because studies, scholarly discourse, and legal analyses from different EU member states are used as references.

However, since it is not possible to interview policymakers and lawyers in different EU states because doing so would mean high costs, this case study on digital inheritance in the EU uses only secondary sources, namely, published information accessed through electronic databases and reliable sources found online. Some of these include legal national reports about the topic, legal opinions, and, scholarly discussions about digital inheritance. Finding appropriate published sources has been challenging because it seems that the legal issues being studied in this paper are emergent ones. Nevertheless, a synthesized analysis may already be undertaken based on knowledge and information that have already been published. By taking this approach, it becomes possible to determine what is known and what has to be known regarding the topic.

3.4. Data Analysis

Data analysis will be through synthesis of information researched in this study on digital inheritance in EU member states, and, legal issues that have arisen. This synthesis and analysis are informed by the literature review in this paper, which does not focus on EU alone but on digital inheritance legal issues comprising a whole. What is important here is the convergance of multiple sources consistent with the case study method.

[48] Ibid.

4.RESULTS AND DISCUSSION

A search of literature reveals that there are five EU member states with published analyses or discourse on digital inheritance. These are Estonia, Netherlands, Poland, Italy, and Croatia.

4.1. Estonia

Under the Estonian Law of Succession Act (ELSA), the principle of universal succession governs digital inheritance through several provisions.[49] Moreover, Estonia's General Part of the Civil Code Act (GPCCA), legal succession, and concept of property, have all been regulated to cover digital inheritance. Based on these laws and provisions, one a person dies, all of his or her
rights and obligations at the moment of death are transferred to an heir, including, ownership of material things, as well as, rights and obligations resulting from these, including, any sale contracts. There are no limitations in the transfer of ownership and rights, which means to say that digital assets are also transferred to the deceased person's heir. However, it must be noted that assets may be transferred to only one entity, who could be either an heir or multiple several heirs jointly. As universal successor, the designated heir "automatically obtains the position of the legal predecessor as if no legal succession had occurred at all, simply replacing his or her predecessor in an existing legal relationship."[50]

Also, in Estonia's universal succession, the heir "enters into all the inheritable legal relations in which his or her legal predecessor participated before the transfer, whether or not the law or a will contains a rule confirming such a transfer."[51] Hence, even if a person dies intestate, digital inheritance automatically occurs and the assets transfer to the heir. If intestate, the intestate

[49] Mikk, T. & Sein, K. (2018). Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law. *Juridica International* 27, 117-128.
[50] Ibid., p. 119.
[51] Ibid.

successors are the closest relatives of the decedent, such as the spouse and children. As intestate successors, they are entitled to the digital estate of the deceased, along with other properties – both real and personal, tangible and intangible. Based on the laws and regulations, the automatic transfer does not depend upon the inheritor's desire to inherit individual assets, nor is it necessary for him or her to be aware of the existence of these assets.

The principle of universal succession in Estonia also makes sure that the deceased individual's property and other assets are transferred in their entirety, encompassing items that "may not even come to mind."[52] Essentially, an heir becomes the (a) owner of the deceased's assets; and (b) continues to assume all legal positions that may be transferred through succession. This means to say that any obligations, debts, ownerships, and rights are conferred on the heir. This legal system also makes provisions for any legal position that terminates upon death. However, these are only few, limited exceptions, and usually justified by the rationale that succession occurs only in assets, not in the deceased's personality.

In light of these, there is no existing barrier to the transfer of ownership and rights to digital assets under the principle of universal succession. Even the most personal property of the deceased transfer to an heir upon death, such as, letters and diaries, emails, private messages on social media and social networking sites, provided that they are stored on a hard drive or USB stick. In other words, if these private items are still stored on a computer upon the demise of the individual, ownership and rights to these automatically transfer to the heir. Estonia's laws and regulations pertaining to digital assets are fairly unique in EU, because the majority of member states do not have such provisions.[53] Just s importantly, the majority of EU member states do not have data protection rules pertaining to privacy, including, digital data. In Estonia, the Personal Data Protection Act of 2008, governs privacy rights to digital inheritance.[54]

4.2. Netherlands

In the Netherlands, when a person dies, laws such as the Burgerlijk Wetboek (BW) provide that

[52] Ibid., p. 120.
[53] Ibid.
[54] Ibid.

heirs succeed to the rights to whatever the deceased owned, including, digital assets.[55] There is no need to formally transfer the individual assets or patrimony to the assets as a whole such as through contracts or wills, because these occur naturally, including, copyrights. This is similar to how Estonian law operates as regards digital inheritance. Thus, the heirs automatically "step into the shoes of the deceased as it were, also referred to as the principle of *saisine*." Because digital assets are considered as regular assets, there are no specific rules governing the transfer of digital inheritance. In other words, an heir inherits digital assets in the same way as any other asset. According to Dutch law, rights may transfer to the heir, to whatever the deceased person owned or held, regardless of whether this may be digital or materials. Just like Estonia, contracts continue jointly because they merely transfer in rights, ownership or obligations, to the heirs unless a contract specifically states that these should not happen.[56]

However, issues may arise when the deceased person has given on certain digital assets particularly since there are exceptions to the transferability of digital assets. For example, a claim made relative to a particular digital content may be inherited by heirs but cannot be made the subject of a bequest unless contracts are discussed first.[57] Contracts for digital services are discussed first, to settle any concerns about licenses and legatees. For contracts on digital services, Dutch law says that heirs step into the position of the deceased in the contract, unless the latter states otherwise – just like in Estonia. Terms and conditions applicable to the specific contract for digital services should be reviewed to determine the rights of the heirs under the contract. Meanwhile, on issue of licenses and legatees, some digital services are only available through licensing, such as, media streaming services of Spotify and Netflix.[58] Other services accessible through Instagram require licenses that users (copyright holders) grant to authorize operation. These are licenses not only for copyrighted materials, including, music, photos and videos, but also software. In these cases, the heir also succeeds the rights of deceased individual.

[55] Berlee, A. (2017). Digital Inheritance in the Netherlands. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082802
[56] Ibid.
[57] Ibid.
[58] Ibid.

Lastly, in the Netherlands, it is usually assumed that privacy rights are personality rights and as such, are not inheritable because personality rights end when a person dies. This is in relation to civil law where a person is given personality upon birth and it also ends upon death. Therefore, once that personality ends, so is the right to privacy. Still, the person's activities may be covered by privacy law prior to his death. Due to specific legal arrangements, authors have the right to privacy even if they pass away as the privacy sought to be protected pertains to activities done prior to a person's death. This is embodied in Article 13 of the Netherland's Constitution, referred to as postal-secret, which is currently also being revised to clearly cover electronic communication. According to Article 13, the privacy of the telephone and telegraph is inviolable and they may only be violated upon the instances laid down by Acts of the Parliament and with authorisation from the proper authorities. [59]

4.3. Poland

Published literature on Poland's approach to digital inheritance is unlike that of Estonia because it highlights the conflicts and issues in the said matter.[60] The underlying framework for digital inheritance under Polish law is established in the Fourth Book of the Civil Code (4th Book). The cornerstone of the 4th Book is the delimitation of a range of inheritable assets. In principle, according to Section One of this provision, it covers "all the patrimonial rights and duties of the deceased, which have the civil law character."[61] In other words, patrimonial rights are those which have corresponding monetary value, and these are the ones covered under the said provision. Most of the issues pertaining to digital inheritance in Poland are with regards to social media. The digital inheritance problem in Poland, as in other EU member states, is based on the concept of succession on patrimonial nature of an asset.[62] In turn, patrimonial nature of law is enshrined in Polish doctrine and case-law as an economic right that may be transferred to heirs during the lifetime of the asset

[59] Ibid.
[60] Grochowski, M. (2019). Inheritance of the Social Media Accounts in Poland. *European Review of Private Law/Revue Européenne de Droit Privé/Europäische Zeitschrift Für Privatrecht*, *27*(5), 1195–1206.
[61] Ibid., p. 1196.
[62] Ibid.

owner or at least, after death. The doctrine also generally assumes inheritability, unless there are contradictions in laws and regulations. With regards to social media, in many instances, these are patrimonial in nature especially if owned by companies or entrepreneurs thereby possessing economic or market value. One main concern revolves around personal accounts that may overlap with intellectual property rules, and may include photographs, and original written works. By nature, such items are inheritable as patrimonial.

Private law in Poland does not infuse rules relating to succession and the subsequent use of copyrighted assets or assets with intellectual property rights. Consequently, these are inheritable under the unified legal regime, along with all the other assets of the deceased individual. Similarly, Polish contract law is strict when it comes to the personalization of digital assets after the owner dies. This is because of the contractual agreement between online platforms and users that underpin an online account.[63] Such agreements encompass a broad range of legal constructs, that complicate the framing of the relationship between an online platform and user. The core idea here is the online platform provider's obligation to deliver services to users in order to maintain their account.

4.4. Italy

Italy is in the process of developing its legal and regulatory framework for digital inheritance.[64] This framework adapts to EU's General Data Protection Regulation
(GDPR), and is called as the Legislative Decree Number 101 of 2018 (LD101), a legislative reform.[65] There are no case laws in Italy pertaining to digital inheritance; however, even before LD101 was passed, some legal scholars in Italy were already anticipating problems related to digital inheritance and analyzed juridical implications comprehensively. The most relevant provision here is Article 2, which addresses the rights of deceased persons. This provision states that rights included in Articles 15 to 22 of the GDPR addressing deceased persons may be exercised by an individual who acts according to his or her own interests to safeguard the interests and rights of the deceased, as an agent

[63] Ibid.
[64] Patti, F.P. & Bartolini, F. (2019). Digital inheritance and post mortem data protection: The Italian reform. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397974
[65] Ibid.

or as a member of the family. Sometimes, these rights cannot be exercised legally in the event that the data subject has been prohibited through a written statement, such as, a will. However, if there is clear, specific, freely-given and informed instructions in a will about the protections of the rights of the deceased, then protection and retrieval of digital data may be done even if the person has already passed away. Such provisions prevent problems pertaining to the entire personal data of the deceased that may conflict with the policies of third parties, including, ISPs that may control the circulation of personal data, such as digital data in emails and social networking sites.

Moreover, Italian laws provide that the contractual relationship between a dead person and the online platform falls within the concept of universal succession.[66] It appears that Italian law adapts the notion that the heir to other properties must in essence also inherit the digital estate of the deceased. However, unlike Estonia, the application of the universal succession to digital assets is much limited in Italy because of concerns that "contracting parties may exclude having their relationship pass to the heirs, due to the non-mandatory character of the rule."[67] When there are no exclusions, in Italy, the heirs may be allowed access to the accounts of the deceased person as successors. Nonetheless, a remaining problem with the Italian legal framework is potential conflict that may arise between different people that have legitimate interest in the digital assets and data of the deceased.[68] This is one area that Italian law could integrate in its provisions so that there is a clear guidance on how this type of situation is treated.

4.5. Croatia

In the Croatian legal system, there are currently no rules specifically regulating digital inheritance.[69] However, a close analysis of the general rules on inheritance articulated in Croatia's Inheritance Act (IA), does not reveal justifications for digital inheritance under the same conditions given to tangible assets. This is different from the other countries that adapt the principle of universal succession as it

[66] Ibid.
[67] Ibid.
[68] Ibid.
[69] Klasicek (2018), *supra nota* 19

relates to digital estate.

In many countries, when a person passes away, whatever property is left is inheritable by heirs or cannot be inherited by the heirs for different reasons. For instance, a given asset is not owned by the deceased person when he or she died, may have ceased to exist after he or she dies, due to its legal nature – such as, "the right of personal easement according to the Law on property and other property rights."[70] At other times, circumstances dictate that assets are inherited by people other than the descendant's heirs, such by donation or contracts on lifelong support. Nevertheless, generally, succession law in Croatia states that digital assets are non-inheritable.[71] This is highly problematic in some instances because online accounts could not be accessed by the heirs and they may be subjected to hacking. The decedent may have opened certain online accounts that include financial information. The heir's purpose in retrieving these information is to prevent their parties or even the site owners to appropriate for themselves these information. But since the law does not sanction universal succession, then, the heir's remedy is likely to ask for injunction from the court in order to obtain these information.

However, it is notable that there have been increasing observations that law reform should be undertaken to make digital assets heritable in Croatia and at the same time, make the distinction between digital and tangible assets.[72] There have been calls for such legislation to take into account password protection in digital assets, the types of inheritable data stored in ISPs' servers, as well as, licensing of digital assets that expire at death. This is clearly important and timely because people use the Internet in many ways, from shopping to banking, to social media platforms. The absence of legislation relative to digital inheritance could put many people at risk of identity theft, which in turn, could also cause damage to their whole estate.

Meanwhile, with regards to individuals who die intestate, which is very common in Croatia, the rules, like most legal systems, reflect the usual matters that people generally expect and desire from wills. However, the Croatian view here is that nobody really knows for sure what a deceased person

[70] Ibid., p. 1054.
[71] Ibid.
[72] Ibid.

would want regarding his or her property, including, digital assets, after the person has died. In the case of digital assets, nobody is certain whether the deceased person would want access to his or her digital assets that are typically held in privacy, or whether heirs should inherit these assets and see what these contain. When it comes to digital assets, Croatian analysts seem to disagree whether the lack of clearly articulated wishes in a will should be replaced by presumed consent. Nonetheless, there is agreement among analysts that digital assets, particularly those that are password protected, are different from tangible assets thereby warranting greater attention and action from lawmakers.[73] At this point, Croatia has not yet articulated a comprehensive law governing digital assets and digital inheritance.

[73] Ibid.

CONCLUSION

This study seeks to address three research questions:

1. How is digital inheritance being managed in the EU?
2. What European countries have laws dealing with digital inheritance?
3. What are the underpinning legal frameworks, and similarities and differences between these approaches to digital inheritance?

As regards the first question, digital inheritance is a recognised issue in the European Union because of the amount of information being stored online, including the possible ramifications to the heirs and the estates after the decedent's death. Currently, there is no unified way of managing digital inheritance in the EU. However, it is increasingly becoming clear to some member states that the topic of digital inheritance needs to be confronted due to the massive use of digital technologies in nearly every sector of society. In addition to this, people are continuing to accumulate digital assets while they are alive and while digital content is subject to laws and regulations, their inheritance is not. Unfortunately, EU has not dealt with these matters in a singular manner. Therefore, it remains unclear whether the EU will allow the decedent's right to privacy, and whether access to other digital assets with economic value should be permitted. At this point in time, it is the EU's GDPR, newly implemented in 2018, that confers on individuals the right to obtain copies of their own data that ISPs hold, as well as, request the deletion of such data. However, the GDPR does not address digital inheritance because it is applicable only to living persons. The clamour from member states for a unified law to govern the entire bloc may likely result to legislation pertaining to digital inheritance in the near future.

As to the second question, while the EU as a whole has no legal framework to govern digital inheritance, some member states have decided that it is reasonable and even important to begin considering digital inheritance laws. There are those that have put in place clear legal provisions on

digital assets and how they should be disposed of once the owner passes away. Although there have been several countries that have begun working on digital inheritance, such as, Germany and the United Kingdom, unfortunately, their scholarly works are not fully published. EU member states that have published works and/or analyses on digital inheritance are studied in this case study, namely, Croatia, Poland, Italy, Netherlands, and Estonia.

Finally, on the third question, the similarities among all of these member states with digital inheritance initiatives, is that any laws they develop should be tied to the GDPR because the overarching legal framework that the EU uses for succession-related matters. However, the five before mentioned member states found the need to expand upon the GDPR so that they can more precisely address issues pertaining to digital inheritance. The common issues that these five member states have in common are (a) patrimonialism which accords economic value to digital assets that may make these more difficult to legally address since there are various parties interested in the assets; (b) continuing rights to privacy of deceased individuals; (c) contracts with third parties that the deceased person may have entered into regarding rights to the digital assets that the third party may seize after the death of the individual; and (d) intestate deaths.

Of the five cases analyzed in this paper, it seems that Estonia is leading the way in addressing digital inheritance. Other member states of the European Union – and the EU itself – can take their cues from Estonia. The EU can decide to adopt a universal approach to digital assets as this can simplify issues of ownership and succession. In doing so, the rest of the EU states can also create their own laws that reflect this approach.

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