

Inheritance of the Social Media Accounts in Poland

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1 Social Media Accounts Post-Mortem: Three Dimensions

The challenges for the existing legal framework, entailed by the Internet revolution, to a growing extent tackle also on the problems of inheritance law. The Bundesgerichtshof's decision of 12 July 2018 (III ZR 183/17) serves as a clear epitome of the complexity of questions triggered by the increasing transfer of private and market activity into the digital realm. The problem of inheritability of digital assets consists of at least three more particular dimensions. (a) Above all, it is the issue of getting access to the deceased's account – especially, to its publicly unavailable content. By answering this question, BGH tackled also on two other dimensions of the problem. (b) As has been implicitly claimed in the judgment, the question of inheritance of an account is also interconnected with succession over particular assets stored on this account. In particular, access to an account may be a necessary prerequisite for exercising entitlements over particular assets, e.g. to download an item subjected to one's intellectual property right, such as a photograph or a video recording. (c) The problem of digital inheritance exceeds also beyond the traditional domain of private law succession rules and constitutes a compound nexus, which combines elements of inheritance, contract, and public law (in the latter regard e.g. privacy and data protection).

Observed from the Polish perspective, the judgment opens a new interesting chapter in the discussion over the concept and legal framework of 'digital inheritance', initiated a few years ago and encompassing so far several contributions¹ that attempt to incorporate this notion into the existing schemes of private law. The BGH judgment brought the issue into wider public attention and triggered media coverage. The matter still lacks, however, a direct voice of Polish courts. From this perspective, the decision of BGH, along with previous US case-law,² may provide a clear point of reference for the

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1 See especially the recent monography by M. Mądel, *Następstwo prawne treści cyfrowych na wypadek śmierci*, Warszawa 2018 and the further papers and blog entries referred to in the subsequent footnotes.

2 Especially, the *In Re Ellsworth* case, decided by the Probate Court of Oakland County, Michigan with an Order to Produce Information of 20 April 2005, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005), the milestone in development of a digital inheritance concept; see also M. Mądel,

Polish legal system. To discuss its relevance, the following observations will focus on the issues related to a particular fraction of digital assets³ – i.e. the accounts on online platforms and the items stored at them by them by users.⁴ In major part, these remarks may be referred also to post-mortem fate of other types of a digital assets.⁵

2. Patrimonial Character of Rights

The foundational framework for digital inheritance under Polish law is set in the 4th Book of the Civil Code (hereinafter: ‘CC’) on succession law.⁶ Its cornerstone is article 922, which delimitates the array of inheritable assets. In principle, according to § 1 of this provision, the subject to succession are all the ‘patrimonial rights and duties of the deceased’, which have the civil law character. This general formula is of pivotal importance for the digital inheritance problem in Poland, along with other European countries that base the concept of succession on patrimonial nature of an asset.

The notion of patrimonial character is commonly defined in the Polish doctrine and case-law by reference to the economic role of a right. It embraces items that typically represent economic (proprietary) interests,⁷ and which usually⁸ can be ascribed an pecuniary worth, expressed through its price.⁹ Rights in this sense can be also transferred upon the others during the lifetime of the entitled

‘Następstwo prawne treści cyfrowych z perspektywy prawa Stanów Zjednoczonych Ameryki’, 7. *Prawo Mediów Elektronicznych*, 2016, pp 40 f.

- 3 Polish law defines digital content in consumer contracts provisions that implement the EU 2011/83/EU directive on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p 64). This notion does not exhaust, however, the entire array of digital assets that may become subject to inheritance (P. Szulewski, ‘Śmierć 2.0. – problematyka dóbr cyfrowych post mortem’, in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, ed. J. Gołaczyński, J. Mazurkiewicz, J. Turłukowski, D. Karkuta, Wrocław 2015, p 734).
- 4 The notion of an online account is by nature descriptive and encompasses a heterogenous pool of elements, which varies across particular platforms and particular accounts (see also D. McCallig, ‘Facebook After Death: An Evolving Policy in a Social Network’, 22. *International Journal of Law and Information Technology*, 2014, p 112).
- 5 Such as e-mail accounts, blogs and other forms of structured sets of digital objects – cf. Cf. K. Sherry, ‘What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social Media Assets Postmortem’, 40. *Pepperdine Law Review*, 2012, pp 193–198; J. Conner, ‘Digital Life After Death: The Issue of Planning for a Person’s Digital Assets After Death’, 3. *Estate Planning & Community Property Law Journal*, 2010–2011, pp 308–314.
- 6 Act of 23 April 1964, consolidated text: Dziennik Ustaw 2018, item 1025 with further amendments.
- 7 See generally W. Borysiak, *Dziedziczenie. Konstrukcja prawna i ochrona*, Warszawa 2013, pp 174–182.
- 8 Cf. M. Mądel, *Następstwo prawne*, p 149.
- 9 See also A. Wolter, J. Ignatowicz & K. Stefaniuk, *Prawo cywilne – część ogólna*, Warszawa 2018, p 138 and S. Grzybowski, in *System prawa cywilnego*, vol. 1, *Część ogólna*, Warszawa 1974, p 231

person¹⁰ or at least after her demise.¹¹ At the same time, the doctrine advocates the general presumption of inheritability, unless it is possible to evidence the opposite solution.¹²

Accounts on social media platforms encapsulate a broad variety of digital assets, of various form and character. In many instances, they have clearly patrimonial character, in the other however, this qualification can be more debatable. Beyond a doubt, patrimonial nature can be attributed to the accounts owned by firms or individual entrepreneurs and used as an element of business or professional activity. In this regard accounts are often commodified and constitute market-based value.¹³ This pertains not only to the accounts utilized as the main tool of market activity (e.g. when an account is used as the only way of advertising goods or services), but also to those that create a significant additional value to the entrepreneur's assets (e.g. when the account is used to communicate with customers or for reputation-enhancing purposes).¹⁴

Even more complicated in this regard is the question about patrimonial character of assets used beyond any business and professional activity. Hypothetically, it would be possible to advocate a different solution, claiming that in principle all the content of an online account should be considered as patrimonial.¹⁵ This solution could have clearly pragmatic worth, it seems, however, dubious in two regards. First of all, Polish law does not provide any clear ground for such generalization. The prerequisite of patrimonial character set forth in article 922 § 1 CC clearly requires examination of every particular asset. Moreover, the intrinsic vagueness of this premise has evident value for flexibility of inheritance law. It allows to maintain sensitivity of article 922 § 1 CC towards peculiarities of particular cases (by allowing to decide, whether the particular asset constitutes patrimonial value for the deceased and heirs involved) and towards the general evolution of the market (by enabling inheritance law to react to commodification of particular assets in market practice¹⁶). Secondly, as will be discussed in point 5, in particular instances the general inheritability of digital assets could infringe other rights, especially privacy and personal rights of the deceased or third parties (though obviously it cannot serve as a self-

10 See also M. Pyziak-Szafnicka, in *System Prawa Prywatnego*, vol. 1, Prawo cywilne - część ogólna, ed. M. Safjan, Warszawa 2012, p 821.

11 Exceptionally, it is possible to inherit a right (e.g. to preempt or repurchase of a good), which cannot be transferred *inter vivos* (see e.g. judgment of the Supreme Court of 9.1.2008, II CSK 394/07, OSNC 2009 no. 2, item 35).

12 W. Borysiak, in *Kodeks cywilny. Komentarz*, ed., K. Osajda, Warszawa 2018, commentary to Art. 922, item 129.

13 See also P. Szulewski, 'Śmierć 2.0.', p 743.

14 Cf. point 4.

15 See also S. Cydzik, 'Facebook zmarłego poza zasięgiem', Rzeczpospolita, 21 October 2016.

16 Cf. e.g. N.S. Cohen, 'The Valorization of Surveillance: Towards a Political Economy of Facebook', 22. *Democratic Communiqué*, 2008, pp 7 f and *passim*.

standing argument for or against a patrimonial character of rights).¹⁷ From this perspective, the definitive assertion of patrimonial character of rights could lead to grossly disproportionate results and seems rather unconvincing.

The general notion of patrimonial rights under article 922 § 1 CC partially overlaps with the intellectual property rules. This is the case, in particular, for digital assets that are products of individual's creativity (such as photographs, short narratives and pieces of poetry). Items of this kind are, by nature, inheritable as patrimonial – except for rather unlikely situations, where they would fall within the scope of article 922 § 2 CC, discussed in the next point. Polish private law does not introduce any particular rules regarding succession and subsequent use of the assets subjected to copyright or other types of intellectual property rights. They are, hence, inherited under the unified legal regime, along with all the other assets of the deceased account user.¹⁸ The only exception in this regard, applicable to correspondence of the deceased (grounded in protection of intimacy and other personal interests of the deceased and third parties) is discussed further in point 5.

3. Rights and Duties Inseparably Connected with the Deceased

Another set of questions arise upon article 922 § 2 CC, which excludes from inheritance 'rights and duties of the deceased that are strictly and personally related to her', as well as rights that are passed directly to specific persons under particular provisions. All of these rights and obligations extinguish after the entitled person passes away. The instances identified in doctrine and case-law are sorted into a few general categories¹⁹, the Polish doctrine is however equivocal, to what extent any of them may apply to online accounts. Some of the authors oppose this possibility entirely, claiming that a social platform account can by no means serve individual purposes only, since it functions as an element of a network, which benefits all of its users (by sharing digital content and building interpersonal connections).²⁰ The others question this view, pointing out that the principal purpose of every account is satisfying individual needs, of both economic and non-economic (e.g. emotional) nature. In general, the vast part of online accounts undoubtedly falls outside the scope of article 922 § 2 CC (which is also in line with the

17 See also point 6.

18 Cf. P. Szulewski, 'Śmierć 2.0.', p 746.

19 See e.g. W. Borysiak, in *Kodeks cywilny*, commentary to Art. 922, items 133-136, who, summarizing the previous views in the doctrine and judiciary, distinguishes in this regard: (a) rights which function is to address solely particular, individual interests, according to the personal situation of the entitled person; (b) rights which content is contingent on individual needs of the entitled person; (c) contractual rights and duties which has been shaped in relation to personal features of the particular contractor (e.g. her unique skills); (d) rights and duties that base on the one-sided or mutual strong trust between parties.

20 M. Pietrzak & P. Babiańczyk, 'Co się dzieje z kontem na Facebooku po naszej śmierci? Dopuszczalność dziedziczenia konta użytkownika serwisu społecznościowego – aspekt cywilnoprawny', 7 *Kwartalnik Krajowej Szkoły Sądownictwa i Prowatury*, 2017, p 63.

view expressed by BGH). Online platforms offer usually standardized services, which are not tailor-made regarding personal interests and features of their users.²¹ Also in this regard, alike for article 922 § 1 CC, all-embracing formulas seem rather unjustified and each particular asset requires individual scrutiny.²²

At the same time, Polish contract law leaves parties with an insular margin of flexibility in personalizing the post-mortem fate of digital assets. It arises upon the nature of the contract between a platform and a user that underlies maintenance of an online account. Agreements of this kind encapsulate a diverse cluster of legal constructs, which frame various dimensions of a bond between a platform and a user. The pivotal element of this agreement is platform's obligation to render services related to maintenance of the account²³ (typically remunerated through access to user's data).²⁴ Under article 750 CC, service agreements are regulated by provisions on mandate contracts, which apply to them *mutatis mutandis*, amongst them by article 747 CC. Under this provision, parties can stipulate that an agreement will be dissolved straight-away after the decease of the recipient of services. The underlying rationale of this provision is the personal relation which, depending on circumstances, may underpin mandate (and hence, service) contracts.²⁵ Resting on this possibility, the platform-user agreements may provide that the account will be deleted, entirely or in part, after the user's decease. The general scheme of the mandate contract, applied to service agreements, makes a big part of these clauses enforceable under Polish law.²⁶

4. Inheritance of an Account vs. Inheritance of Its Content

The general frame set in article 922 CC leaves a substantial problem open: whether the actual subject to succession are particular assets stored on the account or the account in its entirety.

In other words it should be distinguished, whether the heir of a deceased account user bequests entirely her rights and duties under a contract with an online platform or whether the platform is obliged merely to grant this person access to the digital assets stored on this person's account.²⁷ The resolution of this conundrum

21 P. Szulewski, 'Śmierć 2.0.', p 744.

22 M. Mądel, *Następstwo prawne*, p 162.

23 M. Pietrzak & P. Babiańczyk, 'Co się dzieje z kontem', pp 59 f.

24 Cf. Ł. Goździaszek, 'Likwidacja tożsamości na portalu społecznościowym', in *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, ed. J. Gołaczyński, J. Mazurkiewicz, J. Turłukowski & D. Karkuta, Wrocław 2015, p 302; M. Pietrzak & P. Babiańczyk, 'Co się dzieje z kontem', p 64.

25 In a similar way, on applicability of Art. 747 CC to online accounts, M. Mądel, *Następstwo prawne*, pp 169-173 and M. Pietrzak & P. Babiańczyk, 'Co się dzieje z kontem', p 59.

26 See also point 6.

27 M. Załucki, "'Facebook", "Twitter", "MySpace" ... wirtualny świat serwisów społecznościowych mortis causa', 3. *Wrocławskie Studia Sądowe*, 2014, p 241; on the similar controversy P. Szulewski, 'Śmierć 2.0.', pp 747 f.

seems quite complex, considering the current legal framework and remains generally contingent on the features of the particular asset and the account.

In typical settings, accounts established by online platforms function in two interconnected dimensions. First of all, they provide a space for collecting various types of digital content (such as photos, text messages and audio files) for personal use or for sharing with others. Secondly, they create a channel of expressing one's own thoughts and emotions by sending information open publicly (e.g. tweets) or available for a limited number of recipients (e.g. via Facebook's Messenger app). In doing so, communication via online platform account builds directly on the sphere of values proper for the particular user, which under Polish private law is typically encompassed by the notion of 'personal rights (personal interests)'. This category includes, *inter alia*, individual emotions, features and intimate life sphere of the platform's user.²⁸ In this way, with the death of the account owner all the personally-linked assets, such as reputation, freedom from defamation and personal identity exist no longer and thus cannot be transferred upon heirs.²⁹ In a consequence, inheriting an account does not confer upon them a right to use this account in the same way as it would be available for the original user³⁰ (e.g. to post content or send messages in a way as it would be available for the original account user).³¹

This conclusion does not pertain however entirely to the accounts used for non-private purposes. In these situations, the account may constitute a substantial value in itself, which could provide a strong rationale for inheriting it as a one prearranged whole. This pertains especially to the accounts used for business purposes, where the possibility to continue using the account in a usual way constitutes an economic value in itself. This value can be measured also by reputation associated with an account, which in many instances is commodified and increase the economic value of the account. Although in particular circumstances the market rationale may conflict with the identity or other individual interests,³² in typical instances, however, the account will constitute a patrimonial value in the

28 The notion of these rights is set in Art. 23 CC, which defines them by (non-exhaustive) enumeration. Amongst them the provision lists, for instance: freedom, dignity, name or pseudonym, image and privacy of correspondence.

29 See e.g. P. Szulewski, 'Śmierć 2.0.', pp 744 f.

30 P. Szulewski, 'Śmierć 2.0.', p 743; Ł. Goździaszek, 'Likwidacja tożsamości', pp 304-306.

31 The Polish legal doctrine and judiciary allow - to a limited extent - for protection of personal rights of a deceased person; see generally Z. Lisowska, 'Dobra osobiste zmarłych i możliwość ich ochrony w Internecie', 7. *Prawo Mediów Elektronicznych*, 2016, *passim*; M. Mądel, *Następstwo prawne*, pp 232-241.

32 The possibility to inherit directly the account may infringe the personal rights of the other people that may be connected with or derived from the personal sphere or individual characteristics of the deceased. This pertains, in particular, to protection of post-mortem veneration of the dead, which is considered to constitute an independent personal value protected under Polish law. This issue is also referred to in the context of post-mortem fate of online accounts - cf. M.

sense of article 922 § 1 CC. In this situation – unless any strong interest to protect individuals exists – the account should be deemed inheritable.³³

5. Personal Belongings

Polish legal system did not develop a separate way of qualifying personal items, such as letters, diaries or collections of photographs. They are subjected to the general requirement of patrimonial character, under article 922 § 1 CC, without any more precise doctrines in the statutory provisions or in the case-law. In this regard, Polish inheritance rule differs from the assertion in the motives of the BGH decision, which compares Facebook account's content and the personal items of sentimental or intimate nature. As a result, instead of drawing a parallel with the personal belongings in the non-digital world, Polish court would presumably proceed directly towards examination of the patrimonial character of particular assets. In most typical cases, the final outcome of this reasoning is likely to resemble the findings of BGH. The bulk of private items, such as diaries, letters, and memorabilia, is a subject to ownership and as such has a material (patrimonial) character and can be attributed economic value (even if in market terms it was neglectable).³⁴

Polish law deviates from this general approach regarding correspondence of the deceased. It introduces in this regard a higher standard of protection, considering in particular possible violations of privacy of the others. With a view to balance the involved interests, it precludes from dissemination of the deceased's correspondence before twenty years since the user's passing away without permission of her spouse or, subsequently, its descendants, parents, and siblings. Only the addressee of the correspondence can revoke or modify this protection.³⁵ Since the rule does not constrain the concept of correspondence, it can embrace any sort of letters, regardless of their form and channels of communication. In a consequence, the limits on post-mortem proliferation of correspondence may apply to messages sent through online accounts and stored on them.³⁶ This does not limit, however, the access to correspondence by the successors of the account owner.³⁷

Pietrzak, P. Babiańczyk, 'Co się dzieje z kontem', pp 66 f; M. Mądel, *Następstwo prawne*, pp 239-241. M. Pietrzak, P. Babiańczyk, 'Co się dzieje z kontem', p 66.

33 This view is shared also by P. Szulewski, 'Śmierć 2.0.', p 743; Ł. Goździaszek, 'Likwidacja tożsamości', p 304.

34 See also M.-O. Mackenrodt, 'Digital Inheritance in Germany', 8. *Journal of European Consumer and Market Law*, 2018, pp 42 f.

35 Art. 82 of the Act of 4.2.1994 on copyright and related rights, consolidated text: Dziennik Ustaw 2018, item 1191 with further amendments.

36 Cf. M. Pietrzak, P. Babiańczyk, 'Co się dzieje z kontem', p 65; M. Mądel, *Następstwo prawne*, pp 224 f, 229 f.

37 Generally on admissibility of inheriting the deceased's digital correspondence M. Mądel, *Następstwo prawne*, pp 231 f.

In the outcome, it could be claimed that if the account user intends to keep her personal data (e.g. non-public photographs or private messages) out of the access of her successors, she should manually remove them from the account. This would not be profoundly different from the non-digital world practice of destroying intimate personal items by the owner, to prevent others from accessing it after her demise. The case of online platforms is, however, more complex in this regard. They cannot be considered merely as ‘virtual drawers’ for collecting and storing digital personal items. They create a much stronger link of trust between themselves and the users, which encompasses also reliance on protection of secrecy of data. Mostly for these reasons, a significant number of platforms (including Facebook in the case decided by BGH) in principle precludes access to the account for anybody else than the account user and maintains this prohibition also post-mortem. This observation is, however, not categorical. If the personal items are inheritable under article 922 CC (which, as has been said, is typically the case in practice), the inheritance rules are, nonetheless, enforceable against the data protection policies implemented by a platform.³⁸

6. User’s Dispositions Upon Death

The digital content – along with other assets inheritable under Polish law – can be also subject to autonomous disposition in the will of user’s account. This way allows, however, only to indicate the heirs and their share in the total value of the inheritance – and it cannot ascribe particular assets to defined successors. The latter requires the share of the inheritance (by an agreement between the heirs or by court ruling) and can take place only after the account user’s passing away. The only exception in this regard is specific bequest (*legatum per vindicationem*),³⁹ which allows to distribute particular assets upon death. Though the applicability of this instrument to non-tangible objects is not entirely certain in the doctrine,⁴⁰ more arguments seem to support the view that any digital asset that can be inherited can be also transferred as a specific bequest.

In these instances, though Polish law allows for imposing through a will or through a specific bequest enforceable obligations upon others, their practical importance for digital assets is limited. This pertains also to committing heirs to particular dispositions over an account (e.g. deleting it or removing a part of its content). As a result, wills made under Polish law cannot effectively allow to cover all the post-mortem matters of an online account (except for their solely patrimonial aspects),⁴¹ and to create thereby an enforceable ‘social media will’ envisaged in

38 See also point 7.

39 Regulated since 2011 in Art. 981¹-985 CC.

40 Cf. M. Mądel, *Następstwo prawne*, pp 190-192.

41 On this matter also A. Bielajew, ‘Cyfrowy spadek – o potrzebie regulacji “wirtualnej śmierci”’, <http://techlaw.pl/cyfrowy-spadek-o-potrzebie-regulacji-wirtualnej-smierci/> (1 December 2018).

the scholarship.⁴² Although under article 892f CC an order (*modus*)⁴³ or specific bequest could create in principle an enforceable right for the successor, their enforcement would be quite compound. It should require at least establishing an executor of a will, who could claim from heirs to dispose of the digital assets in a particular way. In the most common instances, this solution seems technically too complex and hence, hardly feasible, for inheritance of the social media accounts.

7. Private-Made Inheritance Rules

One of the most peculiar features of the social platforms sector is its strongly self-regulatory character. Platforms operate as *de facto* rulers of social groups composed of their members, setting forth compound regulatory frameworks. They are established typically through standard terms, included in user agreements and applicable to all online accounts. Rules set forth in this way tackle also on handling the account and its content after the user's death. Most of these rules focus on the technical way of allowing access to the deceased's account and to the future way of its continuance⁴⁴ (only rarely they provide for post-mortem closure of an account).⁴⁵ By enacting these terms, platforms tackle directly upon the issues typical for inheritance law, framing post-mortem transfer of entitlements to the account and its content. In other words, in doing so platforms create idiosyncratic sets of succession rules, parallel to the state-made inheritance provisions.⁴⁶

The structure of this relationship is contingent on the general principle of exclusivity of will as a way of voluntary allocation of digital assets in the Polish inheritance law. The key element of this system in article 1047 CC, which precludes in principle any contracts concerning succession to a living person. This general mandatory rule does not embrace in particular contracts with third-party effects - such

42 E. Harbinja, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology', 31. *International Review of Law, Computers & Technology*, 2017, pp 34 f; *eadem*, 'Digital Inheritance in the United Kingdom', 7. *Journal of European Consumer and Market Law*, 2017, p 255.

43 Cf. P. Księżak, 'Żądanie wykonania polecenia', 28. *Przegląd Sądowy*, 2006, p 49; a divergent view is presented by M. Mądel, *Następstwo prawne*, p 180.

44 Such as the Facebook 'in memoriam' account; on the concepts set in this regard by online platforms see also e.g. E. Harbinja, 'Digital Inheritance', pp 254 f; N. Kutler, 'Protecting Your Online You: A New Approach to Handling Your Online Persona After Death', 26. *Berkeley Technology Law Journal*, 2011, p 1649.

45 Cf. D. McCallig, 'Facebook After Death', p 113; N. Kutler, 'Protecting Your Online You', pp 1645-1649; N.M. Banta, 'Inherit the Cloud: The Role of Private Contracts in Distributing or Deleting Digital Assets at Death', 83. *Fordham Law Review*, 2014-2015, p 818.

46 Currently, rules of this kind have been introduced not only by social platforms (such as Facebook and Twitter), but also by other providers of online services, who offer users a possibility to open an account, which allows to store digital content (e.g. Google and Yahoo); on the parallel state- and private-created regulatory regimes in the digital domain see also M. Grochowski, 'Spontaneous Order in the Sharing Economy? A Research Agenda', 13. *Studia Prawa Prywatnego*, 2018, pp 75-85, along with further contributions referred to there.

as the ‘succession’ clauses in user agreements of social media platforms. For obvious reasons, policies of this sort are enforceable before Polish courts only to the extent that does not contradict or overcome the statutory inheritance law. Any clauses that reach beyond these frames (e.g. by prohibiting a transfer of inheritable assets upon the heirs) are deemed null and void and hence, ineffective.⁴⁷ This complies with the BGH decision not to enforce Facebook’s privacy policy against the account user’s successor, as non-compliant with compulsory rules of succession law.

It does not mean, however, that rules produced by a platform are entirely irrelevant for the succession regarding the account. They may be pertinent in two typical instances. They may govern a transfer of assets that fall outside the ambit of article 922 § 1 CC and thus are non-inheritable under Polish law.⁴⁸ Quintessentially, however, they supplement the general rules on inheritance, by providing the instrumental framework for their application. They set particular technical rules that determine the way of opening access to the account to user’s heirs, transferring particular assets upon them. In other words, while classic inheritance law answers mostly the question ‘who’, private-made rules tackle on the issue ‘how’ the succession should be brought through.⁴⁹ The inheritance provisions contained in the user agreement may, for instance, govern the way, how the user’s heir will obtain access to the bequeathed asset.⁵⁰

From the succession law perspective, the agreement concluded between the platform and the original user is binding also upon her heirs. They enter the complete contractual setting established by the predecessor, becoming hence a new party to an agreement with a platform.⁵¹ As a result, they take over all the contractual rights and duties that arise from the contracts, except for those that are not inheritable under article 922 § 2 CC. For these reasons, the successors of the account user are bound also by the post-mortem policies set by platforms. This embraces also all the possible restrictions in accessing or managing the account (e.g. through the Facebook ‘*in memoriam*’ status⁵²).

47 See also M. Załucki, “‘Facebook’, ‘Twitter’, ‘MySpace’”, p 241.

48 Further on the will-based changes to inheritability of an asset W. Borysiak, *Dziedziczenie*, pp 202-206.

49 See also M. Załucki, “‘Facebook’, ‘Twitter’, ‘MySpace’”, p 241 and P. Budrewicz, ‘Postanowienia dotyczące dziedziczenia profilu zawarte w regulaminie portalu Facebook a prawo polskie’, 9. *Prawo Mediów Elektronicznych*, 2018, pp 29-32.

50 Cf., e.g., J. Mazzone, ‘Facebook’s Afterlife’, 90. *North Carolina Law Review*, 2012, pp 1661-1667.

51 This might be particularly essential when the heir does not obtain the entire account’s content, by only some of its elements - e.g. through post-mortem transfer of copyright (see also A. Berlee, ‘Digital Inheritance in the Netherlands’, 7. *Journal of European Consumer and Market Law*, 2017, pp 258 f).

52 See also B. Maeschaelck, ‘Digital Inheritance in Belgium’, 8. *Journal of European Consumer and Market Law*, 2018, p 40. A different solution to this problem is advocated by P. Szulewski, ‘Śmierć 2.0.’, p 743, who claims that heirs of an account (as a separate subject to inheritance) should make a new contract with the platform.

8. Privacy Issues

The general framework for post-mortem fate of digital assets, set in inheritance and contract law provisions, is supplemented and to some extent transformed by the question of privacy. Transfer of any part of the account after user's demise involves by nature an operation over data, usually of a personal character. The question of inheritance of online account is, hence, inseparably paired with the problem of protection of privacy, not only of the deceased but also of the third parties, whose interests may be affected by the post-mortem succession over an online account.⁵³ The issues concerning privacy of a deceased platform users are regulated mostly in a self-regulatory way, in policies established by platforms.⁵⁴ They constitute a part of the privately-set inheritance regimes discussed in the previous point.

The ambit of statutory provisions in this regard is rather limited. The EU data protection regime applies exclusively to living data subjects⁵⁵ (and allowing Member States to provide domestic rules that extend protection over the deceased's data).⁵⁶ For this reason, protection of such data can be awarded only indirectly – as a spillover of protection of privacy or data of other people.⁵⁷ In this way, they can access data that pertain to them, stored at the account of the deceased user, and to oblige platforms to provide information in this regard, under article 15 of the General Data Protection Regulation.⁵⁸ The existing data protection framework awards also a claim for removal of data from the platform⁵⁹, within the frames of the right to be forgotten (under Art. 17 GDPR).⁶⁰

9. Conclusions

The problem of digital inheritance under Polish law still remains mostly the area for hypothetical scenarios that have not been confronted with judicial practice. Since the general frameworks of Polish and German inheritance law are mostly parallel, the general conclusion adopted by Polish courts against the similar factual

53 Cf. <https://www.facebook.com/help/1506822589577997> (1 December 2018).

54 See also J. Mazzone, 'Facebook's Afterlife', pp 1652-1656.

55 See also L. Edwards & E. Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World', 32. *Cardozo Arts and Entertainment Law Journal*, 2013, pp 107-113.

56 See also E. Harbinja, 'Post-Mortem Privacy 2.0.', pp 33f; P. Szulewski, 'Śmierć 2.0.', p 746.

57 Motive 27 of GDPR.

58 Ł. Goździaszek, 'Likwidacja tożsamości', pp 302, 308 f.

59 Regulation (EU) 2016/679 (General Data Protection Regulation) in the current version of the OJ L 119, 04.05.2016; cor. OJ L 127, 23.5.2018.

60 Cf. E. Harbinja, 'Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be the Potential Alternatives?', 10. *SCRIPTed: A Journal of Law, Technology and Society*, 2013, *passim*.

background may very plausibly resemble the BGH decision.⁶¹ This pertains not only to inheritance law as such but also to other legal dimensions of this compound issue, in particular to the general outline of data and privacy protection. The final answer to this question is, however, highly contingent on the particulars of the judicial choices on the interpretation of the existing legal agenda with a view to nitty-gritties of online assets. This pertains, first and foremost, to the attitude towards the ambit of the notion of a patrimonial character of a right and its link with the deceased's personal sphere, as featured in article 922 CC.

Peculiarities of digital succession pose new challenges in this regard and reveal lacunae in inheritance schemes. The current legal framework can provide only a piecemeal solution, which does not address all the problems entailed by the demise of an account owner - in particular, non-material values correlated with an account. For these reasons, one of the most substantial problems is the interrelation between statutory and private-made succession rules. Depending on the type of assets and parties' interests involved, the latter may supplement the state-made inheritance rules (dealing with issues that have not been covered in statutory provisions) or provide clues for application of article 922 CC (revealing interests and values associated by parties with the particular asset). Lastly, the fuzziness caused by the problem of digital inheritance triggered also pleas for reform of the Polish inheritance law, by creating a subset of rules that could address the specificity of online assets.⁶² The decisions of BGH provides a unique insight into tangle of legal problems that comprise the realm of digital inheritance. The possible ambit and architecture of these rules is still highly speculative. Undoubtedly, however, a comprehensive regulation of digital inheritance creates an appeal for exceeding beyond the classic array of inheritance law matter and to cover a much broader sphere of social and economic consequences of one's demise.⁶³

61 P. Szulewski, 'Śmierć 2.0.', p 746; M. Pietrzak, P. Babiańczyk, 'Co się dzieje z kontem', p 65.

62 See also M. Załucki, 'Śmierć a dane w systemach teleinformatycznych - przyczynek do dyskusji', in *Media Elektroniczne. Współczesne problemy prawne*, ed. K. Flaga-Gieruszyńska, J. Gołaczyński & D. Szostek, Warszawa 2016.

63 See e.g. M. Załucki, 'Perspektywy rekodyfikacji polskiego prawa spadkowego', in *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji*, ed. M. Załucki & P. Stec, Warszawa 2015, pp 361 f; J. Ojczyk, 'Dziedziczenie cyfrowe, czyli komu przypadnie osierocone konto na Facebooku', <https://www.prawo.pl/biznes/dziedziczenie-konta-na-facebooku-potrzebne-zmiany-prawa,322983.html> (1 December 2018).