

LEGAL ASPECTS OF THE USE OF SOCIAL MEDIA ACCOUNTS: CURRENT STATE AND PERSPECTIVES

Kateryna Nekit*

Abstract: *This article analyzes the concept and legal nature of social media accounts to explore whether these can become the object of civil-law rights, particularly, an object of property or so-called virtual property rights. It examines the essence of a social media account and reveals the possibility of distinguishing specific elements in its structure. Some problems connected to social media accounts including liability for its content to the opportunity to purchase an account are investigated. The recent case law concerning business accounts is analyzed. The conclusion is made that every company should develop its own policy concerning social networks where all possible consequences connected with the rights in relation to social media accounts of the company would be specified, as there is no uniform court practice on this issue. The article also considers, whether it is possible to inherit a social media account. This takes into account approaches in various countries to the problem of determination of the post-mortem fate of digital assets, which shows a unified tendency to consider social media accounts as part of the estate transferred to the heir.*

Keywords: *social media, account, digital assets, inheritance, virtual property, personal data*

INTRODUCTION

Everyone's life is so closely linked to the Internet today, and it is so natural for us to "live online" that we rarely remember all our online activities and rarely think about the number of accounts we have, as we forget about many of these very soon after their creation. However, according to some data,¹ an average user of the Internet has about ninety accounts. This is an obvious reason to think about the associated problems. Moreover, according to statistics, over 30 million small businesses have a presence on Facebook, over four million companies have LinkedIn profiles and Instagram attracts over five-hundred million users every month.² At the same time, there is a big gap in legislation on the legal nature and regulation of legal relationships governing these accounts, although some of them have a considerable value for their users. Sometimes social media accounts generate income, for example, in case of monetization of YouTube video, or due to the number of followers that gives the opportunity to obtain revenue from advertisement. The fact that social media accounts do have an economic value gradually converts them into important legal objects. Accordingly, there is a need to considerate how such accounts can be transferred during both the life of and on the death of the holder.

* Associate Professor Kateryna Nekit, Ph.D. Department of Civil Law, National University "Odessa Law Academy", Odessa, Ukraine

¹ CARSON, E. How to deal with your online accounts before you die. In: *CNET* [online]. 17. 4. 2017 [2020-01-11]. Available at: <<https://www.cnet.com/how-to/5-steps-to-settle-your-digital-affairs/>>.

² LEESON, P. A. How many #followers do you have?: evaluating the rise of social media and issues concerning in re CTLI's determination that social media accounts are property of the estate. *Catholic University Law Review*. 2016, Vol. 66, No. 2, pp.499–500.

1. THE CONCEPT AND STRUCTURE OF A SOCIAL MEDIA ACCOUNT

To answer the questions mentioned above, the concept of an account must be determined firstly. Technically a user account is a relationship established between a user and a computer, network or information service. In this relationship, a user is identified by a username and password, which are optional for computers and networks, but mandatory for registrations and subscriptions to online services.³ An account can also be defined as a collection of data associated with a particular user of a multiuser computer system. Each account comprises a username and a password, and is the subject of security access levels, disk storage space, etc.⁴

The term “social media” encompasses any online platform that allows individuals to communicate, create content and interact socially.⁵ Social media can include blogs, wikis, podcasts, photos and video sharing, virtual worlds and social networking sites, such as Facebook, Instagram, LinkedIn and Twitter.⁶

Therefore, the conclusion can be made that a social media account (profile) is a personal page, where a user posts his or her personal information, uploads video, audio and other content, and by means of which he or she interacts with other people. The use of this page is only possible after a special procedure of authorization by creation of a username (login) and password. Thus, an account includes several elements: firstly, authentication information (which is necessary for authentication of the user by a provider and includes a username and a password); secondly, an account is linked to a database on the server provider, where information from this account is stored. This database connects a user with information available from social media. Generally, it feels like a “cyberspace within cyberspace” – one’s own place within the larger context (if by “cyberspace” we understand online platforms like Facebook, Google, YouTube, Twitter and so on. Such platforms are usually called “services”, but they are not services in the traditional legal sense, they are rather so-called “cyberspaces”, where people are “digitally present” and acquire a license to use them).⁷

However, not all social media accounts are connected to web pages. For instance, accounts in Viber, WhatsApp and other applications connected with a phone number, exist within mobile applications and are not profile-based networks. They also give their users some other opportunities that create their characteristics, which have to be taken into consideration when developing the legal regulation of the relations connected with them.

³ User account. In: *PC Magazine* [online]. [2020-01-11]. Available at:

<<https://www.pcmag.com/encyclopedia/term/53549/user-account>>.

⁴ User account. In: *Encyclopedia.com*. [online]. 26. 6. 2020 [2020-07-09]. Available at:

<<https://www.encyclopedia.com/computing/dictionaries-thesauruses-pictures-and-press-releases/user-account>>.

⁵ EDOSOMWAN, S., PRAKASA, S., KOUAME, D., WATSON, J., SEYMOUR, T. The History of Social Media and its Impact on Business. *The Journal of Applied Management and Entrepreneurship*. 2011, Vol. 16, No. 3; FUCHS, C. *Social Media: A Critical Introduction*. London: Sage, 2014.

⁶ NAITO, A. A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees’ Social Media Use. *Journal of Constitutional Law*. 2012, Vol. 14, No. 3, pp. 849-883; PARK, S., ABRIL, P. Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights. *American Business Law Journal*. 2016, Vol. 53, No. 3, pp. 537-598. doi: 10.1111/ablj.12084.

⁷ PALKA, P. *Virtual property: towards a general theory*. PhD thesis. Florence: European University Institute, 2017.

It seems appropriate to distinguish the elements of an account such as a username and information from the user's personal page. Such an approach is helpful because in some cases one may be interested only in the acquisition of a username. For instance, someone registers an account with a certain username. Then a new legal entity with the same name appears. Logically, such an entity would like to have an account with its own name, which would make it easy to find it. Unfortunately, if such an entity wants to register an account in the same social media, it is impossible because such a record already exists. An individual who registered the account with the username, which is the object of interest to the new created legal entity, could agree to alienate it. In this case, the profile information could first be deleted, because the object of interest would be only the username, not the whole profile. At the same time, in some cases one may be interested in purchasing the whole user's profile (for instance, when the purpose is to acquire the content and followers). In that case, the object sought will be the whole account, not just the username. We are mentioning this here, because despite the fact the possibility to alienate either profile or username is not provided for by any legislation, those arguments should be considered while developing a regulatory frame for social media accounts.

According to the US case law, a username and password are classified as a trade secret.⁸ This seems to be appropriate. Nevertheless, this approach has been criticized in some scholarly works, where it is argued that a username and password do not have independent economic value and thus cannot be a trade secret.⁹ This statement cannot be accepted because of the reasons mentioned above. Even if some of the grounds for criticizing the trade secret theory are valid, it is still obvious, that a username can have an economic value so it should be classified as a property asset. The concept of property is becoming more and more flexible nowadays. For instance, in American property law economic value is recognized in a wide variety of tangible and intangible assets, including one's personal image.¹⁰ The extension of a property interest to a username, which is also a kind of digital data, is not a problem at all for American law. It can be an issue for European countries though, because the concept of property is narrower here. Nevertheless, this question is beyond the scope of this article, which is focused on the social media account as such and just discusses the possibility to distinguish different elements in its structure and some issues connected with each of them.

Thus, social media accounts have a complex structure and differ from one another depending on the opportunities given by a particular platform. We may try to define what kind of elements are present in the structure of the account in a profile-based network, such as Facebook. First of all, as mentioned above, there is a username and a password as a way of authorization of the user, secondly, there is information that is posted by a user on his or her personal page. Such information (like posts, comments) is protected by copyright law. Here the question could arise, who retains the right to the content posted on

⁸ See *PhoneDog v. Kravitz* (2011), No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

⁹ PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*. p. 15.

¹⁰ RITTER, J., MAYER, A. Regulating data as property: a new construct for moving forward. *Duke Law & Technology Review*. 2017, Vol. 16, No. 1, p. 251.

a social media account? Usually, according to the Terms of Service of the most popular social networking sites, the right on the content posted on a social media account belongs to its user. However, some social networking sites, particularly Facebook, provide the right in their Terms of Service to use all the user's works under the authority of a special license, given by the user at the point of registration.¹¹ Speaking about the immense opportunities of social media developers, which allow them, among other rights, to block or even remove the account, Przemysław Palka (who considers accounts to be objects of virtual property) mentions the so-called "digital force".¹² This right of social media developers, established by internal Terms of Service, gives them a power to control and even to dispose of users' accounts. This has been criticized heavily, especially in the context of opportunities of some companies to delete accounts in case of their long non-use or the death of the user.¹³

One more element that can be distinguished in the structure of an account is the user's correspondence, which, obviously, has to be protected by the general provisions on the secrecy of correspondence enshrined in the Constitutions of most European countries. Besides, the account is inseparably linked to the user's personal data, and here the issue of personal data protection raises. What kind of information is considered personal data of an individual and how it should be protected is specified, particularly, in the recent legislation on data protection – General Data Protection Regulation (GDPR). According to the GDPR, 'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person¹⁴ (most people provide a lot of this data when they register on social media).

Therefore, the legal regulation of social media accounts, involves contract law provisions (Terms of Service developed by social media owners), intellectual property rights, data protection and privacy regulation, as well as property rights. Considering the above-mentioned, we can suggest the distinguishing of a legal regime of separate elements of the account (applied for the moment depending on what kind of rights need to be protected), and a legal regime of the account in general (which we are trying to define, because for the moment an account has no legal regime as a specific object). For instance, in case author's rights to the content in a social media account are broken, such rights are fully protected by existent copyright law. The same is with regard to rights to correspondence or personal data as elements of a social media account: in case of their breach, the solution can be found in existent provisions on the secrecy of correspondence or legisla-

¹¹ Terms of Service. In: Facebook [online]. [2020-01-11]. Available at: <<https://www.facebook.com/legal/terms>>.

¹² PALKA, P. *Virtual property: towards a general theory*.

¹³ This issue is discussed in details in Part 6 of this article.

¹⁴ Regulation EU 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection on natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation). *Official Journal of the European Union*, 119, 4. 5. 2016, pp. 1–88.

tion on data protection. At the same time, our scope is to find or develop the solution for the protection of a social media account as such, to understand whether it can or cannot be a specific object of legal relationships. Thus, we need to answer the question of whether it can be considered as the object of a property right (or the right of so-called virtual property¹⁵) and whether it can be sold or leased to third parties.

2. IS IT POSSIBLE TO SELL YOUR PERSONAL DATA?

One of the most important issues, which arise from the possibility of transferring an account, is the question on the destiny of personal data. In particular, is it possible to transfer personal data (as a part of the account or separately).

The discussion about the proprietary rights to personal data has been lasting for decades. There were several academic researchers on whether property rights should be granted to data subjects with regard to their personal information. In 1960s, Alan Westin proposed to recognize personal information as an object of property rights.¹⁶ In 1993, Kenneth C. Laudon proposed information markets for personal information. He considered it was entirely possible to extend property interest to the data.¹⁷ Later Vera Bergelson advocated that property rights were a suitable legal framework for personal information. She offered to distinguish two types of rights on personal data. Certain rights are inalienable, while other rights for specific data could be transferred. Such rights include rights to obtain records, demand corrections, and block or erase inaccurate information.¹⁸ In 2011, Jamie Lund stated that an individual should have an “enforceable property right” over his or her personal information. He described it as a “limited” property right, sufficient to allow individuals to enforce requests for retraction or correction of inaccurate personal information.¹⁹

After the GDPR entered into force, a new wave of discussions on proprietary rights to personal data emerged. Since the GDPR provides for such provisions, as an opportunity to receive copies of the data, to transfer the data from one controller to another, to demand their destruction and so forth (Articles 17, 20, 26 GDPR), some scholars started to discuss again the possibility of considering personal data to be a kind of property. This was explained by the fact that the specified rights are similar to an owner’s rights to use, to dispose of and to get an income from the non-material asset that he owns.²⁰

¹⁵ The concept of the virtual property is highly discussed today. See FAIRFIELD, J. Virtual property. *Boston University Law Review*. 2005, Vol. 85, pp. 1047–1102, [2020-01-15]; Available at: <<https://ssrn.com/abstract=807966>>; SHELDON, D. Claiming ownership, but getting owned: contractual limitations on asserting property interests in virtual goods. *UCLA Law Review*. 2007, Vol. 54, pp. 751–787; LASTOWKA, G., HUNTER, D. The laws of the virtual worlds. *California Law Review*. 2004, Vol. 92, No. 1, pp. 1–73. doi.org/10.15779/Z386H7P.

¹⁶ WESTIN, A. F. *Privacy and freedom*. New York: Atheneum, 1967.

¹⁷ LAUDON, K. C. Markets and privacy. *Communications of the ACM*. 1996, Vol. 39, No. 9, pp. 92–112, [2020-02-01]. Available at: <<https://dl.acm.org/doi/10.1145/234215.234476>>.

¹⁸ BERGELSON, V. It’s personal but is it mine? Toward property rights in personal information. *University of California, Davis Law Review*. 2005, Vol. 37, No. 379, pp. 379–452.

¹⁹ LUND, J. Property rights to information. *Northwestern Journal of Technology and Intellectual Property*. 2011, Vol. 10, No. 1, pp. 1–18.

²⁰ LANDREAU, I., PELIKS, G., BINCTIN, N., PEZ-PÉRARD, V., LÉGER, L. (2018). My data are mine. Why we should have ownership rights on our personal data. In: *Generation Libre* [online]. 2018 [2020-01-12]. Available at: <<https://www.generationlibre.eu/wp-content/uploads/2018/01/Rapport-Data-2018-EN-v2.pdf>>. pp. 52–57.

However, the statement that personal data is a kind of property does not have much support. For instance, in the French legal literature the above-mentioned scholarly work is criticized. It had been stated that the rights given to users by the GDPR are mistakenly equated to a form of private property. The GDPR does not mention private property concerning personal data. According to this legislation, personal data is protected as an attribute of an individual, but not as a kind of property.

At the same time, some provisions of the GDPR generate a question about the possibility of selling personal data to the third party. To illustrate the issue, we can consider when an individual sells his or her personal data to a third party. This is supposed to be possible on the basis of Article 6 of the GDPR, according to which “processing shall be lawful only if and to the extent that the data subject has given consent to the processing of his or her personal data”. Respectively, the subject interested in such processing, could be ready to pay for the consent to process someone’s personal data. However, according to the concept of “free consent”, the consent must be “unconditional” and consequently, it should be free from any influence, like sanctions or remuneration. If such a concept is accepted officially, then nobody will be able to transfer his or her personal data for remuneration and such a transaction would be considered invalid. It will be equivalent to the statement that personal data are “out of trade” and cannot be transformed into goods.²¹

The fact that personal data cannot be equated with goods is stated also in Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects. According to Art. 54 of those Guidelines, data protection is a fundamental right guaranteed by Article 8 of the Charter of Fundamental Rights. Taking into account that one of the main purposes of the GDPR is to provide data subjects with control over information relating to them, personal data cannot be considered as a tradeable commodity. Even if the data subject can agree to the processing of personal data, they cannot trade away their fundamental rights through this agreement.²²

Thus, it seems that the position of the legislator is quite clear: personal data is an inalienable attribute of an individual and because of that cannot be seen as goods or as an object of property right.

However, the recent adoption of 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 services²³ (hereinafter referred to as the Directive) may be

²¹ MAUREL, L. Le RGPD interdit-il aux individus de «vendre» leurs données personnelles? In: *S. I. Lex* [online]. 12. 5. 2018 [2020-01-13]. Available at: <<https://scinfolex.com/2018/05/12/le-rgpd-interdit-il-aux-individus-de-vendre-leurs-donnees-personnelles/>>.

²² EUROPEAN DATA PROTECTION BOARD. Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects. In: *European Data Protection Board* [online]. 8. 10. 2019 [2020-02-01]. Available at: <https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines-art_6-1-b-adopted_after_public_consultation_en.pdf>.

²³ 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. In: *EUR-Lex* [online]. 22. 5. 2019 [2020-02-01]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0770>>.

revolutionary in terms of the legal nature of personal data. This Directive aims to strengthen consumer protection in the online environment and implements changes to EU consumer protection legislation within the Digital Single Market and “A New Deal for Consumers” package. The Directive covers contracts between traders and users in which a trader supplies or undertakes to supply digital content or a digital service in exchange for a price (which is defined in the Directive as money or digital expression – electronic coupons, vouchers, cryptocurrency) or the provision of personal data.

According to art. 24 of the Directive, “digital content or digital services are often supplied also where the consumer does not pay a price but provides personal data to the trader. Such business models are used in different forms in a considerable part of the market. While fully recognizing that the protection of personal data is a fundamental right and that therefore personal data cannot be considered as a commodity, this Directive should ensure that consumers are, in the context of such business models, entitled to contractual remedies. This Directive should, therefore, apply to contracts where the trader supplies, or undertakes to supply, digital content or a digital service to the consumer, and the consumer provides, or undertakes to provide, personal data. The personal data could be provided to the trader either at the time when the contract is concluded or at a later time, such as when the consumer gives consent for the trader to use any personal data that the consumer might upload or create with the use of the digital content or digital service”,²⁴

Thus, the Directive, in fact, recognizes personal data as a kind of “currency” in the digital world. Extending the scope of the Directive to contracts for which the consumer “pays” by providing his or her personal data is revolutionary for consumer protection legislation and provides consumer protection in the area of contracts that were previously considered as “free”.

The purpose of developing the concept of a “contract for the supply of digital content and digital services for which the consumer provides personal data instead of paying money” was to spread the principles of consumer protection to the so-called “free services”. Some services could not be considered “free” given the growing economic value of personal data. It is unjust that when consumers do not pay money but still provide their personal data for the use of services, they do not receive an adequate protection of their rights, as this situation does not fall under the requirements of EU consumer protection law. It has therefore been proposed to extend the consumer protection provisions to cases where a consumer receives a service in exchange for the provision of his or her personal data, as this responds to current economic realities and needs.²⁵

In fact, the Directive recognizes the possibility of exchanging personal data for digital content and digital services. If the value and the possibility of exchange for other goods (exchange value) is recognized for a certain phenomenon, it can be qualified as an introduction of this phenomenon into the civil turnover. It seems that the provisions laid down in the Directive may be the first step in the revision of the concept of personal data and

²⁴ Ibid.

²⁵ EUROPEAN DATA PROTECTION SUPERVISOR. Opinion 8/2018 on the legislative package “A New Deal for Consumers”. In: *European Data Protection Supervisor* [online]. 5. 10. 2018 [2020-02-01]. Available at: <https://edps.europa.eu/sites/edp/files/publication/18-10-05_opinion_consumer_law_en.pdf>.

possibly even the extension of the legal regime of ownership to personal data. However, nowadays it is impossible to sell personal data neither as a specific object nor as a part of a social media account.

3. DOES THE PROPERTY RIGHT TO INFORMATION EXIST?

The issue of the property right to personal data is connected with a discussion about the property right to information (as personal data is a kind of information). To date the answer to this question is negative. Information is considered to be a separate object of civil rights, and provisions on property rights do not extend on the relations connected with information.

In English legal literature, we can find some additional arguments against the statement that information can be considered a kind of property. For instance, an analysis of the case of *Fairstar Heavy Transport NV v. Adkins*²⁶ concerning the right to demand the content of electronic business emails stored in the defendant's computer led a judge, Sir John Mummery, to the conclusion that information cannot be considered a kind of property. He does not exclude the possibility of extending the law of property rights to information in the future, but to date sees no reason for that. The Canadian case of *Tucows v. Renner*,²⁷ where unfair use of a domain name was a subject of judicial proceedings, is given as the only exception. The case was decided in the plaintiff's favor, but at the same time, it was noted that the domain name is personal property, a part of the intangible property of the claimant, and something more than just information.²⁸ (This conclusion is important for our investigation, so we will return to it later).

There are some scholars who take the middle ground in this discussion. For instance, Przemyslaw Palka expresses the opinion that there is a need to distinguish information (data) as a form and information as a content. The scholar emphasizes differences between a digital form (such as the e-book instead of the real (tangible) book) and information as knowledge, which can be stored in material form, for example, on paper. Analyzing from this perspective the position of Sir John Mummery, Przemyslaw Palka notes that if the above-mentioned case (concerning the request of information from e-mails) had taken place 30 years ago, the case would not have been about the information, but only about the request for paper letters. Thus, several years ago when electronic letters did not exist yet, the case would be about the claiming of material objects which were in someone's possession, and the question of information, in relation to the content of these paper letters, would not arise at all. The problem arises because e-mails simultaneously contain information and are information in themselves, because they consist of bits, which means that they exist as information, but we should understand them as "information technology", not "information asymmetry".²⁹ The Information Asymmetry is precisely defined as

²⁶ See *Fairstar Heavy Transport NV v Adkins* (2013). (EWCA Civ 886).

²⁷ See *Tucows. Com Co. v. Lojas Renner S.A.* (2011). (ONCA 548).

²⁸ MUMMERY, J. Property in the Information Age. In: Warren Barr (ed.). *Modern Studies in Property Law*. Oxford and Portland, Oregon: Hart Publishing, 2015. pp.1–8.

²⁹ PALKA, P. *Virtual property: towards a general theory*.

a situation in which respective parties own different amounts and types of information over time about a project or contract.³⁰ Therefore, to date information has a dual nature and can be considered both in terms of content and form. Even though the issue of property rights to information as knowledge (that is personal data) still remain the subject of discussion, whatever the result of this discussion would be, it can safely be said, that it is a necessary to distinguish (1) property law aspects of information as knowledge and (2) property law aspects of digital objects, which are only information (data) as a form.

4. THE LEGAL NATURE OF SOCIAL MEDIA ACCOUNTS

Following this perspective, we can draw the conclusion that accounts can be considered as a form in which information exists. Here it is possible to draw an analogy between written and electronic forms of documents and transactions: initially there was an uncertainty in understanding of the legal nature of electronic transaction, but now the electronic form of a transaction is equated to the written one in majority of countries.³¹ The same applies for an account: it is possible to consider it as a digital object, the object of property rights (perhaps, a special kind of property – virtual property), just as other material forms of existence of information are objects of ownership and other property rights.

To confirm this conclusion, we may also refer to the definition of the legal nature of domain names, prevailing in world practice (as domain names are similar to accounts, we will consider this point). Thus, the position according to which a domain name is a kind of property was established in Canadian case law (*Tucows v. Renner*). In the US case law an approach according to which a domain name is a kind of personal property prevails (*Kremen v. Cohen*³²). Domain names are considered to be covered by the right protecting possessions in terms of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (*Paeffgen GmbH v. Germany*³³).

The European Court of Human Rights has recognized domain names as a type of property. In *Paeffgen GmbH v. Germany* an applicant held several thousand internet domain names which had been registered by the competent registration authority. Subsequently, several proceedings were brought against the applicant by other companies and private

³⁰ SCERAL, M., ERKOYUNCU, J., SHEHAB, E. Identifying information asymmetry challenges in the defence sector. *Proceedings of the 6th International Conference on Through - life Engineering Services, TESConf2017*. 2017, [2020-01-13]. Available at:

<https://ac.els-cdn.com/S2351978918300180/1-s2.0-S2351978918300180-main.pdf?_tid=09e7e1cb-be95-4469-8ed0-ac58e131a1b6&acdnat=1547384032_947b3f5277f3e7a93de87a1933b8991d>. p.128.

³¹ See: Uniform Electronic Transactions act (1999). In: Michael I. Shamos [online]. [2020-01-13]. Available at: <<http://euro.ecom.cmu.edu/program/law/08-732/Transactions/ueta.pdf>>; Electronic transactions act (2001). In: BC Laws [online]. [2020-01-13]. Available at:

<http://www.bclaws.ca/civix/document/id/complete/statreg/01010_01>; Electronic transactions act (2010). In: Singapore Government Agency [online]. [2020-01-13]. Available at: <<https://sso.agc.gov.sg/Act/ETA2010>>; Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC. (2014). Official Journal of the European Union, 257, 28.8.2014, p. 73–114.

³² See *Kremen v. Cohen* (2000), 99 F. Supp. 2d 1168, No. C 98-20718 JW. (N.D. Cal. May 30, 2000).

³³ See *Paeffgen GmbH v. Germany* (2007), No 25379/04, 21688/05, 21722/05 and 21770/05 (ECHR Sep. 18, 2007).

individuals claiming that the registration and use by the applicant of certain domains breached their trademark rights and/or their rights to a (business) name. The applicant company complained that the prohibition on using or disposing of the internet domains in question and the duty to apply to the registration authority for cancellation of these domains had violated its property rights. It relied on Article 1 of Protocol No. 1 to the Convention, which provides: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”.³⁴

In determining whether the denial of the applicant company’s right to use the domain names registered for it amounted to an interference with its “possessions”, the Court found that the concept of “possessions” referred to in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law. Certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. In the case of non-physical assets, the Court took into consideration, in particular, whether these gave rise to financial rights and interests and thus had an economic value. It has thus considered, for example, intellectual property, such as trademarks and copyrights, or licenses to use property in a particular way (such as licenses to serve alcoholic beverages or fishing rights) to constitute possessions.³⁵

Likewise, in California in *Kremen v. Cohen* it was established that domain names are intangible property. In this case, the plaintiff (Kremen) owned the domain “sex.com”, which he purchased from Network Solutions. The defendant (a notorious con man) sent a fraudulent letter to Network Solutions claiming to be Kremen and instructing the cancellation of the registration, after which the defendant took ownership of the domain. Kremen filed a suit against Cohen seeking to reacquire the domain name and Cohen’s ill-gotten profits. During the process, the question arose as to whether intangible property can be the subject of the tort of conversion. The court stated that California law recognizes “conversion of intangibles represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts”. But intangible property such as “goodwill of business, trade secrets, a newspaper route, or a laundry list of customers” cannot be the subject of a conversion. In *Berger v. Hanlon*³⁶ it was noted that “[a]lthough the common law rule has been relaxed somewhat, and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document, it has not yet been extended further”.

³⁴ COUNCIL OF EUROPE. Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In: *Refworld* [online]. 20. 3. 1952 [2020-01-13] Available at: <<https://www.refworld.org/docid/3ae6b38317.html>>.

³⁵ See *Paeffgen GmbH v. Germany* (des.), No. 25379/04, 21688/05, 21722/05 and 21770/05, ECHR 2007.

³⁶ See *Berger v. Hanlon* (1997), No. 96-35251, 96-35266, 1997 U. S. App. (9th Cir. Nov. 13, 1997).

Network Solutions contended that a domain name is a form of intangible property which cannot be the subject of a conversion claim and the Court concurred, because there was simply no evidence establishing that a domain name was “merged in or identified with” a document or other tangible object. Thus, the Court found that under the traditional precepts governing the tort of conversion, a domain name was not protected intangible property.³⁷

If we recognize that an account has economic value and, respectively, can be covered by the right to possessions in terms of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, owners of accounts will have the power to transfer their personal accounts to third parties. (We should point out that an account does have economic value. This value is the maximum amount a consumer is willing to pay for an item in a free market economy.³⁸ Therefore, the fact that there are individuals interested in obtaining someone’s account means that accounts do have value). However, there is a problem in relation to the elements of an account such as personal data and correspondence. It seems that to date alienation of personal data is impossible, therefore in the case of transferring the account, personal data, correspondence and other personal information must be removed. Where an account is being transferred, considering its complex character, it is worth determining the fate of each of its elements in the contract of transfer.

5. WHO OWNS SOCIAL MEDIA BUSINESS ACCOUNTS?

To date, in the USA disputes concerning rights in relation to social media accounts have been common. Most of these have been connected with so-called business accounts, which are companies’ profiles created and managed by their employees. Thus, in the case of employee dismissals, the issue of who gets the rights to the account must be resolved. For instance, in *PhoneDog v. Kravitz*³⁹ the defendant, who provided social media marketing for a company was dismissed. He continued to use the company’s Twitter account, which had 17,000 subscribers. He just changed the handle of the account from @PhoneDog_Noah to @noahkravitz. The plaintiff claimed that the Twitter password was a trade secret and its continued unauthorized use was misappropriation. The court accepted that under certain circumstances a Twitter password could be a trade secret.⁴⁰

In *Eagle v. Morgan*,⁴¹ the law connected with use of the plaintiff’s profile on LinkedIn became the subject of judicial proceedings. Linda Eagal, the plaintiff, being the owner of the company, created an account on LinkedIn for professional and personal purposes. After her company was taken over by another one, the plaintiff was replaced by another

³⁷ See *Kremen v. Cohen* (2000), 99 F. Supp. 2d 1168, No. C 98-20718 JW. (N.D. Cal. May 30, 2000).

³⁸ BANTON, C. Economic Value. In: *Investopedia* [online]. 18. 4. 2019 [2020-01-13]. Available at: <<https://www.investopedia.com/terms/e/economic-value.asp>>.

³⁹ See *PhoneDog v. Kravitz* (2011), No. C 11-03474 MEJ. 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

⁴⁰ PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*. p. 5.

⁴¹ See *Eagle v. Morgan* (2013), No. 11-4303, 2013 WL 943350, at *9 (E.D. Pa. Mar. 12, 2013).

manager. At the same time, the new owners of the company obtained access to the plaintiff's profile, changed the password and the photo and replaced her name with that of the new manager. But, at the same time, some professional information in relation to the claimant was left in the profile, including her contacts. On this basis, the plaintiff filed the lawsuit on several grounds, including identity theft. The court concluded that the plaintiff had proved tortious interference by her employer but failed to award any damages.⁴²

In *Ardis Health, LLC v. Nankivell*,⁴³ the defendant, who provided social media marketing in the company, refused to provide access to the company accounts after his dismissal. The court ordered him to do it as the defendant signed the agreement that information from accounts belonged to the claimant.

Thus, in situations where there might be a dispute between the company and workers concerning business accounts, it is sensible to specify in a special contract who has the rights in respect of the separate elements of the social media account – profile, access, content, subscribers.⁴⁴ Companies should develop their own policy concerning social networks where all possible consequences connected with the rights in relation to social media accounts of the company should be covered.

The question about the rights to content posted on social media accounts could be solved in accordance with copyright law provisions regarding work-made-for-hire. In the absence of a contract or policy outlining the post-employment retention of intellectual property rights in relation to the content, employers and former employees should be forced to solve this issue in accordance with traditional copyright theories of work-made-for-hire and joint authorship. If the posts were made in the employee's scope of employment, copyright law's work-made-for-hire doctrine would apply and the employer will hold all rights to the work. Where the employee did not make posts as part of his job, the content on the company profile might be considered a work of joint authorship.⁴⁵

Some more problems arise from cases connected to business accounts. The most important is the problem of qualifying the essence of followers and how can they be estimated if possible.⁴⁶

Recently, courts have come to the conclusion that social media connections may amount to a customer list and, consequently, be protected as trade secrets. Relevant factors that are used to evaluate the independent economic value in a trade secret case include: the time and resources spent on generating a customer list, whether access to the information was

⁴² PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*. p. 6.

⁴³ See *Ardis Health, LLC v. Nankivell* (2011), No. 11 Civ. 5013 (NRB), 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011).

⁴⁴ LIZERBRAM, D. (2013). A Legal Perspective: Who Owns Social Media Profiles?. [Blog] *Marketo*. Available at: <<https://blog.marketo.com/2012/08/the-art-of-social-sharing-5-social-campaign-ideas-to-get-your-audience-engaged.html>>. [Accessed 13 Jan. 2020].

⁴⁵ PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*. p. 14.

⁴⁶ See LEESON, P. A. *How many #followers do you have?: evaluating the rise of social media and issues concerning in re CTLI's determination that social media accounts are property of the estate*; PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*.

strictly limited, and whether it would be difficult to replicate the information included in the customer list.⁴⁷ These factors were weighed up in some cases mentioned above.

For instance, in *PhoneDog v. Kravitz* the court found that the economic value of a social media account with 17,000 followers lies in the account's list of followers and the traffic that those followers generated to the PhoneDog website because the Twitter account produces revenue from advertisers.⁴⁸ In *Eagle v. Morgan* the court concluded that the employer had made a "substantial investment of time, effort and money into" creating the LinkedIn account⁴⁹. In *CDM Media USA, Inc. v. Simms*,⁵⁰ a technology marketing and media company asserted that a LinkedIn group that included 679 names of current or potential customers was a trade secret. The court denied the former employee's motion to dismiss the case because the plaintiff proved that "the membership list was a valuable secret commodity" due to the limited access and amount of time, effort, and cost the marketing and media company expended to develop the LinkedIn membership list.⁵¹

Some important conclusions concerning business social media accounts have been made by bankruptcy courts in the USA. As in some respects business social media accounts provide value to the business with access to customers and potential customers, bankruptcy courts have found that business accounts on social media, including pages for business run by individual employees, are property interests which are recognized as intangible assets under the Bankruptcy Code.⁵² Recent bankruptcy cases conclude that the administrative privileges and associated digital rights are bona fide assets and business goodwill.⁵³ Moreover, there are discussed modes of followers' estimation. Thus, Tristan Louis has suggested estimating the value of an individual user by taking the market cap and dividing it by the number of users.⁵⁴ PhoneDog in his case claimed that industry standards valued each Twitter follower at \$2.50 per month.⁵⁵ Other valuation metrics take into account relationships between users, connections of users, and loyalty of users, not just numbers.⁵⁶

Thus, the economic value of social media business accounts is widely recognized in the US court practice. The most valuable part of a social media business account is considered

⁴⁷ LEESON, P. A. *How many #followers do you have?: evaluating the rise of social media and issues concerning in re CTLI's determination that social media accounts are property of the estate.* p. 510.

⁴⁸ *Ibid.*, p. 511.

⁴⁹ *Ibid.*

⁵⁰ See *CDM Media USA, Inc. v. Simms* (2015), No. 14 CV 9111. 2015 WL 1399050 (N.D. III. Mar. 25, 2015).

⁵¹ LEESON, P. A. *How many #followers do you have?: evaluating the rise of social media and issues concerning in re CTLI's determination that social media accounts are property of the estate.* p. 512.

⁵² See *In re CTLI, LLC* (2015), 528 B.R. 359, 359 (Bankr. S. D. Tex. Apr. 3, 2015); *In re Borders Grp.* (2011), No. 11-10614 (MG), 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Dec. 7, 2011).

⁵³ PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights.* p. 30.

⁵⁴ LOUIS, T. How Much Is A User Worth? In: *Forbes.com* [online]. 31. 8. 2013 [2020-01-13]. Available at: <<https://www.forbes.com/sites/tristanlouis/2013/08/31/how-much-is-a-user-worth/#31bdc8b41c51>>.

⁵⁵ See *PhoneDog v. Kravitz* (2011), No. C 11-03474 MEJ, 2011 WL 5415612, at *3 (N.D. Cal. Nov. 8, 2011).

⁵⁶ See GNEISER, M., HEIDEMANN, J., KLIER, M., LANDHERR, A., PROBST, F. Valuation of online social networks taking into account users' interconnectedness. *Information Systems and e-Business Management*. 2012, Vol. 10, No. 1, pp. 61-84; PARK, S., ABRIL, P. *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights.* p. 30.

to be followers. More and more often followers are equated to customer lists and protected as trade secrets. To evaluate the economic value of followers the following factors are usually used: time and resources spent on generating a list of followers, the difficulty of replication of the information included in the list of followers, the traffic generated by followers (as the income from advertisement depends on such traffic). Other valuable parts of a social media business account, which have already become the subjects of court cases, include password (also protected as a trade secret in American practice) and the content (information) itself. One more risk connected to a social media business account for the company is personal data indicated in the account. In case some personal data of a formal employee is left in an account, there is a risk to be accused of the identity theft, that is why it is important to delete all the data of an individual while transferring an account.

Considering those, it is strongly recommended for all companies to settle down at the very beginning the specific policy on social media business accounts, where all rights to an account are clearly allocated between employer and employees. It is worth specifying there, how the password should be transferred to an employer in case an employee responsible for the account dismisses, what kind of personal data should be indicated in the account (certainly, it should be personal data of a company, not of an individual), who has the rights to the content in a social media account. The last issue can be solved in accordance with provisions on work-made-for-hire. For the company it is better to have a contract or policy outlining the post-employment retention of intellectual property rights in relation to the content of the social media business account.

6. IS THERE LIFE [FOR A SOCIAL MEDIA ACCOUNT] AFTER DEATH (OF THE USER)?

One more issue connected with social media accounts is the determination of their destiny after the user's death.

The need to address this question has caused the establishment of internal instructions for use in many search engines or social networking sites, which define possible actions with accounts in the event of their owners' death. In such internal rules consequences are defined by users or by a system (for example, Yahoo! provides for removal of the account on the user's death whereas Facebook gives to users an opportunity to dispose of the account on death).

However, there have already been some cases of state intervention in legal regulation of inheritance of accounts. The first step in this direction was taken in 2014, when an Act to Amend Title 12 of the Delaware Code Relating to Fiduciary Access to Digital Assets and Digital Accounts was accepted. According to this Act, "digital account" means an electronic system for creating, generating, sending, sharing, communicating, receiving, storing, displaying, or processing information which provides access to a digital asset which currently exist or may exist as technology develops or such comparable items as technology develops, stored on any type of digital device, regardless of the ownership of the digital device upon which the digital asset is stored, including but not in any way limited to, email accounts, social network accounts, social media accounts, file sharing accounts, health insurance accounts, health care accounts, financial management accounts, domain registration accounts, domain name service accounts, web hosting accounts, tax preparation service

accounts, online store accounts and affiliate programs thereto, and other online accounts which currently exist or may exist as technology develops or such comparable items as technology develops. “Digital asset” is defined as data, text, emails, documents, audio, video, images, sounds, social media content, social networking content, codes, health care records, health insurance records, computer source codes, computer programs, software, software licenses, databases, or the like, including the usernames and passwords, created, generated, sent, communicated, shared, received, or stored by electronic means on a digital device. This law gives the possibility to appoint a fiduciary over a digital account or a digital asset, who may exercise control over any and all rights in digital assets and digital accounts of an account holder, to the extent permitted under applicable state or federal law, including copyright law, or regulations or any end user license agreement.⁵⁷

Later, in 2015, in the majority of states of the U.S.A. a similar Act concerning fiduciary access to digital accounts was enacted. It allows individuals to specify in their will that the executor of their estate can have access to their email and social media profiles. The uniform law doesn't specify – and the courts have not yet been asked to rule on – exactly how that access should happen. So, for the moment, a deceased person's executor must contact the company behind each digital platform to determine how to get into the person's accounts.⁵⁸ The law also provides some important definitions of digital assets. According to the law, “account” means an arrangement under a Terms of Service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user; “digital asset” means an electronic record in which an individual has a right or interest. In fact, the law uses the construction of a fiduciary or trust for disposal of digital assets of a deceased person. The law establishes for a fiduciary (an original, additional, or successor personal representative, [conservator], agent, or trustee) the same legal duties as for a fiduciary charged with managing tangible property to the management of digital assets, including: the duty of care; the duty of loyalty; and the duty of confidentiality. But some additional rules are stipulated by law because of the specific object of rights: a fiduciary (1) is subject to the applicable Terms of Service; (2) is subject to other applicable law, including copyright law; (3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and (4) may not be used to impersonate the user.⁵⁹

In those states where the Uniform Fiduciary Access to Digital Assets Act was not enacted, companies decide themselves, whether to provide access to digital accounts of the deceased family member to his/her relatives. For example, Yahoo, as it was mentioned before, insists on closure of accounts on the user's death and bans access to them. Such an approach caused a lawsuit in the State of Massachusetts (in this State the Uniform Fi-

⁵⁷ House of Representatives 147th General Assembly. An Act to Amend Title 12 of the Delaware Code Relating to Fiduciary Access to Digital Assets and Digital Accounts. House Bill no. 345. In: *Delaware General Assembly* [online]. 12. 8. 2014 [2020-01-13]. Available at: <<http://legis.delaware.gov/BillDetail/23219>>.

⁵⁸ BANTA, N. Estate planning for your digital assets. In: *The Conversation* [online]. 7. 2. 2018 [2020-01-14]. Available at: <<https://theconversation.com/estate-planning-for-your-digital-assets-90613>>.

⁵⁹ NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS. Revised Uniform Fiduciary Access to Digital Assets Act. In: *Uniform Law Commission* [online]. [2020-01-14]. Available at: <<https://my.uniformlaws.org/viewdocument/final-act-no-comments-33?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22&tab=librarydocuments>>.

duciary Access to Digital Assets Act was not enacted). In *Ajemian v. Yahoo!, Inc.*⁶⁰ the Supreme Court of the State of Massachusetts concluded that the personal representatives may provide lawful consent on the deceased's behalf to the release of the contents of the Yahoo e-mail account.

The criticism of Terms of Service agreements (which are in their essence a contract and, consequently, create binding obligations on the parties) comes down to the fact that the possibility of the platform to delete e-mails or profiles which are in its possession, established by the Terms of Service, is unfair. As mentioned in the case discussed above, even if the Terms of Service agreement were fully enforceable, which would have given the Yahoo the possibility to delete a user's account, it nonetheless could not justify the destruction of e-mail messages after a court orders that they be provided to the user or his or her personal representatives as such destruction would constitute contempt of a court order.⁶¹

The possibility of inheriting social media accounts is recognized also in European case law. Thus, the Federal Court of Justice in Karlsruhe has recently allowed inheritance of accounts in Facebook. According to the judgment, online data should be treated in the same way as private diaries or letters, and pass to heirs. The case involved the parents of a 15-year-old girl killed by a train in 2012. The deceased girl's parents wanted access to her account to try to find out whether her death had been by suicide or accident. Facebook had refused access to the account after their daughter's death, citing privacy concerns about the girl's contacts. Under its current policy, the company only allows relatives of the deceased person partial access to the account, allowing them to change the page into an online memorial or to delete it entirely. The lower German court found for the parents in 2015, supporting the claim that Facebook data was covered by inheritance law as the equivalent of private correspondence. But in 2017, an appeals court overturned the ruling, on the grounds that any contract between the girl and the company ended with her death and could not pass to the parents. The case went to the Federal Court of Justice, and her parents have now reportedly taken over the account. According to what the judge said, it was common to hand over private diaries and correspondence to legal heirs after death, and there was no reason to treat digital data any differently. Moreover, the court added that the parents had a right to know to whom their child, a minor, had spoken online.⁶²

Therefore, the situation is similar to that in the USA: relatives can require online service providers to provide access to the account of the deceased family member, and providers have to give such an access.

Some important scholarly works about the possibility of inheriting digital property have been written recently. Thus, Heather Conway and Sheena Grattan, discussing disposing of an account on death, note that the main problem at inheritance of digital property is the fact that there is no legal definition of "digital assets". Outside the legal context, standard definitions are equally hard to find; instead of that, there are collective descriptors

⁶⁰ See *Ajemian v. Yahoo!, Inc.* 84 N.E.3d 766 (2017). No. 17-1005, 2018 WL 489291 (U.S. Mar. 26, 2018).

⁶¹ *Ibid.*

⁶² Parents win rights to dead child's Facebook. In: *BBC News* [online]. 12. 7. 2018 [2020-01-14]. Available at: <<https://www.bbc.com/news/world-europe-44804599>>.

of what typically falls within the realm of digital assets. Obvious examples include things like emails and email accounts, blogs, social media profiles and accounts, digital music collections, repositories of digital photographs and videos, online bank accounts and other financial instruments, online billing arrangements, subscriptions to magazines and gyms, Amazon accounts and eBay seller profiles, as well as other registered shopping sites and loyalty schemes, business information lists (client data and purchasing profiles), domain names. In effect, any files, stored or generated on digital devices are treated in this way.⁶³ Scholars mention several problems, connected to the variety of different digital objects. First of all, there is the seemingly endless list of things that can constitute a digital asset. Secondly, the value attached to specific types of digital assets will differ immensely: some of them (such as bank accounts, financial instruments and domain names) will have an obvious monetary worth, while others have a purely emotional or sentimental value to the deceased's relatives. Thirdly, there is the issue of how to categorize digital assets. As the most fundamental criteria for categorizing digital assets Heather Conway and Sheena Grattan offer to use the criterion, does an object constitute property or does not. They mention that not all digital assets are property in the traditional sense of the word. Instead, the single most important factor will be the terms of the individual service agreement that the account holder entered into with the relevant service provider. The original contractual agreement may have generated a digital asset in the sense of a distinct item of property, which is transferable, or, alternatively, a mere licensing agreement, which expires on the death of the individual. Thus, what sets digital assets apart from other types of property is the fact that the account holder, the person who we could class as the owner of the digital asset, does not necessarily control their ultimate fate. Attempts to bequeath such assets ignore the private contractual arrangement with the online service provider may prohibit this.⁶⁴

Thus, the fate of digital assets directly depends on the Terms of Service, which can grant to the social media provider the right to dispose of this property. That would not be contrary to the basic principles of contract law as users accept these terms by signing up to the agreement. However, recent cases in the US and Germany courts show that courts tend to protect users' (or their relatives') interests. Therefore, we can assume that in the near future some provisions of Terms of Service, which forbid authorizing access to accounts or provide an opportunity to online service providers to dispose of users' accounts, will be considered as discriminatory and illegal.

An interesting explanation of the possibility of inheriting digital objects is described in Estonian legal literature. Tiina Mikk and Karin Sein look at this problem through the principle of universal succession (which arises from Roman private law and is similar for the majority of European countries). According to this principle, the inheritance of digital objects follows the same rules as transfer of ownership to material objects and, for instance, rights and obligations arising from a sale contract. In the case of an e-account, it is the set

⁶³ CONWAY, H., GRATTAN S. The 'New' New Property: Dealing with Digital Assets on Death. In: H. Conway – R. Hickey (eds.). *Modern Studies in Property Law*. Oxford and Portland, Oregon: Hart Publishing, 2017, pp. 100–101.

⁶⁴ *Ibid.*, pp. 101–103.

of rights and obligations arising from a contract concluded between a deceased person and an Internet service provider that is included in the estate. Hence, upon death contractual relationships, among other objects in the estate, are transferred to the heir. As a universal successor, an heir obtains the same legal position of the deceased as if no transfer had occurred at all.⁶⁵ Transfer of the contractual position in its entirety means that an heir is, at least for the purpose of managing the estate, entitled to access the account of the deceased and to use and manage the content of the account.⁶⁶

It should be considered though the existence of contracts of commercial and personal nature and the fact that personal contracts are generally not subject to the universal succession under the inheritance law. Most social networking sites tend to design their contracts with users as personal. It is usually indicated in the Terms of Service that it is only the specific user who can use the account. It is forbidden to give access to the account to others if it is not directly permitted. Nevertheless, as it was discussed above, it is completely unfair to allow internet tycoons such unlimited control over the situation. Since accounts have an economic value, some legislative provisions aimed at restricting the rights of social media owners by analogy with restricting the rights of entities holding a monopoly position in the market should be developed. The contract between social media and user should be designed as commercial and provide for the possibility to transfer rights to the account either by selling or by inheriting it.

Despite a large number of questions in the sphere of inheritance of digital assets, scholars suggest taking care of digital property's fate by inscription of some specific provisions in the will, taking into account, however, provisions of Terms of Service and in its limits. It is suggested also to have a separate "digital executor" to deal with the digital estate on death, who will be particularly computer-savvy. It is important, however, not to confuse the role of an individual who is merely tasked by a deceased with collating and maintaining his or her digital information on death with a legal personal representative who carries the full mantle of that office's responsibilities and liabilities. The interrelationship between any so-called "digital executor" and the individuals to who represent the deceased has been issued would have to be given careful consideration.⁶⁷

We should mention also that the European Law Institute is currently establishing a joint study group with the Uniform Law Commission in the USA to see if the Uniform Fiduciary Access to Digital Assets Act could be used as a model for European legislation.⁶⁸ It means that there is likely to be a unified approach to determination of the post-mortem fate of digital assets in the world. To ensure protection and digital assets management it would be worthwhile to appoint a digital executor. Management of digital assets, including social media accounts, is possible within the framework of a trust or fiduciary, which are known, respectively, in the Anglo-American and civil law systems.

⁶⁵ MIKK, T., SEIN, K. Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law. *Juridica International*. 2018, Vol. 27, p. 127. doi.org/10.12697/JI.2018.27.12.

⁶⁶ *Ibid.*, p. 124.

⁶⁷ CONWAY, H., GRATAN S. *The 'New' New Property: Dealing with Digital Assets on Death*. p. 111.

⁶⁸ *Ibid.*, p. 113

CONCLUSIONS

Social media is a new sphere of interaction between millions of people, but it is not legally regulated enough. It is obvious that in many cases social media accounts have a real significant value. That is why it is extremely important to determine their legal nature on a legislative level. According to recent judicial practice and modern legal literature, there is a tendency for an account to be considered as a digital asset. The analysis in this chapter shows, that it is possible to distinguish different elements of an account: the username and password as a way of user authorization, information posted on the user's page, correspondence, personal data so on. Each of these elements has its specific legal regime (for instance, correspondence has to be protected by provisions regarding the secrecy of correspondence, posts and comments are the object of copyright law and so on). At the same time, the whole account could be of interest as a specific object. In this case we would suggest treating an account as a complex of elements that in general create a specific object of so-called virtual property. This conclusion is supported in recent case law: a bankruptcy court has determined that a business's accounts constituted a property interest of the bankruptcy estate.⁶⁹ However, if an account is transferred to another person, it is rather to specify in the contract the list of exact elements, which are to be transferred (as not all of them can be transferred, for instance, to date, personal data is "out of trade").

Recent judicial practice in relation to business accounts and inheritance of digital assets also reflects the need to determine a social media account as a specific object of property rights. In the case of business accounts, it is sensible to develop a company policy concerning social networks where all possible consequences connected with the rights to social media accounts of the company would be specified, because there are neither special legal provisions nor uniform court practice on these issues.

One more problem with social media accounts concerns the necessity of determining their post-mortem fate. It is widely agreed that there is a need to appoint a digital executor to deal with all kinds of digital assets including social media accounts. There is legal regulation of this issue in some USA states and the existing American law concerning fiduciary access to digital assets is being seriously considered by European legislators. This gives reason to suppose that a unified approach to the management of digital assets will be adopted soon. Recent European and US case law concerning access to the social media accounts of a deceased user, which was given to their relatives, suggests that some provisions of Terms of Service, which forbid authorizing access to accounts or provide an opportunity to online service providers to dispose of users' accounts, will be considered as discriminatory and made unlawful in the near future.

⁶⁹ See *In re CTLL, LLC* (2015), 528 B.R. 359, 359 (Bankr. S.D. Tex. Apr. 3, 2015).