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WHAT HAPPENS TO MY DIGITAL HERITAGE IF I DIE? Part I[1]

Abstract. Goal and tasks: The purpose of this article— which is divided into two parts — is to verify is a "digital heritage" is transmissible mortis causa.
Scientific Importance: The "Digital Revolution" has been transforming all aspect of social and economic life, including the concept of heritage. In this regard, the idea that a"digital heritage"— which is made up of virtual goods (such as domain name, password, username, social account, email, etc.) — can be configured is beginning to take shape.
Methods: In this first part, the author focuses on the notion of "digital heritage" to understand if, according to article 810 of the Italian Civil Code, the virtual goods can be object of rights. In particular, she distinguishes the legal status of assets contained in offline media — which are transferred in compliance with the general rules of inheritance law — and that of assets placed on the web — which are ruled by the general contractual conditions, whose validity must be established in the light of the Italian legislation.
Main conclusions: At the end of this first part, the author substantiates the conclusion that most of the conditions which exclude the heir from taking over the same contractual position as the deceased are — in the light of the Italian legislation — invalid.
Keywords: Digital Revolution; Digital Heritage; Italian Inheritance Law; Social account; Privacy; General Terms and Conditions; virtual goods; last will; testament.
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1. Introduction

In the past fifty years, technological progress has triggered a real "Digital Revolution", still in progress, transforming all aspects of social life, such as the ways of interacting with others and sharing personal data, the approach to the world of work, culture and information, the method of storing and transmitting documents, and the concept of heritage. In this regard, the idea that an authentic "digital heritage" can be configured is beginning to take shape. However, its configuration is a polymorphous and complex concept, destined to include, as a first approximation, both the files contained on offline supports and the information entered on the web.[2]

If it is true that the inheritance of a subject is composed of active and passive juridical

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[1] The document has also been published, with some differences, in the Italian magazine *Notariato*, 5, 2021. The second part of this article will be published in the next issue of this *Journal*.

[2] *See:* Haskel J. & Westlake S. (2017) Capitalism Without Capital. The Rise of the Intangible Economy, Princeton Univ. The authors highlight how, at the beginning of the 21st century, the main developed economies began to invest more in intangible assets, encouraging the emergence of a new concept of economy ; Conway H. & Grattan S. (2017) The "New" Property: Dealing with Digital Assets on Death, in H. Conway, & R. Hickey (Eds.). Modern Studies in Property Law. Vol. 9 1st ed., P. 99—115. Hart Publishing, Oxford // URL: https://www.bloomsburyprofessional.com/uk/modern-studies-in-property- law-9781782257547/); *Zoppini A.* New properties in the hereditary transmission

relationships, some of which, at the death of the owner, are devolved to an heir,[3] it is then evident that this process of transformation, continuous and unstoppable, cannot leave the operators of the law indifferent. Indeed, an issue is whether "digital assets" are transmissible *mortis causa* and, if so, what are the legal instruments available to the *de cuius*.[4] These are questions of factual relevance, as shown by international and national jurisprudence.

2. Theoretical framework. The concept of digital heritage

The logical and juridical *prius* of the present discussion is the examination of the notion of "digital assets" to understand if, according to article 810 of the Civil Code, they can be the object of rights, and if they can be subject to *mortis causa* succession. Indeed, the expression *de qua* appears for the first time in a text by M. Cinque.[5]

While translating the English locution "digital assets," she warns the reader about the lack of terminological technicality, mirroring the difficulties and uncertainties of interpretation, especially related to the heterogeneity of assets and legal situations that traditionally fall within this perimeter.[6] Such digital assets are

1) the social networks accounts and, therefore, the content entered and stored in them;
2) email and chat communications;
3) databases;
4) text files;
5) images;
6) music;
7) offline digital documents;
8) domain names;[7]
9) cryptocurrencies.[8]

Therefore, the notion of "digital heritage," as mentioned initially, is polymorphous and complex.[9] Nevertheless, the studies carried out by the

of wealth (notes in the margin of property theory), in Riv. Dir. Civ., 2000, 2, 10185 ss. ; *Resta G.* (2010) Exclusive rights and new intangible assets. UTET, Torino ; *Corapi G.* The hereditary transmission of so-called "new properties", in Fam. Pers. Succ., 2011, 5 ss.

3 See: *Capozzi G.* (2015). Successioni e donazioni — IV ed. a cura di Ferrucci A. e Ferrentino C. Giuffrè, Milano.

4 On the subject, the Italian Notariat has immediately shown particular interest on this matter. See: *Bechini U.* Password, credenziali e successione mortis causa. Studio n. 6-2007 / IG del Consiglio Nazionale del Notariato, approvato dalla Commissione Studi di Informatica Giuridica l'11 maggio 2007 (URL: https://www.notariato.it/sites/default/files/6-07-IG.pdf). The CNN has also drawn up a handbook specifically to orient themselves in this complex matter (URL: https://www.notariato.it/sites/default/files/Ereditx_Digitale.pdf) and, in collaboration with Microsoft and Google, has prepared a "protocol" suitable to put the digital heirs in condition to interact with the operators of the net.

5 *Cinque M.* La successione nel "patrimonio digitale": prime considerazioni, in Nuova Giur. Civ., 2017, 10, 20645. Id. L'eredità digitale alla prova delle riforme, in Riv. Dir. Civ., 2020, 1, 72 ss.

6 Some authors prefer to use the expression "succession in digital assets and relationships" to circumscribe the problem to the transmissibility of social network accounts:see: *Resta G.* La "morte" digitale, in Il diritto dell'informazione e dell'informatica. Anno XXIX, 2014, fasc. 6, 891 ss. ; *Marino G.* La successione digitale, in Oss. dir. civ. e comm., 2018, 165 ss.
Other Authors, instead, express themselves in terms of "digital heritage": see: *Camardi C.* Digital inheritance. Tra reale e virtuale, in Il diritto dell'informazione e dell'informatica (II), 2018, fasc. 1, 65 ss.

7 *Resta G.* Ibidem. *Cinque M.* La successione nel "patrimonio digitale". Op. cit. ; *Maspes I.* Successione digitale, trasmissione dell'account e condizioni generali di contratto predisposte dagli Internet Sevices Providers, in Contratti, 2020, 5, 583 ss.

8 Part of the doctrine makes cryptocurrencies part of "digital assets" see: Lorenzo L. L'eredità digitale, in Notariato, 2021, 2, 138 ss.
However, it is important to underline that there is total uncertainty about their legal nature and, consequently, about the applicable regulations. This is to the extent that there is no consensus of opinion as to whether they fall under the notion of article 810 of the Civil Code. For an examination of digital currencies, see: *Rinaldi G.* Approcci normativi e qualificazione giuridica delle criptomonete, in Contratto e Impr., 2019, 1, 257 ss.

9 Some authors point out that the distinction between "heritage" and "digital heritage" should not be misleading, since the mass remains unique to each individual see: *Mastrobernardino F.* (2019) Il patrimonio digitale. Edizioni Scientifiche Italiane, Napoli.

American doctrine, pioneer in the matter, may be a starting point to analyse the concept of digital assets.[10]

Some authors, identifying the legal regime of the single assets involved, have proposed distinguishing between offline digital assets — which include those digital assets stored on physical supports (e.g., PCs, USB keys) — and online digital assets — those digital assets located on the web. Other authors, instead, have suggested subdividing the "digital assets" into four subcategories:

a) Personal Assets, which include data generated by the user for personal use;
b) social media assets, which include data generated by the use of social networks or instant messaging;
c) financial Assets, consisting of accounts provided by banks and financial operators;
d) business accounts, functional to the fulfillment of commercial operations.[11]

Finally, other authors have considered that the notion of "digital heritage" should not only include the data created by the owner but also that created by third parties and referable to the owner.[12]

In the wake of the aforementioned authors, the Italian doctrine[13] has, at first, proposed to distinguish the assets that make up the digital heritage in two categories. On the one hand, there are those with patrimonial content or susceptible to evaluation and economic use (e.g., the blog of an influencer) and, on the other hand, there are the goods having a purely emotional value (e.g., personal photos).[14]

However, as observed by the author G. Resta, such a distinction can only operate in the abstract since, in the digital reality, the same good can include both patrimonial and non-patrimonial contents.[15] Therefore, given the inadequacy of the aforementioned dichotomy, the distinction proposed by the American doctrine between digital assets on the web, often protected by passwords (so-called *online assets*), and digital assets that are stored in devices owned by the deceased (so-called *offline assets*) is accepted.[16]

Indeed, in the writer's opinion, this distinction is more appropriate to identify the legal regime of virtual goods, given that, only in the case of online assets, we need to examine the general contractual conditions, unilaterally prepared by Internet Services Providers (ISPs).

Clearly, all the reconstructions indicated above underlie the idea that virtual goods are legally relevant entities, capable of satisfying interests worthy of protection according to the legal system. Therefore, they would be ascribable to the category of intangible assets[17] and, therefore, to article 810 of the Civil Code.[18]

[10] For a more in-depth review see: *Mollo A. A.* Il diritto alla protezione dei dati personali quale limite alla successione mortis causa, in Jus civile, 2020, 2, 430 ss. ; *Trolli F.* La successione mortis causa nei dati personali del defunto e i limiti al loro trattamento, ivi, 2019, 4, 313 ; *Maniaci A e D'Arminio Monforte A.* L'eredità digitale tra silenzio della legge ed esigenze di pianificazione, in Corriere Giur., 2020, 11, 1367.

[11] *Cahn N.* Postmortem Life On-Line, 2011, 25 Prob. & Prop. 36 // URL: https://core.ac.uk/download/pdf/ 232644468.pdf.

[12] *Haworth S. D.* LayingYour Online Self to Reset: Evaluating the Uniform Fiduciary Access to Digital Assets Act, in 68 U. Miami L. Rev, 2014, 537 ss. (URL: https://lawreview.law.miami.edu/wp-content/uploads/2011/12/Laying-Your-Online-Self-to-Rest-Evaluating-the-Uniform-Fiduciary-Access-to-Digital-Assets-Act.pdf).

[13] *Mastrobernardino F.* (2019). Il patrimonio digitale. Op. cit.

[14] *Camardi C.* L'eredità digitale, op. cit. Spatuzzi A. Patrimoni digitali e vicenda successoria, in Notariato, 2020, 4, 402 ss.

[15] *Resta G.* La successione nei rapporti digitali e la tutela post-mortale dei dati personali, in Contratto e Impr., 2019, 1, 85 ss.

[16] *Camardi C.* L'eredità digitale. Tra reale e virtuale. Op. cit.

[17] *Messinetti D.* (1970). Oggettività giuridica delle cose incorporali, Giuffrè, Milano ; *Pugliese G.* Dalle «res incorporales» del diritto romano ai beni immateriali di alcuni sistemi giuridici moderni, in Riv. Trim. dir. proc. civ., 1982, 1137 ss.

[18] *Biondi B.* (1953). I beni, in Trattato di dir. civ. it.,diretto da F. Vassalli. UTET, Torino ; *Bianca C. M.* (2017). La proprietà — vol. 6. Giuffrè, Milano ; *Costantino M.* (2005). I beni in generale, in Tratt. dir. priv., diretto da Rescigno P. UTET, Torino ; *Zencovich Z.* (1989). Cosa, in Digesto civ., IV. UTET, Torino ; *De Martino F.* (1976). Beni in generale, in Comm. Scialoja-Branca, sub art. 810. Zannichelli, Bologna-Roma.

3. Statement of the problem. Legal regime of virtual goods

After defining the notion of digital assets, it is necessary to verify whether the goods and the legal relationships that make it up are transmissible *mortis causa.*

3.1. Methods. Offline digital assets

There are no particular interpretative difficulties in identifying virtual goods contained in physical storage media, of which the deceased has the availability (goods which, as mentioned above, constitute the so-called offline digital assets). For example, videos, audio, images and documents stored on hard disks, pen drives, CD-ROMs, DVDs, PCs, smartphones or tablets. If the deceased has a real right on the media, the contents will be transferred, *mortis causa*, in compliance with the general rules of inheritance law.[19]

At this point, a clarification is necessary. Recalling the legislation on copyright, part of the doctrine believes that, where the aforesaid digital contents have a strictly personal nature and merely emotional relevance (for example, family photos and videos are mentioned), a phenomenon of subjectively anomalous vocation should occur,[20] since the devolution would not take place in favour of any heir but exclusively in favour of the next of kin (ex art. 93 Law 22 April 1941, no. 633).[21]

The next of kin would indeed be bearer of an interest considered more worthy of protection, i.e. safeguarding the digital identity of the deceased.[22] Similarly, where the digital assets of the offline patrimony are configured as works of the deceased (think of the creation of a website, a blog that is a source of income or registered domain names), there will be the devolution *mortis causa* of the right to the economic exploitation of the same, according to the ordinary rules. Otherwise, the moral right of copyright, pursuant to article 23 of the cited law n. 633/1941, can be asserted only by the next of kin, as a right *iure proprio.*[23]

3.2. Methods. Online digital assets

An intricate problem concerns the fate of digital data created and processed through service contracts concluded with providers (goods that, as mentioned above, constitute the so-called online digital heritage). Someone,[24] considers that the following cases fall into this category:

1) accounts created for the purchase of goods or services (think of an Amazon account);[25]
2) social network accounts, where the personality of the individual develops and manifests itself through the sharing of digital content (think of an Instagram account); 3) email accounts, functional to the exchange of messages and documents (think of a Gmail account).

The above cases are united by the circumstance that users log in to a website owned by the

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[19] *Resta G.* La "morte digitale", op. Cit.

[20] On this subject, see: *Capozzi G.* (2015). Successioni e donazioni. Op. cit. ; *Mandrioli E.* Successioni legittime anomale: un fenomeno sempre meno anomalo, in Vitanot., 2003, 2, 1100 ss. ; *Recinto G.* (2008). Le successioni anomale, in Diritto delle successioni, a cura di Calvo R. e Perlingieri G., I. Edizioni Scientifiche Italiane, Napoli, 647 ss. ; *Bonilini G.* (2009). Introduzione, IV, Le successioni legittime anomale, in Trattato di diritto delle successioni e donazioni, diretto da Bonilini G., III. Giuffrè, Milano, 967 ss. ; *Ieva M. e Rastello A.* (2010). Le successioni anomale, in Trattato breve delle successioni e donazioni, diretto da Rescigno P., coordinato da Ieva M., I. Cedam, Padova, 697 ss.

[21] *Bembo M. D.* (2009). Carte, documenti, ritratti, ricordi di famiglia, in Trattato di diritto delle successioni e donazioni, I, La successione ereditaria, a cura di Bonilini G. Giuffrè, Milano ; *Tuccillo R.* La successione ereditaria avente ad oggetto le carte, i documenti, i ritratti e i ricordi di famiglia, in Diritto delle successioni e della famiglia, 2016, 1, 159 ss. ; *Morri F.* (2009). Il diritto d'autore. Le lettere missive ricevute dal de cuius, ivi.

[22] *Ubertazzi L. C.* (2000). I diritti d'autore e connessi.Giuffrè, Milano ; *Carraro L.* (1951). Il diritto dei ricordi di famiglia, in Studi in onore di Cicu A., I. Giuffrè, Milano.

[23] For an in-depth analysis of the link between a work of genius and the personal identity of its creator, see: *Thiene A.* I diritti morali d'autore, in Riv. Dir. Civ., 2016, 6, 1522 ss.

[24] *Camardi C.* L'eredità digitale. Tra reale e virtuale. Op. cit.

[25] Ibid. The author also brings contractual relationships relating to cryptocurrencies into this category.

supplier, where they share digital data, which constitute the object of a subjective right.

From what has been said so far it is possible to infer, albeit implicitly, the distinction between the account and the relevant digital contents. In fact, the former does not constitute a digital asset *per se*, but is the means through which the contractual relationship between the service provider and the user is expressed.[26]

Therefore, in order to clear the scene from any possible misunderstanding, it is necessary to specify that the expression "succession mortis causa of the account" must be understood in the sense of (verifying the) transmissibility of the contractual relationship and the related digital data, in case of the death of the user. However, given the delicate relationship between the protection of privacy and the digital identity of the *de cuius* — or, as effectively said, "post-mortal protection of personal data"[27] — and universal succession, there is no easy answer.

In addition, the complexity of the case also derives from the absence of specific legislation on the subject, so that there is a continuous proliferation of general contractual conditions, prepared unilaterally by providers who are often based in foreign countries, thus shedding light on those transnational or supranational characteristics that affect the identification of the discipline that is concretely applicable. With reference to contractual relations in general,[28] under the Civil Code of 1865 (art. 1127 Civil Code), it was determined that "it is presumed that each party is responsible for the performance of the contract" — according to which "it is presumed that each person has contracted for him/herself and for his/her heirs and successors in title when the contrary is not expressly agreed, or this does not result from the nature of the contract" — that the same were transmissible *mortis causa*.[29]

Although the aforesaid provision has not been replicated in the current Civil Code, it is common ground that the principle of transmissibility to the heirs of the contractual relations of the deceased is an immanent rule of the Italian legal system, which can be deduced from the discipline contained in Book II and Book IV.[30] This rule, therefore, appears consistent with the idea of the universality of succession.[31] However, there are exceptions, since both relationships for which the parties or the law prevent their circulation, and *intuitus personae* relationships, in which the personal qualities of the contracting parties affect the qualities of the object of performance, are non-transmissible.

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[26] *Maniaci A. e D'Arminio Monforte A.* L'eredità digitale tra silenzio della legge ed esigenze di pianificazione. Op. cit.

[27] Expression used by *Resta G.* La successione nei rapporti digitali e la tutela post-mortale dei dati personali, op. cit. For an in-depth discussion of the personality rights of the deceased, see: *Alpa G.* L'identità digitale e la tutela della persona. Spunti di riflessione, in Contratto e Impr., 2017, 723 ss. Id. e *Resta G.* (2019). Le persone e la famiglia. Vol. 1 : Le persone fisiche e i diritti della personalità, in Trattato di Diritto Civile, diretto da Sacco R. UTET, Torino ; *Marini G.* La giuridificazione della persona. Ideologie e tecniche nei diritti della personalità, in Riv. dir. civ., 2006, 359 ss.

[28] The study of the interaction between succession and contract is the subject of a well-known study by the Consiglio Nazionale del Notariato. *Musto A.* La circolazione mortis causa dei "rapporti giuridici in via di formazione" e dei "rapporti preliminari a parziale indeterminatezza soggettiva". Studio n. 416-2012/C del Consiglio Nazionale del Notariato, approvato dalla Commissione Studi Civilistici del 17 gennaio 2013 (URL: https://www.notariato.it/sites/default/files/416-12-c.pdf).

[29] *Pascucci L.* La successione per causa di morte nei rapporti contrattuali facenti capo al de cuius, in Famiglia e diritto, 2012, 5, 513 ss.

[30] *Cicu A.* (1961). Le successioni per causa di morte. Parte generale, in Trattato di diritto civile e commerciale, diretto da Cicu A. e Messineo F. Giuffrè, Milano ; *Padovini F.* (1990). Rapporto contrattuale e successione per causa di morte. Giuffrè, Milano ; *Caccavale C.* (2006). Contratto e successioni, in Trattato del contratto, diretto da Roppo V., VI. Giuffrè, Milano ; *Mengoni L.* (1999). Successioni per causa di morte, Parte speciale, Successione legittima, in Trattato di diritto civile, diretto da Cicu A. e Messineo F. Giuffrè, Milano ; *Palazzo A.* Le successioni, in Trattato di diritto privato diretto da Iudica G. e Zatti P. Giuffrè, Milano ; *Schlesinger P.* (1971). Voce "Successioni" (diritto civile), Parte generale, in Noviss. Dig. it., XVIII. UTET, Torino, 749 ss.

[31] *Padovini F.* (2009). Le posizioni contrattuali, in Trattato di diritto delle successioni e donazioni, I, La successione ereditaria, a cura di Bonilini G. Giuffrè, Milano.

Therefore, in order to verify whether the positions arising from contracts relating to the provision of digital services fall within the rule or the exception, it is relevant to proceed by:

1) examining the content of the general terms and conditions of the main social networks;
2) identifying the applicable law;
3) verifying, in cases of application of Italian law, the compliance with the clauses drafted by providers.

3.2.1. General Terms and Conditions of the Main Providers of Online Services

As mentioned above, the relationship between the provider and the user is regulated — in the silence of the law — by a contract, within which it is possible to find specific clauses concerning the fate of the account and digital content, in case of death of the user.

Below are the clauses prepared by the main providers.

Amazon provides for the possibility of sending a request to a dedicated team to close the account, to which a copy of the user's death certificate must be attached. In case the deceased was the owner of any gift vouchers, these can be transferred to the person mentioned in the certificate, who will have to provide proof of his/her relationship with the deceased person. The same provision applies to the last purchases made by the user.[32]

Similarly, the terms and conditions set out by *e-Bay* do not allow for the sale or transfer of ownership of the account. Consequently, in the event of the death of the user, it will only be possible to request the closure of the same, with the consequent cessation of all activities associated with it and based on the same identity.[33]

So, the two main marketplaces adopt perfectly overlapping solutions, since they do not allow any succession in the contractual relationship, but only the right to obtain cancellation of digital data. Both technological giants justify this choice by virtue of the need to protect users and the security of the platform.

With regards, instead, social network accounts,[34] there is a range of solutions starting from the possibility of choosing a heir contact to the transformation into a memorial profile, to the removal of the account and its contents. In particular, the conditions of use of *Facebook* provide the following: "you may appoint a party (referred to as an heir contact) to manage your account made commemorative. Only an heir contact or an individual designated in a valid will or similar document expressing clear consent to the disclosure of content in the event of death or incapacity may request disclosure from the user's account once it has been memorialized."[35]

Therefore, the user — in anticipation of his death — has the choice between having his account deleted — with the consequent definitive removal of all messages, photos, posts, comments, reactions, and information — or the appointment of a subject (so-called heir contact), to whom the management of the profile, which has become commemorative, will be entrusted. In fact, if the user does not choose to delete his account, this will be made commemorative as soon as one has knowledge of his death, provided that this event is adequately proved.

Distinguishing features of a memorial profile include:

a) the words "in memory of" appear next to the name of the deceased;
b) depending on privacy settings, "friends" can share posts;
c) content shared by the deceased is not removed;
d) memorial profiles do not appear in public spaces such as "people you might know" suggestions, advertisements, or birthday reminders.

[32] See the section "Assistenza e Servizio clienti" (URL: https://www.amazon.it/gp/help/ customer/display.html?nodeid=gzzqg845t3nkyx9d).

[33] URL: https://www.ebay.it/help/selling/selling/vendere-un-account-ebay?id=4134.

[34] For an examination of the civil law aspects of social networks see: *Perlingieri C.* (2014). Profili civilistici dei social networks. Edizioni Scientifiche Italiane, Napoli.

[35] URL: https://it-it.facebook.com/help/memorialized.

In addition, no one can access a memorial account and no changes can be made to it unless an heir contact has been designated (a choice, by the way, reserved for those at least 18 years of age).

However, the *nomen iuris* must not mislead. The heir contact, in fact, is only attributed the management of the memorial profile. The faculties and powers of this, however, are not super imposable to those of the *de cuius*, since he cannot access the account, nor read messages, nor remove friends or send new friendship requests.

The heir account can only accept friend requests, write a post fixed at the top, update the profile and cover image, and request the removal of the account. Moreover, if this were not the case, a clear conflict of the clause in question would arise in relation to two principles of the Italian law of succession: the sources of delation are the law and the will, so *tertium genus non datur* (Article 457 Civil Code) and the prohibition of agreements on inheritance (Article 458 Civil Code). Rather, as discussed below, the case of the mandate *post-mortem exequendum* could be configured. Indeed, the general conditions prepared by Facebook do not allow a succession in the contractual position of the *de cuius* or a right of the heir to obtain the data contained therein.

The conditions of use of *Instagram* do not provide for the possibility of appointing an heir contact.[36] In fact, in the face of a valid request and proof of the user's death (which can be provided by a document certifying the death, a link to an obituary or a newspaper article), it will be possible to make the account commemorative, so that:

a) no one will be able to access it;
b) the words "in memory of" will be placed next to the name of the deceased;
c) shared posts, including photos and videos, will remain on the platform, visible to the audience with whom they were shared;
d) the memorial profile will not be visible in certain spaces, such as in the "explore" section; and
e) no one will be able to make changes to existing posts or information. Therefore, photos or videos, comments or posts added on the profile, privacy settings, current profile picture, followers and people followed will not be editable. Alternatively, a deceased person's immediate family or heirs may request that the account to be removed by completing an online form.

The terms and conditions of use of *Twitter* only allow for the removal of the account of the deceased, with the consequent non-transmissibility of the relative digital inheritance.[37] To this end, it will be necessary to send an *ad hoc* request, to which a copy of the user's death certificate and identity document of the applicant must be attached. In fact, a note on the website states: "we are unable to provide the access credentials of the account to anyone, regardless of the relationship between the deceased and the person making the request."

Finally, the conditions of service prepared by *TikTok* do not contain specific clauses for the case of the death of a user. However, it is established that the provider reserves the right to suspend or close the account of a user in the event of long periods of inactivity.[38]

With regard to email accounts, which are used to exchange messages and documents, the terms of use of *Gmail* stipulate the following: "we realize that many people do not leave clear instructions for managing their online accounts before they pass away. We may work with next of kin and representatives to close the online accounts of deceased users in some cases. In certain circumstances, we may provide the contents of a deceased user's account. In all cases, our primary responsibility is to keep our users' information safe and private. We may not provide passwords or other access details. Any decision to comply with a request relating to a deceased user will be made only after careful consideration."[39]

This provider — through the "inactive account management" function — also gives the user the

[36] URL: https://help.instagram.com/581066165581870.
[37] URL: https://help.twitter.com/it/managing-your-account/contact-twitter-about-a-deceased-family-members- account.
[38] URL: https://www.tiktok.com/legal/terms-of-service?lang=it.
[39] URL: https://support.google.com/accounts/troubleshooter/6357590?hl=it.

possibility to opt for the cancellation of his account — with the consequent elimination of all data associated with the products used, including publicly shared data — or for the designation of the subject who, in case of inactivity, will receive a notification. If the deceased has decided to only inform the subject of the inactivity of his account, s/he will receive an email with the subject and the contents written by the user during the configuration.

On the other hand, if the user has decided to share his data with a trusted contact, the aforementioned email will also contain the list of data and a link that will allow download. In order to verify whether the user is utilizing his or her account, Google monitors the most recent accesses and activity.

The general conditions prepared by *Microsoft Corporation* state that, for legal and privacy reasons, it is not possible to provide information on email accounts following the death of a user.[40] If the relatives of the deceased have an interest in the removal of the account, they do not necessarily have to contact the provider, because if they know the credentials, it can be done manually; vice versa, if they do not know the credentials, it will be closed automatically after two years of inactivity.

On the other hand, if the heirs of the deceased had an interest in accessing the account, they would have to serve a formal summons or obtain a court order. In this case, Microsoft will consider — after a careful examination of the applicable laws — whether to release the requested information. However, some local variations are to be expected.

Finally, the general terms and conditions of *Apple*stated: "D. No right of inheritance. Unless otherwise required by law, you agree that your Account is non-transferable and that any rights to your Apple ID or Account Content terminate upon your death. Upon receipt of a copy of your death certificate, your Account may be terminated and all Account Content deleted."41 However, the help section of the website stated that in order to assist in accessing a deceased customer's devices or personal information stored in iCloud, family members must obtain a court order indicating: a) the name and Apple ID of the deceased; b) the name and capacity of the person requesting access. In addition, Apple encourages its users to include a provision in their will regarding personal information stored on their devices and in iCloud, in order to simplify the process of acquiring the aforementioned provision. Evidently, almost all of the above contract terms are modeled according to US law.

With the latest iOS update, people now can choose their "digital legacy".

3.2.2. Discussion. The criteria for identifying the applicable law

Moving further into the analysis, the fact that the matter requires an interdisciplinary approach becomes clear.[42] In fact, the main providers are based abroad, so it is necessary to take account of the elements of transnationality or supranationality for the purposes of identifying the law concretely applicable to the succession. To this end, the rules contained in Law no. 218 of May 31,1995 and EU Regulation no. 650 of July 4, 2012 are of assistance.

The aforementioned Law 218/1995 — in the past the only normative reference point for international successions — establishes, in its article 46, the main criterion for identifying the *lex successionis*: the nationality of the deceased. However, it is without prejudice to the so-called *professioiuris*, i.e. the possibility that the de *cuius* — by means of an express declaration in testamentary form — subjects his succession to the law of the State in which s/he resides. This choice will be effective only if at the time of death, the declarant still resides in that State.[43]

[40] URL: https://support.microsoft.com/it-it/office/accesso-a-outlook-com-onedrive-e-ad-altri-servizi-di- microsoft-inseguito-al-decesso-di-un-utente-ebbd2860-917e-4b39-9913-212362da6b2f.

[41] URL: https://www.apple.com/it/legal/internet-services/icloud/it/terms.html.

[42] *Zagaria F.* Patrimonio digitale e successione mortis causa, in De Iustitia, 2020 // URL: http://www.deiustitia.it/ cms/cms_files/20201224120127_hifr.pdf).

[43] For a careful examination of professio iuris under private international law norms, see: *Calò E.* La professio iuris straniera nel diritto internazionale privato italiano delle successioni. Studio 05.07.07.44/UE del Consiglio Nazionale

Subsequently, in order to dictate a uniform European discipline in succession matters, the aforementioned EU Regulation 650/2012 was introduced, intending to operate with regard to all successions opened as from 17 August 2015, not only relating to citizens of the Member States of the Union, but also to non-EU subjects who are habitually resident there. By virtue of this legislation there is a reversal of the criterion for identifying the law applicable to successions. In fact, article 21 provides that the *lex successionis* is that of the State in which the deceased had his/her habitual residence at the time of death. If, however, the deceased was manifestly more closely connected with a State other than the one indicated above, the law applicable to the succession will be that of that of the other State. Article 22 of the Regulation also permits *professio iuris* but in favour of the law of the state of nationality of the deceased at the time of the choice or at the time of death.[44] Therefore, in the light of what has been said above, the Italian law will be applicable to the entire succession — given the principle of its uniqueness — whenever the *de cuius* is habitually resident in Italy, or has manifestly closer links with the Italian State, or has made a valid *professioiuris* in favor of the Italian law.

3.2.3. The Conformity to Italian Law of the Clauses Drafted by the Providers

Once the content of the clauses drafted unilaterally by the main providers has been identified, as well as the criteria for identifying the *lex successionis*, it is possible to proceed with verifying — in the light of national legislation — the validity of the agreements that exclude the heir from taking over the same contractual position as the deceased, user of digital services. To this end, the majority of doctrine has proposed a distinction according to the status of the user.[45] Indeed, if the latter can be qualified as a consumer pursuant to article 3 of Legislative Decree no. 206 of September 6, 2005 (the so-called Consumer Code), i.e. "a natural person acting for purposes unrelated to any entrepreneurial or professional activity carried out", the provision of article 33 of the aforementioned decree will apply.[46] Therefore, the clause that allows the professional to withdraw from contracts for an indefinite period of time without a reasonable notice, causing the consumer a significant imbalance in the rights and obligations arising from the same, is to be considered vexatious, despite good faith, and, consequently, null and void.[47] However, this is partial nullity, pursuant to article 1419 of the Civil Code. On the other hand, in the hypothesis in which the user can be qualified as a professional within the meaning of article 3 of the Consumer Code, i.e. "a natural person acting in the exercise of his entrepreneurial or professional activity, or an intermediary", the

del Notariato, approvato dalla Commissione Affari Europei e Internazionali il 10 settembre 2005 (URL: https://www.notariato.it/sites/default/files/44.pdf).

[44] To identify the main innovations introduced by the EU Regulations see Federnotizie Il regolamento UE n. 650 del 2012 e legge applicabile alla successione (URL: https://www.federnotizie.it/il- regolamento-ue-n-650-del-2012-e-la-legge-applicabile-alla-successione/). See also: *Zagaria F.* I principi della disciplina delle successioni transfrontaliere alla luce del Regolamento UE del 4 luglio 2012 n. 650, in De Iustitia, 2020 (URL: http://www.deiustitia.it/cms/cms_files/20200429093128_@qkq.pdf). *Battiloro R.* Le successioni transfrontaliere ai sensi del reg. UE n. 650/2012 tra residenza abituale e certificato successorio europeo, in Diritto di Famiglia e delle Persone, 2015, 2, 658 ss. ; *Kindler P.* La legge regolatrice delle successioni nella proposta di regolamento dell'Unione europea: qualche riflessione in tema di carattere universale, rinvio e professio iuris in Riv. dir. int., 2011, 426 ss.

[45] *Resta G.* La "morte" digitale, op. cit. *Mollo A. A.* Il diritto alla protezione dei dati personali quale limite alla successione mortis causa, op. cit.

[46] *Deplano S.* La successione a causa di morte nel patrimonio digitale, in Internet e Diritto civile, a cura di Perlingieri C. e Ruggeri L. 2015, 437 ss.

[47] To some, the contractual imbalance would not be found in the non-transmissibility of the account (rectius of the contractual position) but in the non-transmissibility of the content of the same (rectius of digital goods): see Cinque M. La successione nel "patrimonio digitale": prime considerazioni, op. cit.

protection of his inheritance rights will be guaranteed by the application of article 1341 of the Civil Code[48] which provides — according to a granitic interpretation[49] — the nullity of the clauses that attribute, to the person who has prepared them, the right to withdraw from the contract.

4. Conclusion

In conclusion, when a *mortis causa* succession is ruled by the Italian Law, the conditions which exclude the heir from taking over the same contractual position as the deceased might be considered invalid.

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[48] There are many authors according to whom the clauses de quibus are to be considered valid, since the contracting parties can — by virtue of the recognized negotiating autonomy — configure a certain relationship as intuitus personae, with consequent non-transmissibility. See: *Padovini F.* Rapporto contrattuale e successione per causa di morte, op. Cit. It has also been affirmed that the subjective specificity — that is, the individuality — of the network user makes the contract characterized by intuitus personae. Therefore, once the user has died it is not clear how the relationship can continue with the heirs who, otherwise, should be able to use the account as their own. See: *Delle Monache S.* Successione mortis causa e patrimonio digitale, in Nuova Giur. Civ., 2020, 2, 460 ss.

[49] *Genovese A.* Condizioni generali di contratto, in Enc. dir., VII, Milano, 1961, 802 ss.

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