

9. Post-mortem social media: law and Facebook after death

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1. INTRODUCTION

This chapter will look at the content of Facebook accounts in terms of private messages, images, videos, status updates, personal data and information, and the relevant post-mortem issues from a user's perspective, such as transmission of Facebook content on death, privacy, copyright. User accounts will be explored in their relation to terms of service, and in so far as they restrict/enable access to this content.

Facebook has the largest user base¹ and so it has a significant social importance.² In the first eight years of Facebook's existence, 30 million of its users died, with an average of 428 users dying every day.³ These accounts are then memorialised (if requested, see Section 2 below), removed or just remain on Facebook's platform.⁴

Some of the main issues in this area are related to the question whether the content and/or user's account can be considered property or whether an alternative legal doctrine is better suited to describe this content. User accounts are initially created through contracts between service providers and users, and it is clear that the account itself and the underlying software is property/intellectual property (IP) of the service provider. However, as demonstrated later in this chapter, the legal nature of this content is not as clear. If it is an object of property, then the content transmits on death, through one's will or intestate succession (see Section 2). Conversely, if the content is not property *stricto sensu*, then it can be protected by copyright and arguably transmits on death. For published content, this is quite simple, but the issues arise with the unpublished content on Facebook, as demonstrated in Section 3. In addition, a lot of the content is merely personal data and information (see Section 4). This type of content

¹ See eg Statista, 'Number of Monthly Active Facebook Users Worldwide as of 4th Quarter 2015 (in Millions)' <www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>. All websites last accessed 8 August 2016.

² Statista, 'Distribution of Global Social Content Sharing Activity as of 4th Quarter 2015, by Social Network' <www.statista.com/statistics/283889/content-sharing-primary-social-networks-worldwide/>.

³ WebpageFX Team, 'What Happens to Your Online Presence When You Die? [Infographic]' (*WebpageFX*, 18 June 2014) <www.webpagefx.com/blog/internet/happens-online-presence-die-infographic/>.

⁴ This is the most likely scenario; though there is a lack of empirical data to prove this.

cannot be considered property, and therefore cannot be transmitted through the usual mechanism of succession law and probate.

This chapter argues that the law in this area needs updating to allow a deceased user's family to acquire IP rights to user unpublished content on Facebook, without allowing the family to access and use the actual account. This should be done through in-service solutions, with the deceased's consent (akin to Facebook Legacy Account, see Section 3). For the non-copyrightable content, the chapter argues that the law should prevent the deceased's family from controlling his/her account and personal data (as a matter of post-mortem privacy, see Section 4). In this regard, the author welcomes technological solutions, but argues for their legal recognition and more consistency in the service provider's terms of service. User accounts are looked at holistically in this chapter, as is the content shared within an account. Therefore, content available and accessible elsewhere (such as published copyrighted content) is not a significant concern for the purpose of this discussion.

1.1 Illustrations

Although there has not been comprehensive relevant litigation in the UK or the US, the following examples serve to illustrate some of the issues around transmission of Facebook content on death, such as property, privacy and jurisdiction.

In one of the first cases reported by news media, Karen Williams, the mother of Loren Williams who died in 2005 at the age of 22, requested access to her son's Facebook account⁵ when she could no longer log in.⁶ Through her lawyer an agreement with Facebook was reached and a court order was obtained in 2007, giving effect to the agreement and allowing the mother to access her deceased son's account for a period of 10 months.⁷ As Facebook's policy and terms of service currently stand, Karen would not be able to gain access to Loren's account if this transpired today (see Section 2).

Another case concerns John Berlin, the father of Jesse who died in 2012 at the age of 22, and his request, directed to Facebook's founder, to create a 'Look Back' video for his

⁵ Lauren Gambino, 'In Death, Facebook Photos Could Fade Away Forever' (*Associated Press*, 1 March 2013) <www.yahoo.com/news/death-facebook-photos-could-fade-away-forever-085129756--finance.html>.

⁶ 'Karen Williams' Facebook Saga Raises Question of Whether Users' Profiles Are Part of "Digital Estates"' (*The Huffington Post*, 15 March 2012)-.

⁷ Ibid.

deceased son. The father did not have access to his son's account and thus he could not create one himself. After widespread media support, Facebook agreed to create one on his behalf using content that Jesse had posted publicly, in accordance with Facebook policy to protect users' privacy even upon death. There have reportedly been other cases where deceased users' videos have been provided to their families upon request. The request for a Look Back video has now been incorporated in Facebook's terms, but such a request is only available to the deceased user's Facebook 'friends' (see Section 2).

The case of Sahar Daftary, who died at the age of 23 in the UK, concerns the deceased's family application to subpoena the records from her Facebook account, as they believed that it 'contain[ed] critical evidence showing her actual state of mind in the days leading up to her death' which could be used in proceedings in the UK.⁸ This followed Facebook's refusal to grant access without a court order. While this case raises interesting jurisdictional issues, these are beyond the scope of this chapter.⁹ Importantly, this case serves as an example where precedence has been given to the deceased's privacy over the claimed property right of the family and heirs, which will be further explored in Section 4. The Northern District of California Court found that the US Stored Communications Act¹⁰ prevents a US service provider like Facebook from disclosing stored communications in civil proceedings in the US, as well as for the purposes of foreign proceedings.¹¹ The court also noted in an *obiter dictum* that Facebook could disclose the records to the family voluntarily in accordance with the Act. However, it has not been reported if Facebook has done so (see Section 2 and Facebook's terms of use).

<a> 2. FACEBOOK TERMS OF SERVICE: OWNERSHIP AND DEATH

This section will analyse the allocation of ownership/property/copyright in the user's Facebook contents, if any, as established by the service provider contract. The discussion will note some problems with regard to considering Facebook content as property, as well as some specific post-mortem issues arising from Facebook's terms of service. This is significant as all property forms inheritance, an estate of a person, and transmits by the rules of succession to the deceased's heirs. In the UK, for instance, 'a person's estate is the aggregate of all the

⁸ *In re Request for Order Requiring Facebook, Inc to Produce Documents and Things*, C 12-80171 LHK (PSG) (ND California; September 20, 2012).

⁹ For more on this topic, see Alex Mills, Chapter 13 in this volume.

¹⁰ 18 USC §2701.

¹¹ See *Request for Order* (n 8) 2, citing *Theofel v Farley-Jones*, 359 F3d 1066, 1074 (9th Cir 2004).

property to which he is beneficially entitled'.¹² Or, in the US, 'probate assets are those assets of the decedent, includible in the gross estate under IRC §2033, that were held in his or her name at the time of death'.¹³

Conversely, obligations in principle do not persist on demise. In common law jurisdictions purely personal obligations 'die with a person'.¹⁴ This position has been revised and most of the personal rights of action arising from torts survive on death. The only one that would not persist is defamation. As for contractual rights, personal contracts (eg employment contracts, contracts between an artist and a person commissioning him) will be discharged on death, unless there is an opposite provision in the contract.¹⁵ A contract which is not personal in nature is not discharged upon death, and it will survive for the benefit of the estate.¹⁶ A personal representative stands in the position of the deceased, without being a party to the contract.¹⁷ This analysis is important as a Facebook contract is personal in nature and it is interesting to explore whether and how it persists on death, as it currently reads.

Facebook's terms of use and privacy policy are known as the Statement of Rights and Responsibilities and the Data Use Policy.¹⁸ In addition, the labyrinth of terms governing users' behaviour on Facebook is also found in other specific terms, policy documents, guidelines and forms, as is the case for Facebook's policy for deceased users.¹⁹ These terms are often revised and proposed changes are posted to the Facebook Site Governance page a minimum of seven days before the change is effective.²⁰

In its terms of service, Facebook clearly refers to the ownership of user-generated content as belonging to users, with the option to control it through privacy and app settings.²¹ This term appears permissive and seems to cover virtually any material posted on Facebook,

¹² Inheritance Tax Act, s 5(1), applicable to England, Scotland, Wales and Northern Ireland; Wills Act 1837, s 3 (this Act does not extend its effect to Scotland); similarly, Succession (Scotland) Act 1964, s 32.

¹³ Jonathan J Darrow and Gerald R Ferrera, 'Who Owns a Decedent's E-Mails: Inheritable Probate Assets or Property of the Network?' (2006) 10 NYUJ Legis & Pub Pol'y 281; see also eg Laura McKinnon, 'Planning for the Succession of Digital Assets' (2011) 27 CLSR 362, 362-67.

¹⁴ Principle *Actio personalis moritur cum persona* in *Beker v Bolton* (1808) 1 Camp 439, 170 ER 1033, but see the Law Reform (Miscellaneous Provisions) Act 1934 (as amended); for a comparison between US and German perspectives, see eg Hannes Rosler, 'Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law (2008) 26 Berkeley J Int'l L 153.

¹⁵ See *Farrow v Wilson* (1868-69) LR 4 CP 744, 746.

¹⁶ See Law Reform Act 1934, s 1(1) and *Sugden v Sugden* (1957) P 120.

¹⁷ *Beswick v Beswick* [1966] Ch 538 (CA), or for commentary about the contracts and succession, see Anthony R Mellows, *The Law of Succession* (4th edn, Butterworths 1983) 295-96.

¹⁸ Facebook, 'Terms: Statement of Rights and Responsibilities' <www.facebook.com/legal/terms>.

¹⁹ *ibid* s 18.

²⁰ *ibid* s 13. Users must 'like' the page in order to receive a notification on their timeline.

²¹ *ibid*.

including users' personal data.²² However, looking at the very broad licence that the user gives Facebook for using his content, this control does not appear to be as strong as initially stated.²³ For instance, if a user wishes to remove his content, the user cannot be certain whether the content has actually been removed and what the 'reasonable amount of time' for which this content can persist really means.²⁴ Also, the use Facebook makes of this particular content is unclear. Furthermore, while the user seemingly retains control and can remove the content at any time, that is not the case with the account. The essential issue relating to transmission on death and the non-proprietary nature of the account is the non-transferability of Facebook accounts. Facebook's terms state that the agreement 'does not confer any third party beneficiary rights'.²⁵ A Facebook account is non-transferable, including any 'page' or 'application' users administer, without Facebook's written permission.²⁶ There is a clear prohibition on impersonation (using another user's account pretending you are that user), as password sharing is prohibited and users are also banned from letting anyone else access their account.²⁷

Therefore, whereas Facebook notes that the user owns content, Facebook owns the account, and we can identify the same legal implications as in email accounts.²⁸ However, this position is understandable, as the user is actually using proprietary software that enables posting and sharing of his content.

It is disputable whether these terms are enforceable at all, especially the ones outside the Statement of Rights and Responsibilities (the core of Facebook's terms of service). The issues of incorporation of contractual terms might arise here and deem these terms, including the ones relating to the post-mortem transmission, unenforceable or unconscionable.²⁹ In this

²² See *ibid* s 17 (Definitions).

²³ *ibid*.

²⁴ *ibid* s 2.

²⁵ *ibid* s 18.9.

²⁶ *ibid* s 4.9.

²⁷ *ibid* s 4.8.

²⁸ Edina Harbinja, 'Legal Nature of Emails: A Comparative Perspective' (2016) 14 *Duke L & Tech Rev* 227, 254–55.

²⁹ Eg the requirement that these are brought to a user's attention before or at the time of the formation of contract, ie when the user signs up to use Facebook. See *Olley v Marlborough Court Ltd* [1949] 1 KB 532 or *Parker v South Eastern Railway Co* (1877) 2 CPD 416. In the lack of these requirements, the terms would be deemed unenforceable. Unconscionability generally, on the other hand, remains a controversial topic in English law. See, for example, Stephen A Smith, Atiyah's *Introduction to the Law of Contract* (OUP, 2005), 308–313. For a US view, see Steven Hetcher, 'User-Generated Content and the Future of Copyright: Part Two – Agreements Between Users and Mega-Sites' (2008) 24 *Santa Clara Computer & High Tech LJ* 829; Ryan J Casamiquela, 'Contractual Assent and Enforceability in Cyberspace' (2002) 17 *Berkeley Tech LJ* 475, 495; Paul J Morrow, 'Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight' (2011) 11

particular case, it would be incorporation by reference, and Facebook has not taken appropriate steps to bring this to users' attention, as required by the law. Finally, there would be an issue of lack of consideration for the formation of a valid contract in English law. Facebook users, arguably, do not provide any tangible consideration, but it could arguably encompass personal data, used as valuable resources; their users are trading for having their Facebook account.³⁰ Bearing in mind all these issues then, a question remains as to whether some of these forms and policies and terms are 'merely statements of good practice' rather than binding contractual terms.³¹

Moving on to specific terms relating to deceased users, it is important to note at the outset that there is no provision that expressly terminates the contract between Facebook and a deceased user. Facebook terms do not expressly mention ~~deceaseds~~ 'deceaseds' accounts and the policy is set out on their help pages and refers to the 'memorialization' process and deletion of the deceased's account.³² The inclusion of the memorialisation option in Facebook's terms resulted from a personal loss of a Facebook employee.³³ This once more confirms the usual practice of dealing with digital assets on death: leveraging circumstances such as media coverage or personal losses of employees have prompted ad hoc solutions.

The effect of memorialisation is that it prevents anyone from logging in to the account, even those with valid login information and password.³⁴ Any user can send a private message to a memorialised account. Content that the deceased shared, while alive, remains visible to

PJTLP 7; Susan E Gindin, 'Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears' (2009) 8 NJTIP 1 [56]; For a comparative outlook see Phillip Johnson, 'All Wrapped Up? A Review of the Enforceability of "Shrink-wrap" and "Click-wrap" Licences in the United Kingdom and the United States' (2003) 25 EIPR 98; Hasan A Deveci, 'Consent in Online Contracts: Old Wine in New Bottles' (2007) 13 CTR 2231.

³⁰ On the sufficiency of consideration in English law, see eg *White v Bluett* (1853) 23 LJ Ex 36, *Currie v Misa* (1875) LR 10 Ex 153, *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87. Arguably therefore, personal data would represent sufficient consideration, given their importance and prominence in the online advertising, and the revenues Facebook has as a result of selling these data to the advertisers. It would be interesting to see the English courts' view on this. However, on the other hand, it would not be a problem in Scots law and civilian legal systems, which do not require consideration as an essential element for the formation of contracts.

³¹ Lilian Edwards and Edina Harbinja, 'What Happens to My Facebook Profile When I Die? Legal Issues Around Transmission of Digital Assets on Death' in Cristiano Maciel and Vinicius Carvalho Pereira (eds), *Digital Legacy and Interaction: Post-Mortem Issues* (Springer 2013).

³² In the earlier version of the terms, Facebook only referred to the memorialisation process using vague terms ('we may memorialize your account') – for more on this, see Damien McCallig, 'Facebook After Death: An Evolving Policy in a Social Network' (2013) IJLIT 1, 8.

³³ Kathy H Chan, 'Memories of Friends Departed Endure on Facebook' (Facebook, 26 October 2009) <www.facebook.com/notes/facebook/memories-of-friends-departed-endure-on-facebook/163091042130>.

³⁴ For the development of memorialisation as an option, see McCallig (n 30) 11–12.

those it was shared with (privacy settings remain 'as is').³⁵ In allowing privacy settings to remain post mortem, Facebook claims that it wishes to respect the privacy of the deceased. Depending on the privacy settings, confirmed friends may still post to the deceased's timeline. Accounts that are memorialised no longer appear in the 'people you may know' notifications.³⁶ In addition, memorialisation prevents the tagging of the deceased in future Facebook posts, photographs or any other content.³⁷ Unfriending (removing someone from one's friends list) a deceased person's memorialised account is permanent³⁸ and a friend cannot be added to a memorialised account or profile, which might be an issue for parents of deceased children who may not have added their parents as friends while alive.³⁹ As McCallig notes, however, 'it is not entirely clear whether Facebook would consider (or more importantly grant) a "special request" to be added as a friend if made, for example, by a bereaved parent' (as it met the request of Mr Berlin and the access to his son's 'Look Back' video, see Section 1.1).⁴⁰ 'Special request' can also be used for a variety of other purposes, including asking any question in relation to the profile or if a friend wishes to obtain a Look Back video.⁴¹ Look Back video is available at the request of any of the deceased's Facebook friends and Facebook promises to send the link to this video, which cannot be edited or shared.⁴² Again, Facebook justifies these restrictions by invoking privacy of the deceased user.⁴³ This therefore changes Facebook's position set out in Section 1.1 and Mr Berlin would not be able access the Look Back video according to the new terms.

Furthermore, when requesting content from the deceased's account, Facebook does not guarantee that they will be able to provide the requested content and note that they might require the person submitting the request to obtain a court order.⁴⁴ The help page then links to

³⁵ Initially, it was only visible to the user's friends, but this changed in February 2014, see Liz Fields, 'Facebook Changes Access to Profiles of Deceased' (*ABC News*, 22 February 2014)

<<http://abcnews.go.com/Technology/facebook-access-profiles-deceased/story?id=22632425>>; Chris Price and Alex DiScialfani, 'Remembering Our Loved Ones' (*Facebook Newsroom*, 21 February 2014) <<http://newsroom.fb.com/news/2014/02/remembering-our-loved-ones/>>.

³⁶ Facebook, Help Center, 'What Will Happen to My Account if I Pass Away?' <www.facebook.com/help/103897939701143/>.

³⁷ Stephanie Buck, 'How 1 Billion People Are Coping with Death and Facebook' (*MashableUK*, 13 February 2013) <<http://mashable.com/2013/02/13/facebook-after-death/>>.

³⁸ 'Nebraska is Latest State to Address Digital Legacy' (*Death and Digital Legacy.com*, 20 February 2012) <www.deathanddigitallegacy.com/2012/02/20/nebraska-is-latest-state-to-address-digital-legacy/>.

³⁹ Facebook, 'Special Request for Deceased Person's Account' <www.facebook.com/help/contact/228813257197480>.

⁴⁰ McCallig (n 30) 10.

⁴¹ Facebook, 'Special Request' (n 37).

⁴² Facebook, Help Center, 'Deactivating & Deleting Accounts' <www.facebook.com/help/359046244166395/>.

⁴³ *ibid.*

⁴⁴ Facebook, Help Center, 'How Do I Request Content from the Account of a Deceased Person?' <www.facebook.com/help/123355624495297/>.

a request form, which asks a number questions and requests submission of proofs of identity.⁴⁵ It is worth noting this is much more definite than the old version of the request, which permitted a request on the basis of an obituary.⁴⁶ As stated above, even after this procedure and the provision of documents, Facebook does not guarantee fulfilment of this request.

With regard to deactivation and removal of a deceased's account, the procedure is even more complex and vague. Facebook provides for this option, but with very general statements and vague criteria, calling this a 'special request'.⁴⁷ The option is available only to 'verified immediate family members' or an executor and the relationship to the deceased needs to be verified. Again, Facebook only promises that it will 'process' these requests, without giving a firm promise of fulfilling special requests.

Researchers argue that the procedure for removal of a deceased user's profile is incongruous with Facebook's purpose and features (primarily keeping in touch with one's friends). Kasket, for instance, questions the 'right' of parents (often not users' friends on Facebook) to request permanent removal, when this digital bond with friends on Facebook is stronger, and their profiles are essentially co-constructed (through tagging, sharing, re-posting etc).⁴⁸ Pennington, although looking at a small sample size, finds that all her college-student research participants had never unfriended a deceased user, although the reasons given for not doing so varied.⁴⁹ Research also finds that most Facebook users do not have their parents or children on their friends list, but 93 per cent of them do have other relatives on their friends list.⁵⁰ A vast majority of users are connected to their offline friends, and only a small percentage have befriended individuals they have never met offline.⁵¹ Deactivation and

⁴⁵ Facebook, 'Requesting Content from a Deceased Person's Account' <www.facebook.com/help/contact/398036060275245>.

⁴⁶ Katie Notopoulos, 'How Almost Anyone Can Take You Off Facebook (And Lock You Out)' (*BuzzFeed*, 4 January 2014) <www.buzzfeed.com/katienotopoulos/how-to-murder-your-friends-on-facebook-in-2-easy-#.xbLyLygo2>; Jack Schofield, 'What Happens to Your Facebook Account when You Die?' (*The Guardian*, 30 October 2014) <www.theguardian.com/technology/askjack/2014/oct/30/what-happens-to-your-facebook-account-when-you-or-a-loved-one-dies>.

⁴⁷ Facebook, Help Center, 'How Do I Ask a Question about a Deceased Person's Account on Facebook?' <www.facebook.com/help/265593773453448>.

⁴⁸ Elaine Kasket, 'Access to the Digital Self in Life and Death: Privacy in the Context of Posthumously Persistent Facebook Profiles' (2013) 10 *SCRIPTed* 7.

⁴⁹ Natalie Pennington, 'You Don't De-Friend the Dead: An Analysis of Grief Communication by College Students Through Facebook Profiles' (2013) 37 *Death Studies* 617, 625.

⁵⁰ Maeve Duggan, Nicole B Ellison, Cliff Lampe, Amanda Lenhart and Mary Madden, 'Demographics of Key Social Networking Platforms' (*Pew Research Center*, 9 January 2015)

<www.pewinternet.org/2015/01/09/demographics-of-key-social-networking-platforms-2/>.

⁵¹ *ibid.*

removal, therefore, even more than memorialisation, pose a question of reconciling the interests of a deceased user's family, friends and his interests. Is it in a user's interest to allow family members who are not on his friends lists in these co-constructed profiles to request deletion of such a profile and loss of the valuable materials for other users without a user expressing his wish in this direction? The chapter will return to this question again later in Section 4.

More recently, Facebook seems to have followed Google's lead and the introduction of the Inactive Account Manager⁵² with its 'Legacy Contact'.⁵³ As of 12 February 2015, Facebook allows its users to designate a friend or family member to be their 'Facebook estate executor' (an executor for their Facebook content only, as envisaged by the service) and manage their account after they have died. A Legacy Contact has a limited number of options: to write a post to display at the top of the memorialised timeline; to respond to new friend requests; and to update the profile picture and cover photo of a deceased user.⁵⁴ In addition, a user 'may give their legacy contact permission to download an archive of the photos, posts and profile information they shared on Facebook'.⁵⁵ A Legacy Contact will not be able to log in to the account or see the private messages of the deceased. All the other settings will remain the same as before memorialisation of the account. Finally, an option is that a user decides to permanently delete his/her account after their death.⁵⁶ The rationale behind this feature, according to Facebook, is to support both the grieving individuals (it is not clear whether family, friends, or all of them) and the users who want to take more control over what happens to their account on death.⁵⁷

This move from Facebook is, admittedly, a welcome development for users. It does shift the balance of interests from family and next of kin to users. Users now have control over who their Legacy Contact is and this can only be one of their Facebook friends. A Legacy Contact does not take too much control over the deceased's account, as they cannot post on behalf of the user (apart from the one message in remembrance and changing the timeline and profile picture) and they need a permission to download an archive of the deceased user's

⁵² Google, Accounts Help, 'About Inactive Account Manager' (for trusted contacts) <<https://support.google.com/accounts/answer/3036546?hl=en>>.

⁵³ Vanessa Callison-Burch, Jasmine Probst, and Mark Govea, 'Adding a Legacy Contact' (*Facebook Newsroom*, 12 February 2015) <<http://newsroom.fb.com/news/2015/02/adding-a-legacy-contact/>>.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

⁵⁷ *ibid.*

content. It is, however, unclear whether this permission includes all the content or some categories. Also, one of the issues is the obscure place of this option (user needs to click on ‘Settings’, ‘Security’, then choose ‘Legacy Contact’ at the bottom of the page).⁵⁸ The question remains whether this option will trump the options heirs and next of kin have according to the policy of removal, special requests and memorialisation. Facebook needs to make this very clear in their terms of service, so as to fulfil their promises to the users. Also, there might be issues with conflicting interests as between heirs/families and a friend designated as a Legacy Contact and having an option to download the archive of the deceased’s content. For instance, if the heirs inherit copyright in the user’s works, and the Legacy Contact has acquired this content with the permission of the user, will this content be exempt from the provisions of the will/intestacy laws. With this option, Facebook notably shifts the balance and accounts more for the deceased’s interests and decisions made before death. However, the balance remains unclear and a welcome move might end up in a series of legal issues and disputes.

The analysis in this section therefore outlines inconsistencies in Facebook’s terms with regard to ownership of users’ content and accounts from a contract law position and the internal coherence of these terms. It does not, however, mean that the chapter suggests that actual content is or should be of a proprietary nature. This issue is explored in the following section, from a property and IP law perspective. Therefore, even if Facebook recognises ownership over the content, this is not ownership in the property law sense, as seen in Section 3. The author further argues in Section 4 that the proprietary nature is not only inadequate from the current legal position, but also undesirable from a post-mortem privacy, ethical (autonomy) and policy perspective.

<a> 3. REVISITING THE LEGAL NATURE OF FACEBOOK CONTENT

After having established the contractual position of Facebook content, the author considers two alternate paradigms as to the nature of Facebook content to determine whether the content transmits on death.⁵⁹ These are: (1) this content is protected by copyright as literary or artistic works; (2) the content is property. Prima facie, this content predominantly includes literary and artistic works created by their authors and copyright appears to be one of the most obvious answers when determining the legal nature of social network sites (SNSs).

⁵⁸ *ibid.*

⁵⁹ See also Harbinja (n 26).

3.1 Copyright on Facebook and Post-mortem Transmission

Social networks contain vast amounts of potentially or actually copyrighted materials. These include, for instance, photos and videos uploaded on Facebook, status updates, notes in the form of short stories/comments/poems etc. The question of copyright in the content posted on SNSs has been rather straightforward for some US academics, such as Mazzone and Tarney, who argue that the content is protected by copyright and should transmit on death consequently.⁶⁰

Nevertheless, one should not assume that all the content would automatically qualify for copyright protection. This depends on the fulfilment of legal requirements, importantly here fixation and originality.⁶¹ With regard to the former requirement, it is clear that electronic fixation does meet legal requirements of the US and UK copyright law.⁶² Facebook postings are updated and moved from a News Feed and timeline, but they are also rather stable and easily retrievable.⁶³

The second copyright requirement is originality. If Facebook posts, updates, etc contain single words or short phrases/titles, in the US law they would most likely not meet the originality requirement. The situation is less clear in the UK and EU law.⁶⁴ However, unlike on Twitter for instance, most of the posts on Facebook are longer than that and most probably satisfy this requirement, provided that a user has created them.

With regard to photographs, another type of common Facebook content, a similar originality threshold is required. In the US, a photograph would be considered original if it includes a small degree of composure and positioning.⁶⁵ Under the UK copyright law, photographs are protected as artistic works under section 4 of the Copyright, Designs and Patents Act 1988 (CDPA 1988). The UK requirement for originality has been similar to the US one (the labour and skill or ‘sweat of the brow’ test), but differs from the Court of Justice

⁶⁰ Digital works are eligible for copyright protection, 17 USC §102(a) (2006). See also 17 USC §101. See eg Jason Mazzone, ‘Facebook’s Afterlife’ (2012) 90 NCL Rev 1643, 1651; Darrow and Ferrera (n 11); Tyler G Tarney, ‘A Call for Legislation to Permit the Transfer of Digital Assets at Death’ (2012) 40 Cap U L Rev 773, 783.

⁶¹ Copyright, Designs and Patents Act 1988 (CDPA 1988) (UK), s 3(1); US Copyright Act, 17 USC §101 (2010).

⁶² Elizabeth White, ‘The Berne Convention’s Flexible Fixation Requirement: A Problematic Provision for User-Generated Content’ (2012–13) 13 CJIL 685, 697.

⁶³ *ibid* 698.

⁶⁴ Harbinja (n 26) 234–35.

⁶⁵ Main cases *Burrow Giles Lithographic Co v Sarony*, 111 US 53, 59 (1884); *Mannion v Coors Brewing Co*, 377 FSupp2d 444, 455 (SDNY 2005), interpreting 17 USC §101.

of the European Union (CJEU) ‘author’s own intellectual creation’ test, which requires a higher level of creativity.⁶⁶ In relation to photographs, in particular, it could be argued that the lower threshold of originality remains (including eg composition, positioning the object, choice of the angle of shot, lighting and focus, being at the right place at the right time).⁶⁷

Consequently, it can be argued that many of the photos uploaded on Facebook and taken by that particular user could be protected by copyright. The remaining unprotected portion of the photos is probably very small and it includes, for instance, very ordinary selfies where the authors employed an inconsiderable amount of creativity and skills.⁶⁸

A lot of content on Facebook includes cases where users copy someone else’s works, as in quotations, links to different content on other websites (news portals, blog posts, quotation pages etc), music (usually links to YouTube, Spotify etc), articles (scholarly or news articles), photos taken by others etc. This category of content (‘user-uploaded’ or ‘user-copied’ content, as opposed to user-generated content) is not in the scope of this chapter, as the focus is on the content created by users and not the external content copyrighted by someone else. Users would not have any rights in this content and could, potentially, be liable for infringing copyright owned by someone else. For this reason, this content is not relevant to the discussion around transmission on death.

The emphasis of this chapter is on the unpublished works of authorship and materials generated and posted on Facebook only, as the other content accessible elsewhere does not represent a digital asset *stricto sensu*, and if published, its transmission is rather straightforward.⁶⁹ Copyright in the EU, UK and US subsists in unpublished works for a period equal to the duration of copyright in published works, ie 70 years after the author’s death.⁷⁰ Historically, the copyright protection of unpublished work was perpetual in the common law

⁶⁶ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569 [33]–[37]. Harbinja (n 26) 234–35.

⁶⁷ See *Antiquesportfolio.com Plc v Rodney Fitch & Co Ltd* [2001] ECDR 5 [29]–[39]; the unified test of *Infopaq* (n 64) and *University of London Press v University Tutorial Press Ltd* [1916] 2 Ch 601 was adopted by the Patents County Court in *Temple Island Collections Ltd v New English Teas Ltd* [2012] EWPC 1.

⁶⁸ See eg Andrés Guadamuz, ‘The monkey selfie: copyright lessons for originality in photographs and internet jurisdiction’ (2016) 5(1) IPR <<http://policyreview.info/articles/analysis/monkey-selfie-copyright-lessons-originality-photographs-and-internet-jurisdiction>>.

⁶⁹ As defined by Edwards and Harbinja, ‘What Happens to My Facebook Profile When I Die?’ (n 29) 115.

⁷⁰ Art 1 of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12 (Copyright Term Directive).

jurisdictions, the UK and the US.⁷¹ This has been changed and the duration has been harmonised at the EU level, as well as with the US law.⁷² Additionally, an important change in the EU copyright law resulted in incentivising the publication of unpublished works. The EU Copyright Term Directive, and consequently the UK law,⁷³ awarded 25 years of copyright protection for the first lawful publication of a work previously unpublished, after its copyright protection of 70 years has expired.⁷⁴

On Facebook, it is not entirely clear what content would be included in the notion of digital asset, as publishing to a limited number of people is not making the content available to the public.⁷⁵ Therefore, where users' privacy settings are set to 'friends only' or 'only me', so only a limited number of users can access the content, the content is likely to be considered unpublished for the purpose of copyright protection. And yet, posting content on Facebook relinquishes control over the further 'publication' of the content: the item may be shared or communicated to those beyond the limited group of individuals to which the item was originally shared. But in this case, the work has not been communicated lawfully, so it would not affect the nature of it.

The unpublished content potentially transmits on death, according to section 93 of the CDPA 1988. The requirement is that the beneficiary is entitled by a bequest to 'an original document or other material thing recording or embodying a literary, dramatic, musical or artistic work which was not published before the death of the testator', and consequently to copyright embodied in such a medium. The problem with applying this provision to unpublished Facebook content is in the fact that Facebook accounts are not being bequeathed and they probably cannot be considered material things or property for the purpose of this definition.⁷⁶ It would be very difficult to interpret this provision to achieve transmission of unpublished Facebook works. Even if the will simply says 'I leave my whole estate to x' or 'the residue', an 'estate' will not be sufficiently wide to include these works. Most of the

⁷¹ In the UK until the adoption of the Duration of Copyright and Rights in Performances Regulations 1995, SI 1995/3297, in the US until the 1976 Copyright Act, when unpublished works were brought under the federal jurisdiction, see eg Elizabeth Townsend-Gard, 'January 1, 2003: The Birth of the Unpublished Public Domain and Its International Implications' (2006) 24 *Cardozo Arts & Ent LJ* 687, 697–702.

⁷² Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L290/9; the 1976 Copyright Act, 17 USC §302.

⁷³ The Copyright and Related Rights Regulations 1996, SI 1996/2967, reg 16.

⁷⁴ Art 4 Copyright Term Directive (n 70).

⁷⁵ See US case *Getaped.com, Inc v Cangemi* 188 FSupp2d 398 (SDNY 2002). This interpretation would arguably comply with the CDPA 1988 (UK), s 175.

⁷⁶ In English law, tangibility is an essential requirement of property, whereas US state laws are slightly more flexible in this regard. For a more detailed analysis, see Harbinja (n 26) 239–47.

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content, as suggested in the following section, is not property, nor are the underlying accounts, as established in the previous section. The requirement of materiality is lacking and there is a problem of accessing this copyrightable material due to the contractual limitations. This provision needs to be changed, or some technological solutions (eg Legacy Contact) need to be recognised as an ‘entitlement’ for the purpose of section 93 of the CDPA 1988.

In the US, the federal copyright law does not include similar limitations to the UK ones. The US Copyright Act equates transmission of copyright with transmission of personal property.⁷⁷ There are, however, similar issues of accessing this content and privacy interests of the deceased that might prevent the default transmission of copyright in Facebook content (see Section 4).

In addition to the copyright as an economic right, social network authors of literary or artistic work would be entitled to moral rights. In the UK, unless waived, therefore, users would have moral rights for 70 or 20 years post mortem, depending on the type of right.⁷⁸ Moral rights in the UK, in principle, transmit on death. Unless a person waives his moral rights (section 87 CDPA 1988), the right to be identified as author and the right to object to derogatory treatment of work transmit on death, passes to the person as directed by will, or a person to whom the copyright passes, or sits exercisable by a personal representative (section 95 CDPA 1988). There are further relevant issues in relation to Facebook in particular. Facebook, for instance, does not require the waiving of moral rights in its terms of service, but access of a user’s heirs to this content is limited. The US Copyright Act contains similar provisions as to the types of moral right conferred on the authors. However, these rights expire on the author’s death and therefore are not applicable to our issue of post-mortem transmission of copyright in email content.⁷⁹

In summary, a large and indeterminable portion of Facebook content is potentially copyrightable and transmits on death like any other copyrighted work, provided it has been published. A separate issue, explored in Section 2, is whether personal representatives and the next of kin can actually access this content. When the content has not been published for the purpose of copyright laws, and this content is primarily included in the concept of digital assets, there are obstacles to its transmission arising from legislation. Published content will arguably be accessible and the next of kin will inherit the title to this copyright, according to

⁷⁷ 17 USC §201(d)(1).

⁷⁸ CDPA 1988 (UK), ss 77, 80, 84, 86 and 87.

⁷⁹ 17 USC §106A.

the relevant IP and succession laws. This finding directs us to solutions suggested at the end of the chapter.

3.2 Property in Facebook Content

The argument that a social network account 'is, like any online account, intangible property'⁸⁰ oversimplifies the different features of SNSs as well as the relationships between users and these sites. It also favours the American approach to intangible property,⁸¹ and fails to account for IP as a distinct legal concept.⁸²

Relying upon recent research on email content,⁸³ based upon current copyright and property law, and upon the Western theories of property, email content is not the property of its users. It can, however, be protected by copyright, the tort of misuse of confidential information, trade secret doctrine, data protection or publicity rights.⁸⁴ Similarly, Facebook account information would include non-copyrightable material, such as short phrases, single words, or jokes in status updates on Facebook that will not meet the requirements for copyright protection. Additionally, personal data represent a large amount of this content. For instance, there is personal data in the 'About' section (name, place of birth, address, education, age, pictures etc), but also in the user's albums, notes, status updates etc. A vast amount of these data belong to the category of sensitive data (religious and political beliefs, sexual orientation etc).⁸⁵ Conclusions regarding information and personal data contained in emails failing to meet the doctrinal and normative features of property are applicable here as well, as this is essentially the same type of information and data, perhaps only more voluminous and prominent.⁸⁶ Consequently, having in mind the issues with property and copyright in Facebook content, the author maintains that the more relevant concept in relation to the legal nature of this content and its transmission is post-mortem privacy, discussed in Section 4.

4. POST-MORTEM PRIVACY

⁸⁰ Mazzone (n 58) 1650.

⁸¹ Harbinja (n 26) 239–44.

⁸² *ibid.*

⁸³ *ibid* 236–54.

⁸⁴ *ibid.*

⁸⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 (Data Protection Directive) Art 8; Data Protection Act 1998, s 2.

⁸⁶ Harbinja (n 26) 254–55.

Privacy (privacy interests and the protection of personal data of deceased users) further complicates the issues when considering post-mortem transmission of emails and SNS account contents. Post-mortem privacy regulation (or the lack of it) includes ‘the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after their death’.⁸⁷ The new circumstances of the digital world, and in particular the emergence of a new and voluminous array of ‘digital assets’ created, hosted and shared on web 2.0 intermediary platforms, and often revealing highly personal or intimate personal data, suggest some level of urgency in addressing these matters. An analysis of comparative common and civilian law institutions, focusing on personality rights, defamation, moral rights and freedom of testation, confirms that there is little support for post-mortem privacy in common law. Conversely, personality rights in general have gained a greater appreciation in civilian law, including their survival after death. The notable reliance on contract regulation may still mean that users of US-based intermediary platforms, wherever they are based, are deprived of post-mortem privacy rights. Given this current state of online legal privacy protection, future protection may need to come from legislation, contract or ‘code’ solutions, of which the first emergent into the market is Google Inactive Account Manager,⁸⁸ followed by Facebook Legacy Contact.

It is submitted here that the normative support for post-mortem privacy can be found in theories of autonomy,⁸⁹ privacy as autonomy⁹⁰ and the freedom of testation.⁹¹ It is outside the scope of this chapter to explore the theories in more depth and only the main idea is outlined here. It is argued that autonomy in the form of testamentary freedom should be extended to the online world. However, as digital assets, including Facebook content, include predominantly information and personal data, this freedom would translate into the right to control one’s personal data post mortem, ie post-mortem privacy, instead of one’s property.

⁸⁷ Lilian Edwards and Edina Harbinja, ‘Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World’ (2013) 32 *Cardozo Arts & Ent LJ* 103.

⁸⁸ Edina Harbinja, ‘Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be the Potential Alternatives?’ (2013) 10 *SCRIPTed* 19.

⁸⁹ For a commentary on the development of autonomy, see Jerome B Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (CUP 1998); the conception adopted here is Mill’s liberal individualistic approach to autonomy, John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin 1984) 72.

⁹⁰ See eg Louis Henkin, ‘Privacy and Autonomy’ (1974) 74 *Colum L Rev* 1410; Daniel J Solove, ‘“I’ve Got Nothing to Hide” and Other Misunderstandings of Privacy’ (2007) 44 *San Diego L Rev* 745.

⁹¹ See eg François du Toit, ‘The Limits Imposed Upon Freedom of Testation by the *Boni Mores*: Lessons from Common Law and Civil Law (Continental) Legal Systems’ (2000) 3 *Stell LR* 358, 360; or Marius J de Waal, ‘A Comparative Overview’ in Kenneth GC Reid, Marius J de Waal and Reinhard Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh UP 2007).

This chapter will now look at how Facebook views this theoretical position practically, in its policy and technological solutions.

Facebook refers to post-mortem privacy repeatedly (without using the term itself), when refusing to transfer a deceased person's account/allow for access/memorialisation/content. It is important to note at the outset that Facebook must comply with the EU data protection legislation. As its subsidiary Facebook Ireland Limited is the provider of the services and data controller in the EU, the Irish data protection laws apply.⁹² This means that the legislation requires that only personal data of living individuals are to be protected by Facebook.⁹³ In spite of this, in the process of memorialising an account, Facebook promises to remove 'sensitive information such as contact information and status updates' in order to protect the deceased's privacy.⁹⁴ Another instance where Facebook allegedly protects post-mortem privacy is the request for a Look Back video or provision of the deceased's account contents. In this case, Facebook can only provide a unique link to the deceased's confirmed friends who requested the link, without an option to share it.⁹⁵ Finally, their option of the Legacy Contact protects users' choice and privacy, by providing for an individual's control over their account. In particular, this is demonstrated in the fact that the Legacy Contact is prohibited from logging in into the deceased's account and in the fact that the Contact cannot see the deceased's private messages.⁹⁶

This prima facie post-mortem friendly policy is complicated by the fact that the memorialisation of an account is not something that a user can opt in or opt out of, but it is a default if requested by a family member and in the absence of a Legacy Contact. The nexus of data protection regimes in the EU, and perhaps less in the US, is in the user's informed decision and control over their data.⁹⁷ This, in most cases, does not apply to the deceased, as their personal data and privacy are, generally, not protected.⁹⁸ However, if Facebook wishes to establish this protection contractually, as they claim in their provisions, they would need to

⁹² Data Protection Act 1988 (as amended).

⁹³ *ibid* s 1.

⁹⁴ Chan (n 31).

⁹⁵ Facebook, 'Deactivating & Deleting Accounts' (n 40).

⁹⁶ Callison-Burch and others (n 51).

⁹⁷ See Data Protection Directive (n 83).

⁹⁸ See Edwards and Harbinja, 'Protecting Post-Mortem Privacy' (n 85) 130–33; Damien McCallig, 'Data Protection and the Deceased in the EU', Presentation at the Computer Privacy and Data Protection 2014 Panel: Exploring Post-Mortem Privacy in a Digital World, 21–23 January 2014 (on file with the author).

provide users with meaningful information and more coherent options to control this while alive.

The crux of the issue therefore is how to balance the right of the ‘owner’ of information (the person who originally posted it) to control it with the rights of others who believe that this shared information is owned (jointly) by them. This is also where Facebook’s terms, forms and help pages contradict each other. Thus, whereas information may be removed from one’s timeline by another, when Facebook defines a user’s information this includes items that others have posted to the user’s timeline.⁹⁹ This issue surfaced on the death of a user and, according to Facebook’s stance mentioned above, default memorialisation, without an opt-out option (with an exception of the Legacy Contact), solves the problem of maintaining the information on the network.

Post-mortem privacy, more generally, serves as an argument against the default transmission of Facebook account content on death without the deceased’s consent, ie through the laws of intestacy or by requiring the intermediaries to provide access to the deceased’s account. Recognition of post-mortem privacy questions, therefore, the default position of using transmission by way of the laws of succession for some kinds of digital assets (those containing a vast amount of personal data, such as Facebook accounts). Rather than using the current offline defaults in law, it is argued here that more nuanced solutions for the transmission of Facebook content are needed. These solutions will be sketched in the following section and would aim to account for the privacy interest of the deceased. These interests are currently mostly not recognised as the succession laws favour the heirs and the technology solution has initially favoured the interests of the surviving families too.

5. SOME SOLUTIONS FOR TRANSMISSION OF FACEBOOK CONTENT ON DEATH

American states have pioneered legislation and solutions to the issues in the area of transmission of digital assets on death, starting with Connecticut in 2005.¹⁰⁰ Many other states followed and by 2013 about half of them had enacted some sort of legislation to account for these issues.¹⁰¹ The answer to this piecemeal legislation and possible conflicts of law has been

⁹⁹ Facebook, ‘Help Centre: Accessing Your Facebook Data’ <<https://en-gb.facebook.com/help/405183566203254/>>.

¹⁰⁰ Conn Gen Stat §§45a–334a.

¹⁰¹ See James Lamm, ‘February 2013 List of State Laws and Proposals Regarding Fiduciary Access to Digital Property During Incapacity or After Death’ (*Digital Passing*, 13 February 2013)

harmonisation within the US under the leadership of the Uniform Law Commissions Committee (ULC) on Fiduciary Access to Digital Assets.

The final text of the Uniform Fiduciary Access to Digital Assets Act (UFADAA) was adopted by the ULC in July 2014 and a consensus seemed to have been achieved on its text.¹⁰² However, a further round of lobbying, caused by the industry's dissatisfaction with the draft, resulted in a new version of the UFADAA, adopted in December 2015.¹⁰³ The biggest difference between the two texts is in the recognition of post-mortem privacy and technological solutions analysed in this chapter. The Act grants priority to service providers' terms of service and user choices over any other provisions, including the will.¹⁰⁴ The final draft is quite revolutionary and supports the arguments with regard to post-mortem privacy and code-law solution for the transmission of digital assets.¹⁰⁵ This means that the law recognises technology, architecture, services (or 'code' as described in Lessig's seminal work on the Internet regulation),¹⁰⁶ ie Facebook Legacy Contact in this case. Following Lessig's approach on the efficiency of code in regulating the Internet, the technological solution to this problem, in the author's view, is better suited to deal with the digital realm and the UFADAA rightly gives precedence to technology over intestate succession and the will. It will be interesting to see whether the Act will achieve a wider adoption and application in the individual states, or even initiate efforts in other countries. Importantly, the Act in tandem with tech solutions demonstrates the growth of popularity of an active post-mortem privacy convention in the US, which has traditionally been more conservative with respect to the concept of privacy in the first place.

<www.digitalpassing.com/2013/02/13/list-state-laws-proposals-fiduciary-access-digital-property-incapacity-death/>.

¹⁰² National Conference of Commissioners on Uniform State Laws, Drafting Committee on Fiduciary Access to Digital Assets, 'Fiduciary Access to Digital Assets Act' (July 2014) <www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf>.

¹⁰³ See eg James Lamm, 'Revised Uniform Fiduciary Access to Digital Assets Act' (*Digital Passing*, 29 September 2015) <www.digitalpassing.com/2015/09/29/revised-uniform-fiduciary-access-digital-assets-act/>; National Conference of Commissioners on Uniform State Laws, Drafting Committee on Fiduciary Access to Digital Assets, 'Revised Fiduciary Access to Digital Assets Act' (December 2015) <[www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015))>.

¹⁰⁴ National Conference of Commissioners on Uniform State Laws, Drafting Committee on Fiduciary Access to Digital Assets, 'Revised Fiduciary Access to Digital Assets Act' (December 2015) <[www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20\(2015\)](http://www.uniformlaws.org/Act.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015))>.

¹⁰⁵ *ibid.*

¹⁰⁶ Lawrence Lessig, *Code, version 2.0* (Basic Books 2006).

Solutions akin to the UFADAA should garner support. A combined code-law-market solution is the most suitable for the SNS ecosystem. The solutions exclusively based on different technologies and services (such as Facebook's Legacy Contact) could conflict with provisions in wills, or laws of intestacy, in that the digital versions would provide for an option for different beneficiaries/heirs from the offline ones. It would, perhaps, include friends and the digital community that would not be taken into account in an offline distribution of property (beneficiaries in a will, trust or heirs in intestate distribution). This further leads us to the problem identified of conflicts between the interests of the deceased (expressed in his digital will or traditional will), family (spouse, children, parents and other heirs) and friends (with whom the deceased might have firmer ties online than those with his heirs offline, as research suggests).¹⁰⁷ For the reason of the different nature of relationships online and post-mortem privacy issues, it is argued here that the succession laws should generally recognise these different interests and allow for different beneficiaries to be designated online.

In English law, there is also a need for legislative changes, which would recognise technological solutions and prevent potential clashes with the laws of intestate succession or wills (Administration of Estates Act 1925 and Wills Act 1837). These provisions should recognise users' technologically executed choice as a valid designation of a beneficiary for their social network content or against this transmission and deletion of the content. Copyright law should also be amended and clarified, in particular section 93 of the CDPA 1988. The application of this provision should be extended to digital assets, mandating that copyright in unpublished digital works is transmissible, provided that the user has not expressed a contrary wish pre-mortem, in the form of an in-service option.

Additionally, more explicit and clear recognition of post-mortem privacy and protection of the deceased's personal data by Facebook are required. This would recognise users' autonomy and pre-mortem choice, which Facebook claims to foster. Practically, Facebook should make the existing options more obvious and a part of their core terms of service. In order to show a true commitment to post-mortem privacy, they should allow users to decide on whether they want their account to be memorialised, deactivated or some of the content/all of it transferred on death. To achieve this, they could prompt users regularly and come up with some innovative technological solutions, as they do with regard to their interface/functionality etc.

¹⁰⁷ Kasket (n 46).

This would not be entirely new to Facebook, as they have devised a tool to enable users to check and confirm their privacy preferences, ie 'privacy check up tool'.¹⁰⁸ The technology solution has to be followed by a clear post-mortem policy, which should build on the rationale adopted by Facebook so far, ie the protection of post-mortem privacy, but in a much more nuanced, prominent and coherent manner.

6. CONCLUSION

Since a Facebook account as well as the underlying software is property/IP of the service provider, neither Facebook content nor a user's account can be considered property of the user. Still, the user may retain copyright in published content, an interest that can be transmitted upon death, with some issues arising in Facebook's terms of service. Unpublished material remains a lingering difficulty and this situation should cajole efforts to update the law in order to permit a deceased user's family to acquire IP rights to user unpublished content on Facebook (provided the deceased has previously consented to this circumstance). Where material is not copyrighted, the law should prevent a deceased user's family from taking over the deceased's account on the basis of the deceased's privacy rights. While technology solutions (such as Facebook Legacy Contact) are welcome, their legal recognition and greater consistency in the service provider's terms of service constitute further points to address. The underlying rationale for this is recognising users' autonomy and making technological choices that support autonomy more coherent.

¹⁰⁸ Paddy Underwood, 'Privacy Checkup Is Now Rolling Out' (*Facebook Newsroom*, 4 September 2014) <<http://newsroom.fb.com/news/2014/09/privacy-checkup-is-now-rolling-out/>>.