

PROTECTION OF DIGITAL ASSETS ON SOCIAL MEDIA: NAVIGATING PRIVACY AND INHERITANCE CHALLENGES

Abstract

Today technology controls our lives study, and earn. Images, videos, and memories on WhatsApp, Facebook, Instagram, Google Drive, *etc.* This article investigates digital data as a monetary and sentimental asset. It analyzes digital asset classification and the failure of Indian law, including the Digital Personal Data Protection Act, 2023. Social media firms and others exploit this data during our lifetime and, most crucially, after death. Most individuals are unaware of their digital traces after death. Property and succession rules are silent on this issue; hence this article supports digital asset inheritance. It examines inheritance issues like privacy on social media and emails *via* numerous examples. In addition to the EU's General Data Protection Regulation and the United State's Revised Uniform Fiduciary Access to Digital Assets Act, social media networks also regulate digital assets and inheritance. The paper closes with proposals for preserving digital assets after death and amending Indian inheritance rules.

I Introduction

THE PHRASE 'digital asset' is widely used in this digital era, but there is no common meaning that applies to the many diverse contexts in which it is employed. In general parlance, 'digital assets' are assets that are created and transferred using blockchain or distributed ledger technology. They are also known as crypto assets, cryptocurrencies, and digital tokens.¹ Besides, social media is growing at a breathtaking pace, and firms acquire, use, and analyze more "big data" about individuals than ever before.² Individuals are constantly adding digital assets in the form of personal information, photographs, videos, emails, documents, *etc.* All social media networks store data, which is proportional to digital asset value. Furthermore, modern artificial intelligence technologies can exploit every social media post, making it crucial to preserve and secure these data assets utilizing suitable legislation.³ While the number of social networking site users is growing, the number of deceased users is also increasing. Despite the prevalent utilization and significant societal importance attributed to social

1 U.S. Securities and Exchange Commission, "Framework For 'Investment Contract' of Digital Assets" (2019), *available at* : <https://www.sec.gov/files/dlt-framework.pdf> (last visited on Jan. 10, 2024).

2 Andrew McAfee and Erik Brynjolfsson, "Big Data: The Management Revolution" *Harvard Business Review*, Oct. 2012, *available at* :<https://hbr.org/2012/10/big-data-the-management-revolution> (last visited on Jan. 10, 2024).

3 Tarleton Gillespie, "Content moderation, AI, and the question of scale" *Big Data and Society*, Jul – Dec, 2020, *available at* : <https://journals.sagepub.com/doi/pdf/10.1177/2053951720943234> (last visited on Jan. 10, 2024).

media platforms, the legal regulations pertaining to the dissemination of digital assets and the authorization of posthumous access to the social media profiles of deceased individuals are currently in the process of being formulated.⁴ The authors in this paper have focused on the latter category of digital assets available on the social media platforms.

The Centre for Creative and Social Technologies of Bristol University published a report on internet use research in 2011. The cloud stores £2.3 billion in British digital data, according to the report. It revealed that 24 per cent of United Kingdom youth estimated they had £200 million in digital assets per individual. Similar situations exist in other European countries and the United States. This illustrates that people value digital assets, yet India has no law defining them.⁵

This absence of legal consistency for digital assets is seen in benefit initiatives like AADHAR, India's largest digital personal data repository.⁶ Even after death, an Indian cannot opt out of AADHAR, thus they live practically in the database even though they no longer need subsidies or evidence of domicile.⁷ Thus, technology and the internet have affected our right to privacy of personal data, posing the question of what happens to digital assets once a person dies. Digital content creation and preservation create different concerns because posthumous rights over digital assets are not yet defined in many nations, including India. Important considerations include ownership, inheritance, and privacy. This paper brings forth various issues and challenges regarding the inheritance of digital assets on social media platforms, *e.g.*, WhatsApp, Facebook, Instagram, Google Drive, and their relationship with posthumous privacy. It also compares the law relating the same in India with that of the United States, and European Union. Finally, it suggests better protection of posthumous digital assets through legislative and policy changes by the social media fiduciaries.

II Concept of digital assets

The digital transformation touches all facets of human life because it promises huge prospects for improved quality of life, creativity, economic growth, and sustainability.

4 Yael Mandel, "Facilitating the Intent of Deceased Social Media Users" 39 *Cardozo Law Review* 1910 (2018).

5 University of Bristol "A Social Study into The Impact of Cloud-Based Services on Everyday UK Life" *Generation Cloud* 5 (2011).

6 Billy Perrigo, "India Has Been Collecting Eye Scans and Fingerprint Records from Every Citizen. Here's what to Know" *Time*, Sep. 28, 2018, available at: <https://time.com/5409604/india-aadhaar-supreme-court> (last visited on May 10, 2024).

7 Money Life Foundation "Aadhaar has created third civil death for citizens, says CIC Prof Sridhar Acharyulu" *Moneylife*, Feb. 10, 2018, available at: <https://www.moneylife.in/article/aadhaar-has-created-third-civil-death-for-citizensays-cic-prof-dr-sridhar-acharyulu/53028.html> (last visited on May 10, 2024).

This transformation has created an unimaginable amount of individual digital data which is a legal personality.⁸ Section 2(o) of the Information Technology Act, 2000 defines “data” as a structured representation of information, knowledge, facts, concepts, or instructions for computer processing. It can be computer printouts, magnetic or optical storage media, punched cards, tapes, or computer memory.⁹ Companies are currently spending between \$150 million and \$250 million per year on digital content operations. Hence, such data can easily be considered as ‘assets’ that are suitable for commercial applications since they are uniquely recognizable and have a monetary value.¹⁰ A ‘digital asset’¹¹ is a combination of two terms: ‘digital’ which can be identified as binary data that is held on a computer system and composed of numerical values that are either zero or one,¹² and ‘asset’ implies that the entity has a monetary value.¹³

In India, section 2(47A) of the Income Tax Act, 1961 defines “virtual digital asset”.¹⁴ Accordingly, any cryptographically created information, code, number, non-fungible token (NFT) or any other token which includes any digital representation of value exchanged with or without consideration. It can be used as a store of value or a unit of account in financial transactions or investments that can be traded, saved, or transmitted electronically. It is vital to remember that this term includes many assets, not just investment plans. Further, the Central Government may designate any additional digital asset through an official notification. It is important to note that this definition is not limited to investment schemes and encompasses a wide range of assets.

In the United States, the Stored Communications Act (hereinafter ‘SCA’) was passed in 1986 to extend privacy protections to information stored on computer servers. Some argue that the SCA prohibits internet service providers (ISPs) from releasing deceased individuals’ online accounts without their “lawful consent” under section 2702. According to section 2702 of the statute, ISPs that knowingly disclose communication contents while in electronic storage face civil penalties. The definition

8 Ewa Michalkiewicz-Kadziela and Ewa Milczarek, “Legal boundaries of digital identity creation” 11(1) *Internet Policy Review* (2022), available at: <https://policyreview.info/articles/analysis/legal-boundaries-digital-identity-creation> (last visited on Jan. 10, 2024).

9 Act No. 21 of 2000.

10 “Defining Digital Assets” *Dam News*, available at: <https://digitalassetmanagementnews.org/features/defining-digital-assets> (last visited on Jan. 20, 2024).

11 “What are Digital Assets?” *Nasdaq*, available at: <https://www.nasdaq.com/solutions/nasdaq-marketplace-technology/about-digital-assets> (last visited on Dec. 10, 2023).

12 “Digital”, *Cambridge Dictionary*, available at: <https://dictionary.cambridge.org/dictionary/english/digital> (last visited on Jan. 30, 2024).

13 “What is ‘Asset’” *The Economics Times*, Sep. 13, 2023, available at: <https://economictimes.indiatimes.com/definition/asset> (last visited on Feb. 10, 2024).

14 Act No. 43 of 1961.

of “lawful consent” is unclear. Even when the “lawful consent” exception is met, the SCA only allows ISPs to authorize access to deceased accounts.¹⁵

The SCA’s impact on digital inheritance has spurred state-level reforms. Numerous states endeavored to establish regulations pertaining to the correlation between technology and death. Certain statutes stipulate that the deceased must provide lawful consent for their personal representative to manage their digital assets, whereas other statutes lack clarity in this regard.¹⁶ Therefore, digital asset laws needed some uniformity.

The Uniform Fiduciary Access to Digital Assets Act (hereinafter ‘UFADAA’) was enacted by the Uniform Law Commission (ULC) in 2014 as a response to the aforementioned issue. UFADAA is a legal framework that guarantees fiduciaries the necessary access to fulfil their responsibilities in alignment with the estate plan or, in the absence of one, in favour of the deceased account holder. It has broadened the scope of a fiduciary’s jurisdiction to encompass digital assets through the establishment of a consistent and dependable procedure on a national scale. The ability for an estate representative to access the electronic communications and digital assets of a deceased individual is contingent upon the deceased’s decision to opt out during their lifetime.¹⁷

The UFADAA faced opposition from internet and telecommunications companies due to concerns regarding privacy, potential violations of federal law, and infringements upon contractual rights. Therefore, ULC was compelled to enact the Revised Fiduciary Access to Digital Assets Act (hereinafter ‘RUFADAA’) in 2015. The RUFADAA, which revised several provisions, addresses digital asset ownership issues more comprehensively.¹⁸

The RUFADAA prefatory note calls digital assets “electronic records in which individuals have a right or interest”. Section 4 of the RUFADAA states that an online tool overrides a user’s will, trust, power of attorney, or other record when directing digital asset disclosure.

In the event that an individual opts not to utilize an online tool, they have the option to convey their disclosure preferences through a legally binding instrument, e.g., a will; or if the user fails to provide guidance in accordance with section 4, it is within the purview of the user, federal legislation, or the terms-of-service agreement to

15 Matt Borden, “Covering Your Digital Assets: Why the Stored Communications Act Stands in the Way of Digital Inheritance” 75 *Ohio State Law Journal* 411 – 23 (2014).

16 David Horton, “Contractual Indescendibility” 66 *Hastings Law Journal* 1078 – 79 (2015).

17 Isabelle N. Sehati, “Beyond the Grave: A Fiduciary’s Access to a Decedent’s Digital Assets” 43 *Cardozo Law Review* 752 (2021).

18 *Id.* at 754 – 55.

alter or terminate a fiduciary's ability to access digital assets as stipulated in section 5(c).¹⁹

III Digital assets on social media platforms

Today, most of us are living our lives online through numerous social media platforms and other online channels. From a sociological perspective, the physical gap between people and their families and friends has been eliminated by this virtual environment. According to recent data published by global social media statistics for 2023, there were 4.9 billion people using social media around the world, and from the last year, these numbers surged as 173 million new users joined the social media platforms.²⁰ Facebook acquired the top spot in social media companies by holding 37.2 percent of the world's population. India is home to a significant number of active Facebook users, with a minimum estimate of 369.9 million individuals engaging with the platform.²¹

Facebook, Google, Apple iCloud, Dropbox, *etc.* are used to create, share, and save data. Amazon, Google, and Microsoft dominate deeper digital infrastructure services like website hosting and email. The digital assets are user data, not the device or platform. The service provider stores email messages on disks and networks, whereas the user owns just the content they generated there.²²

The issue is that Google lets users upload their own work on YouTube, Blogger, and Google Drive, but Google specifically rejects any rights to the intellectual property in such information.²³ If these big corporations retain peoples' data, it generates market insecurity since it is unambiguous how they utilize it. In fact, users develop a lot of digital assets on social media, which leaves them with a large financial and emotional posthumous digital presence. The legal heirs of that individual value this data, but what happens if the person dies with digital assets?

In 2019, *in re Scandalios* case, a Manhattan judge issued an order for Apple to provide Nicholas Scandalios, the widower of Ric Swezey, with access to their jointly shared photo library stored on iTunes and iCloud. Ric Swezey neglected to include provisions regarding his digital legacy within the testamentary document. The court's decision established that the act of revealing electronic communications necessitates either

19 *Supra* note 4 at 1936.

20 "Global Social Media Statistics", Datareportal, *available at* : <https://datareportal.com/social-media-users> (last visited on Jan. 10, 2024).

21 "Facebook Users, Stats, Data and Trends", Datareportal, *available at*: <https://datareportal.com/essential-facebook-stats> (last visited on Jan. 10, 2024).

22 Prashant Mali and Aswathy Prakash G, "Death in the era of Perpetual Digital afterlife: Digital assets, Posthumous legacy, ownership and its legal implications" 15 *National Law School Journal* 128 (2019-2020).

23 "Google terms of service", *available at*: <https://policies.google.com/terms?hl=en-us> (last visited on Feb. 13, 2024).

the user's consent or a legal mandate, in contrast to the disclosure of other digital assets. However, it was explicitly stated that the photographs stored in the deceased individual's Apple account did not meet the criteria outlined in this definition.²⁴

In several highly publicized cases, Facebook denied access to parents of young individuals' account who died unnatural deaths. Such cases highlight the conflict between grieving family members, who can argue they can access non-electronic notes or messages left behind, and those who value privacy after death, such as social media platforms that want to protect their users' privacy. Social media platforms can decide to let requestors consent on behalf of deceased users, but they rarely do. Most website policies may consider the deceased's intent, but no testamentary formality is needed to access someone else's social media pages after death.²⁵

Social media platforms exacerbate the lack of laws and procedures. A significant portion of the population engages in the utilization of multiple social media platforms, maintaining multiple accounts for the purpose of generating, sharing, and preserving personal content. This phenomenon exacerbates the complexity of the matter, as each platform possesses distinct policies regarding the duration of post-existence. Certain policies exclusively serve to commemorate or remove the accounts of users who have passed away. Individuals who desire to grant posthumous access to their social media accounts without divulging their login credentials or seek to circumvent the need for frequent password updates during their lifetime will encounter a significant challenge. After an account is memorialized, most social media platforms prohibit logins even if someone has login information for another user.²⁶

Bereaved families of deceased users struggle due to United Kingdom law and user ignorance. The Central London County Court learned about this issue in *Rachel Thompson v. Apple*. In early 2019, widow Rachel Thompson sued Apple for access to her husband's Apple account photos and videos. Thompson wanted her daughter to inherit the child and father photos and videos on the account. Apple declined the request and insisted on obtaining a court order due to the user's failure to make provisions for posthumous content access. Apple granted Thompson access to the account after she won a court case.²⁷

IV Digital inheritance and posthumous privacy

Common law says that a person's right to privacy and publicity dies with them when they die, and their descendants can't sue to get them back. Nevertheless, the

24 *Supra* note 22 at 136.

25 *Supra* note 4 at 1921.

26 *Id.* at 1922.

27 Heather Warnock, "Rachel Thompson has won her case against Apple", *Mitchells Robertson*, May 24, 2019, available at: <http://www.mitchells-robertson.co.uk/blog/rachel-thompson-won-case-apple/> (last visited on Feb. 13, 2024).

forementioned right is currently acknowledged as a posthumous entitlement that can be legally enforced by the individual's successors-in-title or the administrator of their estate.

The process of passing ownership to legitimate successors when the actual owner passes away is known as inheritance. In India, both movable and immovable properties are inheritable in two ways: intestate succession and testamentary succession. *E.g.*, the Hindu Succession Act, 1956²⁸ governs the distribution of assets in cases of intestate succession within the Hindu community, and it extends its applicability to Sikhs, Jains, and Buddhists as well; the Indian Succession Act, 1925,²⁹ applies to all communities except transfers made by "will" or testamentary succession. Nevertheless, 'digital inheritance'³⁰ is a new phenomenon internationally. It refers to tokens, cryptocurrencies, messages on messengers, emails, electronic bank cards, Instagram images, cloud services, music selections on different apps, and others. Thus, digital assets are inheritable and valuable to the deceased's legal heirs, yet most nations, including India, have no digital inheritance laws.

Considering the forecast of Facebook's usage figures for 2018, more people would be dead than alive by the end of the Century. With the potential to transform the deceased users' profiles into memorial accounts, where friends and family can visit in commemoration of the deceased, this will turn the site into a virtual cemetery.³¹ It's important to note that the average user stores emails instead of deleting them. According to some compilation made by noted journalist Rob Errera, people retain approximately 70 per cent of their email communications.³²

Data protection and succession laws primarily govern digital legacies. The dilemma is about balancing privacy concerns regarding the information to be transmitted in case the account holder's legal representative inherits these assets. In the United States, RUFADAA does not allow estate representatives to access a decedent's electronic communications without consent. In case that the deceased individual has provided consent for disclosure, the custodian of the account may initiate the process of obtaining a court order that specifically identifies the account in question and verifies the presence of consent. Only upon successful completion of this procedure would

28 Act No. 30 of 1956.

29 Act No. 39 of 1925.

30 Gulyamov Said Saidakhrarovich *et al.*, "Digitalization in Inheritance Law" 10 *World Bulletin of Management and Law* 18 (May 10, 2022).

31 "Dead Could Outnumber Living on Facebook within 50 Years", *The Times of India*, Apr. 28, 2019, available at: <https://timesofindia.indiatimes.com/world/uk/dead-may-outnumber-living-on-facebook-within-50-years/articleshow/69080347.cms> (last visited on Feb. 13, 2024).

32 Rob Errera, "Email Usage Statistics: A Look at How We Use Email in 2021", *Toner Buzz*, Jul. 30, 2021, available at: <https://www.tonerbuzz.com/blog/email-usage-statistics/> (last visited on Feb. 13, 2024).

the custodian be authorized to furnish the estate representative with the content requested. The RUFADAA allows estate representatives to access other digital assets unless the decedent opts out or the court orders otherwise. Facebook, Instagram, Twitter, and LinkedIn face some issues, but these provisions allow estate representatives to access all digital assets except electronic communications. Electronic communications require consent in an estate-planning document, unless an 'online tool' allows it.³³

Challenges in the inheritance of digital assets

The legal system faces additional issues from the digital legacy of deceased internet users. As said, digital assets encompass financial and emotional assets, so when a person dies, he leaves data he withheld from his kin. After his death, his kin will breach his right to privacy by knowing about or accessing his private secrets and personal data.

Privacy protects an individual's private life. It protects non-public personal information from third parties. The public or a third party receiving such information without authorization violates privacy. Privacy provides a greater kind of protection than data protection since it includes all elements of a person's private existence.³⁴

Posthumous privacy is the right to maintain one's reputation, dignity, integrity, secrets, and memories after death. Indian legislation is not enough to address the rising demand for posthumous privacy protections. In *K. S. Puttuswamy v. Union of India*,³⁵ the Supreme Court declared the right to privacy a Fundamental Right under Article 19(1)(a) of the Indian Constitution. The court noted that an individual has the right to regulate his life, even online. An individual has complete control over his internet personal data, which is safeguarded by privacy. This case proves that personal data protection includes privacy. How would personal data on numerous sites be maintained if the individual dies? Neither the Constitution nor the statutory laws safeguard personal data after death.

Posthumous privacy in social media

Online social networking has increased the internet's influence on privacy. There are several ways online social networking affects privacy. Social media sites save user data in their databases to promote social engagement. The question then is how far the law goes to protect users' right to privacy on social media sites.

The problem becomes more complex when the information has emotional value for the survivors. When the deceased's private email account is accessed, we don't know if we are opening Pandora's Box or merely assisting them in their time of grief. These requests for access can be emotional, making it hard for the law to maintain

33 *Supra* note 4 at 1935.

34 Samantha D. Haworth, "Laying Your Online Self to Rest: Evaluating the Uniform Fiduciary Access to Digital Assets Act" 9 *Miami Law Review* 549 (2014).

35 (2017) 10 S.C.C. 1.

stability. Such a problem occurred after a young US marine was killed in Iraqi fighting. His wife, who is also his heir, wanted access to his webmail account, but the provider refused to transmit credentials and terminate and destroy the account upon notice of death. After a court order, the webmail provider allowed the widow to download the inbox and folders without passwords. The widow was horrified to see that the e-mails showed the marine's gay relationship with a fellow soldier. Additionally, some of the e-mails specifically stated that she was not to be informed.³⁶ Therefore, for securing the deceased's personal data, post-mortem privacy is needed.

The legal position is different in the UK. In *Fairstar Heavy Transport N.V. v. Adkins*,³⁷ England and Wales Court of Appeals ruled that emails are not "property". The issue pertained to a commercial conflict between Adkins, a previous employee of the organization, and the company's current proprietors. Adkins possessed business-related correspondence that was saved on his personal computer located in England. Fairstar expressed the need to access and peruse the aforementioned electronic document due to their criticality in facilitating the operations of the organization. Fairstar asserted an exclusive entitlement to the content of the emails in question, which were transmitted or received by Adkins in representation of the organization. Justice Edwards-Stuart made a distinction between a physical paper document and an electronic email, asserting that only physical paper may be legally considered as "property". The court has provided clarification that, according to English law, emails do not fall under the category of property. Consequently, the claim made by Fairstar was defeated.

The second important issue is that fiduciaries legally and practically hold many significant digital assets. Facebook limits access to profiles; users must agree to Facebook's terms to create one. When a user hits 'I accept' or a similar button, they are believed to have read and accepted Facebook's terms and conditions.³⁸ Facebook retains the custodianship of a deceased profile. Consequently, the closure, deletion, or memorialization of a profile is subject to the rules set by Facebook. However, it is worth noting that if the heirs of the deceased individual are not active Facebook users or were not connected as 'Friends' with the deceased, they may encounter difficulties accessing the profile content.³⁹ So, the question remains: what will happen to my Facebook profile?

36 Cole Schotz PC, "New Jersey Enacts Uniform Fiduciary Access to Digital Assets Act" *Lexology*, available at: <https://www.lexology.com/library/detail.aspx?g=61a3b590-b48d-4cc9-a6be-8556ee91dd6b> (last visited on Feb. 13, 2024).

37 [2012] EWHC 2952 (TCC).

38 In reality, these are facilitated through clickwrap, browsewrap or multiwrap provisions which accompany considerable amount of texts which are often perplexing and incomprehensible for general public.

39 Lilian Edwards and Edina Harbinja, "What happens to my Facebook profile when I die?" *Legal Issues Around Transmission of Digital Assets on Death*, *SSRN* 10 (2013), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222163 (last visited on Feb. 13, 2024).

The third important issue with social media is that users neglect to deactivate their accounts, inviting hackers. According to statistics, 2.5 million idle US user profiles are vulnerable to identity theft.⁴⁰ These stolen identities were used to get credit cards, mobile phone connections, and social security numbers. Social media platforms also supply identity thieves with a lot of information. Many fraudsters are close friends or relatives of the deceased. Criminals have often filed tax returns on the identities of the deceased to get government reimbursements. This type of fraud is profitable since it takes months or years for legal heirs or financial institutions to discover it.⁴¹ To solve this situation, India needs social media restrictions and posthumous privacy laws.

V Regulatory mechanisms for posthumous privacy and digital inheritance

In the contemporary era characterized by advanced technology, a significant majority of individuals have embraced a lifestyle that revolves around digital platforms and activities. In the context of India, it is imperative to acknowledge that the right to privacy holds the status of a fundamental right for all citizens, encompassing both physical and digital domains. Due to the extensive reach of the internet, complete eradication of content across several platforms is no longer feasible. To safeguard posthumous privacy effectively, it is imperative to establish robust regulatory systems that encompass both legislative frameworks and the policies of social media corporations.

Protection of digital data in India

The Information Technology Act, 2000 (hereinafter ‘IT Act’)⁴² in India primarily addresses various aspects of electronic provisions, although it does not specifically address financial digital assets. The concept of inheritance does not now include provisions for a ‘digital will’. The absence of legal provisions can be attributed to the fact that the Transfer of Property Act, 1882 (hereinafter ‘TP Act’)⁴³ does not provide a definition for ‘digital assets’, despite their occasional surpassing of physical assets in terms of value. In a recent development, the Digital Personal Data Protection Act, 2023⁴⁴ under section 14 sought to safeguard the personal data of deceased individuals through the implementation of the “right to nominate” provision.

40 Bob Sullivan, “Study: ID thieves robbing the grave; 2.5 million dead hit annually”, *NBC News*, available at: <https://www.nbcnews.com/business/consumer/study-id-thieves-robbing-grave-2-5-million-dead-hit-flna729283> (last visited on Feb. 25, 2024).

41 U.S. Department of Justice, “Stolen Identity Refund Fraud”, available at: <https://www.justice.gov/tax/stolen-identity-refund-fraud> (last visited on Feb. 13, 2024).

42 Act No. 21 of 2000.

43 Act No. 4 of 1882.

44 Act No. 22 of 2023.

Accordingly, the data principal possesses the entitlement to designate an individual to safeguard their personal data in the event of their demise or inability to do so. Nevertheless, the document fails to provide explicit details regarding the protocol for inheritance, including the permissible number of nominators, the allocation of responsibilities for managing the data, and the contingency plan if the deceased desires to designate distinct individuals for different social media platforms. It is not possible to assert that the issue of digital inheritance will be definitively resolved upon the enactment of this legislation. The establishment of comprehensive legal frameworks is important to effectively address the matter of digital asset inheritance.

Protection of digital data in the US and EU

Section 6 of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) confers upon the custodian of digital assets the exclusive authority to exercise discretion in granting a fiduciary or designated recipient complete access, partial access, or a recorded copy of digital assets that the deceased user would have been able to access during their lifetime. According to section 8, a custodian is obligated to disclose a comprehensive inventory of electronic data, excluding electronic communications, if the representative presents the necessary documentation as mandated. This section grants personal representatives' inherent access to the electronic communications and other digital assets that are not safeguarded by federal privacy legislation, as elucidated in section 8.⁴⁵

The General Data Protection Regulation (hereinafter 'GDPR') of the European Union establishes the right to erasure as a means of safeguarding the privacy of individuals whose data is being processed under article 17. However, it does not explicitly address the rights of deceased individuals in relation to data protection. According to the provisions outlined in article 4(1), the scope of personal data protection is limited to individuals who are alive, excluding deceased individuals. Hence, GDPR lacks the capability to effectively address privacy concerns and the transfer of digital assets upon an individual's demise.

Despite the critical importance of passing such laws, only a minority of EU member states have done so. The Digital Republic Act of 2016, for instance, guarantees the right to an electronic death in France. The provisions of this law ensure that an individual's wishes regarding what happens to his or her online profile after death are honored by the relevant parties, *i.e.*, the right is felt by the owner to some extent.⁴⁶

45 *Supra* note 4 at 1938.

46 Olivier Proust, "France Adopts Digital Republic Law", *Fieldfisher*, Oct. 10, 2016, available at <<https://www.fieldfisher.com/en/services/privacy-security-and-information/privacy-security-and-information-law-blog/france-adopts-digital-republic-law> (last visited on Dec. 13, 2023).

Protection policies of the social media companies

When we consider a few of the most important online fiduciaries in the world of digital assets, we don't find a single set of rules. Instead, they face a maze of incomprehensible terms and restrictions. Facebook, which is considered the industry gold standard, allows users to delete or commemorate their profile after death and download it if they approve or a court order is filed. Recently, the German Federal Court of Justice ordered Facebook to provide parents full access to their deceased daughter's account. At the same time, parents cannot use the account. Thus, the judges established legally binding guidelines for using deceased users' social media profiles.⁴⁷

Google has created a new 'code' approach accessing email and other services after death. The 'Inactive Account Manager' (IAM) was introduced in April 2013 with the purpose of enabling users to selectively disclose certain portions of their account data or notify designated individuals in the event of prolonged inactivity.⁴⁸ If the user is idle for 3–18 months, he can nominate trustworthy contacts to get data. After verifying their identities, trustworthy contacts can download user data. The user can also notify selected contacts of his inactivity and delete his data.

Twitter (now 'X') often permits the cancellation of a deceased user's account. Nevertheless, the policy explicitly prohibits the provision of login credentials to beneficiaries for the purpose of accessing the account of a deceased user, so limiting access choices to discretionary measures only. In the circumstance of a Twitter user's demise, Twitter will collaborate with a duly authorized representative of the estate or a verified immediate family member of the dead to deactivate the account. Twitter is incapable of providing account login information to individuals, irrespective of their affiliation with deceased individuals.⁴⁹

Facebook has the most comprehensive policy of all social media platforms. In 2015, Facebook added a new feature called a "legacy contact". It is important to note that the access provided to a legacy contact does not encompass all aspects of a user's account. The designated legacy contact is not provided with authorization to access a user's page or personal communications, irrespective of the user's explicit intention to grant such access.⁵⁰

47 Antoinette Maget Dominicé and Dario Henri Haux, "The Decision of the German Federal Court of Justice against Facebook: Opportunity to Define Digital Heritage?" 6 *Santander Art and Culture Law Review* 252 (2020).

48 "About Inactive Account Manager", *Google.com*, available at: <https://support.google.com/accounts/answer/3036546?hl=en> (last visited on Feb. 13, 2024).

49 Help center "How to contact Twitter about Deceased Family Member's Account, Help Centre", *Twitter.com*, available at: <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (last visited on Feb. 13, 2024).

50 *Supra* note 4 at 1922.

Both Facebook and Google offer some insights into its internal policies; however, a significant portion of these policies remain undisclosed. This may imply that the resolution of conflicts is entrusted to the discretion of service providers. In situations where regulations are in place, it is evident that conflicts may arise between contract rules and rules pertaining to succession or execution upon an individual's demise. Therefore, the optimal approach to address the aforementioned issues is to uphold and advance the user's autonomy, while concurrently devising technical interventions that facilitate the achievement of this objective.

VI Conclusion and the way forward

As the world shifts from physical to digital property and “digital assets” is not defined in Indian law, digital assets and their financial and emotional value must be defined. Legal heirs can inherit physical things with financial value, thus digital assets must also have inheritance laws. Social media assets contain financial and emotional data, but inheritance raises postmortem privacy concerns. Digital assets should not be automatically transferred after death due of posthumous privacy. Posthumous privacy requires protecting the deceased's personal data from inheritance. The US has enacted a law that allows will executors and attorneys-in-fact to legally handle the digital assets of deceased or incapacitated people. The RUFADAA protects digital assets and their management after death, but it has several gaps that need to be filled to meet society's growing needs.

In such a situation, the authors endeavours providing few suggestions for dealing with this emerging issue of digital assets in India. *Firstly*, privacy under Article 21 of the Indian Constitution must be expanded. The *K.S. Puttaswamy* judgment states that the right to privacy for digital data is only valid throughout one's lifetime, but the problem is that digital personalities do not expire with the body. Therefore, we need legislation to preserve the deceased's privacy on social media.

Secondly, the Transfer of Property Act, 1882 shall include the term “digital assets” as a part of an asset. Then, we should introduce the concept of “digital will” in the Indian Succession Act, 1925 and succession laws under personal laws for proper inheritance of digital assets. Most of the digital laws are governed by the IT Act, 2002, but it doesn't include the term “digital will”. So, for the inheritance of digital assets, we require amendments in these laws.

Thirdly, data protection cannot rely solely on legislation. Social media companies must have policies for managing deceased people's data. Facebook and Gmail have implemented data management policies, but they seem to be futile because they are hidden in long and complicated forms. To fix this, companies should clearly state the terms and conditions of account management after death when creating the account. They must offer editing services so the account holder can make changes if his mind changes. Emails contain personal data, so users' autonomy and privacy must be

protected. Establishing and legalizing in-service posthumous privacy solutions like Inactive Account Manager can do it. Such in-service policies let users to choose the process of handling their mail after death. Before this, fiduciaries must inform the user of this option and other related avenues during his lifetime.

Finally, the authors recommend sending individuals an “Annual Data Protection and Privacy Report” detailing account threats. A report like this would raise social media data privacy awareness. Therefore, more people will know about digital data management. Furthermore, private businesses and individuals can also discuss privacy concerns at data protection conferences.”

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