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Succession of Digital Rights in Brazil: In Search of Appropriate Legal Treatment

Dóris Ghilardi [α] & Jorge Nunes da Rosa Filho [σ]

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Introduction

Since the 1940s, with the beginning of the cybernetic revolution and the subsequent, gradual and inexorable change in the global social order by means of network communicability - *internet*, *e-mails*, discussion forums, social networks, search engines, free, open, and collective contribution *sites* - the logic of human relations has been irremediably changed.

An environment marked by disruption and the intangible, with no strict separation between reality and the symbolic. A space of constant interactions, in which a large amount of data and information is created and inserted, transformed into a digital assets. The fate of these assets, in case of the death of its owner, is one of the delicate questions that have challenged jurists worldwide, justifying the present research.

As such, this article focuses on the succession of digital assets - digital inheritance, and aims to address some of its intricate issues, such as the legal nature of digital assets (whether of personal, patrimonial or mixed content) and, based on that, investigate the possibility of transmission in case of death of the rightholder, either by last will disposition or by law.

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In this regard, it is clearly relevant to study to what extent the rights directly linked to the new network economy and the digital information society can be subject to the civil norms in force, applicable to analog data, or to what extent they deserve specific regulations, requiring the issue of new laws.

To this end, the article begins with the presentation of the new scenario, inaugurated with the information society and new technologies, in order to introduce some of the legal challenges contemplated by the theme.

In the sequence, it analyzes existing bills in Brazil on digital inheritance and laws on regulation of internet use and protection of personal data with the intention of demonstrating the inexistence of specific legal provision on succession of this type of heritage.

It then looks at technical issues such as the verification of the possibility of legal classification of digital data in traditional legal categories such as property, as well as the study of the classification and legal nature of these digital assets, and then addresses the terms of use and services of digital platforms and tries to find harmony between the interests of users and those of online service providers.

Finally, based on the presentation of Spanish law and German paradigm decision, the aim is to find guidelines and solutions to guide the appropriate treatment of the issue in Brazilian territory. In addition to these two foreign analyses, the text also analyzes some legal provisions on the subject in Argentina, the United States and France.

The research, of utmost relevance to the current context, is based on technical data, national and foreign doctrine, Brazilian legislation, as well as international legislation and judicial decisions, in order to foster debate and seek plausible alternatives, given the complexity of the issue under discussion.

I. Information Society and Digital Data: A Change of Scenery

With the advent of the information society and new technologies, a new virtual environment has opened up, identified by some authors as the Fourth Industrial Revolution, the 4.0 Revolution, also seen by others as a passage from the Industrial Revolution to the Post-Industrial Society.

A new context has emerged, in which the production of goods would have given way to the

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provision of services, leveraging the digital world of new technologies and data exchange, creating, consequently, new forms of social and economic representation.

In this scenario, computers are referred to as the main mechanism of possibility for the realization of this new world, especially with the advent of the Internet, seen as a new political and revolutionary dimension.

According to Loveluck (2018, p. 77-78) interactions by networked computers represent unprecedented forms of sociality, a vision of chosen community, in which one can free oneself from the constraints of one's immediate environment to establish bonds, from a purely voluntary basis, independent of the ordinary structuring constraints of individuals, such as neighborhood, family, religion, and tradition.

In this context, unequivocally, it was the installation of computer networks, in a *human-machine symbiosis* model, that allowed the computer to go beyond the initial state of a mere calculator, to become an *information system* capable of communication, thus raising the relevance of information - or, more properly, data - to a privileged position in the context of commercial and non-commercial exchanges. (TRICLOT, 2008).

Such reflections are affiliated to the notion that the advent of technologies has subverted the order hitherto established in the most varied fields of human knowledge. The logic of scarcity has been replaced by the logic of abundance.

There is no longer any doubt: cybernetics, personal computing (microcomputing) and network communication have established new and unsurpassable social, political, cultural, economic and, consequently, also legal paradigms. One need only consult public statistics to have an exact notion of the vertiginous increase in the number of Internet users and social networks over time.

According to a report released in January 2022 by digital marketing firms We Are Social, UK, and Hootsuite, USA, on internet consumption and social networking (DIGITAL 2022), the number of users has more than doubled in the last 10 years from 2.18 billion in early 2012 to 4.95 billion in early 2022.

This same report (DIGITAL 2022) shows that the number of social media users has grown even faster over the last decade than Internet users. While in 2012 there were 1.48 billion users, that number is now 3.1 times higher, totaling 4.62 billion social media users.

A fact that draws attention and deserves to be highlighted is the time spent online. The report points out that the average Internet user spends more than 40% of his or her life in the digital world, considering that a person sleeps on average 7 to 8 hours a day.

It is estimated that only in 2022 the world will spend more than 12.5 trillion hours online. In this scenario, Brazilians appear together with South Africans, Filipinos and Colombians as the people who spend more than 10 hours a day online.

Speaking specifically about Brazil, according to the 2022 report (DIGITAL 2022), the total number of Internet users is 165.3 million, and the total number of social media users is 171.5 million, which is 79.9% of the total population.

Also according to the Digital report the platforms most used by Brazilians are Youtube (138 million), Instagram (119.5 million) and Facebook (116 million).

These surveys show the large number of digital traces left by each user, challenging the legal world to deal with this new scenario in an attempt to define the fate of the content available on the network after the user's death, especially in social media, paying attention to the fact that the information available there may have a mixed legal nature.

In other words, in the sphere of the information society, the *data* circulating on network systems may or may not refer to very personal rights, some are of a strictly patrimonial nature, others not. Even so, such content is often clearly relevant to the aspects of intimacy and privacy, and has no intrinsic economic value; however, when inserted into the context of *big* data collection, it constitutes an important element of the political economy, and is considered an economically measurable asset (LOVELUCK, 2018).

This in itself denotes the complexity of the subject in question and its nuances, which cannot and should not be ignored when thinking about an adequate legal treatment to be given to the succession issue of digital assets.

Therefore, in an attempt to frame digital data in the existing legal structure, it is essential to revisit some traditional concepts and classifications of civil law, in order to accommodate them adequately, given the specific legislative gap on the subject, which will be seen in the next topic.

II. Digital Data and Internet Regulation

Regarding digital data regulation, it is worth noting that in Brazil the first bills dealing with the transmissibility of the digital contents and files of the author of the inheritance dated back to 2012. Bill no. 4.847/2012 proposed the addition of articles 1.797-A, 1.797-B and 1.797-C to the Civil Code, bringing as guidelines the concept of digital inheritance and the possibility of transmitting this inheritance to legitimate heirs, if the deceased had not left a will.

This text also allowed heirs to define the fate of the deceased's social networking accounts.

Bill no. 4.099/12, drafted by Representative Jorginho Melo, suggested the addition of a single paragraph to article 1.788 of the Brazilian Civil Code,

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expressly providing for the transmission of all digital content in the event of death.

Both bills were criticized, mainly for authorizing the indiscriminate transmission of all the contents of the holder of the accounts to his or her successors, without any concern for the rights of personality, especially privacy and intimacy. However, neither of them was ever approved, being shelved. The same text of project 4.847 was re-edited by project 8.562/17.

In turn, Law no. 12.965/14, known as "Marco Civil da Internet" (Internet Civil Framework), created to regulate the use of the network and ensure the rights and duties of users and companies providing access and online services - although a recent diploma, does not provide specifically about digital assets, being silent about the succession of these assets in case of death. The Bill no. 1.331, of 2015, suggested the amendment of item X, of Article 7 of the Marco Civil da Internet to provide for the legitimacy of the spouse, ascendants and descendants to claim the deletion of the deceased's personal data. And the project no. 7.742, of 2017 provided for the inclusion of art. 10-A of Law no. 12.965/14, providing for the exclusion of the accounts of deceased users by internet providers. All these projects have been shelved.

Currently in progress is Bill no. 5.820, of 2019, which proposes to amend article 1.881 of the Brazilian Civil Code, to include paragraph 4, to address codicil formalities to contemplate digital inheritance. Also from 2019 is Bill no. 6.468, which suggests a single paragraph to article 1.788, establishing the transmissibility of all digital content to heirs.

Finally, the General Data Protection Law - no. 13.709/2018 -, the "LGPD", created to protect the violation of privacy in relation to personal data, does not expressly provide for the protection of user personal data after their death.

In Europe, the General Data Protection Regulation 2016/679 (GDPR), the document that inspired the Brazilian law, in its recital 27, expressly provides for the inapplicability of the law for the protection of deceased person's data, leaving it to the member states to establish the rules regarding their treatment.

In Brazil, Article 1 of the LGPD refers to the processing of personal data, including by digital means, with the aim of protecting the fundamental rights of freedom, privacy and personality of the natural person. From the literal reading of the referred article, one cannot understand the applicability of LGPD to the data of deceased users, but also no prohibition is extracted. In this sense it is important to mention the considerations made by Honorato and Leal (2021) in the sense of the importance of this applicability, although they also understand that the question is left open, citing the express consent of the holder provided for in Article 7 as an example. And they question: "would the operating agent or responsible party be authorized to maintain the processing of personal data even after death or would there be a need for prior manifestation of the holder or authorization to relatives in this regard?"

In this sense, it is not too much to mention Argentine law, which also does not contain any provisions about the destination of digital assets after the user's death, but ensures the right of access to the data of deceased persons by the universal successors, as can be extracted from the reading of art. 14.4 of Law no. 25.326/2000 – "Ley de Protección de los Datos Personales".

It is noted that, despite this, Argentine law does not establish parameters of how this access will be allowed and what the limit will be, which is why a new draft law was introduced in 2018, providing in its article 34 that universal successors will have, in addition to the right of access, the right to rectification, deletion and portability of the deceased's personal data, as well as the right to oppose the processing of such data.

While these issues are being discussed in the neighboring country, in Brazil, in the absence of a specific law dealing with the projection of personal data after death, there are more questions than answers, which is why we will now address some of these questions.

To do so, it is imperative to dialogue to the law of succession, which brings rules of patrimonial transmission from the deceased owner to his heirs.

III. In the Quest for a Legal Framework for Digital Data

According to article 1.784 of the Brazilian Civil Code, "when the succession is opened, the inheritance is immediately transmitted to the lawful and testamentary heirs", and the right of inheritance is assured as a fundamental right by article 5, item XXX, of the 1988 Constitution of the Federative Republic of Brazil (CRFB/88).

When dealing with the content of the succession, the need arises to identify its object, i.e., that which is admitted as susceptible to transmission. Beviláqua (1932, p. 19) treats inheritance as equivalent to patrimony, defining it as "the universality of property that someone leaves behind on the occasion of his death, and that the heirs acquire. It is the set of goods, the patrimony, that someone leaves at death".

In fact, the character of succession is linked to the idea of heritage, which can be translated into economic expression (goods, rights and obligations) and which must be succeeded by the application of its own legal instruments (the law and the last will disposition).

Wald (2015, p.16) recalls that, at one time, inheritance law was linked to an extrapatrimonial sense, case of the Roman family, in a continuation of the domestic religion. Today, however, not anymore.

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When dealing with legitimate succession - arising from law - the Brazilian Civil Code's provision is restricted only to the transmission of property, and it is not possible to speak of succession of very personal rights; at most, the law grants the respective heirs the right of defense - of honor, name, intimacy and privacy *post mortem*.

However, when dealing with testamentary succession, paragraph 2 of art. 1.857 of the Civil Code expressly admits the possibility of making testamentary dispositions without patrimonial content.

These normative guidelines are important to analyze the transferability or not of digital data. First, however, it is imperative to verify if it is possible to talk about ownership of this content. The answer to this question is linked to the analysis of its legal nature: are digital data very personal rights, are they assets of economic content or are they of mixed nature?

There seems to be an inclination in the doctrine for the mixed nature of digital data, since it may include data of an exclusively patrimonial nature, data of a non-property nature, and other hybrids, containing both characteristics.

To exemplify this possibility, among the assets with patrimonial content are virtual currencies/ cryptocurrencies, such as bitcoins, airline miles or loyalty programs, and even personal data that are susceptible to economic valuation, such as accounts in profitable social networks.

As examples of data of mixed or hybrid nature can be related the confidential information about a certain industrial process, the results of a journalistic investigation or encrypted documents with economic value. (FONT; BOFF, 2019, p. 32)

Among digital data of a non-property nature, according to Font and Boff (2019, p. 32), are those related to digital identity, non-property assets that may be protected within these accounts, such as photographs, electronic signatures, backups of communication tools, and personal digital information.

However, records of human interaction in the virtual environment, such as conversations, posts, and *likes,* with content linked to the spectrums of intimacy and privacy (and therefore approaching the condition of most personal rights), notably arising from the dynamics of social networks, can also arouse economic interests, becoming goods with potential or economically assessable assets (LOVELUCK, 2018).

In fact, in view of the above, it becomes unfeasible to treat digital data as uniform, and they deserve to be classified according to their content, which may or may not have a patrimonial nature.

Based on this, there are contradictory understandings regarding the possibility of treating digital data as property. According to Prieto and Cabezudo (2017, p.33), there is no reason not to talk about digital property, despite the evident lack of correspondence between the concept of traditional property and the concept of digital property, recognizing that there is a wide variety of digital property and distinct classifications, according to the type of service or nature.

Therefore, they argue that, although colloquially one can speak of digital asset ownership, encompassing all types of assets, strictly speaking, only those relationships that have a determined or determinable economic value can be considered as such (PRIETO; CABEZUDO, p. 34).

Other authors, such as Mendes (2014), expressly disagree with treating them as property, which does not come to preclude them from being worked as legal goods, as highlighted by Frazão (2019, p. 104).

In this line of thinking, we begin to treat them as legal goods, as soon as they can be presented as the object of a subjective right, of a patrimonial or affective nature, while digital goods can be understood as any information, record, or file of a digital nature stored on the net.

The concept of digital property includes accounts or content on the network, hosted on a computer, on a server or in the cloud. Such digital goods can be e-mail accounts, bank accounts, games, writings or opinions in blogs, photos, comments on social networks, music, books, etc., as long as they are digital in nature. (MORÓN, 2018, p. 416). Therefore, it is necessary to analyze whether it is possible to include digital goods in the traditional classification of goods. In this regard, several authors fit digital goods into the classification proposed by the legal literature, which distinguishes between tangible and intangible goods.

Tangible goods are those that are palpable, that exist materially, while intangible goods are those that have abstract existence, but with economic value. So, would digital goods be a kind of intangible goods?

There seems to be some consensus on this, which does not make things any simpler. This is because digital intangible assets do not always have a monetary value, so some argue that in the virtual environment, the classification should be made according to the analysis of economic and non-economic assets.

Maia (2019, p. 153) points out that the most important distinction for civil law today, in the face of the new category of legal property, is no longer the separation into rights in rem and obligations, but the distinction of relationships into property and non-property, denoting the difficulty of maintaining or framing digital data in watertight categories.

While there is no legal provision for this, nothing prevents us from classifying digital goods as, on the one hand, economic content goods, and on the other hand, digital goods with non-economic content, and we can also add, as mentioned above, mixed content goods.

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There are those who differentiate digital goods from digital assets, whose concept is broader; while digital goods would be online accounts and content, digital assets would encompass any type of electronic record, such as the so-called cryptocurrencies.

In view of the above, there are no conditions to consider the legal nature of either digital goods or digital assets (which for this article will be treated as synonyms) as uniform. In other words, the nature of digital assets must consider the distinction of their contents, therefore, non-analog assets may have a patrimonial, non-patrimonial or mixed nature. This understanding will help in the appropriate legal treatment regarding the study of the *causa mortis* transmissibility of the so-called digital inheritance.

IV. Service Providers and the Contractual Provisions of Digital Goods

Every time a user decides to join an *online* service*, it* is a *sine qua non* condition for access that the user agrees to the terms of use and services, which are not negotiable. These are general conditions, without any control mechanism, especially with regard to the power exercised by service providers to freely access these accounts and data.

Regarding this aspect there are extensive discussions in the search for harmonization between the interests of the user and the interests of the digital platforms. Doubts about the ownership of the digital assets, which is present in the digital platforms, are among them.

The central issue of this and other questions resides in the reconciliation between the deficiency of hetero-regulation (state regulation) and contracts, since personal data transformed into digital goods are protected, in the absence of state rules, by the terms contained in these contracts.

Moreover, as Loveluck (2019, p. 176) reminds us, the services provided in the virtual environment, also called cyberspace, are sophisticated, covering several territories and jurisdictions, in a complex interaction with multiple actors (individuals, states, economic interests, etc.), and the source codes constitute rules of fact (code is law), which must be carefully articulated with the rules of law, under penalty of having serious violations of fundamental rights.

Aware of this, some countries have started to regulate and protect personal data in the digital sphere, among them Brazil, through the General Law of Data Protection (LGPD), although most legislations have not contemplated an important aspect: the protection of data after the user's death.

While legislative limbo remains, Rodotá (2008, p. 76) draws attention to the intimate relationship between consent and informational self-determination, highlighting consent as an important alternative existing between regulation and deregulation, further highlighting the difficulty of establishing a sufficient system of prohibition and legislative authorization in order to protect all users' interests.

France, for example, seems to have bet on this model of valuing informed consent, by providing, in article 63 of Law no. 2016-1321 - Law "for a Digital Republic" - which also inserted article 40-1, in Law no. 78-17, that any person can exercise the rights of conservation, deletion or communication of their personal data, in addition to appointing a responsible person to carry out their instructions, on their death. And, if no one has been appointed, it confers this legitimacy on the heirs.

The French regulation also provides for the possibility of leaving general instructions about the user's personal data or specific instructions. In this case, specific consent is required, which cannot result from the broad approval inserted in the general conditions contained in the terms of use of digital services. Although rather timid, with no provision for digital inheritance in the absence of a last will disposition, the importance attributed in the French regulation to specific and informed consent and to the free exercise of the holder's autonomy regarding the destination of his/her data is noteworthy.

It can be seen that, in general, users agree with the terms of services and use, without even reading them. Therefore, the scope and validity of these consents are questioned, increasing the importance of regulation and/or state position in order to establish some limits and dictate important guidelines on this issue.

Ensuring this self-determination and informed consent is no simple task; on the contrary, so much so that the text of the Brazilian LGPD states the need for qualified consent for the processing of personal data, establishing for the validity of this agreement the "free, informed and unequivocal manifestation of its holder. Although these guidelines are valid for the user's personal data in life, and there are doubts about their applicability or not after death, they demonstrate that the problem of the succession of digital rights is real and calls attention to the urgent need to be addressed by the law, confirming the questioning already raised above, involving this issue.

This is because the lower the state regulation, the greater the power concentrated in the hands of digital service providers, also increasing the complexity of the answer about the ownership of assets. Now, if the content of the terms and conditions of use prevails, there will be several regulations, and the contracts *themselves* must be observed.

In Facebook's terms of use, for example, there is the following provision about the user: "you own the content you create and share on Facebook, and nothing

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in these Terms removes the rights you have to the content itself." A similar provision appears in YouTube's terms of service: "You retain ownership rights to your Content. However, you are required to grant certain rights to YouTube and other users of the Service."

During life, the ownership is recognized in this term as belonging to the user; however, when it comes to the same verification of ownership after the user's death, one often finds clauses providing for the automatic termination of the account or its transformation into a memorial account.

Instagram transforms the user's account into a memorial account when informed of the account holder's death. Facebook, on the other hand, has expanded the regulation of this issue, giving account holders the right to choose the fate of their account after their death.

Google, the owner of YouTube, has created a so-called account manager, which allows the user to define what will be done with the data in case of death, allowing the deletion of the account or the sharing of some data with someone trusted.

In general, what is noticeable is that the terms of use and conditions of *online* service providers have changed to allow users to define the fate of their data in case of death. However, when this is not done, the accounts will be deleted or turned into memorials, making it impossible to transfer their content, which characterizes a broad power of digital platforms over these assets.

Given the above, the question is: is the already existing civil regulation sufficient to invalidate the prohibitive clauses contained in these terms of use or should specific laws arise to account for these contradictions between the user's need for protection and the interests of digital service providers? The second answer seems to be the correct one. In this sense, some countries have already advanced, feeling this need, which may guide the discussions in Brazil.

V. The Delicate Question of the Transmission of Digital Assets: In Search of Guidelines, based on Foreign Experiences

As seen above, under the current Brazilian legislation, only patrimonial assets are transmitted by hereditary succession, while non-property rights may be transmitted/disciplined *post-mortem* by means of a last will disposition. The testamentary succession gains, in the meantime, important relevance, since it allows the prediction of transmission of any digital asset, in addition to ensuring the desire of the holder of these assets, who may choose, even, for the non-transferability of accounts and contents or goods without economic nature.

Wills, although not rooted in Brazilian culture, are an important mechanism to enforce the holder's will regarding the destination of his or her assets. Succession planning, so much discussed at the moment, can and must include virtual assets.

It is necessary to make people and legal professionals aware of the importance of expressing the will about the destination of e-mail accounts, Whatsapp conversations, social or professional network accounts in general, and any other digital assets.

The lack of custom regarding the will or even the difficulties and costs related to the formalities required to make it in the form of a public instrument can be supplanted by other valid forms of last will disposition.

One of these mechanisms is the codicil, an old institute provided in the Brazilian Civil Code, in art. 1.881, which ensures the possibility of establishing provisions of the funeral act and donations of small value. An expansion of its content is part of Bill no. 5.820/19, which is in progress in the House of Representatives, proposing the modification of this article, so that the destination of digital assets through codicil is also contemplated.

A curious fact is that the text allows, in addition to the will expressed in writing, that the will can also be recorded in a digital sound and image system, as long as some requirements are met, such as the declaration of the date of the act and the presence of two witnesses, if there is a declaration with patrimonial content.

Specifically regarding digital assets, the legal literature also speaks of a digital will. Despite the name, it is a digital document, without the formalities required for a will, for provisions about intangible, non-analog assets. (LARA, 2016).

Therefore, the user has several means to express his will regarding the digital assets, such as making a will or codicil, appointing someone he trusts to execute his recommendations upon his death; using the service provider's own terms of use to leave someone appointed; or electing digital account managers, made available by the platforms. These are companies created for the management of the digital collection.

Regarding this last possibility, it should be noted that there is no specific legal protection in the Brazilian legal system to ensure the compliance and effectiveness of the provisions made through these digital contracts - digital will - especially if these companies cease to exist, according to Font and Boff (2019, p. 36).

Authors such as Herrera (2018, p. 7) also challenge the use and validity of instruments not provided by law, warning of the possibility of conflicts about the temporal or functional prevalence of the various regulations, in addition to the fractionation of succession.

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This concern is not irrelevant, so much so that in the United States of America, for example, there is an appreciation of the holder's will about the fate of digital assets, similar to that provided in France. However, they go beyond simple permissibility of will disposition, to include an order of observance of the type of instrument handled.

In the proposed uniform legal regulation - RUFADAA, *Revised Uniform Fiduciary Access to Digital Assets Act* - a non-legally binding but nonetheless highly relevant standardizing document, it provides for the establishment of a priority regime for carrying out the disposition of these assets, according to the type of instrument used.

The order of priority foreseen there is staggered in three levels: the first is the will expressed by the holder through the tools made available by the digital service providers; secondly, if this instrument has not been used, the will contained in testaments or other authorized forms is fulfilled, and only lastly, the terms of service of the digital service providers apply, followed by any legal guidelines that may exist.

Given the above, the best path for the adequate treatment of the destination of digital assets revolves around the appreciation of private autonomy, through last will provisions, ensuring that the holder's will can be fulfilled. Within this idea, the proposal of priority scheduling is able to solve questions regarding functional or temporal prevalence among the various possibilities of regulation, revealing itself as an important alternative for the solution of the issue.

In the USA regulation, given its contractual culture, the possibility of digital contracts - digital will, through specialized companies - stands out as a priority.

In Brazil, allocating the will and/or codicil as a priority - as already occurs by force of law -, a specific law would come, in sequence, to regulate the limits of the terms of use and digital contracts.

For Honorato and Leal (2021, p. 401), if there is both a will and the registration of certain choices made by the user on the digital platform, there would be no need to establish the staggering, since they suggest seeking "the solution that allows the maximum use of the two wills, especially when both do not conflict".

In this specific situation, the solution pointed out is interesting, and the wording of article 1.899 of Brazilina Civil Code, which provides for the observance of the testator's will as interpretative criterion, may also be applied, by analogy. However, when the manifestations are conflicting and the deceased person's will cannot be clearly extracted, the escalation seems important. Of course, the user's autonomy cannot violate legal precepts, under penalty of inapplicability.

But what if there is no last will? Are the general rules of succession law sufficient to solve all questions or, on the other hand, would legislating specifically on the subject be the best solution? Believing that the last option is the most viable one, in the search for a legal basis, the analysis of some alternatives found in foreign law can serve as a guide for Brazilian law.

Spain, for example, enacted the Ley Orgánica no. 3/2018, de Protección de Datos y Garantía de Derechos Digitales (LOPDGDD), expressly providing for the right to digital inheritance, with respect to accounts and digital content available on social networks, considered an important milestone on the subject in the Ibero-American legal space, as stated in its preamble.

We can see from the wording of Article 96 of the aforementioned law that the heirs, spouses, or companions have the legitimacy to decide the fate of the digital content on the web belonging to the deceased, such as deletion of accounts, modification, or its use, if there is no testamentary provision to the contrary or prohibitive state law.

In fact, the holder can forbid access to his heirs, as well as allow them to follow his instructions, to request the digital service platforms to delete the account, to delete certain content or to stop its use. All this, provided there is no express local law forbidding such possibilities. Spanish law is organized by states, each of which must regulate in its own way.

Although very succinct in what concerns *post-mortem* digital assets, the Spanish law valued private autonomy, expressly assuring the holder of digital assets the priority to test his will, to be mandatorily fulfilled by the service providers. It was silent, however, about the transmission in the case of *intestate* succession.

Germany, still without specific rules on the succession of digital assets, has judged an important case, applying the transmissibility of digital assets in accordance with the succession rules, without mentioning any legislative gap.

On July 12, 2018, the *Bundesgerichtshof* (BGH III ZR 183/17), a court equivalent to the Brazilian Superior Court of Justice, judged one of the paradigm cases, setting the tone for the solution of several subsequent cases.

The *leading case* involved a dispute fought by the parents of a 15-year-old girl killed in an underground subway station in 2012 against Facebook, whose main claim was the right to access their daughter's virtual account. The justification of the claim was based on two main arguments: one was to understand the cause of the daughter's death, since there were doubts whether it was an accident or a suicide; the other was based on the fact that access to the content could help in the defense of a compensation lawsuit, filed by the public transportation operator, who claimed to feel psychologically shaken because he was involved in the supposed suicide.

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In the first instance, the judge in Berlin (*Landesgericht Berlin*) granted the request. Facebook, on appeal, obtained a reversal of the sentence. The *Kammergericht* (German Court) made it clear that access to the daughter's account would represent a violation of the expectation of privacy and the confidentiality of communications of the interlocutors. Nevertheless, it recognized that the "rights and obligations related to a contract, such as Facebook, are in principle transferable via inheritance" (MENDES; FRITZ, 2019), although there was still no *legal clarity* on the topic.

However, the BGH, in analysis of the new appeal filed by the parents of the deceased young woman, granted the appellants the right to have access to the account under dispute. To reach such a conclusion, they faced several controversial aspects regarding the discussion of the transmissibility or not of digital content stored on social networks, in a firm and detailed decision.

The central point of the decision was the understanding for the transmissibility of the Facebook account to the heirs, with the *Karlsruhe Court* stating that the digital inheritance is subject to the general regime of successions, by force of the principle of universal succession, therefore, with immediate transmission from the death of the holder (principle of *saisine*), except those that are extinguished by the express will of the party or by force of law (MENDES; FRITZ, 2019).

The claim that the digital inheritance conflicts with the personality rights of the deceased or third parties, the secrecy of communication, or the protection of personal data was strongly refuted, due to the definition of the nature of the contracts between the platforms and the user.

According to the German Court, these are contractual relationships and not personal rights, making an important distinction between the contract signed between the user and the platform and the content itself of the digital account, which is of a very personal nature, as highlighted by Mendes and Fritz (2019).

To this end, the contract is related to duties of performance, in which the networks are obligated to make available the communication platform, the publication of content and permission to access such content, a service provided indistinctly to all users and not in a personalized manner. The personal nature would be only in the sense that the account holder can send and publish the contents of his account, which does not prevent the transmission of this content.

This construction made it possible to rule out the argument of the non-transmissibility of the digital inheritance, based on the protection of the deceased's privacy sphere, since the obligatory relationships are transmitted with the death, and the prohibitive clauses contained in the terms of use are considered abusive and, therefore, null and void, due to the confrontation and emptying of the rules of universal succession. The German Court also pointed out that such understanding allows the control of legality of the terms of use, according to objective good faith and pre-existing legal norms (MENDES; FRITZ, 2019).

It is also important to mention that the decision departed from the understanding that only economic contents should be transmitted, because German law, according to the German court, makes no distinction between off-balance sheet inheritance and patrimonial inheritance.

This important decision, which is serving as a parameter for European law, may also guide the discussion in Brazil. Brazilian law is very similar to German law, except that here only property is automatically transferred upon death, and the transfer of non-economic assets is only possible by last will disposition - and, therefore, the principle of *saisine*, as set forth in art. 1.784 of the Brazilian Civil Code, is inapplicable.

Understanding the legal nature of the contracts signed between users and digital platform as obligatory relationships, in fact, seems the most correct. With submission to the rules of the Brazilian Consumer Protection Code (Law no. 8.078/90), such contracts should have restrictive clauses of right highlighted and, depending on the content, be considered abusive.

However, since the account itself is economically assessable and its contents may contain data of a financial nature, it cannot be ignored that much of this data concerns intimate aspects. In this case, the transmission of the entire account may infringe on most personal rights.

On the other hand, the distinction of content may bring practical challenges, such as the difficulty of identifying and correctly classifying digital assets, as well as the legitimacy of who should do it - a named third party or the executor? It would be interesting if the user himself would indicate who will take care of the account after his death, should he choose to do so. But when this is not done, the future law cannot fail to provide who will have this legitimacy.

Therefore, it is necessary to define in Brazil, in case it is understood by the transmissibility of the digital content and, in the absence of last will disposition, if it will be considered as a universality of goods or if there will be a division of its content, under penalty of violation of the general rule of legitimate succession, permissive only of the transmission of patrimonial property and of serious violations to personal property.

Therefore, it's believed that the constant dialog between the protection of property and the protection of very personal rights is salutary, remembering the tripartite existence of property in: property, mixed property, and very personal property, giving the appropriate treatment to each of them, without forgetting

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the possibility of violation of third party rights, which must be safeguarded.

In this sense, one should be very careful with regard to non-economic digital content - so much so that the German paradigm case and the Spanish law deal only with personal data contained in digital platforms - since assets that are strictly property in nature may, in principle, be considered part of the digital inheritance. Therefore, personal rights, as a rule, cannot be subject to transferability, except in exceptional cases in which there is the express will of the deceased user and it does not affect the rights of third parties.

Also in relation to property, it is important to note the need for the holder to have a property right and not only a right of an obligatory nature over the digital content in order to be able to talk about transmissibility, which is the case of a license of use, as usually happens in cases of acquisition of music, books and videos (Kindle, Amazon, etc.) which, in principle, are not transmissible.

This point also deserves further reflection, but there is no space to be worked on in this essay. This is also the case with some assets, such as virtual currencies (cryptocurrencies), which are requiring more specific solutions due to the great difficulty of global definition of their legal nature.

Cryptocurrencies were the subject of sentence 326, 2019, of the Spanish Court, from which a relevant analysis about the impossibility of considering cryptocurrency as money can be extracted, given its peculiarities. It can be observed, from the sentence, that virtual currency is an immaterial asset, of consideration or exchange, and cannot be legally treated as money, for lack of legal provision and because it is not a material object, but rather a unit defined by means of technology and cryptography, whose value is determined by each unit of account or variation in supply and demand transactions, performed on specific *trading* platforms. That is, cryptocurrency would be, at most, financial assets, subject to transactions on a global scale, generated by algorithms, with enormous volatility and without any kind of state control. (LONGHI; FALEIROS JUNIOR 2019).

This makes it extremely difficult to assign a specific value, since virtual currencies have no fixed nominal value, just like money, imposing huge challenges for the State to contain and discipline the risks involved in this type of market, even if the validation model through blockchain proposes to ensure greater protection to these virtual operations. It can be seen, therefore, that even purely economic digital assets may challenge the latency of specific state regulation regarding the *causa mortis* transmissibility, due to their intrinsic peculiarities.

The subject will certainly still be the subject of much debate and controversy, and should be treated with the care it deserves.

VI. Conclusion

From all of the above, we conclude that it is urgent to apply an adequate legal treatment to digital assets after the death of their owner. The existing regulations on the subject in other countries are still very timid and divergent, as can be observed, but a trend towards the transferability of these assets is emerging, especially those resulting from an express provision left by the owner.

In the USA, the disposition of last wills regarding digital assets is strongly encouraged, and there are attempts to standardize it, in order to cover any type of digital asset. Spain, in turn, has also legislated for the digital will as a way to dispose of digital assets, but it has been restricted to data contained in social accounts, just like the German *leading case.*

In this sense, the absence of legal provision or the insufficient legal provision forces the application of the established norms of civil law and, especially, of succession law, which may even be able to solve such issues, but leave room for diverging interpretations.

The specific discipline of *post-mortem* dispositions of digital assets appears, then, as the path to be followed, in order to standardize and regulate the specificities that the matter requires, mainly due to the distinctions between digital assets of personal or patrimonial nature, taking into consideration digital assets in a broad sense and not only the assets contained in social networks. The different treatment of content depending on its nature (whether property, mixed or personal) is one of the most important aspects for a more coherent direction of the matter.

In this sense, not only because of the law currently in force, but also because of the need to preserve the most personal rights and all its implications, the digital assets of a strictly personal nature should not be subject to transferability, unless as a result of the will manifested by the holder during his or her lifetime and insofar as it does not violate the rights of third parties.

The legal provision of other simpler *causa mortis* disposition instruments in digital format also deserves regulation, preferably with express provision about its priority over the terms of use and services, or its compatibility and maximum use of the deceased user's will, when not conflicting. Issues such as the legitimacy of management of these assets and digital accounts should also deserve special attention from the legislator.

As for hybrid digital assets, such as some profiles on social networks, the analysis must be made on a case-by-case basis, verifying the preponderance of the interests at stake: whether economic or existential.

Patrimonial assets, on the other hand, can be the object of transmission according to the general rules of succession law, in case there is no testamentary

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prediction about them, as long as they are considered proprietary rights and not merely rights of use.

These are just a few contributions to the question posed.

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