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EDITORIAL: POST MORTEM PRIVACY

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Consider the following scenarios:

- A young US marine dies in combat in Iraq. His widow and heir petitions to have access to his webmail account but the webmail provider stand by their terms and conditions which forbid transfer of passwords to the account and require termination of the account and deletion of its contents on notice of an account holder's death. The webmail provider agrees, however, after a court order is obtained, to transfer the contents of the inbox and folders to the widow as a digital download without handing over passwords. On examination, the widow finds to her distress that the emails provide evidence of a homosexual affair the marine was having with a fellow soldier; some of the emails say explicitly that she was never to know about it¹.
- A well-known novelist dies suddenly. During her life she had made it clear she did not want any unfinished works published on death in case they were sub-standard. However she dies without the chance to destroy any such manuscripts, which are stored in the cloud on Google Drive. Her will leaves everything to her sole child and heir, who guesses the password, accesses, downloads, finishes, and publishes an unwritten novel for a large advance from publishers².
- In a tsunami disaster, thousands of people disappear without proof of death and unidentified bodies abound. An investigator leaks a video of a girl's disfigured body to a journalist, who releases it to the Internet where it goes viral. The parents recognise the body and are distressed at the publicity but pleased to be able to identify it. Later the video turns up as part of a disaster DVD sold to tourists³.
- A teenage girl dies and her Facebook page becomes a shrine to her memory, with friends leaving notes and sharing pictures and memories of the deceased in the comments. When her parents, who are not social media users, finally contact Facebook, they are distressed at some of the posts on the profile relating to drink and drugs, and ask Facebook to close the page down⁴.

These are all scenarios of considerable current interest, drawn from the pages of the articles in the interdisciplinary dedicated section of this edition, in some cases with notable counterfactual changes. The subject of this dedicated section is *post mortem privacy*: a concept which only now is becoming a subject of concern in various disciplines, including law, sociology, psychology and social work. Both Harbinja and Bikker in their contributions to this collection note that the legal rights of the dead to privacy have historically been regarded as non-existent. For example, despite European adherence to the notion of control of personal data as defined in the EC Data Protection Directive, data protection rights are defined in most EU countries as

¹ Drawn from the US case of *In re Ellsworth* No. 2005-296, 651-DE (Mich. Prob. Ct 2005), but with significant changes of facts.

² Compare the case of Nabokov who similarly attempted and failed to prevent the publication of post mortem works: see "The inside story of Nabokov's last work", *Guardian*, 17 November 2009 at <http://www.guardian.co.uk/books/2009/nov/17/inside-story-nabokov-last-work> .

³ See similar scenarios around the Christchurch and Thai disasters and Hurricane Katrina explored in Bikker, *infra*.

⁴ See discussion in Kasket, *infra*.

protecting solely the personal data of natural or living persons, excluding rights to the deceased⁵. Similarly, in common law, rights to sue for libel generally die with the deceased and do not transmit to their heirs; hence, for example, the deluge of sudden revelations regarding the paedophile activities of the former DJ Jimmy Saville following his death in October 2011, when the risk of expensive libel suits had vanished. This principle is known as *actio personalis moritur cum persona* - personal causes of action die with the person – and although this principle has been whittled away at in certain contexts, it still stands as a relatively entrenched principle in relation to post mortem privacy claims.

Why then does it seem to be time to reconsider protecting post mortem privacy? One reason is the growth and sheer volume of “digital remains” in the post-Internet world. As McCallig chronicles, there have been copyright and succession disputes from centuries back regarding unpublished novels and letters in hard copy – so arguably there is nothing new when these disputes are set in the context of Facebook or Dropbox, rather than in pen and ink world. However the digital world, and especially the growth of social media, has meant that, more than ever before, digital relics left by “ordinary people” are preserved and accessible after death. Digital communications are also not easily kept private in one place; instead as intangible assets, they can be copied, mirrored and spread around the globe in minutes. Such a volume of digital remains makes it harder than ever perhaps for the living to give up their connection with the deceased, and potentially transforms the communications left behind into valuable assets, whose ownership and control may be desirable and contested. In this sense, post mortem privacy is intimately connected to post mortem *property* in digital assets, a notion which McCallig explores here through the vehicle of copyright, and which an interesting body of literature is also beginning to analyse⁶.

Another key aspect to the new world of post mortem relics is the de facto control in many cases of intermediary service providers, such as Facebook. Intended to provide entertainment to the living, social networking sites have found themselves, probably to their surprise, becoming informal sites of grieving and memorial of the dead, a phenomenon discussed by Kasket. They have also become the practical arbiters of who gets what rights in the “digital remains” of their users, as discussed in scenarios 1, 2 and 4 above. Although the sole decisions of social networks are beginning to be challenged in courts – as in *In re Ellsworth* – for the great majority of social network users, the platform’s various privacy policies and abuse teams tend to be final judge and jury. In such a world, new and troubling conflicts are increasingly adjudicated: between platform and family or heirs; between different groups of stakeholders *inter se*, including family, friends and heirs of a deceased; and, fundamentally, between the wishes of the deceased themselves and the wishes of the living.

In such conflicts it is not always easy to discern what outcome is best for the disputants let alone society. The platform is not well qualified to be an arbiter in this respect, being almost certainly more interested (and quite correctly) in making profits, than in what is good for its users and their heirs. What interests should policymakers

⁵ See Harbinja *infra* who notes minor exceptions for Bulgaria and Estonia.

⁶ See eg Edwards L and Harbinja E “What happens to my Facebook profile when I die? Legal Issues Around Transmission of Digital Assets on Death” in (Springer, 2013 forthcoming) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222163; Mazzone J “Facebook’s Afterlife” (2012) 90 N Carolina Law Rev 143; Desai D. “Property, Persona, and Preservation” (2008) 81 Temple Law Review 67.

and regulators have in mind? It is easy to say, on first thought, that in cases of conflict, the interests of the living should surely outweigh the interests of the dead – as is often the case in the context of organ donation, for example, where the wishes of the family have generally trumped those of the deceased, notwithstanding known pre-death wishes. Such an approach would deny any allocation of post mortem privacy rights to the deceased. Yet it is also intuitively tempting – and recognised by various legal systems – to say that the dead have some moral right – in both the ethical and the copyright sense – to control the uses of their creations post mortem, and hence preserve their reputation, and their preferred image, after death. Harbinja notes conflict even among Continental systems here, which tend to have a much firmer notion of the moral rights of the author than common law systems. with the German courts protecting the dignity and personality interests of authors post mortem in the Mephisto and Marlene Dietrich cases, but the French courts refusing to go down the same track.

Both Kasket and Bikker consider the resolution of conflicts between stakeholders post mortem. Bikker suggests the concept of *post mortem relational privacy*, which recognises that although a person has died, personal data relating to him or her still has value to the relatives. Bikker uses this notion to argue for the ability of relatives of the deceased to control access to the digital remains, last words etc of their beloveds, as against the contrary claims of the media to represent a “public interest”. He notes, for example, the legal struggles in the US courts over access by media to the last messages of the astronauts who died in the space shuttle *Challenger* disaster. Here in the UK, the public were profoundly shocked when the voicemails of dead murder victim Milly Dowler were hacked by journalists in the name of “getting the story”. If such court cases were to arise in the UK (or EU) it seems likely the privacy interests of the relatives would prevail – but as data subjects themselves rather than as representatives of the deceased.

Kasket, a psychologist, argues interestingly that in the social networking context, rights of privacy would better be seen as pertaining to *relationships* than *individuals*. Considering scenario 4, she warns that when the family ask for a Facebook profile to be removed, with which they personally, perhaps, never engaged, they may be disrupting the relationships, and hence also the privacy, of the friends who did so engage on that site. She thus argues for greater rights for friends, usually “disenfranchised” by the law, in comparison to the interests of family, in the context of memorialisation on social networks. Kasket hypothesises that Facebook profiles are increasingly becoming the durable representation of a beloved’s personality after death; a *res digitalis*, somewhere between a physical being and a being of the mind. As such, the law should recognise the rights of access of friends to what remains, almost tangibly, of the person they mourn.

Such ideas, coming from non-lawyers, conflict with existing legal paradigms of succession, particularly in intestacy, where friends have rarely had locus compared to the priority accorded family or partners; but they clearly have some traction among the public. A recent TV drama in the *Black Mirror* series by Charlie Brooker “Be Right Back”⁷, features a grieving young woman rebuilding, first, a digital, and then a physical, recreation of her dead lover, from his left-behind social media

⁷ Still available on 4OD at time of writing: see <http://www.channel4.com/programmes/black-mirror/4od#3479642>.

manifestations (tweets, photos, emails, videos etc). There is no sign of parental or sibling claims in this dark vision: only his friends and lover figure in the picture⁸. One wonders though if this notion of friends as closer than family in the virtual world, and hence more deserving therein of rights, is a generational one, and may become redundant as we enter an era where almost everyone, parents and children alike, is a digital native and participates fully in the online socially networked world.

One side-effect of Kasket's approach may be that the privacy of the deceased is itself trumped by the wishes of the living. In scenario 1, the dead marine wished his secrets to die with him: Kasket might seem to say that the wishes of those who had the closest relationship with him (here, his widow) should take precedence after death. It might be argued that often the interests of the deceased and the friends *or* family they leave behind may be neither coherent nor consistent.

Finally, the lawyers contributing to this collection present another set of policy choices; if we want to recognise, to whatever extent, the notion of post mortem privacy, then what legal tool should we use to protect it? Harbinja turns to the recognised key European institution for protection for privacy, namely the EC Data Protection Directive: arguing that reforms such as the right to be forgotten, and the right to data portability, proposed in the draft Data Protection Regulation, might be harnessed to protect the rights of data subjects after death, as well as during life. Her work teases out the problem however that such remedies effectively commodify personal data as a property asset which can be controlled by instructions left after death; but this conception also detracts from her preferred (and the dominant European) notion of privacy as a human right rather than an item of property. In any case, since human rights usually also pertain only to the living, it is already difficult to apply this conceptual framework to the privacy of the dead (although the Bikker/Kasket ideas of relating the privacy of the dead to that of the living may help).

McCallig takes another approach, studying the history of copyright as an institutional "surrogate" for post mortem privacy, especially in jurisdictions where privacy was and remains under-developed as a legal concept. He argues that changes in copyright law relating to unpublished work – withdrawing perpetual copyright, and allowing for automatic transfer of copyrights to heirs on death without need for *inter vivos* act – have effectively reduced the ability of creators to control the publication of their unpublished works – which tend to include highly personal items such as letters or diaries - after their death. Only by actually destroying copyright works with finality (not easy in a digital world) can creators now ensure that these works will remain private after their death. Again one might argue that there is a public interest in the publication of historical and literary remains after death, especially in relation to public figures, which should surely trump the post mortem privacy interests of the authors⁹. To this however, McCallig argues instrumentally that the lack of an effective post mortem veto by authors on publication of unpublished works will lead them to destroy such works, thus defeating the public good. Such arguments could be

⁸ Though interestingly (spoiler!) it soon turns out that the lover is in fact pregnant by the deceased; so en route to becoming "family"?

⁹ Interestingly, similar debates about the value of privacy and personal data control vs the preservation of the historical record and freedom of speech have haunted the "right to forget" debate in the draft Data Protection Regulation process: see notably Fleischer P "Foggy thinking about the Right to Oblivion", 9 March 2011, at <http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html>.

complicated still further by throwing in the effect of Harbinja's notion of a post mortem "right to forget personal data" (would it defeat an heir's right to inherit copyright in personal letters of the deceased?), or considering what happens when the work has been constructed on a platform, such as Facebook, which claims, by contract, a non-exclusive license to any works it hosts. Luckily Google (at least for now) explicitly disclaims any claims to the IP in assets hosted or created on its platforms, so if the novelist in scenario 2 had left their unpublished novel behind stored on Google Drive, this complication at least would be avoided¹⁰.

We hope that readers will find something new, engaging and stimulating in the contents of this dedicated section; this editor certainly did. One thing is certain: in a world where digital storage is ever cheaper and communication ever faster; where social networks continue to rise and gain users; where the volume and range of "digital remains" continues to grow, and "life logging" comes increasingly into vogue¹¹; and where an aging demographic population will likely exert ever more political pressure in favour of the rights of testators; the subject of post mortem privacy is likely to remain nothing if not controversial.

¹⁰ The problem might still remain though that by breaching the password policies of Google Drive, deletion of the account might be triggered if the breach came to light.

¹¹ See eg the furore around Google's introduction of Google Glass which will let users effectively record their whole life at will: see <http://www.google.com/glass/start/>.