pensar
Revista de Ciências Jurídicas
e-ISSN: 2317-2150
Universidade de Fortaleza

Digital Inheritance: commentary on the TJ/SP decision regarding the Facebook case*

Herança digital: comentário à decisão do TJ/SP sobre o caso do Facebook

Karina Cristina Nunes Fritz**

Abstract

The present article analyzes the decision of the São Paulo Court of Justice that denied the genitor the right to access her deceased daughter's Facebook profile.To this end, a comparative analysis is made with the decision of the German infra-constitutional court (BGH), which, judging a similar case, allowed parents access to their deceased daughter's account, addressing the arguments for and against the transmission of digital inheritance.
Keywords: Digital inheritance. Rights to personality. Inheritance law. Contract for the use of virtual space. Data protection.

Resumo

O presente artigo analisa a decisão do Tribunal de Justiça de São Paulo que negou à genitora o direito de acessar o perfil do Facebook da filha falecida. Para tanto, faz-se uma análise comparada com a decisão da Corte infraconstitucional alemã (BGH) que, julgando caso semelhante, permitiu o acesso dos pais à conta da filha falecida, abordando-se os argumentos contrários e favoráveis à transmissão da herança digital.
Palavras-chave: *Herança digital. Direitos da personalidade. Direito sucessório. Contrato de uso de espaço virtual. Proteção de dados.*

1 Introduction

One of the most exciting topics in inheritance law in the digital age has been the discussion around the so-called digital inheritance, which comprises the entire collection stored in the cloud during the life of the holder, such as bank accounts, cryptocurrencies, music, movies, games, avatars, *e-books*, documents, photos, videos and a multitude of messages posted or exchanged with third parties via email or on social networks such as Facebook, Instagram, TikTok or Twitter. The question that arises is: what happens to all this digital collection after the death of the holder? In other words: who has the legitimacy to keep all the content stored in the virtual world by the deceased?

* Artigo traduzido por Inteligência Artificial.

** Doutora na Humboldt Universidade de Berlim/Alemanha. Mestre em Direito Privado pela Pontifícia Universidade Católica de São Paulo (2005). Mestre (LL.M) pela Universidade Friedrich-Alexander Erlangen Nürnberg (2006). Professora da FGV Rio. Advogada. Lattes: http://lattes.cnpq.br/0896795985021582 Orcid: https://orcid.org/0000-0001-9866-4240. E-mail: nunesfritzdoutorado@live.de

If in relation to the assets accumulated in the real world – so-called analogical, as opposed to the virtual world – there are no doubts about the automatic transmission to the heirs at the time of death by virtue of the principles of universal succession and *saisine*, affirmed in Article 1,784 CC2002, there is controversy in relation to the transferability of assets accumulated in the virtual world. Here two doctrinal currents currently diverge: while the partial transferability chain – contrary to the millennial rule of universal succession – maintains that not all digital assets should be transmitted to heirs, the full transferability chain defends the application of the general rule: every inheritance must be transmitted, unless expressly provided otherwise by the deceased.

This article aims to address the issue based on the decision of the Court of Appeals of São Paulo, recorded in the records of Civil Appeal 1119688-66.2019.8.26.0100, judged on 03/09/2021 by the 31st. Chamber of Private Law, which denied the mother's access to the deceased daughter's Facebook account. To this end, an analytical-comparative comparison of the decision of the TJ/SP is made with the judgment of the German infra-constitutional Court, the *Bundesgerichtshof* (BGH), appointed as the *leading case* in Europe on the subject, analyzing the arguments against and in favor of the transferability of digital inheritance.

2 The decision of the TJ/SP on digital inheritance

The case submitted to the TJ/SP for analysis discusses a problem that has frequently reached the Judiciary: the power of parents (heirs) to access the social media accounts of their deceased son. In the specific case, the plaintiff was the mother of a Facebook user who, after her daughter's death, started to use her profile on the social network to remember facts of the girl's life and interact with friends and family. The daughter had informed her in life of the account access data, but Facebook – suddenly and without any justification – deleted the profile of the deceased (strictly speaking, it took it down, because the profile is still in the company's possession).

The plaintiff contacted the company, but did not obtain information about the deletion of the profile, which is why she filed an action for obligation to make compensation for moral damages, pleading for the restoration of the account or the obtaining of the data stored in the profile. The lawsuit was dismissed, and the plaintiff was ordered to pay procedural costs and expenses, in addition to attorneys' fees set at 10% of the value of the case.

On appeal, the TJ/SP concluded that Facebook "acted in the regular exercise of right" by deleting the profile of the deceased, "without any abusiveness or failure in the provision of

services", whether from a civil or consumer perspective. According to the Court, Mark Zuckerberg's company acted correctly, as the deceased, when creating the account, adhered to the Terms of Service and Community Standards, which prohibit the user from sharing the password, giving access or transferring the account to third parties without permission from the company. In this way, the user had violated the terms of use by informing the username and password to her mother, a fact that, in itself, would justify the removal of the profile.

In addition, the Court pointed out that the daughter did not indicate her mother as an "heir contact" to take care of the account transformed into a memorial or promote its exclusion, implying that the user did not want the profile to be transferred, although a contrary conclusion results from the evidentiary context, since the deceased herself shared the access data with her mother. According to the Bandeirante Court, as the deceased did not choose to delete the profile during her lifetime, nor did she indicate an heir contact, the "manifestation of will" issued by the account holder when adhering to Facebook's terms of service is valid.

With regard to the grounds for the decision, the TJ/SP – despite the general rule of universal succession set forth in Art. 1,784 CC2002, whose concept of inheritance has ontological and semantic breadth to encompass both the analog and the digital collection of the deceased – initially argued that there is no specific rule on digital inheritance in the Brazilian legal system, since neither the Civil Rights Framework for the Internet (Law 12,965/2014) nor the General Data Protection Law (Law 13,709/2018) govern the issue. Thus, the Court understood that the dispute should be resolved "in the light of constitutional and civil provisions, notably by personality rights and the principle of autonomy of will, which leads to respect for the manifestation of will expressed by the account holder when she adhered to Facebook's Terms of Service".[1]

And, without focusing on the doctrine produced on the subject, especially without facing the criticisms made to the current of the non-transferability of digital inheritance, the TJ/SP took for granted the fragile distinction between patrimonial content (endowed with economic value) and existential content (not defined in the ruling), concluding that the Facebook account – strictly speaking: object of an atypical contract (of adhesion) for the use of a digital platform – would have an existential character and would be, therefore, it is non-transferable to the heirs in respect to "personality rights, such as privacy and identity, which are personal and non-transferable rights".[2]

[1]Civil Appeal 1119688-66.2019.8.26.0100, p. 8.
[2]Civil Appeal 1119688-66.2019.8.26.0100, p. 8.

3 Theories about the (in)transmissibility of digital inheritance

The São Paulo Court expressly joined the *current of partial transferability* of digital inheritance. According to this view, not all digital content accumulated during life in the virtual world should be automatically transferred to the heirs after the death of the holder[3]. It is necessary, say its adherents, to first carry out an autopsy of the digital collection of the deceased and separate *the patrimonial legal situations*, i.e., the patrimonial contents (e.g., bank accounts, cryptocurrencies, financial investments, digital books, columns and *blogs* on *websites*, etc.) from the so-called *existential* legal situations, which are those contents of an existential nature (e.g., emails, Facebook, Instagram, WhatsApp and Twitter accounts, files in clouds such as Dropbox or iCloud, cell phone passwords, etc.) to only, in a second moment, decide which content can be accessed by the heirs.

While the patrimonial contents would be transferred to the legitimate successors of the deceased, the so-called existential contents would be excluded from the inheritance[4] because they are "extensions of the privacy" of the deceased and, therefore, non-transferable, since there is no *post-mortem* transmission of personality rights in Brazilian law. Thus, unless expressly authorized or conclusive behavior of the *deceased* (as, in fact, the behavior of the deceased could be qualified in the case under analysis), the heirs cannot access the cell phone, WhatsApp, email accounts and social networks, many of which in contemporary times exercise the function of digital family diaries and/or albums in view of the infinity of personal testimonies, photos and videos posted.

For the adherents of this current, the access to existential content by the heirs would offend the personality rights not only of the deceased, but also of the third interlocutors, who would have their privacy and intimacy violated, sometimes arising a conflict of interest between the deceased and the heirs, who, not infrequently, have purely financial interests in selling intimate information of the deceased through posthumous publications and biographies or the active maintenance of the profile, exploring the name and image of the famous relative.

It is also alleged that the access of the heirs to existential content breaks the "legitimate trust" of users in the secrecy of conversations established in the digital world, since the

[3] This idea is similar to that of Thomas Hoeren, who already in 2005 focused on the theme of the hitherto little discussed digital heritage. See: HOEREN, Thomas. Der Tod und das Internet – Rechtliche Fragen zur Verwendung von E-Mail- und www-Accounts nach dem Tode des Inhabers, NJW 2005, p. 2113.

[4] In this sense: MALHEIROS. Pablo; AGUIRRE, João Ricardo Brandão and PEIXOTO, Maurício Muriack. *Transmissibility of the digital collection of those who die: effects of personality rights projected post mortem.* Journal of the Brazilian Academy of Constitutional Law, v. 10, n. 19, Jul-Dec, 2018, p. 598s. and LEAL, Lívia. Internet and death of the user. Brazilian Journal of Civil Law, v. 16, Apr-Jun, 2018, p. 194.

requirement of a password to access the accounts generates a greater expectation of secrecy[5]. Thus, the platform, by allowing heirs access to the stored content, would violate *pari passu* the confidentiality of communications and the commandment to protect personal data. Finally, it is necessary to respect the provisions of the contract, since the user, when creating the account, agreed to the express rules that prohibit the transmission of profiles to third parties, established in the terms of use and conditions.

In a different sense, the *full transferability school of thought* understands that the general rule of succession law should be applied, according to which all the individual's inheritance, whether digital or analog, must be automatically transferred to the heirs at the time of the opening of the succession, unless expressly provided otherwise, freely manifested by the deceased. The millennial rule of universal succession, stamped in Article 1,784 CC2002, a structuring principle of succession law, applies here. This understanding is also corroborated by two arguments: first, by the current understanding, in comparative law, that personal data is a human and fundamental right of the person, whose *post-mortem protection* is the responsibility of the closest family nucleus – that is: as a rule, the heirs of the deceased and, second, by the characteristics of the existing contract between the platform and the user.

Here it is important to keep in mind that the legal relationship between the platform and the user has *an obligatory legal nature*, as it is an *atypical contract – onerous, synallagmatic and adhesion – for the use of the digital platform*, through which the holder grants the company the free use of his personal data (consideration) to be able to use the communication platform (provision) with all its functionalities. This obligatory relationship, like all other obligatory relationships of the deceased, is transferred to the heirs, who, with the death of the holder, come to occupy the legal position of the user before the platform.

The access of the heirs to the profile of the social network does not violate the personal data of the deceased, nor the confidentiality of communications, since the heirs are not, before the law, strange third parties (such as a *hacker* who invades the account or Facebook who reads the messages of users on WhatsApp[6]), but rather people legitimized to succeed the deceased in their legal relations and defend their posthumous interests. Any violations of personality rights as a result of publications of intimate and sensitive content are sanctioned by the mechanisms

[5] BRANCO, Sérgio. *Memory and oblivion on the internet*. Porto Alegre: Arquipélago Editorial, 2017, p. 110. In the same sense: MARTINI, Mario. *Der digitale Nachlass und die Herausforderung postmortalen Persönlichkeitsschutzes im Internet*. Juristenzeitung 1145, 2012, p. 11.

[6] Investigation finds that Facebook reads WhatsApp messages. That is, 09/09/2021. Available at: https://www.istoedinheiro.com.br/investigacao-descobre-que-facebook-le-mensagens-do-whatsapp/. Accessed: 09/07/2022.

for reparation of damages, available in the legal system. Thus, for this current, the user has the power to decide – freely and consciously – about the heredity of his digital collection. If he does not do so, the legal succession regime applies, as with any succession.

There are still few judgments on the subject and the Superior Court of Justice has not yet ruled on the issue. In comparative law, the *leading case* regarding digital inheritance is the decision of the *Bundesgerichtshof* (BGH), the German infra-constitutional Court, whose central issue discussed was identical to that of the judgment of the TJ/SP, that is, the right of parents to access the profile of the deceased child on Facebook. In the so-called "Berlin girl case", the parents of a 15-year-old girl, who died in 2012 in an accident on the Berlin subway, filed a lawsuit against Facebook asking to access their daughter's account, which had been turned into a memorial after a stranger reported the death to the company[7].

As the circumstances of the death were controversial and there was suspicion of suicide, the parents wanted to access the account in order to look for clues that would allow them to elucidate the case. Facebook denied, however, access to the account, arguing that the measure was aimed at protecting the privacy of the user and her contacts, who have a "legitimate expectation" that messages exchanged in life will remain confidential even after death. This would mainly protect teenage users of the platform, who want to keep intimate details exchanged on social networks away from their parents.

The lower court – *LandgerichtBerlin* – ruled in favor of the parents, ordering Facebook to release access to the deceased's account[8], but the *Kammergericht*, on appeal, reversed the decision[9]. The mother then filed an appeal (*Revision*) with the BGH, which reversed the decision of the lower court, recognizing the parents' right of succession to have access to the account of the deceased daughter and, consequently, to all the content stored there. This is the BGH III ZR 183/17 case, judged on 07.12.2018[10].

In summary, the Court stated that the parents, the sole heirs of the minor, had the right to access the account and all the stored content, a claim arising from the contract for the use of the digital platform entered into between the teenager and Facebook, which was transmitted to the heirs by virtue of the principle of universal succession (§ 1922 I of the BGB), which prevails

[7]For a complete analysis of the decision, allow us to refer to: NUNES FRITZ, Karina and SCHERTEL MENDES, Laura. Case Report: German court recognizes the transferability of digital inheritance. *Journal of Liability Law*, year 1, p. 525-555, 2019 and NUNES FRITZ, Karina. The Berlin Girl and the Digital Heritage, p. 227-243.

[8] LG Berlin 20 O 172/15, judged on 17.12.2015.

[9] KG Berlin 21 U 9/16, judged on 31.05.2017.

[10] For a detailed analysis of the case, allow us to refer to: NUNES FRITZ, Karina and SCHERTEL MENDES, Laura. *Case report*: *German court recognizes the transmissibility of digital inheritance*, p. 525ff. and NUNES FRITZ, Karina. The girl from Berlin and the digital heritage, In: Ana Carolina Brochado Teixeira and Livia Teixeira Leal (coord.). *Digital inheritance – controversies and alternatives.* Indaiatuba: Foco, 2021, p. 227ff.

in the digital world in the same way as in the analog world. To rule out the transferability of the account, the holder must – during life, by will or other document that proves unequivocal will – expressly prohibit the access of the heirs, rejecting, by an act of private autonomy, the heredity of the digital collection. If he does not do so, all the contents of the account are automatically transferred to the successors with the opening of the succession.

4 Critical analysis of the judgment of the TJ/SP

From this background, a closer analysis of the judgment of the TJ/SP shows that the judgment presents serious deficiencies in reasoning, since, inverting the general rule in succession law, it empties the mother's right of inheritance, guaranteed in Article 5 XXX of the CF1988, tainting the decision with the vice of unconstitutionality. In addition, by bringing a unilateral view of the problem, the Court goes against the judgment of the German Court and the trend in comparative law.

a) The problem of defining the existential content

The first problem of reasoning concerns the lack of definition in the judgment about what is the so-called existential content, a central concept based on which the Court prohibited the mother's access to the digital collection of the deceased daughter, emptying her right to inheritance which, it is worth remembering, is a fundamental right enshrined in Article 5ºXXX of the CF1988. In fact, the judgment does not conceptualize, nor does it provide parameters to define what existential content is, which is a serious problem insofar as this content is excluded from the succession.

Considering that a simple photo (an asset of an existential nature) can have a high economic value, in Europe the well-established doctrine states that it is practically impossible to separate in practice assets with patrimonial content from assets of an existential nature[11]. But even when it comes to purely existential content, there is no rational explanation – based on the analysis of the current law – to prevent the heirs from accessing such content, leaving it in the possession of Facebook, considering that the family members are the legitimate successors of

[11] KUNST, Lena. In: Staudinger BGB – Einleitung zum Erbrecht. Berlin: De Grutyter, 2016, p. 282. In the same sense: NUNES FRITZ, Karina. *Digital inheritance: who has the legitimacy to keep the digital content of the deceased?*, p. 193ff..

the deceased and those legitimized by law to defend the post-mortem personality rights of the deceased, under the terms of Arts. 12, Sole Paragraph and 20 of the CC2002[12].

In addition, by preventing access by heirs, the chain of partial transferability *leaves all the existential content of the deceased in the hands of large platforms*, which continue to use and dispose of the existential data of their users in a way, at the very least, intransparent. This reveals, in all evidence, a serious axiological incoherence of this current, as it allows third parties, outside the family nucleus, to commercially use precisely the existential data that it is intended to protect. Although seductive and allegedly progressive, by apparently prioritizing the protection of the human being (deceased and interlocutors) to the detriment of supposedly illegitimate and/or selfish interests of the heirs, this current *ends up privileging the patrimonial interests of the large digital conglomerates to the detriment of the existential (sentimental) interests of family members*, who generally only want to keep the last memories of the loved one.

But the difficulties do not end there. The current of partial transferability does not explain who should perform the autopsy of the deceased's account to separate – among an infinity of information and personal data stored for years or decades – what is patrimonial content and what is existential content. Should the judge, already overworked, read all the posts and messages exchanged, and analyze all the photos and videos to screen the transmissible content? Or should the task be left to an expert? And so, on the basis of which criteria, and set by whom?

Or would it be up to Facebook itself, interested in appropriating – for commercial purposes – the data and information stored in the user's account? After all, today there is no longer any doubt that the personal information and data of users and their contacts are worth gold[13]. And here the question arises: why would strange third parties have greater legitimacy than the family nucleus or the heirs to access the account of the deceased, intrusion into their

[12] Article 12. It may be demanded that the threat, or injury, to the right of personality cease, and claim losses and damages, without prejudice to other sanctions provided for by law. Sole Paragraph. In the case of a deceased person, the surviving spouse, or any relative in a direct line, or collateral up to the fourth degree, will have legitimacy to request the measure provided for in this article. Article 20. Unless authorized, or if necessary for the administration of justice or the maintenance of public order, the dissemination of writings, the transmission of the word, or the publication, exhibition or use of the image of a person may be prohibited, at his request and without prejudice to the compensation that may be due, if it affects his honor, good reputation or respectability, or if they are intended for commercial purposes. Sole Paragraph. In the case of a deceased or absent person, the spouse, ascendants or descendants are legitimate parties to request this protection.

[13] The Superior Court of Justice, analyzing a case involving the unauthorized collection and sharing of consumer personal data by a database, recognized that "information about the consumer's profile, even of a personal nature, has gained economic value in the consumer market" hence the usefulness – and, it should be added: the profitability – of database services, that constitute an activity potentially harmful to the personality rights of people. Resp. 1.758.799/MG, T3, Rel. Min. Nancy Andrighi, j. 12.11.2019.

intimacy? Here a serious problem of *legitimacy*[14] is evident. These and many other questions would need to have been rationally answered to guarantee the constitutionality of the TJ/SP judgment.

b) Non-transferability of personality rights and personal data

Another argumentative deficit of the judgment consists of the apparent confusion between the personality of the human person and the account of a social network. In fact, by denying the mother access to the account of the deceased user on the grounds that personality rights are non-transferable, since they are extinguished with the death of the holder, the Bandeirante Court seems to confuse the personality of the human person with certain assets related to personality rights, as carefully noted by Aline Terra, Felipe Medon and Milena Oliva[15]. In fact, the individual's personality is not to be confused with goods in the corporeal or digital world that may reflect some aspects of their personality, such as posts, emails, photos, videos, or the person's own profile on various digital platforms.

At the current stage of legal science, no one questions that personality rights are non-transferable, since, as a subcategory of subjective rights, they are strictly personal rights (*höchstpersönliche Rechte*), which are characterized by having an intrinsic link with the person of the holder, a circumstance that prevents their transfer to the heirs and imposes their extinction with death[16]. On the other hand, it is also unquestionable that the closest family nucleus holds – and should hold – the legitimacy to protect the *post-mortem interests* of the deceased, which is based on the long cultural and legal tradition of Western and Eastern peoples, as Furstel de Coulanges points out[17].

[14] In addition to this problem of material legitimacy, there is also a problem of formal legitimacy well pointed out by Ferdinand Kirchhof, a retired judge of the German Constitutional Court. The author questions the democratic legitimacy for the large players in the market – especially the digital conglomerates with global operations, holders of financial and informational power over people – to replace the legislator and dictate rules that directly contradict principles and norms of national law. Regarding the discussion, allow us to refer to: NUNES FRITZ, Karina. Digital inheritance: who has the legitimacy to keep the digital content of the deceased?, p. 205s.

[15] Controversial aspects of digital inheritance. Migalhas, 9 April 2021. Available at: https://www.migalhas.com.br/depeso/343356/aspectos-controvertidos-sobre-heranca-digital. Accessed: 09/07/2022.

[16] In this sense: MÜLLER-CHRISTMANN, Bernd. In: Heinz Georg Bamberger and Herbert Roth (Coord.), *Kommentar zum Bürgerlichen Gesetzbuch*. v. 3 (§§ 1.297-2.385). München: Beck, 2003, p. 1289.

[17] The author explains that it was from the cult of the dead, symbolized on an altar with fire, that primitive religion developed, in which each family had a god (domestic fire) and this god could only be worshipped by the family. This means that the cult could only be carried out by the family to the dead linked to it by blood ties. For this reason, funerals could only be religiously celebrated by the closest relative, in the same way that the funeral meal (a ceremony in which family members brought food to the graves of the dead) was only attended by the family. It was believed that the deceased only received the offering from the hands of their descendants and relatives.

Bernd Müller-Christmann, commenting on universal succession in German law, enshrined in § 1.922 BGB, explains that, while the general right of personality is extinguished with the death of the holder, the posthumous protection of personality (*postmortaler Persönlichkeitsschutz*) remains, based on the duty of the State to protect the human dignity of the deceased against attacks perpetrated by any person. Therefore, the law grants the persons appointed by *the deceased* or, in the absence, the close family members the legitimacy to plead claims for abstention or compensation in cases of injury to personality committed by third parties[18].

Thus, although the legal system recognizes the non-transferability of personality rights, it *gives the family the right to protect the post-mortem reflections of the personality of the deceased*, with the name, honor, image, grave and corpse[19]. And this – it should be repeated – for the obvious reason that, since the dawn of humanity, it is the closest social group (family) that has a true interest in protecting the dignity of the deceased loved one.

Thus, *data maxima venia*, it is evident that the rental of a "digital safe" or a cloud space (because, after all, that is what it is about) is not the object of personality rights, but rather the object of a onerous consumer contract entered into between the user and Facebook, as will be shown below. The Court's statement that the personal data of the deceased is not transferable to the heirs also sounds wrong. One, because, with the death of the holder, the respective data loses the character of personal data. Two, because of the clear tendency in comparative law to confer on heirs the power-duty to access and protect the data of deceased family members.

In Spain, the *Organic Law of Data Protection and Guarantees of Digital Rights* (2018) repealed the old data protection law (1999) and began to expressly admit, among other things, that people linked to the deceased for family or de facto reasons, as well as heirs, can succeed him on their social networks, electronic mail or instant messaging services such as WhatsApp, unless expressly prohibited by the deceased or by law (Art. 96, inc. 1, subparagraph a). According to the items. 1, paragraph "a" and 2 of the provision, this right even includes the power to change or delete the data contained in the accounts[20]. In other words: the automatic

The word by which the Latins designated the cult of the dead was curiously *parentare*. *The ancient city*: *studies on the cult, law and institutions of Greece and Rome.* 3rd ed. Translated by Edson Bini. São Paulo – Bauru: Edipro, 2001, p. 34.

[18] Op. cit., p. 1289.

[19] TEPEDINO, Gustavo; BARBOZA, Heloísa Helena and BODIN DE MORAES, Celina. *Civil Code commented, Interpreted Civil Code*. v. 1, Rio de Janeiro: Renovar, 2004, p. 35.

[20] *Luces y sombras del nuevo testamento digital reflejado en la LOPDGDD*. Available at: https://confilegal.com/20190506-luces-y-sombras-del-nuevo-testamento-digital-reflejado-en-la-lopdgdd/. Accessed: 12/10/2019.

transferability of digital assets to the heirs occurs, unless otherwise provided by the deceased, as the full transferability chain defended here maintains.

In France, Law 1.321, of 07/10/2016, amended *Loi Informatique et Libertés n. 78-17 du 6 janvier 1978* allowing the user to define guidelines regarding the storage, deletion and communication of their personal data after death, and contractual clauses that limit and/or exclude the user's testamentary powers are considered null and void (Art. 85). In the absence of a statement to the contrary, the heirs may obtain access to the deceased's data and digital information to promote the liquidation and distribution of the deceased's assets, including the power to delete the deceased user's accounts, oppose the continuity of data processing or require its updating. And, as far as the comparative analysis of the TJ/SP decision is concerned, the heirs may have access to digital assets and data related to family memories[21].

In Italy, Legislative Decree 101, of 10/08/2018, gives heirs and family members the right to protection in relation to the *post-mortem* data of deceased users. In this way, the data of deceased people can be claimed by those who have a personal interest or act to protect the holder as family members or agents, with the *right to all be recognized*, as informed by Guilherme Magalhães Martins and José Faleiros Júnior[22]. Laura Marques Gonçalves, with the support of Giorgio Resta, states that one of the most relevant provisions of the Italian law concerns the *mitigation of the binding of the terms of service of digital providers*, especially when there are contractual clauses, established unilaterally, that limit the exercise of users' rights by the mere subscription[23] – an understanding diametrically opposed to that of the TJ/SP in the case at hand. There is, therefore, a clear tendency on the European continent to ensure the transmission of digital heritage.

This is a global trend, actually. In China, since 2021, a legal provision has been in force that the "legal property" (terminology used as equivalent to inheritance) of the deceased includes assets on the internet as a whole, thus covering platform accounts, items and virtual money in games, among others[24]. In the United States, several states – such as California, Connecticut, Rhode Island, Indiana, Oklahoma, Oregon, Nebraska, Massachusetts and New

[21]GONÇALVES, Laura Marques. *Post-mortem transmission of digital heritage*. Master's thesis. Federal University of Minas Gerais, 2021, p. 122.

[22] MARTINS, Guilherme Magalhães FALEIRO JÚNIOR, José Luiz. Digital inheritance succession planning. In: Daniele Chaves Teixeria (coord.). *Architecture of succession planning*. 2. ed. Belo Horizonte: Fórum, 2020, p. 472s.

[23]GONÇALVES, Laura Marques. Op. cit., p. 124.

[24]GONÇALVES, Laura Marques. Op. cit., p. 125. Check it out: *China approves law that guarantees the right to receive inheritance in cryptocurrencies, Livecoins*, 30/05/2020. Available at: https://livecoins.com.br/china-aprova-lei-que-garante-direito-de-receber-heranca-em-criptomoedas/. Accessed in: 09/07/2022.

York – have issued rules that allow, to a greater or lesser extent, the access of successors to the email accounts and social networks of the deceased, attributing to them express competence to access communications and some digital assets, and – like Delaware – even to continue using digital profiles, recognizing the full *post-mortem transfer* of ownership of the accounts[25].

The mistake of the premise accepted by the TJ/SP is already revealed in the common example of the transmission of the personal documents of the deceased: RG, CPF, birth, marriage or death certificate contains the most sensitive data of the holder and no one seriously doubts that these assets belong to the closest family members and, in their absence, to the other relatives. The same can be said about the dead body. As Thomas Hoeren notes, the body is an inseparable part of the personality and, therefore, is not legally qualified as a thing, nor an object of inheritance.

However, if the person does not determine the fate to be given to his own body during life, nor does he appoint anyone to do it after death, the decision is up to the closest relatives, who have in relation to the corpse a kind of "right of custody of the deceased" (*Totensorgerecht*). The same logic applies to detachable artificial body parts of the corpse and to biological parts such as semen and eggs, sex cells that contain genetic material and therefore ultra-sensitive data of the holder[26].

Now, if much more sensitive assets of the deceased are transmitted or conferred on the custody of the heir relatives, there is no plausible reason to prohibit the transmission of letters, photos and documents simply because they are stored on paid servers of private companies. It is not by chance that for centuries, more intimate and confidential photos and diaries have been transmitted to heirs, even when kept in a sealed chest, making evident the deceased's desire for privacy. The analogy here is perfectly appropriate, since the sensitive character of the content of the information is the same in both situations, regardless of the medium (paper or digital) in which it is materialized.

For this reason, the German Infra-Constitutional Court stated, on the occasion of the judgment of the case of the girl from Berlin, that it would be nonsense to allow the heirs access to the letters and diaries kept in a sealed trunk and to prohibit access to the letters and digital diaries stored on the platforms of large technology companies, given that the intimate content is the same[27]. Nor should it be said that the transmission of this material to the successors of the

[25]GONÇALVES, Laura Marques. Op. cit., p. 127ff.
[26]LEIPOLD, Dieter. In: Sibylle Kessal-Wulf (editor). *Münchener Kommentar zum BGB*. v. 10, 7th ed., München: Beck, 2017, § 1922, p. 99.
[27]NUNES FRITZ, Karine and SCHERTEL MENDES, Laura. Op. cit., p. 543.

deceased would violate the personality rights of the third interlocutors, since the legal system grants them adequate protection through compensatory protection in the event of eventual disclosure of information harmful to personality rights, as occurs in the cases of unauthorized biographies, approved by the Federal Supreme Court in the records of ADI 4.815/DF in 2015.

In fact, it is a serious systematic and axiological inconsistency to prevent the heirs' access to the so-called existential content when the law itself gives them, as seen, the defense of the post-mortem personality rights of the deceased. And this legitimacy is given for the obvious reason that it is the family, the closest social nucleus, that has the most interest in protecting the dignity of the deceased relative; as recognized by the Superior Court of Justice, with lucidity and sensitivity, in the judgment of Special Appeal 512.697/RJ, in 2006, in which it recognized the legitimacy of the children of the player Garrincha to postulate, in their own name and right, compensation for moral and material damages against the author of the athlete's biography and against the publisher, in view of the violation of the father's right to privacy[28].

c) Disregard of the contractual relationship between Facebook and user

The São Paulo Court's ruling also suffers from a third serious problem: the lack of analysis of the legal nature and contours of the legal relationship between Facebook and the deceased user. Currently, there is no doubt that – contrary to what is maintained by the big platforms – the service offered by Facebook is not free. On the contrary: it is known today that the user "pays" to use the cloud (communication platform), in which he can chat, store photos, videos, music, books, messages, etc.

Strictly speaking, Facebook and the user enter into a *contract for the use of digital space* (in this case: communication platform), whose object is a kind of "rent" of the digital space, made available to the user. However, unlike the typical lease, the consideration is not in cash,

[28] In the judgment, the Court recognized the legitimacy of the children of the player Garrincha to postulate, in their own name and right, compensation for moral and material damages against the author of the athlete's biography and against the publisher, in view of the violation of their father's right to intimacy. In the summary, the Court, recognizing the legitimacy of the family to defend posthumous personality rights, states: "Personality rights, of which the right to image is one of them, have as their main characteristic their non-transferability. However, the image and honor of those who die do not deserve protection, as if they were nobody's things, because they remain perennially remembered in memories, as immortal goods that extend far beyond life, even being above it, as Ariosto sentenced. That is why one cannot take away from the children the right to defend the image and honor of their deceased father, because they, in line of normality, are the ones who fade the most with the exaltation made to his memory, as they are the ones who are most depressed and depressed by any aggression that may bring him a stain. In addition, the image of a famous person projects economic effects beyond his death, so that his successors have, in their own right, legitimacy to claim compensation in court, either for moral damage or for material damage." REsp. 521.697/RJ, T4, Rel. Min. Cesar Asfor Rocha, j. 16/2/2006, DJ 20/3/2006.

but through the free assignment of the use of the holder's personal data. And at the moment when a party gives the performance in exchange for consideration, one can no longer speak of gratuity, but rather of the co-respectivity of obligations[29].

Please note that the user is required to allow the Meta conglomerate to collect, process and sell their personal data in order to use the platform and, in this way, participate in social life[30]. In other words: the user only uses the digital space (provision) if he provides his personal data (consideration). The Facebook use contract is, therefore, a bilateral, atypical, onerous, synallagmatic and adhesion contract[31], which, in Brazilian law, attracts the incidence of the rules of the Consumer Protection Code.

In view of the patrimonial nature and the characteristics of the existing contract between the user and the platform, it is necessary to conclude that this obligatory legal relationship is automatically transmitted to the heirs at the time of the opening of the succession by virtue of the principle of universal succession, according to which all assets, i.e., all legal relationships of the deceased are transferred to the successors at the time of death[32]. In order for a contractual relationship not to be transmitted to the heirs, it is necessary that the non-transferability results from its legal nature, the law or an act of private autonomy of the deceased. As the law does not prohibit the transmission, it is concluded that the contract for the use of digital platforms is only not transmitted to the heirs in the face of an express provision of the deceased to the contrary, manifested freely and consciously or if this contradicts its legal nature.

Non-transferable are, as a rule, contracts *with intent personae*, whose content has a very personal character, such as the medical contract or the artist's contract, since the rights and duties present therein are molded in such a way to the person of the contracting parties that a subjective change in the contract causes an essential modification in the provision[33]. The duties of provision (mainly, that of enabling access to the account and the content stored therein)

[29] SCHMIDT-KESSEL, Martin and GRIMM, Anna. *Unentgeltlich oder entgeltlich? – Der vertragliche Austausch von digitalen Inhtalten gegen personenbezogene Daten*. ZfPW 2017, p. 94.

[30] DONEDA, Danilo. *The protection of personal data as a fundamental right*. Espaço Jurídico, v. 12, n. 2, jul-dez 2011, p. 97.

[31] Regarding the characteristics of contracts for the use of digital space, allow us to refer to: NUNES FRITZ, Karina. *Digital inheritance: who has the legitimacy to keep the digital content of the deceased?*, p. 201-205.

[32] In this sense: NUNES FRITZ, Karina and SCHERTEL MENDES, Laura. Op. cit., p. 533. In the same sense, alerting to the non-transferability of personal obligations: BEVILAQUA, Clovis. *Inheritance law*. 2nd ed. Rio de Janeiro: Freitas Bastos, 1932, p. 15s.

[33] In the case of the contract for the realization of an artistic work, the obligation assumed by the artist cannot be demanded from his successors by the counterparty, in the same way that in the medical contract the obligation assumed by the health professional, to treat the patient, cannot be extended to the successors of the deceased, because the main duty of performance, of a very personal character, was directed to the dead. In this sense: LEIPOLD, Dieter. Op. cit., p. 96 and NUNES FRITZ, Karina and SCHERTEL MENDES, Laura. Op. cit., p. 537.

arising from the contracts for the use of a digital platform do not, however, have a very personal nature, since the services due to a user are in no way different from the services due to all other users on the planet.

In fact, digital platforms such as Facebook do not even control the identity of the contracting user, as evidenced by the numerous fake profiles, which removes the very personal nature of the contract. What is really very personal is the content of the user's account (personal data, messages, posts, photos, videos, etc.), as the *Bundesgerichtshof pointed out*[34], which imposes on the platform the duty to prevent improper access by third parties. The heirs, however, are not illegitimate third parties, but the successors legitimized by law to assume the legal position occupied by the deceased in the contract.

None of this was taken into account by the TJ/SP in the judgment under analysis. By limiting itself to stating – in a generic way, without addressing the characteristics of the digital platform use contract – that Facebook's terms of use "are in line with the legal system", the TJ/SP ignores that the principle of universal succession ensures the transmission of the entire inheritance to the heirs without distinguishing between analog or digital assets, which includes, mainly, the legal relationships of the deceased.

Moreover, by claiming that the terms of use should be valid simply because the user agreed to them at the time of entering into the contract, the Bandeirante Court – with due respect – ignores the character of adhesion of the contract for the use of digital space and makes a clean slate of fundamental notions of contract law, hard-won in the last century, such as that there is no full freedom of decision in adhering to the rule unilaterally imposed by the company, for its exclusive benefit, as is the case of the rule that requires the indication of an heir contact, under penalty of appropriation of the account – and of all content (patrimonial and existential) – by Facebook.

The rule was considered abusive and therefore null and void by the German infra-constitutional court in the trial of the Berlin girl's case, because it puts the user at an extreme disadvantage. In fact, through the "legacy contact rule", Facebook gives the user – in general, without clearly informing him at the time of the celebration – only two options: appoint someone to take care of his account or tacitly agree to the platform's appropriation of his profile and personal data. All it takes is for the user to abstain (not indicating a legacy contact) and Facebook automatically becomes the owner of all their data, including the existential content

[34]NUNES FRITZ, Karina and SCHERTEL MENDES, Laura. Op. cit., p. 537.

that it intends to protect against the alleged "undue invasion" of the heirs. Given that few people worry – and this is a global problem – about what will happen after death, Facebook will become heir to the overwhelming majority of its users.

In addition, the indication of the heir contact is of little use, since the account is not transmitted to the heir, who cannot access it, but only decide its fate, that is, leave it in the form of a memorial or delete it – *rectius*: remove it from the air, since the account remains in the Facebook archives, which, according to them, does not delete anything. Given the little – or no – usefulness of the figure, it is, in essence, a "friendly heir" of Facebook, as only the company can effectively access and operate the account, even "deleted".

In this way, through the rule of inheritance contact, Facebook *removes the principle of universal succession and places itself in the legal position of heir*, replacing those who should legitimately occupy it, without allowing the user to discipline – freely and autonomously – the succession of his account. In practice, the North American conglomerate proclaims itself the heir and owner of the accounts of deceased users, emptying the rule of universal succession and the fundamental right to inheritance of legitimate successors in total violation of Arts.1.784 CC2002 and 5th XXX CF1988. Thus, Facebook ends up replacing the right imposed by the right imposed through its terms of use.

Against this backdrop, it is evident that a private company, which rents a "room" on its digital platform, *does not have the legitimacy to place itself in the legal position of heir due to the mere abstention of the user*, that is, due to the lack of a *click*. The clause of the heir contact is tainted by nullity, under the terms of Article 51 § 1 I-II CDC. For this and other reasons, the German Infra-Constitutional Court declared the nullity of the rule imposing the inheritance contact, as well as the rule that automatically transforms the deceased's account into a memorial, preventing its access by the heirs. Guided, however, by a simplistic and unilateral view of the problem, the TJ/SP approved the appropriation of the account and – what is more serious – of the existential content by Facebook, allowing the company to appropriate precisely the user's most intimate data.

Under the pretext of protecting the personality rights of the deceased and her interlocutors against the improper access of the mother, *the Bandeirante Court ended up protecting the purely patrimonial interests of the digital conglomerate*. And here it is important to keep in mind that the discussion around digital inheritance hides a range of obscure interests of digital conglomerates. A study by the University of Oxford, released in 2019, showed that Facebook

continues to use (read: monetize), even after death, the data of the deceased user and their contacts[35].

The work also drew attention to an important aspect, almost always ignored: the danger that it is for the history of humanity to let private, for-profit companies be in possession of data from generations of users and an unimaginable amount of information about human behavior and culture. In possession of this data, few private companies will control, in practice, access – including for scientific and research purposes – to this very rich historical archive. And so, Facebook will have in the future not only the key to a great "virtual cemetery", but the key to the largest digital archive in human history, which will give it economic, political and social power of dimensions still unimaginable. Ultimately, controlling this archive will mean controlling history and the large digital conglomerates will know how to monetize this very well.

5 Conclusion

In view of the above, in view of the general rule of the succession system stamped in Article 1,784 CC2002, it is necessary to conclude that the decision of the TJ/SP suffers from the flagrant defect of unconstitutionality, as it violates the fundamental right to inheritance, enshrined in Article 5 XXX of the CF1988. The problem of digital inheritance needs to be treated with the utmost caution, based on the rules, principles and values in force in the legal system. The discourse against the transferability of the digital collection, embraced by the big technology companies, has easy appeal, as it raises the flag of the protection of privacy, personal data and the secrecy of communications.

However, one cannot fail to consider an important sociological aspect: those who defend the flag of privacy and data protection are precisely the companies that illegally collect the most personal data from millions of people around the world, who track every click of their users – and[36] non-users – in order to draw detailed profiles later marketed with the most diverse types of advertisers. This sociological data needs to be brought to light so that an honest debate about digital heritage can be established.

---

[35] Digitales Erbe auf Facebook. *Was passiert mit den Daten verstorbener Facebook-Nutzer?* Available at: https://www.pcspezialist.de/blog/2019/05/10/digitales-erbe-facebook/. Accessed: 12/10/2020.

[36] Take the case of the Facebook like button, reviewed by the Court of Justice of the European Union, which established the joint and several liability of the *websites* that used said button, as well as the BGH decision that ordered Facebook to immediately suspend the abusive collection of personal data. In: NUNES FRITZ, Karina. *Commented jurisprudence of the German courts*. Indaiatuba: Foco, 2021, p. 101-104 and 113-117, respectively.

Strictly speaking, the debate around digital inheritance is not a dispute over privacy, but a fight to know who will get the infinity of data stored over a lifetime in the user's account. From the beginning, the assets of the deceased have been transmitted to the closest family group[37], and the idea of universal succession is rooted in the culture – including legal – of all peoples. With the arrival of Facebook, this legal-cultural rule began to be questioned and the company has been moving away – unsuccessfully in Europe, but successfully in Brazil – the principle of universal succession in its terms and conditions, imposed unilaterally on users.

The time has come to demand that big technology companies respect Brazilian law and to impose limits on the performance of *big techs* that, through their terms of use, have replaced the right imposed by the right imposed for their exclusive benefit, contrary to the rules, principles and structuring values of the legal system. Brazilian law has a clear rule: all inheritance – whether analog or digital – is transmitted to the heirs at the time of the opening of the succession, unless otherwise provided by the deceased, expressed expressly and freely. This general rule of succession law needs to be respected by large digital conglomerates, even when contrary to their economic interests. And, in this case, the Judiciary only needs to demand compliance with the law.

References

BEVILAQUA, Clovis. **Succession law**. 2nd ed. Rio de Janeiro: Freitas Bastos, 1932.

BRANCO, Sérgio. **Memory and oblivion on the internet**. Porto Alegre: Arquipélago Editorial, 2017.

COULANGES, Fustel de. **The ancient city**: studies on worship, law and institutions in Greece and Rome. 3rd ed. Translated by Edson Bini. Bauru: Edipro, 2001.

DONEDA, Danilo. The protection of personal data as a fundamental right. **Espaço Jurídico Journal of Law [EJJL]**, [*s. l.*], v. 12, n. 2, p. 91–108, 2011. Available at: https://periodicos.unoesc.edu.br/espacojuridico/article/view/1315 . Accessed on: 7 set. 2020.

HOEREN, Thomas. Der Tod und das Internet – Rechtliche Fragen zur Verwendung von E-Mail- und www-Accounts nach dem Tode des Inhabers. **Neue Juristische Wochenschrift [NJW]** v. 30, 2005, p. 2113-2117. Available at: https://miami.uni-muenster.de/Record/32314d8a-c759-4322-8da0-2f9e65c69d6c. Accessed on: 7 set. 2020.

KUNST, Lena. **Staudinger BGB:** Einleitung zum Erbrecht. Berlin: De Gruyter, 2016.

LEAL, Lívia Teixeira. Internet and the death of the user: the necessary overcoming of the paradigm of digital inheritance. **Brazilian Journal of Civil Law**, [*s. l.*], v. 16, p. 181-197, 2018. Available at: https://rbdcivil.ibdcivil.org.br/rbdc/article/view/237. Accessed on: 7 set.

[37] *The ancient city – studies on worship, law and institutions in Greece and Rome*. 3rd ed. Translated by Edson Bini. São Paulo – Bauru: Edipro, 2001, p. 30.

2022.

LEIPOLD, Dieter. In: KESSAL-WULF, Sibylle (ed.). **Münchener Kommentar zum Bürgerlichen Gesetzbuch.** 7. ed. München: Beck, 2017.

MALHEIROS, Pablo; AGUIRRE, João Ricardo Brandão; PEIXOTO, Maurício Muriack e. Transmissibility of the digital collection of those who die: effects of personality rights projected post mortem. **Journal of the Brazilian Academy of Constitutional Law**, [*s. l.*], v. 10, n. 19, p. 564-607, 3 nov. 2018. Available at: https://www.abdconstojs.com.br/index.php/revista/article/view/192. Accessed on: 7 set. 2020.

GONÇALVES, Laura Marques. **Post-mortem transmission of digital assets**: in defense of broad succession.2021. Dissertation (Master's Degree in Law) – Graduate Program in Law, Federal University of Minas Gerais, 2021. Available at: http://hdl.handle.net/1843/41742. Accessed on: 06 Oct. 2022

MARTINI, Mario. Der digitale Nachlass und die Herausforderung postmortalen Persönlichkeitsschutzes im Internet. **JuristenZeitung**, [*s. l.*] p. 1145-1155, 2012.

MARTINS, Guilherme Magalhães FALEIRO JÚNIOR, José Luiz. Digital inheritance succession planning. *In:* TEIXEIRA, Daniele Chaves (coord.). **Architecture of succession planning**. 2. ed. Belo Horizonte: Forum, 2019. p. 465-481.

MÜLLER-CHRISTMANN, Bernd. *In:*. BAMBERGER, Heinz Georg; ROTH, Herbert (Coord.). München: Beck, 2003. (Kommentar zum Bürgerlichen Gesetzbuch, v. 3).

NUNES FRITZ, Karina; SCHERTEL MENDES, Laura. Case Report: German court recognizes the transferability of digital inheritance. **Journal of Liability Law**, [*s. l.*], year 1, 2019. p. 525-555. Available at: https://revistadireitoresponsabilidade.pt/2019/case-report-corte-alema-reconhece-a-transmissibilidade-da-heranca-digital-karina-nunes-fritz-e-laura-schertel-mendes/. Accessed: 07 Sep. 2020.

NUNES FRITZ, Karina. Digital inheritance: who has the legitimacy to keep the digital content of the deceased? *In:* MARTINS, Guilherme Magalhães; LONGHI, João Victor Rozatti (coords.). **Digital law**. 3rd ed. Indaiatuba: Foco, 2020. p. 193-210.

NUNES FRITZ, Karina. The girl from Berlin and digital heritage. *In:* TEIXEIRA, Ana Carolina Brochado; LEAL, Lívia Teixeira (coords). **Digital inheritance**: controversies and alternatives. Indaiatuba: Foco, 2021. p. 227-244.

NUNES FRITZ, Karina. European Court of Justice rules that websites that use Facebook buttons are jointly and severally liable. *In:* **Commented Jurisprudence of the German Courts**. Indaiatuba: Foco, 2021. p. 101-104.

NUNES FRITZ, Karina. BGH orders Facebook to immediately suspend the abusive collection of personal data. *In:* **Commented Jurisprudence of the German Courts**. Indaiatuba: Foco, 2021. p. 113-117.

SCHMIDT-KESSEL, Martin; GRIMM, Anna. Unentgeltlich oder entgeltlich?: der vertragliche Austausch von digitalen Inhalten gegen personenbezogene Daten. **Zeitschrift für die gesamte Privatrechtswissenschaft [ZfPW]**, [*s. l.*], n.1, p. 84-108, 2017. Available at: https://eref.uni-bayreuth.de/37396/. Accessed on: 06 out. 2022.

TEPEDINO, Gustavo; BARBOZA, Heloísa Helena; BODIN DE MORAES, Celina. **Civil Code interpreted**: according to the Constitution of the Republic. v.1. Rio de Janeiro: Renovar, 2004.

TERRA, Aline de Miranda Valverde; OLIVA, Milena Donato; MEDON, Felipe. **Controversial aspects of digital inheritance**. 2021. Available at: https://www.migalhas.com.br/depeso/343356/aspectos-controvertidos-sobre-heranca-digital. Accessed on: 06 out. 2022.

Received: 30.07.2022

Reviewed on: 03.10.2022